No. 24-203

In the
Supreme Court of the United States

DAVID SNOPE, an individual and resident of Baltimore County, et al.,

Petitioners,

v.

ANTHONY G. BROWN, in his official capacity as Attorney General of Maryland, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL SHOOTING SPORTS FOUNDATION, INC., IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The National Shooting Sports Foundation, Inc. ("NSSF"), is the firearm industry's trade association. Founded in 1961, NSSF's mission is to promote, protect, and preserve hunting and shooting sports. NSSF has approximately 10,500 members—including thousands of federally licensed manufacturers, distributors, and sellers of firearms, ammunition, and related products. NSSF has a clear interest in this case. Its members engage in the lawful production, distribution, and sale of constitutionally protected arms. When a state like Maryland tries to categorically ban such an arm, that action threatens NSSF members' businesses and infringes on their and their customers' constitutional rights.

Since this Court's decision in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), several states that expressed open hostility to the rights enshrined in the Second Amendment have responded with what can only be described as protest legislation, imposing even *greater* restrictions on law-abiding citizens' ability to keep and bear arms. As a result, NSSF has found itself frequently challenging such laws in courts across the Nation, and it can attest from firsthand experience to the hostility that decision has provoked in certain quarters. For instance, NSSF was a petitioner in *Barnett v. Raoul*, No. 23-879, part

[1] Pursuant to Supreme Court Rule 37, *amicus curiae* states that counsel of record were given notice of this filing and that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

of a consolidated challenge to an Illinois law banning the same rifles that has Maryland now banned (and more), where the Seventh Circuit reversed a preliminary injunction against such a law. While this Court denied certiorari, Justice Alito would have granted the petition, and Justice Thomas wrote separately to underscore the problems with Illinois' law and the Seventh Circuit's approach. *See Harrel v. Raoul*, 144 S.Ct. 2491 (2024). Justice Thomas noted that the Seventh Circuit was poised to "ultimately allow[] Illinois to ban America's most common civilian rifle," "[b]y contorting [the] guidance our precedents provide" and "contriv[ing]" a test "unmoored from both text and history." *Id.* at 2492-93. And he urged the Court to at some point "consider the important issues presented by these petitions." *Id.* at 2492.

This case is one of many that present the same important issues as the Illinois case. And the decision below makes all the same errors that the Seventh Circuit made there—and then some. Absent this Court's intervention, Maryland (and its neighbors) will be empowered to "ban America's most common civilian rifle" and many more common arms. *Id.* And other states and Circuits inclined to resist this Court's ruling in *Bruen* will take note that they may continue to do so. NSSF accordingly submits this brief in support of petitioners.

SUMMARY OF THE ARGUMENT

The decision below defies this Court's instructions at every turn. The Fourth Circuit held that the most popular rifle in America is not even an "arm." It held that its own principal pre-*Bruen* opinion, *Kolbe v. Hogan,* 849 F.3d 114 (4th Cir. 2017) (en banc), which

applied a military-use test unmoored from (and flatly inconsistent with) *District of Columbia v. Heller*, 554 U.S. 570 (2008), somehow survived *Bruen*'s clear teachings on the correct Second Amendment analysis. It held that "[j]ust because a weapon happens to be in common use does not guarantee" that it satisfies this Court's common-use test, and that an arm must instead be "not ill-suited and disproportionate to" self-defense (in the view of unelected members of the judiciary) to warrant constitutional protection. Pet.App.44a, 46a. It implemented this novel test by repeatedly applying naked interest-balancing, in derogation of *Bruen*. And while it purported to apply *Bruen*'s historical-tradition test in the alternative, the supposed tradition the court distilled is indistinguishable from rational-basis review.

That alone is enough to justify this Court's review. But the defiance goes deeper still. In *Heller*, this Court held that "[i]t is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." 554 U.S. at 629. Here, the Fourth Circuit held the inverse: It is permissible to ban long guns (rifles) because the possession of handguns is allowed (and, in the majority's view, better for self-defense). Pet.App.42a. And that logic was by no means limited to AR-15s. By the Fourth Circuit's telling, there is national tradition of legislating in response to "the dangers posed by semiautomatic weapons" that *supports banning any and all such arms outright*. Pet.App.67a. As even a *concurring* judge thus acknowledged, the decision "cabin[s] the Second Amendment right to effectively cover only handguns." Pet.App.82a (Gregory, J.,

concurring in the judgment). And it may not even stop there, as the logic of the decision would seemingly support banning *any* semiautomatic firearms.

Unfortunately, the Fourth Circuit is not alone in its defiance and derogation of this Court. The Seventh Circuit, in a preliminary posture, has reached the same substantive result, permitting a ban on the most popular rifle in America (and much more) via the same path of resuscitating its own pre-*Bruen* decision instead of faithfully following *Bruen*. The First and Ninth Circuits have likewise turned *Bruen* upside-down and inside-out to avoid holding that arms in common use for lawful purposes are protected by the Second Amendment. And this will continue to happen until and unless this Court intervenes to make clear to the lower courts that *Bruen* meant what it said. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Heller*, 554 U.S. at 634. Ultimately, the decision below and the similar decisions out of the First, Seventh, and Ninth Circuits underscore the prescience of this Court in *Heller*: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* It is disheartening that this Court must step in once again just to make that clear—but the sheer volume of lower court decisions flouting that teaching confirm beyond cavil that this Court's intervention is now imperative, either in this case or in any of the many other recent, pending, and coming petitions raising similar issues.

ARGUMENT

I. The Decision Below Blatantly Defies This Court's Precedents.

A. The Fourth Circuit Replaced *Bruen*'s "Plain Text" and Common-Use Inquiries With Its Own Pre-*Bruen* Test and Policy Preferences.

1. *Bruen*'s threshold inquiry is not demanding—a point this Court made clear beyond cavil just last Term in *United States v. Rahimi*, 144 S.Ct. 1889 (2024). *Bruen* used the phrase "plain text" three times to describe the textual inquiry into whether conduct is presumptively protected, 597 U.S. at 17, 32, 33, and it dispensed with that inquiry in a few short paragraphs, which simply looked to the most common "definitions" of the key terms in "the Second Amendment's text" (i.e., "the people," "keep," "bear," and "Arms"), *id.* at 32-33. Ultimately, *Bruen*'s conclusion on the threshold inquiry boiled down to a single sentence: "Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms." *Id.* at 32. *Rahimi* doubled-down on that approach, making clear that "when the Government regulates arms-bearing conduct, … it bears the burden to 'justify its regulation,'" full stop. 144 S.Ct. at 1897 (quoting *Bruen*, 597 U.S. at 24).

Under *Bruen* and *Rahimi*, the threshold inquiry here should have been equally straightforward. Maryland prohibits the general public from possessing 45 types of rifles, including the most popular model in the country. *See* Pet.App.5. Because the Second Amendment's plain text covers "keep[ing]," U.S. Const. amend. II, the only question at the threshold is

whether those firearms are "Arms." The answer is easy, as it should go without saying that rifles are "Arms," no matter what grip, stock, or reloading mechanism they may have. But to the extent there was ever any doubt, this Court has eliminated it—repeatedly. As *Heller* explained and *Bruen* reiterated, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Bruen*, 597 U.S. at 28 (quoting *Heller*, 554 U.S. at 582); *accord Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (per curiam). That includes "'any thing that a man … takes into his hands, or useth in wrath to cast at or strike another,'" *Heller*, 554 U.S. at 581, which a firearm surely is, no matter what features it has. Again, this Court has already said so: *Heller* noted that even "one founding-era thesaurus" that offered a relatively "limited" view of the term's scope still "stated that all firearms constituted 'arms.'" *Id.*

2. The Fourth Circuit acknowledged (with considerable understatement) that, "[a]t first blush," semiautomatic rifles may seem to "fit comfortably within the term 'arms' as used in the Second Amendment." Pet.App.15-16a. But it then held that because the Second Amendment "'codified a *pre-existing* right,'" the word "arms" must be read to incorporate, as a *textual* matter, all the limitations that might inhere in that right. Pet.App.16a (quoting *Bruen*, 597 U.S. at 20). And it then concluded that the best guide to those limitations is not this Court's cases, but its own pre-*Bruen* decision in *Kolbe*. Pet.App.18a.

That (il)logic cannot be reconciled with this Court's precedent. *Bruen* could not have been clearer that the initial inquiry is a "plain text" inquiry. *See,*

e.g., *Bruen*, 597 U.S. at 17, 32, 33. And as *Rahimi* reiterated, the question is simply whether a law restricts "arms-bearing conduct." 144 S.Ct. at 1897. While courts must certainly assess the historical limitations on the Second Amendment right, those limitations are to be evaluated at the historical-tradition stage, where the state bears the burden of proving what they were. Indeed, that is the only way to make sense of *Bruen*'s repeated statements that it was rejecting the two-step test and replacing it with one where the state must "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." 597 U.S. at 19. If courts had to conduct an exhaustive inquiry into historical scope of the right to keep and bear arms just to determine whether a rifle qualifies as an "Arm," then the state would never have to bear its burden of justifying restrictions on what any ordinary speaker (whether in 1791, in 1868, or today) would plainly understand to be "arms-bearing conduct."[2]

The Fourth Circuit's attempt to derive support for its contrary conclusion from *Heller* is equally flawed. Resuscitating *Kolbe*, the court insisted that *Heller* held that "weapons … 'like' 'M-16 rifles', i.e., 'weapons that are most useful in military service,'" do not even qualify as arms. Pet.App.18a (quoting *Kolbe*, 894 F.3d

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[2] In point of fact, the Fourth Circuit insisted that petitioners had not even adequately stated a challenge as to 44 of the 45 firearms Maryland has banned—on the theory that the court did not have enough information to determine whether those rifles qualify as "arms." Pet.App.27-30a; *cf.* Pet.App.184a & n.66 (Richardson, J., dissenting).

at 136). *Heller* said no such thing. To the contrary, the very passage of *Heller* on which the majority relied explicitly described "M-16 rifles and the like" as "arms." 554 U.S. at 627. And rightly so, as whatever else may be said about M-16s, they are indisputably "weapons" that people can use "to cast at" (i.e., fire at) an adversary. *See id.* at 581. *Heller* thus did not (and could not) embrace the illogical proposition that some firearms are not "Arms" at all.

Heller instead simply explained that if "M-16 rifles and the like" fall within "*the historical tradition* of prohibiting the carrying of 'dangerous and unusual weapons,'" then they "may be banned" consistent with the Second Amendment. *Id.* at 627 (emphasis added). Indeed, the entirety of Court's brief discussion of "M-16 rifles and the like" follows immediately on the heels of its recognition of that tradition. And that discussion exists solely to respond to the critique that "modern developments have limited the degree of fit between the prefatory clause and the protected right" since many "weapons that are most useful in military service" today are so "highly unusual in society at large" as to fit within that historical tradition. *Id.* *Heller* thus acknowledged only that some "arms" bans will *survive* historical-tradition scrutiny; it in no way immunizes any such bans from the scrutiny *Bruen* and *Rahimi* require.

Ultimately, the Fourth Circuit's decision is incompatible with *Heller*, *Bruen*, and *Rahimi*, as it hopelessly conflates the threshold-textual inquiry this Court demands and the state's historical-tradition burden. The Fourth Circuit seemed to think that any weapon that can be banned consistent with the Second

Amendment must *ipso facto* not be an "Arm" at all. But it failed to grasp that something can be *presumptively* protected by the Second Amendment (because it is covered by the plain text) yet still be subject to restriction. That is the whole point of the historical-tradition test *Bruen* set forth in such meticulous detail: to identify when conduct that is *presumptively* protected by the Second Amendment may nevertheless be restricted "consistent with this Nation's historical tradition of firearm regulation." *See Bruen*, 597 U.S at 17. If nothing not *ultimately* protected by the Second Amendment could be *presumptively* protected either, then the distinct inquiries *Bruen* articulated would collapse into each other. And if a challenger could not make it past the threshold inquiry without first proving that a law is *not* analogous to a historically permissible regulation, then the state would be relieved of its historical-tradition burden in virtually every case.

3. If the Fourth Circuit were set on reading some historical tradition into the word "Arms," at least it could have picked the tradition that is actually grounded in this Court's precedent—i.e., the "common use" test. *See Bruen,* 597 U.S. at 47; *Heller*, 554 U.S. at 627. Had it done so, its decision would have been much shorter, and the judgment would have come out the other way. Indeed, the court essentially admitted as much, positing that asking what is typically possessed by law-abiding citizens for lawful purposes *must* be the wrong question, because if it were the right question (as *Heller* and *Bruen* make clear that it is), then that "would foreclose the ability of legislators" to ban whichever firearms they (and the Fourth Circuit) think should be banned. Pet.App.45-46a.

It should go without saying that it is not for lower courts to grade this Court's handiwork or rewrite its opinions. And under a faithful application of this Court's opinions, the firearms that Maryland has banned not only are plainly "Arms," but are plainly in common use. *See* Pet.App.44-45a (the Fourth Circuit admitting this). The AR-15 is "America's most common civilian rifle," *Harrel*, 144 S.Ct. at 2493 (Thomas, J.); its "popularity seemingly knows no bounds," Pet.App.77a. *See also Garland v. Cargill*, 602 U.S. 406, 429-30 (2024) (Sotomayor, J., dissenting) (AR-15s are "commonly available, semiautomatic rifles"); *Heller v. District of Columbia*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("The AR-15 is the most popular semi-automatic rifle" in America); Pet.6-10; Pet.App.85a; Pet.App.172a. And as Judge Richardson extensively documented (and the majority nowhere disputed), AR-style rifles are just as plainly commonly owned for lawful purposes, including recreational target shooting, self-defense, and hunting. Pet.App.173-76a. They are unquestionably "typically possessed by law-abiding citizens for lawful purposes." *See Heller*, 554 U.S. at 625. Under this Court's precedent, that should have been the end of the matter, as "the Second Amendment *protects*" the right to keep and bear "weapons that are … 'in common use.'" *Bruen,* 597 U.S. at 47 (emphasis added) (quoting *Heller*, 554 U.S. at 627).

But the majority refused to follow that precedent either, instead mocking the common-use tradition this Court has repeatedly recognized as an "ill-conceived popularity test" and a "trivial counting exercise." Pet.App.44-45a. In the majority's view, "[j]ust because a weapon happens to be in common use does not

guarantee that it falls within the scope of the right to keep and bear arms." Pet.App.44-45a. That instead turns on a novel test of the court's own making: "[T]he Second Amendment protects only those weapons that are typically possessed by average Americans for the purpose of self-preservation *and are not ill-suited and disproportionate to achieving that end*." Pet.App.46a (emphasis added).

If that sounds like a balancing test, that is because it is. Indeed, the Fourth Circuit made no secret of the fact that it was interpreting the Second Amendment to empower *the government* to engage in "careful interest balancing between individual self-defense and societal order." Pet.App.45a; *see also, e.g.*, Pet.App.22a-23a (purporting to derive a historical tradition of "a careful balancing of interests between individual self-defense and public protection from excessive danger"). As Judge Gregory forthrightly acknowledged in his separate opinion concurring only in the judgment, "the majority's analysis is comprised of the very sort of means-end scrutiny that *Bruen* explicitly forbids courts from applying in the Second Amendment context." Pet.App.86-87a.

The Fourth Circuit tried to justify that approach by repeatedly invoking what it viewed as the purpose of the Second Amendment, which it perceived to be self-defense subject to "[l]imitations." Pet.App.19a; *see also, e.g.*, Pet.App.19-23a, 26a, 40a, 43-46a, 69-72a. But "[a] court may not 'extrapolate' from the Constitution's text and history 'the values behind [that right], and then … enforce its guarantees only to the extent they serve (in the courts' views) those underlying values.'" *Rahimi*, 144 S.Ct. at 1908

(Kavanaugh, J., concurring) (quoting *Giles v. California*, 554 U.S. 353, 375 (2008)). And the supposed purposes here proved to be little more than a guise for policy preferences. For instance, in considering the continued validity of *Kolbe*, the Fourth Circuit devoted seven pages to discussing its compatibility with what the majority perceived to be "the purpose of the individual right to keep and bear arms," Pet.App.19-27a, but just one paragraph to whether *Kolbe* is compatible with *Bruen*, Pet.App.18a.

Ultimately, the majority simply superimposed "its preferred values into the plaintext inquiry." Pet.App.181a (Richardson, J., dissenting). The result was predictable: The majority gave itself license to examine at length what it sees as the dangers of criminal misuse of AR-15s, on the one hand, and their utility for personal defense, on the other, and then ruled that the AR-15 is not a suitable personal self-defense device—in derogation of the views of the millions of law-abiding Americans who use AR-15s for exactly that purpose every day. Pet.App.34-43a. As Judge Richardson pointed out, the majority performed this self-assigned task without regard to individual circumstances, at a serious factual deficit, and while "trad[ing] in tropes and hyperbole." Pet.App.191a; *see* Pet.App.186-91a. That this analysis was done poorly is self-evident, but the far more important point is that it should not have been done at all. Under this Court's decisions in *Heller* and *Bruen*, the question is what "American society" chooses for self-defense, not what a panel of judges *thinks* they should. *Heller*, 554 U.S. at 628; *see also Bruen*, 597 U.S. at 47; Pet.App.170a (Richardson, J., dissenting).

4. Making matters worse, even if there were some "suitable for self-defense" test, the notion that AR-15 rifles are better suited for military service than for self-defense strains credulity. AR-15s have virtually never been used in military service, and no military in the world currently uses them—precisely because they lack fully automatic capability. *See* Nicholas J. Johnson, et al., *Second Amendment: Regulation, Rights, and Policy* 1968 (3d ed. 2021) (2024 Supp.) ("[N]o national military force actually uses semi-automatic-only rifles in combat."). The Fourth Circuit tried to brush away that inconvenient fact, insisting that "[t]he primary difference between the M16 and AR-15—the M16's capacity for automatic fire[—]pales in significance compared to the … features that makes the two weapons so similar." Pet.App.35a. But a test that purports to carve "military-style" arms out of the Second Amendment, yet ignores what weapons the military *actually uses*, defies common sense.[3]

It also defies this Court's precedent yet again, as this Court has repeatedly recognized that the distinction between fully automatic machineguns and semiautomatic rifles is both factually and legally significant. *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 603, 610-15 (1994); *Cargill*, 602 U.S. at 416-21. The core question before the Court in *Staples*, for instance, was whether an AR-15 rifle is sufficiently similar to an M-16 rifle to put people on notice that they should ensure that it has not been modified in a way that renders its possession illegal. In answering

[3] That, unfortunately, did not stop the Seventh Circuit from making the exact same error. *See Bevis v. City of Naperville*, 85 F.4th 1175, 1196 (7th Cir. 2023).

that question "no," the Court accepted that "certain categories of guns," including "machineguns," may be so dangerous and unusual that people should know that their mere possession may be illegal. 511 U.S. at 611-12. But it refused to extend that logic to "conventional semi-automatic" firearms such as AR-15 rifles, "precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions." *Id.* at 612, 615.

Staples thus rested entirely on the premise that AR-15s are *not* equivalent to M-16s—a premise on which an entire legal regime dating back nearly a century has been built. Put differently, when this Court referred to "M-16 rifles and the like" in *Heller*, 554 U.S. at 627, it was obvious to anyone paying attention that "the like" does not include semiautomatic-only firearms that no military in the world currently uses. The Fourth Circuit's blithe conflation of semiautomatic and fully automatic firearms makes nonsense of that reality—and raises the alarming prospect that a state could ban even semiautomatic handguns without having to satisfy any Second Amendment scrutiny at all. That result simply cannot be reconciled with this Court's repeatedly admonitions that "the Second Amendment *protects*" the right to keep and bear "weapons that are … 'in common use.'" *Bruen,* 597 U.S. at 47 (emphasis added) (quoting *Heller*, 554 U.S. at 627).

B. The Fourth Circuit's Effort to Ground Its Alternative Holding in History Defies This Court's Cases Yet Again.

Perhaps betraying an uneasy sense that it had done *Bruen* less than full justice, the Fourth Circuit

went on to address historical tradition in the alternative. But the tradition the court purported to divine was not the one this Court has repeatedly recognized—i.e., that weapons in common use for lawful purposes are protected, while only those that are dangerous and unusual may be banned. *See Bruen*, 597 U.S. at 21; *Heller*, 554 U.S. at 627. Instead, the court "deduce[d]" a supposed tradition so broad as to effectively nullify the Second Amendment, under which states may respond to "public safety concerns" by disarming law-abiding citizens of any and all firearms that their legislatures believe to be "excessively harmful" in the hands of criminals. Pet.App.53a, 57a; *see also* Pet.App.62a, 69a.

This ahistorical proposition is not just an invitation to perform impermissible interest balancing; it is indistinguishable from rational-basis review. After all, it is the rare restriction on arms that the government will *not* claim is animated by "public safety concerns." Pet.App.57a. If states have carte blanche to enact ever more restrictive measures so long as they are grounded in such concerns, then virtually anything will be justified as long as it is rational. If that were really all it took to withstand Second Amendment scrutiny, then *Heller* and *Bruen* would have come out the other way. After all, the D.C. government certainly maintained—and the majority acknowledged—that it was legislating to respond to the danger of handgun violence. *See Heller*, 554 U.S. at 634, 636. As did New York in defending its outlier permitting regime in *Bruen*.

Given the enormous gulf between the supposed "tradition" the Fourth Circuit deduced and the one

this Court has recognized repeatedly, it should come as no surprise that the majority cited zero historical precedents remotely resembling Maryland's sweeping ban. In fact, the majority failed to identify almost any historical law that removed from the civilian market *a single type of firearm* that had long been kept and used by law-abiding citizens for lawful purposes. That is because none exists. Instead, most of the historical laws the majority discussed did not ban any types of arms at all, let alone ban anything typically possessed by law-abiding citizens for lawful purposes or commonly used for self-defense.

For instance, the majority began, Pet.App.54a & n.3, by citing the very gunpowder laws that *Heller* rejected as a basis for banning handguns since they were self-evidently just fire-safety measures, *see* 554 U.S. at 632. The court nowhere explained how these same fire-safety laws could justify banning rifles when they did not justify banning handguns. *See* Pet.App.204a (Richardson, J., dissenting). Instead, it posited that they illustrate a supposed tradition of broad legislative discretion to enact laws in "response to th[e] danger" posed by arms *not even in use*. Pet.App.54a. Again, if that were the case, then *Heller* would have come out the other way, as D.C. was inarguably legislating in response to danger too.

The majority next invoked a grab-bag of nineteenth-century restrictions on "firearms … Bowie knives, dirks, sword canes, metal knuckles, slungshots, and sand clubs." Pet.App.59-60a. But those laws almost uniformly either prohibited only the concealed carry of Bowie knives (or carry with intent to do harm) or provided heightened punishments for

using one in the commission of a crime. *See* Response Br. 48-49, *Barnett v. Raoul*, Nos. 23-1825, 23-1826, 23-1827, & 23-1828 (7th Cir. June 20, 2023) ("*Barnett*.Response.Br."), Dkt.56; David Kopel, *Bowie Knife Statutes 1837-1899*, Reason.com (Nov. 20, 2022), bit.ly/3RNRpQD. Moreover, as Judge Richardson explained, the more restrictive measures "were considered *constitutional* only insofar as they applied to weapons that were both dangerous *and unusual*." Pet.App.205a. Those laws thus are plainly not proper analogues for a flat ban on the most popular rifle in the country.

More remarkable still, the majority tried to divine from these laws a legislative prerogative to restrict the people's access to technological developments that produce "more effective arms." Pet.App.57a; *see also* Pet.App.54-56a; 68-69a. If that were all it took for the legislature to ban common arms, then the Second Amendment right would be frozen in time—a result that *Heller* squarely rejected as "bordering on the frivolous." 554 U.S. at 582. Simply put, there is no historical tradition in this country of confining the people to *less* effective means of defending themselves, their loved ones, and their homes.

The majority was thus left pointing to twentieth century restrictions on "dynamite and a wide array of other explosives" and (of course) machineguns. Pet.App.65a. But it did not even try to claim that any of those weapons has ever been commonly owned "by law-abiding citizens for lawful purposes." *See Heller*, 554 U.S. at 625. It simply noted that their possession and use have long been restricted. Pet.App.65-67a. That breezy (mis)characterization of the history

overlooks that when bearable, fully automatic submachineguns first hit the civilian markets in the 1920s (after the military showed little interest in them), the people did not respond by clamoring to buy them *en masse*. *See* Barnett.Response.Br.8-9. They instead responded all throughout the country by restricting or banning them almost immediately. Indeed, within a decade, more than half the states had restricted their possession and use, and the federal government followed suit not long thereafter. *See id.*

Contrast that with the Nation's tradition vis-à-vis semiautomatic firearms. Semiautomatics came onto the civilian market in the 1890s. Yet no state restricted them until a few swept them up in the 1920s and 1930s in ham-fisted efforts to restrict then-new fully automatic arms. *See* 1927 Mich. Pub. Acts 887, 888; 1927 R.I. Acts & Resolves 256, 256-57; 1933 Minn. Laws ch. 190.[4] And each of those outlier laws was ultimately repealed outright or replaced with one that restricted only automatics. *See* 1959 Mich. Pub. Acts 249, 250; 1959 R.I. Acts & Resolves 260, 260, 263; 1963 Minn. Sess. L. ch. 753, at 1229.[5] Indeed, it was

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[4] The Fourth Circuit asserted in one half-sentence and a footnote that "ten states restricted semiautomatic weapons between 1928 and 1934." Pet.App.66a. That is not correct. *See* Barnett.Response.Br.51. Indeed, even Professor Robert Spitzer, on whom the Fourth Circuit relied, has since retreated down to seven, of which four are clearly inapposite. *See id.*; n.5, *infra*.

[5] In addition to those three states, California and Ohio enacted licensing laws for certain semiautomatics, but did not enact outright bans. *See* 1933 Cal. Stat., ch. 450; 1933 Ohio Laws 189, 189. And while a Virginia law enacted in that era could be read to include semiautomatics that hold more than 16 rounds, it

not until 1989 that any state started targeting certain semiautomatic firearms for restriction. *See* 1989 Cal. Stat. 60, 64. Neither did Congress until 1994, *see* Pub. L. No. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)), and Congress allowed that law to expire in 2004 after a Justice Department study revealed that it had produced "no discernible reduction" in firearm violence, Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets & Gun Violence, 1994-2003*, Rep. to the Nat'l Inst. of Justice 96 (2004), https://bit.ly/3wUdGRE. Even now, bans like Maryland's remain outliers; the vast majority of the firearms Maryland now bans (including AR-15s) remain legal in most of the country.

In the end, then, the Fourth Circuit did not identify any historical support for Maryland's flat ban on rifles. That should come as no surprise; this Court has already studied the same history in exhaustive detail and concluded that, "[a]part from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense," *Bruen*, 597 U.S. at 70, let alone prohibited the bare possession of arms that are "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625.

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applied only to use of the firearm in a "crime of violence" or "for offensive or aggressive purpose." 1934 Va. Acts ch. 96, §§1(a), 4(d). In all events, each of these laws likewise was either repealed outright or replaced with one restricting only fully automatic arms. *See* 1965 Cal. Stat., ch. 33, at 913; 1972 Ohio Laws 1866, 1963; 1975 Va. Acts, ch. 14, at 67.

II. The Question Presented Is Exceptionally Important.

Whether and when the government may ban—and even confiscate from law-abiding citizens—common arms is an issue of incredible importance. After all, the scope of the right to keep and bear arms depends, first and foremost, on what arms it covers. And that issue has taken on even greater practical significance since *Bruen*, as several of the states that expressed open hostility to this Court's decision responded with protest legislation imposing even *greater* restrictions on which arms law-abiding citizens may keep and bear. Yet, as the decision below demonstrates, the same courts that were reversed in *Bruen* for refusing to take *Heller* at face value are now doing the same thing all over again with *Bruen*.

Exhibit A is the Seventh Circuit's recent decision resuscitating its own pre-*Bruen* precedent to uphold a ban on long-lawful arms. There, as here, the court reached the remarkable conclusion that the most common rifle in America is not even an "Arm" within the meaning of (or covered by the plain text of) the Second Amendment, and then rejected a challenge to a magazine ban without so much as mentioning text or historical tradition. *Bevis*, 85 F.4th at 1197.

Similarly, the First Circuit, confronted with a ban on half the magazines in America, was willing only to assume without deciding that such a ban implicated the Second Amendment. *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 49 (1st Cir. 2024) (quoting *Bevis*, 85 F.4th at 1195). The First Circuit then relied on *Bevis* to avoid protecting these ubiquitous arms, by holding that magazines that come standard-issue with

all manner of semiautomatic firearms are especially "dangerous" because they can be used in AR-15 rifles, which it deemed "'almost the same gun as the M-16 machinegun.'" *Id.* at 48-49. A petition for certiorari challenging that untenable decision has been filed and remains pending before this Court. *See* Pet'n for Writ of Certiorari, *Ocean State Tactical, LLC v. Rhode Island*, No. 24-131 (U.S. filed Aug. 2, 2024).

The Third Circuit, meanwhile, recently refused to even consider a challenge to Delaware's magazine and firearms ban on the equally remarkable theory that individuals who wish to possess the banned arms would not be entitled to relief *even if the law is likely unconstitutional* because "they already own" other arms that Delaware has not (yet) seen fit to ban. *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 205 (3d Cir. 2024). *But see Heller*, 554 U.S. at 629 ("It is no answer to say … that it is permissible to ban … handguns so long as … other firearms … [are] allowed.").

The Ninth Circuit's recent actions in *Duncan v. Bonta* are likewise eerily reminiscent of its pre-*Bruen* patterns. After this Court vacated an earlier en banc decision upholding California's magazine ban and remanded for re-analysis in light of *Bruen*, 142 S.Ct. 2895 (2022), the *en banc* court instead remanded to the same district court that had already held the ban unconstitutional, which unsurprisingly did so again, in an opinion that exhaustively examined the historical record, 695 F.Supp.3d 1206 (S.D. Cal. 2023). The Ninth Circuit, however, would have none of it. The court bypassed the ordinary appellate-review process, reconvened an en banc panel now composed

mostly of non-active judges, and granted an "emergency" stay over the dissent of most of the active judges, in an opinion that cited *Bruen* only for the truism that "'the right secured by the Second Amendment is not unlimited.'" 83 F.4th 803, 805-07 (9th Cir. 2023).

All of that vividly "illustrates why this Court must provide more guidance" on which arms the Second Amendment protects. *Harrel*, 144 S.Ct. at 2492 (Thomas, J.). Absent the absolute clearest of instructions, lower courts will continue "contorting" this Court's cases to uphold arms bans, producing a parade of ever-more confused and contradictory opinions aligned only in being utterly "unmoored from both text and history." *Id.* The time has come for this Court to step in—either in this case or in one of the many others raising these issues—provide the guidance lower courts profess to lack, and ensure that law-abiding citizens in outlier states who do not share the founding generation's respect for the right to keep and bear arms do not have their constitutional rights trampled all over again.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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