

No. 24-598

**In The
Supreme Court of the United States**

—◆—
B&L PRODUCTIONS, INC.,
D/B/A CROSSROADS OF THE WEST, ET AL.,
Petitioners,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS GOVERNOR
OF THE STATE OF CALIFORNIA AND IN HIS PERSONAL
CAPACITY, ET AL.,
Respondents.

—◆—
**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

—◆—
**BRIEF OF THE NATIONAL RIFLE
ASSOCIATION OF AMERICA AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

—◆—
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INTEREST OF *AMICUS CURIAE*¹

The National Rifle Association of America (NRA) is America's oldest civil rights organization and foremost defender of Second Amendment rights. It was founded in 1871 by Union generals who, based on their Civil War experiences, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA has approximately four million members, and its programs reach millions more.

The NRA is interested in this case because the Ninth Circuit's failure to recognize the right to acquire firearms threatens the Second Amendment.



¹ All parties received timely notice of *Amicus*'s intent to file this brief. No counsel for any party authored this brief in any part. Only *Amicus* funded its preparation and submission.

SUMMARY OF ARGUMENT

Lower courts are divided over whether the Second Amendment protects the right to acquire firearms. Some courts hold that the right is protected, some hold that it is not, and others hold that the right is implicated only when acquisition restrictions sufficiently burden one's ability to possess arms.

This Court has long recognized that the Constitution protects certain fundamental rights that, although not expressly guaranteed, are indispensable to the enjoyment of enumerated rights. Thus, four Justices of this Court agreed—and none disagreed—that the right to transfer ownership of a firearm lawfully is a necessary concomitant of the right to keep arms. And Justice Thomas recognized that the Second Amendment would be toothless without the right to acquire arms. This is consistent with how other rights are treated—for example, this Court has determined that the First Amendment includes the right to purchase paper and ink for printing newspapers.

History makes clear that the Founders intended to protect arms commerce. Beginning with the first English settlements in 1606, American arms commerce was given specific legal protection. A century-and-a-half later, Britain turned a political crisis into war when it prohibited commerce in gunpowder and firearms. Had the British won, they planned to make the arms commerce prohibition permanent. Americans resisted the commerce prohibition by all means necessary. After the Revolution, they created a new government to ensure that British-style infringements of arms rights could never be repeated.

The decision below is emblematic of the Ninth Circuit's hostility to the Second Amendment. The court has upheld every firearm restriction—over 50 so far—brought before it. And it has demonstrated that it will continue to uphold every firearm restriction it considers, no matter the violence done to the rule of law. Several of this Court's Justices and several Ninth Circuit judges have acknowledged the court's disdain for arms rights. By showing that it will uphold every arms restriction it encounters, the court has eliminated the Second Amendment's protections altogether.

Certiorari should be granted to resolve the uncertainty among lower courts and establish that the Second Amendment protects the right to acquire arms, and to halt the Ninth Circuit's open defiance of the Second Amendment.



ARGUMENT

I. Certiorari should be granted to establish that the Second Amendment protects the right to acquire firearms.

A. Whether and to what extent the Second Amendment protects firearm purchases has divided lower courts.

Lower courts are split over whether and to what extent the Second Amendment protects the right to acquire arms.

The Second, Third, and Seventh Circuits have concluded that the right to acquire arms is protected. The Second Circuit held that “[t]he right to keep arms,

necessarily involves the right to purchase them.” *Gazzola v. Hochul*, 88 F.4th 186, 195–96 (2d Cir. 2023) (quoting *Andrews v. State*, 50 Tenn. 165, 178 (1871)). The Third Circuit determined that “purchase and practice restrictions” burden the Second Amendment. *Drummond v. Robinson Twp.*, 9 F.4th 217, 229 (3d Cir. 2021). And the Seventh Circuit held that “[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use.” *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011).

By contrast, the Tenth Circuit held that a prohibition on firearm purchases by 18-to-20-year-olds “falls outside of the scope of the Second Amendment’s right to ‘keep and bear’ arms,” *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 119–20 (10th Cir. 2024), despite recognizing that such adults are “part of ‘the people’ as defined by the Second Amendment,” *id.* at 116. Judge McHugh disagreed, arguing that “purchasing firearms is a necessary concomitant of the right to ‘keep and bear Arms’” because “acquisition is a prerequisite to possession.” *Id.* at 140 (McHugh, J., concurring).

The Fifth Circuit concluded that the Second Amendment’s plain text “does not include purchase,” while noting that the Amendment is “implicate[d]” when “restrictions on purchase” result in “functional prohibitions on keeping.” *McRorey v. Garland*, 99 F.4th 831, 838 (5th Cir. 2024).

Here, the Ninth Circuit held that “the right to acquire firearms” is an “ancillary right” that “only implicates the Second Amendment” when “a regulation ‘meaningfully constrain[s]’ the right to keep

and bear arms.” *B&L Prods., Inc. v. Newsom*, 104 F.4th 108, 118–19 (9th Cir. 2024) (quoting *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 680 (9th Cir. 2017) (en banc)).

Certiorari should be granted to resolve this split among lower courts.

B. This Court has strongly indicated that the Second Amendment protects firearm sales.

Four Justices of this Court agreed—and none disagreed—that “a necessary concomitant of” the “right to keep a handgun in the home” is the right “to take a gun outside the home in order to transfer ownership lawfully.” *New York State Rifle & Pistol Ass’n, Inc. v. City of New York*, 590 U.S. 336, 364–65 (2020) (Alito, J., joined by Gorsuch and Thomas, JJ., dissenting); *id.* at 340 (Kavanaugh, J., concurring) (expressing “agree[ment] with Justice Alito’s general analysis of *Heller*”).

Likewise, Justice Thomas recognized that “[t]he right to keep and bear arms...implies a corresponding right to obtain the bullets necessary to use them,” because “[w]ithout protection for th[is] closely related right[], the Second Amendment would be toothless.” *Luis v. United States*, 578 U.S. 5, 26–27 (2016) (Thomas, J., concurring in the judgment) (quotation marks and citation omitted).

Heller concluded that “the most natural reading of ‘keep Arms’ in the Second Amendment is to ‘have weapons.’” 554 U.S. at 582. And to “have” something—both historically and today—has always included its

acquisition.² See *United States v. Quiroz*, 629 F. Supp. 3d 511, 516 (W.D. Tex. 2022) (Because “the plain meaning of the verbs ‘have’ or ‘possess’ include the act of receipt,” “to have weapons” must encompass the “receipt” and “possession of those weapons.”). Further, *Heller* thrice cited *Andrews* approvingly, 554 U.S. at 608, 614, 629, which held that “[t]he right to keep arms, necessarily involves the right to purchase them,” 50 Tenn. at 178. Moreover, *Heller* identified certain regulations on “the commercial sale of arms” that are “presumptively lawful,” which would make little sense if commercial sales were outside the scope of the Second Amendment. 554 U.S. at 626–27 & n.26 (emphasis added). Indeed, the other “presumptively lawful” regulations *Heller* identified—“prohibitions on the possession of firearms by felons and the mentally ill” and “laws forbidding the carrying of firearms in sensitive places,” *id.*—involve conduct covered by the Second Amendment, see *id.* at 592 (Second Amendment protects possessing firearms); *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 32 (2022) (Second Amendment protects publicly carrying firearms).

² See 1 Samuel Johnson, *DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 1773) (unpaginated) (defining “have” as “5. To obtain” and “6. To take; to receive”); 1 Noah Webster, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828) (unpaginated) (defining “have” as “9. To gain; to procure; to receive; to obtain; to purchase”); *MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY* 533 (10th ed. 1996) (defining “have” as “4 a: to acquire or get possession of: OBTAIN” and to “b: RECEIVE”); *THE AMERICAN HERITAGE COLLEGE DICTIONARY* 622 (3d ed. 1993) (defining “have” as “6.a. To come into possession of; acquire. b. To receive; get. c. To accept; take”).

“A constitution....requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.” *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). Thus, “the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579 (1980). And “fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.” *Id.* at 580; *see also Luis*, 578 U.S. at 26 (Thomas, J., concurring in the judgment) (“Constitutional rights...implicitly protect those closely related acts necessary to their exercise.”).

The First Amendment’s free press guarantee includes the right to purchase paper and ink to print newspapers. *Minneapolis Star & Trib. Co. v. Minnesota Com’r of Revenue*, 460 U.S. 575, 582 (1983). And the First Amendment’s free speech guarantee “include[s] the right to engage in financial transactions that are the incidents of its exercise.” *McConnell v. Federal Election Com’n*, 540 U.S. 93, 252 (2003) (Scalia, J., concurring in part). The Second Amendment, which is not a “second-class right,” *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion), to be “singled out for special—and specially unfavorable—treatment,” *id.* at 778–79 (majority opinion), contains implicit rights just like the First Amendment. Indeed, “self-defense” is not among the 27 words of the Second Amendment’s text, yet *Heller* identified it as a “core protection” of the Second Amendment. 554 U.S. at 634. The Second Amendment

must also protect the right to purchase firearms, and this case presents an ideal vehicle to resolve the split over the issue in the lower courts.

II. Britain’s infringements on early Americans’ freedoms to buy and sell arms precipitated the Revolutionary War.

To appreciate the importance of purchasing and selling firearms to the Founding generation, it is helpful to understand the robust tradition that existed prior to the Revolutionary War, and to understand Britain’s attempts to disarm the Americans by prohibiting arms commerce.

Arms commerce in America was a protected right from the beginning. Binding his “Heirs and Successors,” King James I in 1606 granted the “Southern Colony” (today’s Virginia and the entire South) the perpetual right to import from Great Britain, “the Goods, Chattels, Armour, Munition, and Furniture, needful to be used by them, for their said Apparel, Food, Defence or otherwise.” 7 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3787–88 (Francis Thorpe ed., 1909).³ The 1620 Charter of New England (originally the entire North) similarly guaranteed the right “att all and every time and times hereafter, out of our Realmes or Dominions whatsoever, to take, load, carry, and transports in...Shipping, Armour, Weapons,

³ “Armour” included all equipment for fighting, including firearms. *Heller*, 554 U.S. at 581.

Ordinances, Muniton, Powder, Shott, Victuals...and all other Things necessary for the said Plantation, and for their Use and Defense, and for Trade with the People there.” 3 *id.* at 1834–35.

Over the next 150 years, Americans freely engaged in arms commerce. *See, e.g.*, Joseph Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY’S L.J. 35, 45–48 (2023). “Gunsmiths were found nearly everywhere: in port towns along the coast, in settled inland areas, and...on the frontier.” Harold Gill, *THE GUNSMITH IN COLONIAL VIRGINIA* 1 (1974). This tradition came to an abrupt halt, however, when the British attempted to disarm America by forbidding arms commerce, which led to the Revolutionary War.

A. Great Britain prevented domestic arms commerce.

In 1774, Massachusetts royal governor Thomas Gage attempted to disarm the colonists by blocking gunpowder commerce. In colonial towns, large quantities of gunpowder were stored in central “powder houses” or “magazines.” Unlike modern smokeless gunpowder, the black powder of the 18th century was volatile, so merchants’ and government reserves were often stored in reinforced brick buildings. Boston merchant John Andrews wrote on July 22nd that “the Governor has order’d the Keeper of the Province’s Magazine not to deliver a kernel of powder (without his express order) of either public or private property[.]” John Andrews, *LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON, 1772–1776*, at 19 (Winthrop Sargent ed., 1866) (July 22, 1774). On September 2nd, Andrews reported, “A Guard of Soldiers is set upon the Powder house at the back of

ye. Common, so that people are debar'd from selling their own property." *Id.* at 39. Andrews noted, "it's now five or six weeks since the Governor has allow'd any [powder] to be taken out of the magazine here, whereby for some weeks there has not been a pound to be sold or bought in town." *Id.* at 52.

Even more provocatively, on September 1, 1774, Gage "sent a Party of Two hundred men" to the Charlestown powder house. John Rowe, *LETTERS AND DIARY OF JOHN ROWE* 283–84 (Anne Cunningham ed., 1903). They seized "two hundred and fifty half barrels of powder, the whole store there." Unsigned report, Sept. 5, 1774, *in* 1 *AMERICAN ARCHIVES* 762 (4th Ser., Peter Force ed., 1837).

Rumors that the British had shot colonists while confiscating the gunpowder set off the "Powder Alarm" throughout New England. The colonists "began to collect in large bodies, with their arms, provisions, and ammunition, determining by some means to give a check to a power which so openly threatened their destruction, and in such a clandestine manner rob them of the means of their defence." *Id.* Andrews reported that "at least a hundred thousand men were equipt with arms, and moving towards us from different parts of the country." Andrews, *LETTERS*, at 52. A patriot in Litchfield, Connecticut, wrote:

all along were armed men rushing forward, some on foot, some on horseback; at every house women and children making cartridges, running bullets, making wallets, baking biscuit, crying and bemoaning, and at the same time animating their husbands and sons to fight for their liberties tho not

knowing whether they should ever see them again.

Charles Clark, *The 18th Century Diary of Ezra Stiles*, 208 N. AM. REV. 410, 419 (Sept. 1918).

In November, General Gage wrote his superior in London, explaining his “order to the Storekeeper not to deliver out any Powder from the Magazine, where the Merchants deposite it, which I judged a very necessary and prudent measure in the present circumstances, as well as removing the Ammunition from the Provincial Arsenal at Cambridge.” Letter from Thomas Gage to Earl of Dartmouth (Nov. 2, 1774), *in* 1 AMERICAN ARCHIVES, at 951.

B. Great Britain banned the import of arms.

King George’s government already favored the same policy. On October 19, 1774, King George issued an order-in-council prohibiting the importation of arms and ammunition into America. 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES, A.D. 1766–1783, at 401 (James Munro & Almeric Fitzroy eds., 1912). Secretary of State Lord Dartmouth sent a letter that day “to the Governors in America,” announcing “His Majesty’s Command that [the governors] do take the most effectual measures for arresting, detaining and securing any Gunpowder, or any sort of arms or ammunition, which may be attempted to be imported into the Province under your Government.” Letter from Earl of Dartmouth to the Governors in America (Oct. 19, 1774), *in* 8 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 509 (1857). The embargo proclamation was initially for six months, but was “repeatedly renewed,

remaining in effect until the Anglo-American peace treaty in 1783.” David Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 297 (2012).

The king’s “proclamation, it is said, was occasioned by intelligence received from Sheffield and Birmingham of amazing quantities of fire arms, &c. being nearly ready to be sent to America.” CONNECTICUT JOURNAL, Dec. 28, 1774, at 1.

The embargo was swiftly enforced. In October 1774, an armed British cutter near Amsterdam blockaded a Rhode Island vessel that “had been sent expressly to load different sorts of firearms, and had already taken on board forty small pieces of cannon.” Daniel Miller, SIR JOSEPH YORKE AND ANGLO-DUTCH RELATIONS 1774–1780, at 39 (1970). Then, “Two vessels, laden with gun-powder and other military utensils, bound for the other side of the Atlantick, were stopped at Gravesend...by the out clearers, in consequence of the King’s proclamation.” PA. GAZETTE, Dec. 21, 1774, at 2.

The British deployed “several capital ships of war, and six cutters” in the Atlantic “to obstruct the American trade, and prevent all European goods from going there, particularly arms and ammunition.” 1 Frank Moore, DIARY OF THE AMERICAN REVOLUTION 61 (1860) (entry of Apr. 4, 1775). A December 26, 1774, letter from Bristol, England, observed “several frigates to be fitted out immediately to sail for America, to be stationed there in order to cruise along the coasts, to prevent any ammunition or arms being sent to the Americans by any foreign power.” Stephen Halbrook, THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE

RIGHT TO KEEP AND BEAR ARMS 64 (2008); *see also* PROVIDENCE GAZETTE, Jan. 14, 1775, *reprinted in* 1 NAVAL DOCUMENTS OF THE AMERICAN REVOLUTION 62 (William Bell Clark ed., 1964) (“Orders have been given for the seizing every Ship, of what Nation soever, employed in conveying Arms or Ammunition to the Americans.”).

Additionally, “[s]tocks of powder and arms in the possession of merchants were forcibly purchased by the Crown.” David Hackett Fischer, PAUL REVERE’S RIDE 50 (1994).

C. Americans viewed arms commerce restrictions as an effort to enslave them.

Defying a ban on public meetings, residents of Suffolk County (including Boston) convened in September 1774 and adopted the Suffolk Resolves. The Resolves expressed that General Gage’s “hostile intention” was demonstrated when “in a very extraordinary manner” he confiscated the Charlestown powder, and forbade “the keeper of the magazine at Boston to deliver out to the owners the powder which they had lodged in said magazine.” THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS IN 1774 AND 1775 AND OF THE COMMITTEE OF SAFETY 603 (William Lincoln ed., 1838).

The Suffolk Resolves “were sent express to [the Continental] Congress by Paul Revere,” and the Congress unanimously denounced “these wicked ministerial measures.” 1 JOURNALS OF THE CONTINENTAL CONGRESS 39 & 39 n.1 (1904). The Suffolk Resolves were reprinted verbatim in the Journals of the Continental Congress, and the

Congress had the Resolves disseminated in newspapers throughout America. *Id.* at 40. The Massachusetts Provincial Congress—also meeting in defiance of Gage—twice condemned him for “unlawfully seizing and retaining large quantities of ammunition.” JOURNALS OF EACH PROVINCIAL CONGRESS, at 31 (Oct. 25, 1774), 47 (Oct. 29, 1774).

“A Watchman,” writing in the *New Hampshire Gazette*, called the arms embargo a violation of the right to self-defense. A Watchman, *To the Inhabitants of British America* (Dec. 24, 1774), in 1 AMERICAN ARCHIVES, at 1063–65. He asserted, “when we are by an arbitrary decree prohibited the having Arms and Ammunition by importation...the law of self-preservation” includes “a right to seize upon those within our power, in order to defend the liberties which God and nature have given to us.” *Id.* at 1065. A Watchman reminded readers that the Carthaginians’ “surrender of Arms” to the Romans “proved the destruction of that City.” *Id.* at 1064.

After a British seizure of imported arms in New York, a handbill “secretly conveyed into almost every house in town” asked, “when Slavery is clanking her infernal chains,...will you supinely fold your arms, and calmly see your weapons of defence torn from you?” 1 AMERICAN ARCHIVES, at 1071.

South Carolina’s legislature, now operating independently of British control as the General Committee, declared: “by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and

enslave them.” 1 John Drayton, MEMOIRS OF THE AMERICAN REVOLUTION 166 (1821).

D. Americans used force to thwart the restrictions.

Americans emptied their own powder houses before the British could. For example, Abigail Adams wrote on September 17, 1774, that about 200 patriots had seized gunpowder from the powder house in Braintree, Massachusetts, “in consequence of the powders being taken from Charlestown.” THE BOOK OF ABIGAIL & JOHN: SELECTED LETTERS OF THE ADAMS FAMILY 1762–1784, at 72 (L.H. Butterfield et al. eds., 2002). Knowing her to be a patriot, the men offered her gunpowder on their way past the Adams home. *Id.*

Americans also recaptured arms the British had confiscated. After learning that a New Hampshire fort contained seized arms, around 400 patriots “attacked, overpowered, wounded and confined the captain, and thence took away all the King’s powder.” Letter from Gov. Wentworth to Gov. Gage (Dec. 14, 1774), *in* 18 PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 146–47 (1813). The patriots took “upwards of 100 barrels of powder, 1500 stand of small arms, and several pieces of light cannon.” Letter from Hugh Percy to Grey Cooper, *in* LETTERS OF HUGH EARL PERCY FROM BOSTON AND NEW YORK, 1774–1776, at 46 (Charles Bolton ed., 1902).

New Hampshire’s royal governor, John Wentworth, understood that “this mischief originates from the...order...prohibiting the exportation of military stores from Great Britain.” Letter from Wentworth to Gage, at 146. He bemoaned “the

imbecility of this government to carry into execution his Majesty's order in council, for seizing and detaining arms and ammunition imported into this province, without some strong ship in this harbour." *Id.* at 145.

Similarly, "[i]n May, 1775, the 'Liberty Boys' in Savannah, Georgia, seized 600 pounds [of gunpowder] stored in the magazine of that town, and, July 10, one of the king's ships was boarded and something like 12,700 pounds were carried away." O.W. Stephenson, *The Supply of Gunpowder in 1776*, 30 AM. HIST. REV. 271, 272 (1925).

E. Americans smuggled arms imports.

The Continental Congress established secret committees and agents to procure arms from overseas. Miller, YORKE AND ANGLO-DUTCH RELATIONS, at 42–43. Benjamin Franklin was the mastermind of smuggling arms from the Spanish, French, and Dutch. Robert Richmond, POWDER ALARM 95 (1971). The Continental Congress's agents "made contracts which totaled about \$2,000,000.00." Miller, YORKE AND ANGLO-DUTCH RELATIONS, at 43. "From May to June alone, in 1775, the Pennsylvania Committee spent £20,300 (plus £4,000 for freight) to procure arms, ammunition, and medicine from Europe[.]" David Salay, *The Production of Gunpowder in Pennsylvania During the American Revolution*, 99 PENN. MAG. HIST. & BIOGRAPHY 422, 423 (Oct. 1975).

The *Virginia Gazette* in April 1775 published a report from London that "six large ships sailed lately, three from Holland, and the rest from France, with arms, ammunition, and other implements of war, for

our colonies, and more are absolutely preparing for the same place.” VA. GAZETTE, Apr. 22, 1775, at 1. In May 1776, “eighteen Dutch ships...left Amsterdam...with powder and ammunition for America,” in addition to “powder shipments disguised as tea chests, rice barrels, *et cetera*.” Miller, YORKE AND ANGLO-DUTCH RELATIONS, at 41. The French covertly increased gunpowder exports to America in the face of the British blockade. See Stephenson, *The Supply of Gunpowder*, at 279–80.

F. Americans encouraged domestic arms manufacture and commerce.

Besides stepping up imports, Americans encouraged domestic production and commerce in arms and ammunition. Paul Revere, in August 1774, “engraved a plate diagramming how to refine saltpeter, an essential component in the making of gunpowder,” and had his instructions published in the *Royal American Magazine*. Halbrook, FOUNDERS’ SECOND AMENDMENT, at 33. “Saltpeter recipes ...appeared in American newspapers and pamphlets[.]” Rick Atkinson, THE BRITISH ARE COMING 127–28 (2019). Pennsylvania’s Committee of Safety initiated a program to “instruct the inhabitants of the different Counties in the manufactory of Salt Petre”; the Committee’s handbills were “printed & distributed in the English & German Languages, setting forth the process for extracting and refining Salt Petre.” Report of the Pennsylvania Committee of Safety (Jan. 3, 1776), in 10 MINUTES OF THE PROVINCIAL CONGRESS OF PENNSYLVANIA, FROM THE ORGANIZATION TO THE TERMINATION OF THE PROPRIETARY GOVERNMENT 443 (1852). “A number of [Pennsylvania] counties

responded by establishing model works and providing demonstrations.” Salay, *The Production of Gunpowder*, at 427. And on March 14, 1776, New York’s Provincial Congress printed 3,000 copies of Henry Wisner’s forty-page *Essays Upon the Making of Salt-Petre and GunPowder*. NEW YORK IN THE REVOLUTION AS COLONY AND STATE SUPPLEMENT 58 (Frederic Mather ed., 1901); *see also* CATALOGUE OF MANUSCRIPTS AND RELICS IN WASHINGTON’S HEAD-QUARTERS, NEWBURGH, N.Y. 55 (E.M. Ruttenber ed., 1890) (listing “Essays upon the making of Salt-Petre and Gun-Powder Published by order of the Committee of Safety of the Colony of New York” among the literature present in Washington’s headquarters). “Printing presses throughout the colonies worked overtime, making and distributing broadsides and pamphlets with explicit instructions for manufacturing gunpowder and locating and preparing the ingredients.” M.L. Brown, FIREARMS IN COLONIAL AMERICA 301 (1980).

The patriot governments likewise encouraged domestic production and sale of firearms. Massachusetts’s Provincial Congress, Massachusetts’s House of Representatives, Maryland’s Council of Safety, New Hampshire’s House of Representatives, Pennsylvania’s Committee of Safety, South Carolina’s Provincial Congress, New York’s Provincial Congress, North Carolina’s Provincial Congress, and Connecticut’s General Assembly all solicited arms manufactured and sold by private citizens throughout the war, guaranteeing money and often militia exemptions for anyone willing to provide them arms. Greenlee, *American Tradition of Self-Made Arms*, at

54–61. As British Lieutenant Frederick MacKenzie recorded in his diary: “Arms of all kinds are so much sought after by the Country people, that they use every means of procuring them.” Frederick MacKenzie, *A BRITISH FUSILIER IN REVOLUTIONARY BOSTON: DIARY OF LIEUTENANT FREDERICK MACKENZIE*, at 39–40 (Allen French ed., 1926).

Of the roughly 300,000 long guns used by American line troops in the Revolutionary War, America’s gunsmiths manufactured over 80,000, often by repairing and combining mixed parts from damaged firearms. See George Neumann, *American Made Muskets in the Revolutionary War*, *AM. RIFLEMAN*, Mar. 29, 2010.⁴

The Revolutionary War had almost begun with the September 1774 (inaccurate) Powder Alarm reports that Governor Gage’s redcoats had shot people when seizing gunpowder. And the “War almost began in Virginia in April 1775 when Governor Dunmore ordered the Royal Marines to remove the colony gunpowder supply from the magazine” in Williamsburg. Brown, *FIREARMS IN COLONIAL AMERICA*, at 298. Upon learning of the nonviolent seizure, the Virginia militia assembled to fight, but Governor Dunmore “placated the irate populace by making immediate restitution for the powder.” *Id.*

The War did begin on April 19, 1775, at Lexington and Concord, Massachusetts, when Governor Gage, ruling Boston under martial law, dispatched his army

⁴ <https://www.americanrifleman.org/content/american-made-muskets-in-the-revolutionary-war/> (last visited Dec. 31, 2024).

to Concord to “seize and destroy all artillery, ammunition, provisions, tents, small arms, and all military stores whatever.” Letter from Gov. Gage to Lieut. Col. Smith (Apr. 18, 1775), in Arthur Tourtellot, *LEXINGTON AND CONCORD: THE BEGINNING OF THE WAR OF THE AMERICAN REVOLUTION* 103 (1959). This time, the Americans were forewarned and forearmed.

At the Lexington Green and the Concord Bridge, the British demonstrated they were willing to kill Americans to take their arms. Coercive disarmament initiated the war. See Kopel, *How the British Gun Control Program Precipitated the American Revolution*, at 308–12.

During the War, both sides agreed that the suppression of arms commerce and the disarmament of the Americans was the *sine qua non* of what the Americans called the British plan to “enslave” them. See Greenlee, *American Tradition of Self-Made Arms*, at 48–62.

To the Americans, being “enslaved” included being under the absolute will of another, as they would be if they could not defend themselves. Instead of saying “enslave,” the British called their objective “due subordination,” but it meant the same thing. It depended on terminating arms commerce in the colonies. A 1777 British plan for what to do with America after winning the war urged:

The Militia Laws should be repealed and none suffered to be re-enacted, [and] the Arms of all the People should be taken away...nor should any Foundery or manufactuary of Arms, Gunpowder, or Warlike Stores, be ever

suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence.

William Knox, *Considerations on the Great Question, What Is Fit to be Done with America* (1777), in 1 SOURCES OF AMERICAN INDEPENDENCE: MANUSCRIPTS FROM THE COLLECTIONS OF THE WILLIAM L. CLEMENTS LIBRARY 176 (Howard Peckham ed., 1978).

The Bill of Rights protects against abuses that the Founders never suffered and could not foresee, such as warrantless thermal imaging of homes. *See, e.g., Kyllo v. United States*, 533 U.S. 27 (2001). The Bill of Rights also protects against the abuses the Founders *did* suffer—including obstructions to firearms commerce. As Thomas Jefferson, when serving as America’s first Secretary of State, wrote to the British Ambassador: “Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them.” Letter from Thomas Jefferson to George Hammond (May 15, 1793), in 7 THE WRITINGS OF THOMAS JEFFERSON 326 (Paul Ford ed., 1904).

III. Certiorari should be granted to cabin the Ninth Circuit’s concerted resistance to the Second Amendment.

Bruen requires the government to justify any regulation of conduct that “the Second Amendment’s plain text covers.” 597 U.S. at 24. But the Ninth Circuit below held that litigants must prove a “meaningful constraint” on protected conduct before the government is held to its burden. *B&L Prods., Inc.*,

104 F.4th at 119. The Ninth Circuit’s departure from this Court’s precedent is emblematic of a troubling trend that has persisted since *Heller*.

In the Ninth Circuit, Judge VanDyke recently wrote, “17/29ths of our bench is doing its best to avoid the Court’s guidance and subvert its approach to the Second Amendment. That is patently obvious to anyone paying attention.” *United States v. Duarte*, 108 F.4th 786, 788 (9th Cir. 2024) (VanDyke, J., dissenting from the grant of rehearing en banc).

Between *Heller* and *Bruen*, the Ninth Circuit heard “at least 50 Second Amendment challenges” and “ultimately denied” every challenge. *Duncan v. Bonta*, 19 F.4th 1087, 1165 (9th Cir. 2021) (en banc) (VanDyke, J., dissenting), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022). Undeterred by *Bruen*, the court has continued this trend. See *United States v. Perez-Garcia*, 96 F.4th 1166 (9th Cir. 2024); *B&L Prods., Inc.*, 104 F.4th 108; *Doe v. Bonta*, 101 F.4th 633 (9th Cir. 2024).

“In the Ninth Circuit, if a panel upholds a party’s Second Amendment rights, it follows automatically that the case will be taken en banc.” *Duarte*, 108 F.4th at 787 (VanDyke, J., dissenting from the grant of rehearing en banc); see e.g., *id.* (vacating panel opinion holding 18 U.S.C. §922(g)(1) unconstitutional as applied to a nonviolent felon and ordering rehearing en banc); *Teter v. Lopez*, 93 F.4th 1150 (9th Cir. 2024) (vacating panel opinion holding a butterfly knife ban unconstitutional and ordering rehearing en banc); *McDougall v. Cnty. of Ventura*, 26 F.4th 1016 (9th Cir. 2022) (vacating panel opinion holding a prohibition on the operation of gun stores and firing ranges

unconstitutional and ordering rehearing en banc). And the en banc court has never ruled in favor of the Second Amendment. *See Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) (upholding special-need requirement for a concealed-carry permit); *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc) (upholding county ban on new gun stores); *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc) (upholding ban on open handgun carriage); *Duncan*, 19 F.4th 1087 (upholding magazine ban and confiscation).

Although the Ninth Circuit asserts that its “[c]ases are rarely reheard en banc,” *Ninth Circuit Advisory Committee Note to Rules 35-1 to 35-3*, favorable Second Amendment rulings are *always* reheard en banc. In fact, in *Peruta* and *McDougall*, the court initiated en banc proceedings *sua sponte* after the parties declined to petition.

In *Duncan*, the en banc decision upholding California’s magazine ban was vacated by this Court after *Bruen*, and the case was ultimately remanded to the district court. The district court then held the ban unconstitutional, and the state moved for an emergency stay of the district court’s order. For “perhaps the first time” in the Ninth Circuit’s history, the “en banc panel retained the emergency stay motion as a comeback case in the first instance—bypassing [the] traditional three-judge consideration of motions,” *Duncan v. Bonta*, 83 F.4th 803, 809 (9th Cir. 2023) (Bumatay, J., joined by Ikuta, Nelson, and VanDyke, JJ., dissenting), and possibly violating 28 U.S.C. §46, *id.* at 807–08 (Nelson, J., dissenting)—and ultimately granted the stay pending appeal, *id.* at 807.

The Ninth Circuit’s handling of *McDougall* is also illustrative. A three-judge panel held that Ventura County’s COVID orders shuttering gun shops and firing ranges for 48 days violated the Second Amendment. Recognizing that the ruling will “face an en banc challenge” because “this is *always* what happens when a three-judge panel upholds the Second Amendment in this circuit,” Judge VanDyke added an extraordinary “alternative draft opinion” upholding the restrictions for the future en banc court to use. *McDougall v. Cnty. of Ventura*, 23 F.4th 1095, 1119 (9th Cir.), *reh’g en banc granted, opinion vacated*, 26 F.4th 1016 (9th Cir. 2022) (VanDyke, J., concurring). It did not take “a prophet” to guess what happened next. *Id.* at 1119. After Ventura County declined to petition for rehearing, the Ninth Circuit *sua sponte* ordered rehearing en banc and vacated the favorable panel opinion. *McDougall*, 26 F.4th at 1016–17.

Several Justices of this Court have noted the Ninth Circuit’s disdain for the Second Amendment. *Silvester v. Becerra*, 583 U.S. 1139, 1147–48 (2018) (Thomas, J., dissenting from denial of certiorari) (“The Ninth Circuit’s deviation from ordinary principles of law is unfortunate, though not surprising. Its dismissive treatment of petitioners’ [Second Amendment] challenge is emblematic of a larger trend.”); *Peruta v. California*, 582 U.S. 943, 945 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (“The approach taken by the en banc court is indefensible.”); *Jackson v. City & Cty. of San Francisco*, 576 U.S. 1013, 1014 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (“Despite the clarity with which we

described the Second Amendment’s core protection for the right of self-defense, lower courts, including the [Ninth Circuit] here, have failed to protect it.”).

Ninth Circuit judges have also acknowledged the court’s contempt for the right. *See, e.g., Young*, 992 F.3d at 860 (O’Scannlain, J., joined by Callahan, Ikuta, and Nelson, JJ., dissenting) (“[O]ur circuit has not merely demoted” the Second Amendment to “the status of ‘a second-class right’ but has extinguished its status as a right altogether.”); *Peruta*, 824 F.3d at 956 (Callahan, J., joined by Bea and N.R. Smith, JJ., dissenting) (“[T]he Second Amendment is becoming... no constitutional guarantee at all.”) (quotation omitted); *Mai v. United States*, 974 F.3d 1082, 1104–05 (9th Cir. 2020) (VanDyke, J., joined by Bumatay, J., dissenting from denial of rehearing en banc) (“[O]ur court just doesn’t like the Second Amendment very much. We always uphold restrictions.... Show me a burden—any burden—on Second Amendment rights, and this court will find a way to uphold it.”); *Duncan*, 83 F.4th at 808 (Bumatay, J., joined by Ikuta, Nelson, and VanDyke, JJ., dissenting) (“If the protection of the people’s fundamental rights wasn’t such a serious matter, our court’s attitude toward the Second Amendment would be laughably absurd.).

As Judge VanDyke observed, “[u]ntil the Supreme Court forces our court to do something different... the Second Amendment will remain essentially an ink blot in this circuit.” *Duncan*, 19 F.4th at 1167 (VanDyke, J., dissenting). Certiorari should be granted to halt the Ninth Circuit’s open and repeated defiance of the Second Amendment.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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