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

BRIEF OF AMICUS CURIAE KNIFE RIGHTS, INC. IN SUPPORT OF PETITIONERS

John W. Dillon
DILLON LAW GROUP APC
2647 Gateway Road
Suite 105, No. 255
Carlsbad, CA 92009
(760) 642-7150
jdillon@dillonlawgp.com

George M. Lee
Counsel of Record
SEILER EPSTEIN LLP
4 Embarcadero Center, 14th Floor
San Francisco, CA 94111
(415) 979-0500
gml@seilerepstein.com

September 23, 2024 *Counsel for Amicus Curiae*

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IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

This writ petition presents the perfect forum for the Court to provide nationwide guidance on issues of exceptional importance arising from Second Amendment challenges to arms prohibitions. This brief identifies a slew of post-*Bruen*[2] lower court decisions that narrowly confine the plain text analysis of the Second Amendment contrary to this Court's precedent and in conflict with the Second Amendment's ordinary meaning.

Amicus Curiae KNIFE RIGHTS, INC. (*Knife Rights*), a 501(c)(4) non-profit member organization incorporated under the laws of Arizona with its primary place of business in Gilbert, Arizona, serves its members, supporters, and the public through its efforts to defend and advance the right to keep and bear bladed arms under the Second Amendment. Knives are one of mankind's oldest and most commonly used tools and weapons, and their ownership and lawful possession, use, and carry are fully protected by the Second Amendment.

Knife Rights has intense interests in this case because it has participated in Second Amendment litigation across the country challenging unconstitu-

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[1] All parties received timely notice to the filing of this brief. No counsel for any party authored the brief in whole or in part. Only Amicus Curiae Knife Rights funded its preparation and submission.

[2] *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1, 19 (2022).

tional prohibitions on bladed arms. Most recently, Knife Rights has seen two lower courts at opposite ends of the nation coming to contradictory determinations regarding "switchblades" (automatically opening knives) as "arms" protected by the plain text of the Second Amendment, which provides Knife Rights with a unique perspective to present this brief. In *Commonwealth v. Canjura*, 240 N.E.3d 213 (2024), for which Knife Rights was an Amici, the Massachusetts Supreme Judicial Court found switchblades to be "arms" under the plain text of the Second Amendment and that no historical justification existed for the Massachusetts ban in a well-reasoned decision abiding by this Court's precedent. However, just four days earlier, in *Knife Rights Inc. v. Bonta*, U.S. District Court for the Southern District of California, No. 3:23-cv-00474 (challenging California's prohibition on "switchblades". *See* Amicus Appendix at App.1a), while agreeing that there was no historical justification for the California ban, the district court ruled that switchblades were not "arms" under the Second Amendment's plain text. Like the Fourth Circuit's misapplication of the Second Amendment's plain text analysis under *Bruen* at issue in this writ petition, the district court in *Knife Rights, Inc. v. Bonta* improperly added additional conditions to the Second Amendment's plain text, namely, requiring automatically opening knives to be "in common use for self-defense" in order to be considered "arms" under the ordinary meaning of the Second Amendment.

Knife Rights also has interests in this case because it has members, some of whom reside in the State of Maryland, who are barred from exercising their right to keep and bear arms under Maryland Code Ann.

Crim. Law §§ 4-301(b), 4-301(h)(1) ; *see also* id, §§ 4-301(d) , 4-303(a) , contrary to "the Second Amendment's text, as informed by history." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1, 19 (2022). The Supreme Court's decision in *Bruen* was misapplied by the *en banc* Fourth Circuit Court of Appeals, which continues a disturbing trend in the lower courts to step far outside the text of the Second Amendment and engraft new conditions, qualifications, and limitations onto the plain text of the Second Amendment resulting in bans or near-total-bans on arms protected under the Second Amendment.

Various forms of this "in common use for self-defense" language have been injected into the Second Amendment's plain text analysis by other lower courts in defiance of this Court's decisions in both the *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *Bruen*. By misapplying the *Heller*/*Bruen* plain text analysis to ban "arms" disfavored by some lower courts (*e.g.*, semiautomatic centerfire rifles, butterfly knives, automatically opening knives [switchblades], stun guns), such courts have effectively avoided placing the burden on the government to demonstrate that the law or regulation "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24.

Knife Rights respectfully requests that the Court grant the petition for writ of certiorari and step in to resolve a rapidly emerging and disturbing conflict among lower courts, which are misapplying *Heller*, reaffirmed in *Bruen*, as to the Second Amendment's plain text analysis, a constitutional issue of national importance. As shown in the summary of argument below, the Second Amendment's plain text analysis

is straightforward. Yet, the sampling of lower court decisions identified below provides a clear picture of how easily this standard is abused to defy this Court's precedent, and in the process, deny the People their right to keep and bear arms under the Second Amendment.

SUMMARY OF ARGUMENT

The importance of granting Appellants' petition cannot be understated. In *Heller*, this Court "began with a 'textual analysis' focused on the 'normal and ordinary' meaning of the Second Amendment's language." *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 576-577). From that foundation, this Court "assessed whether our initial conclusion was 'confirmed by the historical background of the Second Amendment.'" *Bruen*, at 20 (quoting *Heller*, at 592). The Court "looked to history because 'it has always been widely understood that the Second Amendment . . . codified a pre-existing right.'" *Ibid*. Since this Court's *Bruen* decision in 2022, lower courts have gone to extraordinary lengths to undercut the Court's Second Amendment plain text analysis by establishing new, convoluted tests that go well beyond the plain text-history constitutional analysis established in *Heller* and reaffirmed in *Bruen*. Second Amendment analysis of any "arms" ban or near-total-arms-ban must begin by answering a simple question, namely, are the "arms" at issue protected by the Second Amendment? The answer is an emphatic yes.

Nonetheless, in this case—and in other lower court rulings—the government seeks to require plaintiffs challenging arms laws and regulations to make a threshold showing that the "arm" at issue is "in common use for self-defense," or that the arm is not "most useful in military service"—language that obviously does not appear in the Second Amendment. This is not only an unlawful attempt to shift to plaintiffs the burden of showing the unconstitutional nature of the challenged law, but injects additional purported requirements that *Bruen* does not demand. As before when applying now abrogated means-end scrutiny tests, the government, assisted by lower courts, are attempting to rewrite the test applied to Second Amendment challenges to truncate the scope of its protection. This Court can and should take immediate action to halt misapplication and manipulation of the plain text of the Second Amendment.

Central to the Fourth Circuit's holding at issue in this writ petition is the question of exactly what "arms" fall under the definition of "arms" under the plain text of the Second Amendment. But this question has already been answered by this Court in *Heller* and *Bruen*: "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. *Bruen*, 597 U.S. at 28 (quoting *Heller*, at 544 U.S. at 582). Nonetheless, under the Fourth Circuit's analysis, "arms" that are "most useful in military service" may be banned, a test not found anywhere in the plain text of the Second Amendment. Similarly, the district court in California in *Knife Rights Inc., v. Bonta* held that, to be considered an "arm" under the plain text analysis, the "arm" must be shown to be "in

common use for self-defense." *See* Amicus Appendix at App.10a-17a. Placing this burden on Plaintiffs in that case, the district court held that unless it can be shown that the arm in question is commonly used for self-defense, it does not meet the definition of an "arm," and thus, the government need not carry its heavy burden to justify that its regulation "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. *See* Amicus Appendix at App.19a. Other lower courts have also misapplied the textual analysis to reject challenges to gun laws and regulations, holding that certain activities such as purchasing a firearms or training with firearms somehow do not encompass arms-bearing conduct under the plain text of the Second Amendment.

By granting this petition, this Court can address how the Second Amendment's plain text analysis should be applied uniformly throughout this country. Additionally, granting the petition will halt lower courts from misapplying the Second Amendment's textual analysis in other arms-bearing cases.

ARGUMENT

This Court in *Bruen* instructed lower courts how to decide right to arms issues, "[i]n keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, . . . the government must demonstrate that the regulation is consistent with this Nation's

historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17 The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

The Second Amendment's plain text analysis is both concise and simple because this Court already defined the key terms of the guarantee that "the right of the people to keep and bear Arms, shall not be infringed:"

a) "The people" facially means "all Americans." *Heller*, 554 U.S. at 581.

b) "Arms" facially means "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id*. at 582; *see also Bruen*, 597 U.S. at 28 (quoting *Heller*, 544 U.S. at 582).

c) "Keep Arms" facially means "have weapons." *Heller*, 554 U.S. at 582.

d) "Bear" arms facially means to carry and possess weapons. *Bruen*, 597 U.S. at 2119.

e) "Shall not be infringed" facially means that the right conferred by the Second Amendment is an "unqualified command." *Bruen*, 597 U.S. at 17, 24.

This Court has long held that constitutional text also encompasses necessarily included matters that are required for the exercise of a right and thus includes rights "implicit in enumerated guarantees." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-580 (1980); *Luis v. United States*, 578 U.S. 5, 26-27 (2016) (Thomas, J., concurring).

The right to keep and bear arms thus presupposes the right to acquire an arm, to obtain ammunition, to train, and to make an arm operable. *See Luis v. United States*, 578 U.S. at 26-27 (Thomas, J., concurring); *see also Heller*, 554 U.S. at 628-630 (government cannot require firearms to be made inoperable).

Accordingly, lower courts are not free to interpret the terms of the Second Amendment *de novo* or to insist on confining, indeed qualifying, the unqualified command to the point that would empty the Second Amendment of its plain and ordinary meaning, informed by the text and history.

This Court's decision in *Heller*, *Bruen*, and most recently *Rahimi*, have provided the guidance necessary to lower courts on how to address Second Amendment challenges. However, some lower courts need additional guidance to properly apply the text and standard, or this Court must rectify the other lower courts' defiance of binding precedent.

A. Misapplication of the *Heller/Bruen* Second Amendment's Plain Text Analysis

In *Bruen*, this Court reaffirmed that *Heller* provided a single and exclusive "standard for applying the Second Amendment." 597 U.S. at 24. "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Ibid.* Once this prima facie textual showing has been made, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Ibid.* "Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command'" of not infringing

upon the right of the people to keep and bear arms. *Ibid.* (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n. 10 (1961). This case "demands a test rooted in the Second Amendment's text, as informed by history." *Bruen*, 597 U.S. at 20. In distilling this test, the *Bruen* Court spent significant time describing how lower courts, like the Fourth Circuit, are to proceed in Second Amendment cases. As particularly relevant here, in *Bruen* the Court described the proper analysis of the term "arms." That word, *Bruen* affirmed, has a "historically fixed meaning" but one that "applies to new circumstances." *Id.* at 28. It thus "covers modern instruments that facilitate armed self-defense." *Id.* (citing *Caetano v. Massachusetts*, 577 U.S. 411, 411-412 (2016) (*per curiam*) (stun guns). Accordingly, the text of the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.*

Moreover, despite that this Court provided addition guidance on the application of the Second Amendment's plain text analysis as recently as June 2024 in *United States v. Rahimi*, 144 S.Ct. 1889 (2024), the lower courts are outright ignoring the Court's precedent. Specifically, the Second Amendment protects "the right of the people." Before the Supreme Court's *Rahimi* decision, lower courts, quoting this Court's *Heller* and *Bruen* language about "law-abiding, responsible citizens" held that "the people" meant only the law-abiding, responsible ones. All nine Justices rejected this view in *Rahimi*, 144 S.Ct. at 1903; *see also id.* at 1944-1945 (Thomas, J., dissenting). Rahimi was an American citizen, but was neither law-abiding nor responsible. The Court held that he is nonetheless

one of "the people," and therefore, his possession of firearms was conduct covered by the plain text of the Second Amendment. The Court then conducted the historical tradition inquiry, and by 8-1 found sufficient historical analogical support for the federal statute banning firearms possession by persons under domestic violence restraining orders, based on an individualized judicial determination that the person is a violent threat (18 U.S.C. § 922(g)(8)(C)(i)).

Yet, lower courts are refusing to apply this simple plain text analysis to various kinds of arms (*e.g.*, semiautomatic centerfire rifles, AR-15s, switchblades, butterfly knives) and other arms-bearing conduct (*e.g.*, purchasing firearms, obtaining ammunition, training, waiting periods, selling firearms, making them operable) *e.g.*, *Luis v. United States*. These sweeping prohibitions are then criminally enforced with severe consequences, including felony and misdemeanor charges.

B. Lower Courts Are Misapplying the Second Amendment by Wrongly Imposing Additional Textual Requirements

The misapplication of the definition of "Arms" under the Second Amendment's plain text will have extraordinary consequences if the Fourth Circuit's decision is permitted to stand, as the most popular rifle in the country—and frankly potentially all firearms—will be held not to fall under the definition of "Arms" under the Second Amendment. Moreover, such a decision will have effects beyond specific firearms, like the AR-15, as this reasoning will be used to prohibit other arms. An illustration about how plain text errors can dramatically change the result of remarkably

similar cases comes from two recent cases about automatically opening knives (switchblades).

A switchblade is a type of folding knife. Unlike a manually opening knife or an assisted opening knife, which has a bias toward closure, a switchblade style knife is definitionally an "automatically opening knife," with a bias towards open. In other words, inside the handle of an automatically opening knife is a spring that is under pressure when the knife is folded closed. Once an individual operates a lever or button on the handle of the knife, it releases the blade which "automatically" opens to the locked position. Many users prefer switchblades because they move to the fully open position quickly, reliably, and with minimal effort. In a self-defense situation, this quick, reliable opening with minimal effort could be critical. While this operation is most obviously important for persons with disabilities who can only use one hand, it is just as important for anyone where the other hand may be occupied — such as a rancher extracting an animal tangled in wire, and who is using the second hand to pull the wire away from the animal, or a boater who must cut a line with one hand while the other hand secures the person in the boat in angry seas. Fundamentally, these are folding knives for everyday use, including self-defense.

Automatically opening knives, or "switchblades," are categorically "jackknives"[3] or pocket knives. Automatically opening knives or "switchblades" were first produced in the 1700s. After World War II, many Italian style switchblades were brought back

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3 *See* https://www.thefreedictionary.com/jackknife; and *Mackall v. State*, 283 Md. 100, 387 A.2d 762, 769, n. 13.

by soldiers who served in Italy. Subsequent U.S. factory production of the blades made them affordable and common to everyday U.S. customers, especially hunters and sportsmen, starting in the early to mid-1900s. *See* David Kopel, *How Some Courts are Evading Bruen by Changing the Rules*, Sec. 7, Switchblades (Sept. 4, 2024).

Today, "switchblades" are entirely legal to manufacture, sell, purchase, transfer, possess, and carry in a majority of states in this country. The possession of switchblades is banned in Delaware, New Mexico, Minnesota, and Washington. California and Connecticut ban switchblades that are a certain length (2 inches or more, and over 1.5 inches respectively). Possession of switchblades is also permitted in Rhode Island and Vermont, although they restrict the public carrying of switchblades to 3 inches or less. In New York, carry is allowed only with a valid hunting, fishing or trapping license. *Id*. Kopel at Sec. 7. Until the most recent decision by the Massachusetts Supreme Judicial Court which ruled that the ban violated the Second Amendment, Massachusetts outlawed carrying of switchblades in public with a blade over 1.5 inches. *Canjura*, 240 N.E.3d at 216-219.

Dismissing the Attorney General's argument that the Second Amendment only applied to firearms, the Massachusetts court properly applied *Bruen*'s textual analysis finding that the conduct of carrying a switchblade is covered by the plain text of the Second Amendment. As *Heller* explains, the text says "arms," not "firearms." Further, historical evidence showed that in the eighteenth century, folding knives "were commonly possessed by law-abiding citizens for lawful purposes (emphasis added) around the

time of the founding. . . . Therefore, the carrying of switchblades is presumptively protected by the plain text of the Second Amendment." *Id.* at *3.

Satisfying the plain text analysis, the Massachusetts court then placed the burden on the government to show that its switchblade ban was consistent with this Nation's historical tradition of arms regulation—a test the government failed. All the historic laws the government relied on involved fixed blade knives, such as Bowie knives. None involved pocket knives, and the state's switchblade laws from the 1950s and 1960s came far too late (per *Bruen*) to establish a historical tradition that elucidated the original meaning of the Second Amendment. *Canjura*, 240 N.E.3d at 220, and n. 9.

Additionally, the Massachusetts court rejected the Attorney General's argument that switchblades are not "in 'common use' today for self-defense." *Id.* 240 N.E.3d at 220-221. The court held that legality of switchblades in most states supported the reasonable inference that "switchblades are weapons in common use today by law-abiding citizens for lawful purposes." *Id.* at 221. The court also rightly concluded that "switchblades are not 'dangerous and unusual' weapons falling outside the protection of the Second Amendment." *Id.* at 221-222.

However, the exact opposite result was reached by a district court in California. Although the court agreed with the Massachusetts court that there was no American historical tradition that could be analogized to support a switchblade ban, the court held that the plain text of the Second Amendment "arms" did not include switchblades. *See Knife Rights v. Bonta,* No.: 3:23-cv-00474 (S.D. Cal. Aug. 23, 2024).

According to the California district court, *Bruen* does not say who bears the burden of proof at what the court called *Bruen*'s "plain text" "step one." Knife Rights contends that this is because the plain text issue, like similar constitutional issues, was not meant to be a matter requiring factual evidence, and as such, requires no burden to be placed on either party. It is a simple question: Does the conduct at issue involve arms-bearing conduct? If so, the court places the burden on the government to historically justify its firearm regulation.

However, since the Ninth Circuit has treated "plain text" as placing a burden of proof on the challenger,[4] the *Knife Rights v. Bonta* court did so too. As no data is kept regarding how often switchblades are actually used for self-defense against criminal attackers, the district court held that plaintiffs had not met their burden to prove that switchblades are "in common use today for self-defense" under the Second Amendment's plain text analysis pursuant to *Bruen*. *Id*. Kopel at Sec. 7.

While granting this petition will not prevent—nor correct—every flawed decision from the lower courts, this matter represents an appropriate case to rein in the number of post-*Bruen* lower court decisions that read the Second Amendment's plain text contrary to its ordinary text and historical understanding. *Id*. Kopel at Sec. 7 (conclusion). Granting this writ petition is the appropriate case and time.

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[4] *See United States v. Alaniz*, 69 F.4th 1124 (9th Cir. 2023)

C. To "Keep and Bear" Necessarily Protects Other Arms-Bearing Conduct

While this writ petition presents a central question of whether certain arms fall under the Second Amendment's plain text, by granting it, the Court can also provide the necessary instruction for lower courts on how other arms-bearing conduct falls under the protection of the Second Amendment's text, thus requiring governments to justify the regulation through an analogous historical tradition of firearms regulation under *Bruen*.

Specifically, while the plain text of the Second Amendment states that the people have the right to "keep and bear Arms," keeping and bearing arms necessarily encompasses other arms-bearing conduct. While seemingly obvious that the right to keep and bear Arms includes the right to purchase, manufacture, obtain, and train with arms, lower courts have manipulated *Bruen*'s plain text analysis to reach irrational conclusions.

In the Second Amendment, as in most constitutional law cases, a court must first read the plain text to determine if the constitutional provision is relevant. As shown in *Luis v. United States*, 578 U.S. 5 (2016), a constitutional right generally includes lesser, "incidental" powers and rights necessary to effectuate the principal right. *E.g.,* 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *347 (1765-69) ("A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant."). As applied to enumerated congressional powers, the Necessary and Proper Clause makes the point explicitly. *See McCulloch v. Maryland*, 17 U.S. 316, 406, 411-16 (1819) ("there is

no phrase in the instrument [the Constitution] which, like the Articles of Confederation, excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described.")

For example, the Sixth Amendment's principal "right to have the assistance of counsel for his defense" includes incidental rights such as counsel having adequate time to prepare a defense, and being able to confer privately with defendant. *Id.* Kopel at Sec. 1. In *Luis v. United States*, 578 U.S. 5 (2016), the plurality opinion held that governmental pretrial seizure of a defendant's untainted assets violated his Sixth Amendment right to counsel of choice by freezing assets needed to obtain counsel. The plurality opinion used a balancing approach, but Justice Thomas's concurrence focused on constitutional text, and the acts necessary or incidental to protect the exercise of those textual rights:

> The law has long recognized that the "[a]uthorization of an act also authorizes a necessary predicate act." A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 192 (2012) . . . . As Thomas Cooley put it with respect to Government powers, "where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one, or the performance of the other, is also conferred." Constitutional Limitations 63 (1868); *see* 1 J. Kent, COMMENTARIES ON AMERICAN LAW 464 (13th ed. 1884) ("[W]henever a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end is implied"). This logic equally

> applies to individual rights. After all, many rights are powers reserved to the People rather than delegated to the Government. . . .
>
> Constitutional rights thus implicitly protect those closely related acts necessary to their exercise. "There comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself." (citation omitted.) The right to keep and bear arms, for example, "implies a corresponding right to obtain the bullets necessary to use them," *Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (C.A.9 2014) (internal quotation marks omitted), and "to acquire and maintain proficiency in their use," *Ezell v. Chicago*, 651 F.3d 684, 704 (C.A.7 2011). *See District of Columbia v. Heller*, 554 U.S. 570, 617-618 (2008) (citing T. Cooley, . . . (discussing the implicit right to train with weapons)); *United States v. Miller*, 307 U.S. 174, 180 (1939) . . . (discussing the implicit right to possess ammunition)) . . . Without protection for these closely related rights, the Second Amendment would be toothless.

Luis v. United States, at 26-27 (emphasis added).

Constitutional text is not meant to be read hyperliterally so as to effectuate a nullification of the right. *Id.* Kopel at Sec. 1. The "right to keep and bear Arms" is, literally, a right to possess and carry. *Id.* The text does not mention a right to *use* arms (such as purchasing or acquiring a firearm, by shooting a firearm or bow, or cutting with a knife). Nor does the

right expressly mention ammunition, such as cartridges for firearms, arrows for bows, or magazines to hold ammunition. Yet, for example, any reasonable reading of the "plain text" of the Second Amendment includes the right to keep and carry ammunition and to shoot that ammunition. *Id.*

D. Lower Courts Improperly Exclude Arms-Bearing Conduct as Not Covered By The Second Amendment's Plain Text

Though clear, the Second Amendment's textual analysis under *Bruen* continues to be improperly applied by the lower courts throughout this country in numerous cases that involve clear, arms-bearing conduct falling under the protection of the Second Amendment—underscoring the necessity of the Court to grant this writ petition and provide explicit instruction for the lower courts.

For example, a district court in New Mexico recently upheld a waiting period to acquire a firearm, because the court determined that "purchasing a firearm" did not fall under the plain text of the Second Amendment. *Ortega v. Grisham*, 2024 WL 3495314 (D.N.M. July 22, 2024). In reaching its decision, the district court acknowledged the "divergence of opinion among" district courts on whether the Second Amendment's plain text encompasses the right to obtain and purchase firearms. *See Ortega*, at *25, and n. 5 (discussing the diverging district court cases). The New Mexico court also relied on two Fifth and Ninth Circuit cases for the dubious proposition that the "Second Amendment's plain text, which speaks only to a right 'to keep and bear arms,' does not cover the conduct of purchasing a firearm," citing the Second Amendment. *Ibid.* Using convoluted reasoning from

certain cited district court opinions and the cited Fifth and Ninth Circuit opinions, the New Mexico district court held, wrongly, that the plaintiffs' Second Amendment challenge to the waiting period "fails . . . because the Second Amendment's plain text does not cover the conduct of purchasing a firearm." *Id.* at *25-28.

Moreover, a district court in Colorado reached the same conclusion due to a faulty application of *Bruen*'s plain text analysis. *Rocky Mountain Gun Owners v. Polis*, 701 F.Supp.3d 1121 (D. Colo. 2023). In determining *Bruen*'s "first consideration" of "whether the 'plain text' of the Second Amendment covers the particular conduct such that the Constitution presumptively provides protection," the Colorado district court stated:

> The relevant conduct is, therefore, not covered by the plain meaning of the terms "keep" or "bear" in the Second Amendment. Seemingly recognizing this fact, Plaintiffs contend that "[t]he right to "keep" arms necessarily implies the right to possess arms one has acquired." *Id.* at 5. But the purchase and delivery of an object (here, a firearm) is not an integral element of keeping (*i.e.*, having) or bearing (*i.e.*, carrying) that object. Rather, purchase and delivery are one means of creating the opportunity to "have weapons." The relevant question is whether the plain text covers that specific means. It does not.

Rocky Mountain Gun Owners, 701 F. Supp. 3d at 1133.

This overly literal textual analysis has been used to rule against other clear, arms-bearing conduct,

such as training/shooting ranges. In a case involving a municipal zoning law change to thwart a public outdoor shooting range with a 1,000-yard bay, a three-judge panel of the Sixth Circuit unanimously agreed that "shooting ranges" are covered by the plain text of the Second Amendment; however, according to the 2-1 majority, while the plain text applies to shooting ranges at close distances, the plain text does not cover shooting a longer distances—at 1,000 yards. *See Oakland Tactical Supply, LLC v. Howell Twp., Michigan*, 103 F.4th 1186, 1197 (6th Cir. 2024); *see also id* Kopel at Sec. 6B. In that case, the court proceeded with a textual analysis, which included the question of whether certain arms-bearing conduct, like training at long distances, was "necessary" for self-defense:

> Plaintiffs make no real argument that long-distance training is necessary for the effective exercise of the right to keep and bear arms for self-defense, other than briefly noting that the federally chartered Civilian Marksmanship Program offers 1,000-yard training. We cannot conclude, based on these arguments, that the plain text of the Second Amendment covers the second formulation of Plaintiffs' proposed course of conduct—the right to commercially available sites to train to achieve proficiency in long-range shooting at distances up to 1,000 yards.

Id. at 1198-99.[5]

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[5] Congress created the Civilian Marksmanship Program (CMP) in 1903 to promote civilian familiarity and proficiency with arms that would be helpful in national defense, and the court in

The majority's holding that the "plain text" of the Second Amendment somehow applies to shooting at close distances but not at 1,000 yards was wrong; and it provides an excellent example of how the lower courts are taking the Second Amendment's straightforward textual analysis under *Heller*/*Bruen* and judicially splitting hairs to unlawfully limit arms-bearing conduct. *Id.* Kopel at Sec. 6B.

Another example of lower courts struggling with the Second Amendment's plain text analysis under *Bruen* involves firearm serial numbers. Federal law prohibits possession of a firearm with a defaced or obliterated serial number. 18 U.S.C. § 922(k). In a Fourth Circuit opinion, the court upheld the federal ban on possession of a firearm with a defaced or obliterated serial number. *United States v. Price*, 111 F.4th 392 (4th Cir. 2024) (*en banc*). According to the majority, "the conduct regulated by [Section] 922(k) does not fall within the scope of the right enshrined in the Second Amendment because a firearm with a removed, obliterated, or altered serial number is not a firearm in common use for lawful purposes and they therefore fall outside the scope of the Second Amendment's protection." *Id.* at 408. The *Price* majority came closer to adhering to the plain text, by recognizing that the right applies to all "lawful purposes," not solely self-defense. *Id.* Kopel at Sec. 6D. Likewise, the *Price* majority adhered to *Heller*'s determination that the Second Amendment protects arms "in common

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Oakland Tactical admits that the CMP offers "1,000-yard training." *Id.* at 1198-1199. The plain text includes "the People," it includes "a well-regulated Militia," and as such, the plain text of the Second Amendment does not evaporate if the shooting is at a distance of 1,000 yards. *Id.* Kopel at Sec. 6B.

use for lawful purposes." *Id*. However, the majority went off the rails, holding that firearms with defaced serial numbers are not in common use for lawful purposes because it could not "fathom" why a person would own a firearm with an imperfect serial number for any non-criminal purpose (*id*. at 408)," though the dissent by Judge Gregory answered the question in two ways: (1) by pointing out that a "constitutional guarantee subject to future judges' assessments of what is fathomable is no constitutional guarantee at all," citing *Bruen*, 597 U.S. at 22 (*id*. at 422), and (2) adding that a gun owner may "wish to avoid Big Brother's watchful eye[.]" *Id*. at 421.

One concurrence admonished the majority for its claim that there was no Second Amendment issue in the case, stating that the majority "treats . . . historical analysis as a component of the first step, despite *Bruen* and *Rahimi*'s clear statements that historical analysis falls in step two." *Id*. at 411 (concluding that "the majority's shift of the historical tradition to step one is simply wrong"); *see also* Kopel at Sec. 6D. Circuit Judge Richardson's dissent observed:

> [T]he Court in *Rahimi* explicitly stated that the government bears the burden to justify its law any time it "regulates arms-bearing conduct," *Rahimi*, 144 S.Ct. at 1897. In other words, the burden flips to the government—and we transition to *Bruen*'s second step—as soon as the challenger establishes that the regulation covers "arms-bearing conduct." And notably, the Court didn't limit "arms-bearing conduct" to "conduct that historically fell within the traditional scope of the right to keep and bear arms." Instead,

> historical limitations on the scope of the right are relevant to establish whether the government is permitted to regulate the "arms-bearing conduct" in the manner it does — the step-two inquiry.

Id. *United States v. Price*, 111 F.4th at 428-429 (citing *Rahimi*, 144 S.Ct. at 1897).

As shown, lower courts are misapplying the Second Amendment's plain text analysis under *Bruen* —including the Fourth Circuit *en banc* in this case. Unless this writ petition is granted, lower courts will continue to wrongly engraft additional limitations to the Second Amendment's plain text.

CONCLUSION

Knife Rights requests that this Court grant the writ petition to prevent the current and persistent misapplication of the *Bruen* analysis before the lower courts implement another 10 years of misguided Second Amendment jurisprudence that reduces the Second Amendment to a second-class right. This case is the vehicle to correct the minority of post-*Bruen* lower court decisions that read the plain text of the Second Amendment contrary to its ordinary understanding.

Respectfully submitted,

George M. Lee
Counsel of Record
SEILER EPSTEIN LLP
4 Embarcadero Center, 14th Floor
San Francisco, CA 94111
(415) 979-0500
gml@seilerepstein.com

John W. Dillon
DILLON LAW GROUP APC
2647 Gateway Road
Suite 105, No. 255
Carlsbad, CA 92009
(760) 642-7150
jdillon@dillonlawgp.com

Counsel for Amicus Curiae
Knife Rights, Inc.

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