No. 24-203

IN THE

Supreme Court of the United States

DAVID SNOPE, *et al.*,

Petitioners,

v.

ANTHONY G. BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MARYLAND, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION FOR GUN RIGHTS IN SUPPORT OF PETITIONERS

BARRY K. ARRINGTON
Counsel of Record
ARRINGTON LAW FIRM
4195 Wadsworth Boulevard
Wheat Ridge, CO 80033
(303) 205-7870
barry@arringtonpc.com

Counsel for Amicus Curiae

130462

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Cited Authorities

Page

Constitutional Provisions

Statutes, Rules and Regulations

Other Authorities

Page

Cited Authorities

INTEREST OF AMICUS

The right to keep and bear arms is a fundamental right that existed prior to the Constitution. The right is not in any sense granted by the Constitution. Nor does it depend on the Constitution for its existence. Rather, the Second Amendment declares that the pre-existing "right of the people to keep and bear Arms shall not be infringed." The National Association for Gun Rights ("NAGR")[1] is a nonprofit membership and donor-supported organization with hundreds of thousands of members nationwide. The sole reason for NAGR's existence is to defend American citizens' right to keep and bear arms. In pursuit of this goal, NAGR has filed numerous lawsuits seeking to uphold Americans' Second Amendment rights. NAGR has a strong interest in this case because the guidance the Court will provide in its resolution of this matter will have a major impact on NAGR's ongoing litigation efforts in support of Americans' fundamental right to keep and bear arms.

SUMMARY OF ARGUMENT

The Fourth Circuit held that the rifles banned by Maryland are not "suitable" for self-defense. The court reached this conclusion based on its assessment of the relative merits of the AR-15 as a self-defense weapon compared to the public safety implications of the use of the weapon. This was clear error because the lower

1. No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of the filing of this brief.

court's "suitability" analysis amounts to stealth interest balancing, and interest balancing was forbidden in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022).

The Fourth Circuit held the AR-15 and similar weapons are not protected by the Second Amendment in part because they are not suitable for self-defense by civilians against criminal attack. The court assumed that the Second Amendment protects only the right to defend against "private violence," such as attacks by criminals. This was error because in *D.C. v. Heller*, 554 U.S. 570 (2008), the Court held that the right to keep and bear arms is an individual right protecting against *both* public and private violence. The Court recently reemphasized the dual nature of the right in *United States v. Rahimi*, 144 S. Ct. 1889 (2024).

Indeed, while the Second Amendment protects the right to defend against both private violence and public violence, the Founders were more preoccupied with preserving the right to defend against the latter. They had recently thrown off a tyrannical government and were concerned lest the people be deprived of the means of resistance should the central government they were forming also prove to be tyrannical. Therefore, commonly possessed weapons useful for collective defense—weapons like the AR-15—are, if anything, more protected by the Second Amendment than handguns. Thus, the lower court's protection of the latter and not the former is erroneous.

Finally, NAGR reviews the status of post-*Bruen* arms ban cases. There have been 17 cases. The government has

prevailed in all 17. Unfortunately, when it comes to arms ban cases at least, after *Bruen* the lower courts have applied the "government always wins" principle decried by Justice Gorsuch in *Rahimi*.

ARGUMENT

I. The Lower Court's "Suitability" Argument is Precluded by *Bruen*

The lower court discussed the AR-15 as the paradigmatic semiautomatic rifle banned by the statute. Pet.App. 30a. The court held that the AR-15 and similar weapons are not protected by the Second Amendment in part because they are not "suitable" for self-defense by civilians against criminal attack. Pet.App. 40a. According to the panel majority, the rifle's lack of suitability for defense against criminals renders it "far outside the animating purposes of the Second Amendment." *Id.* The court cited several other lower court decisions reaching similar conclusions about the AR-15's lack of suitability for defense against attacks by criminals. Pet.App. 40a—43a. The lower court's suitability analysis is erroneous.

Whether a court deems certain rifles suitable for use in self-defense is surely a "difficult empirical judgment[ ] about the costs and benefits of firearms restrictions" in the service of an interest-balancing analysis of the sort expressly forbidden by *Bruen*. 597 U.S. at 25 (quoting *McDonald*, 561 U.S. at 790-91 (internal quotation marks omitted)). Moreover, the whole point of *Heller* was that American citizens are not required to justify their choice of weapon to the government. *Heller*, 554 U.S. at 629. If a weapon is in common use for self-defense, "[w]hatever

the reason" that is the case, it cannot be prohibited. *Id.* This is true even if the government believes citizens' choice is unwise because the weapon they have chosen is "unsuitable" for self-defense *Id.*

It is not difficult to understand why *Heller* established this rule. Everyone knows that "common sense gun law" is a progressive euphemism that means "any gun law we can get away with up to and including total confiscation." It follows that no gun is ever deemed "suitable" for civilian use by politicians bent on disarming the American people. In *Heller*, D.C. and its amici argued vociferously that handguns are a scourge on society and long guns are much better for self-defense. *Heller*, 554 U.S. at 629. Now the State argues that handguns are great for self-defense and rifles like the AR-15 are wholly unsuitable for that purpose. Pet.App. 42a. "In short, arms-ban advocates switched their pre-*Heller* strategy of 'rifles good, handguns bad' to a post-*Heller* strategy of 'handguns good, rifles bad.'" *See* Mark W. Smith, *What Part of "In Common Use" Don't You Understand?: How Courts Have Defied Heller in Arms-Ban Cases-Again*, 2023 Harv. J.L. & Pub. Pol'y Per Curiam 41, 8 (2023). If those arguments failed in *Heller*, there is no reason they should succeed now.

In summary, Judge Richardson was correct in his masterful dissenting opinion. Pet.App. 96a—211a. This Court looks "to the usage of the American people to determine which weapons they deem most suitable for lawful purposes . . . It is thus the customary practices of the American people—not the uninformed meditations of federal judges—that determine which weapons are protected by the Second Amendment." Pet.App. 182a.

II. The Lower Court's Cramped Conception of the Right of Self-Defense Caused it to Err

As noted above, the Fourth Circuit held AR-15s and similar weapons are not protected by the Second Amendment in part because they are not suitable for self-defense by civilians against criminal attack. Pet.App. 40a. This cramped conception of the scope of the right to self-defense is consistent with the unanimous view of the lower courts that have considered the matter, and the panel majority cited several of those cases. Pet.App. 40a—43a. Radically narrowing the scope of the right to self-defense to a right to defend against private violence only is another way the lower courts have attempted to cabin *Heller*.

The lower court erred when it followed this trend. The right to self-defense is not restricted to defense against criminal attacks. The panel majority's error is especially startling coming as it did only 46 days after this Court made this clear in *Rahimi*. There, the Court stated:

> We have held that the right to keep and bear arms is among the fundamental rights necessary to our system of ordered liberty. Derived from English practice and codified in the Second Amendment, the right secures for Americans a means of self-defense. The spark that ignited the American Revolution was struck at Lexington and Concord, when the British governor dispatched soldiers to seize the local farmers' arms and powder stores. In the aftermath of the Civil War, Congress's desire to enable the newly freed slaves to

> defend themselves against former Confederates helped inspire the passage of the Fourteenth Amendment, which secured the right to bear arms against interference by the States. As a leading and early proponent of emancipation observed, "*Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty*." Cong. Globe, 40th Cong., 2d Sess., 1967 (1868) (statement of Rep. Stevens).

Id., 144 S. Ct. at 1897 (selected citations and quotation marks omitted; emphasis added).

Rahimi's reference to Lexington and Concord and Congress's desire to assist newly-freed slaves defend against former Confederates pointed to an aspect of the right to self-defense that the panel majority completely ignored—the right to resistance. As *Rahimi* noted, the pre-existing right to self-defense codified in the Second Amendment is based on the English common law tradition. *Id*. *Heller* summarized that tradition as follows:

> By the time of the founding, the right to have arms had become fundamental for English subjects. See Malcolm 122–134. Blackstone, whose works, we have said, "constituted the preeminent authority on English law for the founding generation," *Alden v. Maine* . . . cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. See 1 Blackstone 136, 139–140 (1765) . . . It was, he said, "the natural right of *resistance and*

> *self-preservation*," *id*., at 139, and "the right of having and using arms for *self-preservation and defence*," *id*., at 140; see also 3 *id*., at 2–4 (1768). Other contemporary authorities concurred. See G. Sharp, Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia 17–18, 27 (3d ed. 1782); 2 J. de Lolme, The Rise and Progress of the English Constitution 886–887 (1784) (A. Stephens ed. 1838); W. Blizard, Desultory Reflections on Police 59–60 (1785). Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against *both public and private violence*.

Heller, 554 U.S. at 593–94 (emphasis added).

One immediately notices that the common law right to self-defense was described using doublets that encompassed the two different components of the right, i.e., "resistance[2] and self-preservation" and

2. The founders understood the term "resistance" to means resistance against tyranny. J.L. de Lolme was an eighteen-century author much read at the time of the American Revolution. Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L. Q. 285 (1983). J.L. de Lolme asked what the recourse of the People would be if the Prince began acting as a tyrant. He responded to his own question: "It would be resistance . . . the question has been decided in favor of this doctrine by the Laws of England, and that resistance is looked upon by them as the ultimate and lawful resource against the violence of Power." *Id*. at 286 (quoting J.L. de Lolme, *The Constitution of England* 227 (New York 1793).

"self-preservation and defence."[3] Using a similar doublet, *Heller* summarized the right as the right to defend against "both public and private violence." By using the word "both" in that sentence, *Heller* was emphasizing that the right to self-defense encompasses the right to defend against two different kinds of violence. But in their effort to cabin *Heller*, the panel majority and the courts they cited have elided completely the first kind of violence to which *Heller* referred. Yes, the right to keep and bear arms encompasses the right to defend against a criminal attack (private violence). But it also encompasses the right to defend against government tyranny (as at Lexington and Concord) and the unchecked predations of lawless mobs such as that encountered by the newly freed slaves (public violence).

Rahimi brought both kinds of violence described by *Heller* into focus when it quoted Representative Stevens' statement: "'Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty." Cong. Globe, 40th Cong., 2d Sess., 1967 (1868) (statement of Rep. Stevens).'" *Rahimi*, 144 S. Ct. at 1897. Representative Stevens used two sentences to describe the evil of disarming citizens. In the first sentence he referred to taking away the means of defending life—i.e. depriving citizens of their right

3. As with "resistance," in this context the term "defence" means defense against tyranny. "When, therefore, Parliament says that 'subjects which are Protestants may have arms for their defence, suitable to their condition, as allowed by law,' it does not mean for private defence, but, being armed, they may as a body rise up to defend their just rights, and compel their rulers to respect the laws." *Aymette v. State*, 21 Tenn. 154, 157 (1840).

of self-preservation. This is evil because (using *Heller's* terms) it deprives them of the means to defend against private violence.

Representative Stevens then referred to taking away citizens' "inalienable right of defending liberty." Surely, he was alluding to the Declaration of Independence, which states that men are "endowed by their Creator with certain unalienable Rights." The Declaration's purpose was to justify separation from England because the "present King" had sought "establishment of an absolute Tyranny over these States." The Declaration stated that men have a natural right to resist such tyranny. Thus, by invoking the Declaration, Representative Stevens was referring to the inalienable natural right of "resistance." In *Heller's* terms, he was referring to the right to defend against public violence.

Rahimi could have quoted only Stevens' first sentence. Instead, it quoted both sentences because the Court intended to re-emphasize the second aspect of the right to keep and bear arms—the right to defend against public violence. This aspect of the right needed to be brought to the fore, because, as evidenced by the panel majority decision, the lower courts have busied themselves shoving this part of *Heller* down the memory hole.

Judge Richardson was correct about this as well. He wrote that the right "of having arms" set forth in the English Bill of Rights is derived from "the natural right of resistance and self-preservation." Pet.App. 105a, citing 1 William Blackstone, *Commentaries on the Laws of England* *136. The right is an "auxiliary right" which served to protect the three great and primary rights of

personal security, personal liberty, and private property. *Id.*, citing 1 Blackstone, *supra*, at *136, *139; and 2 J.L. de Lolme, *The Rise and Progress of the English Constitution* 886–87 (1784) (A. Stephens ed., 1838). The right ensured Englishmen the right to personal defense, but it also allowed them to defend against government violations of their rights. *Id.*, citing 1 Blackstone, *supra*, at *139 and Granville Sharp, *Tracts Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia* 27 (3d ed. 1782). Judge Richardson correctly concluded that "[i]ndividual and communal self-defense . . . were thus the purposes enshrined in the Second Amendment upon ratification." Pet.App. 118a –119a.

In summary, *Heller* held that the right to keep and bear arms protects citizens' right to self-defense. The right to self-defense includes the right to have arms for the purpose of "resistance" (defense against public violence) and "self-preservation" (defense against private violence). The particular law at issue in *Heller* (D.C.'s prohibition on the possession of handguns even for self-defense in the home) burdened citizens' ability to defend against private violence. Therefore, *Heller* naturally focused on that aspect of the right. But the Court never stated that the right to defend against criminal assault is the only right protected by the Second Amendment. Indeed, as set forth above, it stated the opposite. Unfortunately, the lower courts have incorrectly concluded from *Heller's* focus on defense against private violence that that is the only part of the right to keep and bear arms that is codified in the Second Amendment. That is the primary error made by the Fourth Circuit in this case. See Pet.App. 19a (holding that the Second Amendment is about protecting a citizen's right to defend against private violence when the government cannot).

III. A Proper Understanding of the Second Amendment Reveals that AR-15s Have Greater Protection, Not Less

A. The Founders Were More Concerned with Tyranny Than with Defense Against Criminals

The lower courts have, as noted, laser-focused on the Second Amendment's protection of the right to self-defense against private criminal conduct to the exclusion of the Amendment's protection of the right to defend against public violence. This is ironic because it turns the original primary purpose of the Second Amendment on its head. When the Second Amendment was ratified, the Founders had recently fought a war to throw off a tyrannical government. Yes, the right to keep and bear arms includes the right to bear arms for self-preservation. But can there be any doubt that protecting the right of resistance was foremost in the Founders' minds?

This issue was recently addressed in C.D. Michel and Konstadinos Moros, *Restrictions "Our Ancestors Would Never Have Accepted": The Historical Case Against Assault Weapon Bans*, 24 Wyo. L. Rev. 89 (2024). The authors note that the Second Amendment was ratified by people who had just violently overthrown their former government, and the provision was included in the Bill of Rights because they were afraid the new government they were forming would itself become tyrannical. *Id*. at 97. The authors included a collection of quotations from the Founding period that make this point. For example, James Madison wrote:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely

> at the devotion of the federal government . . . To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

The Federalist No. 46 (James Madison).

Alexander Hamilton wrote that should a large army ever be raised, "that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens." *The Federalist No. 29* (Alexander Hamilton). Tench Coxe, a delegate to the Constitutional Convention, in discussing the Second Amendment, wrote "civil rulers . . . may attempt to tyrannize," and they might use the power of the military

to injure fellow citizens. Thus, "the people are confirmed by the article in their right to keep and bear their private arms." *Tench Coxe*, James Madison Rsch. Libr. & Info. Ctr., https://www.madisonbrigade.com/t_coxe.htm (last accessed September 17, 2024) (quoting Tench Coxe in '*Remarks on the First Part of the Amendments to the Federal Constitution*' under the Pseudonym 'A Pennsylvanian' in the Philadelphia Federal Gazette, June 18, 1789, at 2 col. 1).

Noah Webster wrote, "[b]efore a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution Proposed by the Late Convention Held at Philadelphia* (1787) reprinted in *Pamphlets on the Constitution of the United States* 56 (Paul Ford ed. 1888). He added that unlike in Europe, the United States is less susceptible to tyrants enforcing unjust laws "because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States." *Id.*

Finally, the authors note that St. George Tucker, perhaps the preeminent authority on the Constitution for the Founding generation, wrote that the Second Amendment

> may be considered as the true palladium[4] of liberty . . . in most governments it has been the study of rulers to confine this right within the

4. "Palladium" is a word that is not much used nowadays. It is derived from the Greek "Palládion," which meant a thing that provides protection. Thus, "palladium of liberty" means "protector of liberty."

> narrowest limits possible. Whenever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, pt. 1, at 300 (1803).

B. Arms Useful for Resistance Are at the Top of the Hierarchy of Protected Weapons

The Second Amendment codified the right to keep and bear arms to quell the fears of the anti-federalists that the federal government would attempt to eliminate the effectiveness of the militia by disarming the people. This reason for codifying the right is why the prefatory clause speaks of a militia. *Heller*, 554 U.S. at 599. The Founders' preoccupation with preserving the right to keep and bear arms for the purpose of collective action against a tyrannical government has implications for the hierarchy of weapons protected by the Second Amendment. Surely those arms most useful for collective resistance would be at the top of that hierarchy. Michel and Moros write:

> [P]eople do not typically resist a tyrant with small pistols or slow-firing hunting rifles, which even governments have acknowledged when faced with invasion and distributing weapons to civilians. Resistors do it with the prevailing common long guns of the day—AR-15s and other

> similar so-called "assault weapons" that are owned by millions of regular citizens across the country. These are "the sorts of lawful weapons that they possessed at home" that would be brought to bear in the horrible circumstance of a tyrant upsetting our constitutional order or a foreign invader occupying our country.

Restrictions "Our Ancestors Would Never Have Accepted", 24 Wyo L. Rev. at 96.

The modern preoccupation liberal states have with banning so-called "assault weapons"[5] is thus deeply ironic. *Heller* noted that at the time of the Founding, "ordinarily when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[6] Those men did not show up for militia service with handguns. They showed up with muskets, the Founding-era analog to the AR-15.

Commonly possessed rifles like the AR-15, not handguns, are the most useful weapons for exercising the right of resistance to tyranny. Former Ninth Circuit Judge Kozinski was in a better position than most to understand this. Judge Kozinski was born to a Jewish family in Romania shortly after World War II. Both of his parents were Holocaust survivors. In the pre-*Heller*

---

5. "Assault weapon" is a propaganda term developed by the anti-gun lobby. *Stenberg v. Carhart*, 530 U.S. 914, 1001 n. 16 (2000) (Thomas, J., dissenting) (citation omitted).

6. *Id.*, 554 U.S. at 624 (cleaned up; internal citation and quotation marks omitted).

case of *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), the court held there is no individual right to keep and bear arms and upheld California's "assault weapon" ban. NAGR begs the Court's indulgence while it quotes Judge Kozinski's justly famous dissent at length:

> The majority falls prey to the delusion—popular in some circles—that ordinary people are too careless and stupid to own guns, and we would be far better off leaving all weapons in the hands of professionals on the government payroll. But the simple truth-born of experience—is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. . . .
>
> All too many of the other great tragedies of history—Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name but a few-were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece, as the Militia Act required . . . If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.
>
> My excellent colleagues have forgotten these bitter lessons of history. The prospect of

> tyranny may not grab the headlines the way vivid stories of gun crime routinely do. But few saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Id., 312 F.3d at 569-70 (Kozinski, J., dissenting).

Some might say that defense against tyranny is no longer necessary and therefore protecting the weapons most useful for resistance is not a priority. But surely Judge Kozinski was correct. No society, even an advanced liberal democracy, is immune to human nature. Justice Scalia emphasized this point in a speech he gave in 1987 on Holocaust Remembrance Day. Anyone who believes "it can't happen here" because America is such a sophisticated liberal democracy would do well to heed his warning about Germany's descent into madness.

> The one message I want to convey today is that you will have missed the most frightening aspect of it all, if you do not appreciate that it happened in one of the most educated, most progressive, most cultured countries in the world.

> The Germany of the late 1920s and early 1930s was a world leader in most fields of art, science, and intellect. Berlin was a center of theater; with the assistance of the famous producer Max Reinhardt, playwrights and composers of the caliber of Bertolt Brecht and Kurt Weill flourished. Berlin had three opera houses, and Germany as a whole no less than eighty. Every middle-sized city had its own orchestra. German poets and writers included Hermann Hesse, Stefan George, Leonhard Frank, Franz Kafka, and Thomas Mann, who won the Nobel Prize for Literature in 1929. In architecture, Germany was the cutting edge, with Gropius and the Bauhaus school. It boasted painters like Paul Klee and Oskar Schlemmer. Musical composers like Anton Webern, Alban Berg, Arnold Schoenberg, and Paul Hindemith. Conductors like Otto Klemperer, Bruno Walter, Erich Kleiber, and Wilhelm Furtwängler. And in science, of course, the Germans were preeminent.

Antonin Scalia, *On Faith: Lessons from an American Believer*, Christopher J. Scalia and Edward Whelan, eds. (Penguin Random House 2019), Kindle, 149-150.

Moreover, while the United States has so far escaped a dictator's coup, as *Rahimi* reminded us, it has not escaped the plague of violence against hated minorities. Cottrol and Denning recently reminded us of this unpleasant aspect of our history:

> If the nation as a whole [has] escaped the problem of a macro-tyranny imposed by a

> dictator's usurpation or a military coup, it [has] not escaped the problem of micro-tyranny, ruthless suppression of disfavored minorities brought about by the systemic failure of federal and state governments to protect citizens against racial violence.

Robert J. Cottrol and Brannon P. Denning, *To Trust the People with Arms, The Supreme Court and the Second Amendment* (University of Kanas Press 2023), 122.

Sadly, such public violence is not a relic of the nation's distant post-Reconstruction past. It is within the living memory of some, including the leaders of the civil rights movement. Cottrol and Denning continue:

> Individuals like Robert Williams and members of groups like the Deacons for Defense and Justice helped transform the South and the nation. Student Nonviolent Coordinating Committee veteran Charles Cobb was probably not exaggerating when he said that the willingness of groups like the Deacons to provide armed defense against racial violence made the civil rights movement possible. Many veterans of the movement experienced occasions when local police officers were often sympathetic to the Klan, and federal officials provided little protection for the lives of Southern Negros and the civil rights workers who worked with them. For those who lived through that history the right to be armed proved critical. *And the idea that governmental tyranny could take the form of indifference and*

> *inaction as well as active oppression became a strongly held belief.*

Id. at 125 (emphasis added).

One hopes that the demon of systemic violence against hated minorities has been banished never to return. But even a casual perusal of the latest headlines suggests that one counts on it at one's peril. And that is why the lower court's failure to protect the arms most useful for exercising the right of resistance is not only erroneous as a matter of law, it is also tragically misguided as a matter of history.

IV. There is No Circuit Split—And That's Part of the Problem

In *Bruen*, the Court noted that in the years after *Heller* and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), the courts of appeals developed a two-step framework for analyzing Second Amendment challenges that combined history and means-end scrutiny. *Bruen*, 597 U.S. at 17. The Court then held that the courts of appeals had gotten *Heller* and *McDonald* wrong. *Id.* There was no circuit split.

Whether a case will address a matter that is the subject of a circuit split is usually a key consideration in determining whether this Court grants certiorari. U.S. Sup. Ct. R. 10(a). But *Bruen* shows how in Second Amendment cases more emphasis should be placed on Rule 10(c).[7] This is true because, as noted above, the

7. "United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."

courts of appeals have attempted to cabin *Heller* as much as possible.[8] Justice Gorsuch recently made the following observations about this unfortunate practice:

> Just consider how lower courts approached the Second Amendment before our decision in *Bruen*. They reviewed firearm regulations under a two-step test that quickly "devolved" into an interest-balancing inquiry, where courts would weigh a law's burden on the right against the benefits the law offered. Some judges expressed concern that the prevailing two-step test had become "just window dressing for judicial policymaking." To them, the inquiry worked as a "black box regime" that gave a judge broad license to support policies he "[f] avored" and discard those he disliked. How did the government fare under that regime? In one circuit, it had an "undefeated, 50–0 record." In *Bruen*, we rejected that approach for one guided by constitutional text and history. Perhaps judges' jobs would be easier if they could simply strike the policy balance they prefer. And a principle that the government always wins surely would be simple for judges to implement. But either approach would let judges stray far from the Constitution's promise.

Id., 144 S. Ct. at 1909 (Gorsuch, J., concurring) (internal citations omitted).

---

8. See, e.g., *Heller v. D.C.*, 670 F.3d 1244, 1286 n. 14 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (alluding to a "bare desire to restrict *Heller* as much as possible or to limit it to its facts").

In summary, the courts of appeals had been practically unanimous in adopting the judge-empowering, right-restricting interest-balancing test rejected in *Bruen*. And if this Court had waited for a circuit split to develop, it would likely still be waiting. Therefore, departing from the usual practice of stepping in to resolve circuit splits, in *Bruen* the Court granted certiorari in the face of unanimity among the lower courts.

Unfortunately, at least insofar as arms bans cases such as this one are concerned, the lower courts still do not seem to have gotten the message. In this context, they continue to apply the "government always wins" rule[9] to which Justice Gorsuch alluded in *Rahimi*. There have been 17 arms bans cases decided since *Bruen*. The government has prevailed in all of them. See

1. *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175 (7th Cir. 2023), *cert. denied sub nom. Harrel v. Raoul*, 144 S. Ct. 2491 (2024) (upholding Illinois assault weapon and magazine bans);

2. *Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec.*, 108 F.4th 194 (3d Cir. 2024) (upholding Delaware assault weapon and magazine bans);

3. *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38 (1st Cir. 2024) (upholding Rhode Island magazine ban);

---

9. As discussed below, *Association of New Jersey Rifle & Pistol Clubs, Inc., v. Platkin*, was a split decision.

4. *Bianchi v. Brown*, 111 F.4th 438 (4th Cir. 2024) (upholding Maryland's assault weapon ban);

5. *Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023) (staying injunction of California's magazine ban);

6. *Miller v. Bonta*, 2023 WL 11229998 (9th Cir. 2023) (staying injunction of California's assault weapon ban);

7. *Capen v. Campbell*, 708 F. Supp. 3d 65 (D. Mass. 2023) (upholding Massachusetts' assault weapon and magazine bans);

8. *Or. Firearms Fed'n v. Kotek*, 682 F. Supp. 3d 874 (D. Or. 2023) (upholding Oregon's law restricting magazines);

9. *Brumback v. Ferguson*, 2023 WL 6221425 (E.D. Wash. Sept. 25, 2023) (denying plaintiffs' motion for a preliminary injunction in challenge to Washington's law restricting magazines);

10. *Hartford v. Ferguson*, 676 F. Supp. 3d 897 (W.D. Wash. 2023) (same, as to Washington's assault weapon law);

11. *Nat'l Ass'n for Gun Rights v. Lamont*, 685 F. Supp. 3d 63 (D. Conn. 2023) (same, as to Connecticut's assault weapon and magazine laws);

12. *Or. Firearms Fed'n v. Brown*, 644 F. Supp. 3d 782 (D. Or. 2022) (denying plaintiffs' motion for TRO);

13. *Hanson v. D.C.*, 671 F. Supp. 3d 1 (D.D.C. 2023) (same, as to D.C.'s magazine law);

14. *Goldman v. City of Highland Park, Illinois*, 2024 WL 98429 (N.D. Ill. Jan. 9, 2024) (upholding assault weapon and magazine ordinance);

15. *Rupp v. Bonta*, 2024 WL 1142061 (C.D. Cal. Mar. 15, 2024);

16. *Vermont Fed'n of Sportsmen's Clubs v. Birmingham*, 2024 WL 3466482 (D. Vt. July 18, 2024) (upholding Vermon magazine ban); and

17. *Association of New Jersey Rifle & Pistol Clubs, Inc., v. Platkin*, 2024 WL 3759686, (D.N.J. 2024) (striking assault weapon ban and upholding magazine ban). This case is unique because it was a partial loss for the government, as the court declared its assault weapon ban unconstitutional.[10]

10. *United States v. Morgan*, 2024 WL 3936767 (D. Kan. Aug. 26, 2024), was a criminal case in which the Court granted a motion to dismiss because the government had failed to carry its burden under the *Bruen* test. The court held that its holding would not apply in any other case.

The lower courts have decided these Second Amendment cases in a way that conflicts with this Court's decisions in *Heller*, *McDonald*, *Bruen* and now *Rahimi*. Rather than waiting for a circuit split that, as in *Bruen*, does not appear likely to develop, the Court should grant certiorari in this case and use it as a vehicle to vindicate the important Second Amendment rights at stake.

CONCLUSION

For the reasons set forth herein, NAGR respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

Barry K. Arrington
Counsel of Record
Arrington Law Firm
4195 Wadsworth Boulevard
Wheat Ridge, CO 80033
(303) 205-7870
barry@arringtonpc.com

Counsel for Amicus Curiae