No. 24-1046

IN THE
Supreme Court of the United States

JASON WOLFORD, *ET AL.*, *Petitioners*,
v.
ANNE E. LOPEZ, ATTORNEY GENERAL OF HAWAII,
Respondent.

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

Brief *Amicus Curiae* of Gun Owners of America, Gun Owners Fdn., Gun Owners of California, Coal. of New Jersey Firearm Owners, Tennessee Firearms Assoc., Tennessee Firearms Fdn., Virginia Citizens Defense League, Virginia Citizens Defense Fdn., Arizona Citizens Defense League, Arizona Libertarian Party, America's Future, Citizens United, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioners

JOHN I. HARRIS III
Nashville, TN 37203

OLIVER M. KRAWCZYK
Carlisle, PA 17013

MIKE BOOS
Washington, DC 20003

ROBERT J. OLSON*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for Amici Curiae

November 24, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Amici Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Coalition of New Jersey Firearm Owners, Tennessee Firearms Association, Tennessee Firearms Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Arizona Citizens Defense League, America's Future, Citizens United, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code.

The Arizona Libertarian Party is a state political party dedicated to promoting individual liberty, free markets, and limited government in accordance with libertarian principles. As a party operating within the Ninth Circuit's jurisdiction, the Party has a particularly urgent interest in this case, as the Ninth Circuit's decision currently binds Arizona courts and lawmakers.

These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by

---

[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

law. Some of these *amici* have filed *amicus* briefs in this case in the courts below and in this Court. *See* U.S. District Court for the District of Hawaii, No. 1:23-cv-00265, *Amicus* Brief of Gun Owners of America, Inc., *et al.* (July 14, 2023); U.S. Court of Appeals for the Ninth Circuit, No. 23-16164, Brief of *Amici Curiae* Gun Owners of America, Inc., *et. al.* (November 9, 2023); Supreme Court of the United States, No. 24-1046, Brief of *Amicus Curiae* Second Amendment Law Center, *et al.* (May 2, 2025). Some of these *amici* also filed an *amicus* brief in this Court in *New York State Rifle & Pistol Ass'n v. Bruen*, No. 20-843, *see* Brief *Amicus Curiae* of Gun Owners of America, Inc., et al. (July 20, 2021).

INTRODUCTION

Prior to this Court's decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the State of Hawaii was one of "only six States and the District of Columbia" whose "'may issue' licensing laws" effectively "den[ied] ordinary citizens their right to public carry." *Id.* at 13-14, 38 n.9. Now, more than three years later, little has changed. Following *Bruen*, most of these formerly "may-issue" states enacted legislation in "response" to this Court's vindication of the right to bear arms in public. These self-described "*Bruen*-response bills" professed compliance with this Court's decision, but their hostility to *Bruen* was clear. For example, New York Governor Kathy Hochul

decried *Bruen* as "reckless and reprehensible."[2] New Jersey Governor Phil Murphy called *Bruen* "deeply flawed," "right-wing," and "dangerous."[3] And so, because these jurisdictions were now required to issue, begrudgingly, carry licenses to ordinary Americans post-*Bruen*, they sought to maintain their public-disarmament regimes using the next best means: criminalizing the carry of firearms in nearly every public place. These states' licensing regimes may now be technically "shall-issue," but their carry licenses have been rendered practically worthless. Hawaii was no exception.

In 2023, Hawaii enacted "Act 52," which state officials "prepared in response to … *Bruen*" and expressly "intended to mitigate the *harm* arising from [that] decision...."[4] Viewing *Bruen* as an impediment to be circumvented rather than a constitutional guidepost to be followed, Hawaii's legislature sought to undermine this Court's pronouncements. Thus, rather than consulting history to guide its new lawmaking, Hawaii invoked the familiar language of interest balancing in Act 52's very first section: "there are

---

[2] "Governor Hochul Announces Extraordinary Session of the New York State Legislature to Begin on June 30," *N.Y. State* (June 24, 2022).

[3] "Statement from Governor Murphy on the U.S. Supreme Court's Decision in New York State Rifle & Pistol Association Inc. v. Bruen," *State of N.J.* (June 23, 2022).

[4] "Office of the Governor — News Release — Gov. Green Signs Firearms Legislation," *Off. of the Governor* (June 2, 2023) (emphasis added).

compelling interests in protecting public health, safety, and welfare from the serious hazards associated with firearms and gun violence." Joint Appendix ("J.A.") 66a. Hawaii Governor Josh Green signed Act 52 into law, defiantly having pledged to do "anything that we can do"[5] to negate *Bruen*.

STATEMENT OF THE CASE

Hawaii's Act 52 designated 15 categories of "sensitive places" where carry licensees "shall not intentionally, knowingly, or recklessly carry or possess a loaded or unloaded firearm," which include most public places frequented by ordinary Americans on a daily basis. J.A.68a. As relevant here, Act 52 enacted Hawaii Rev. Stat. § 134-9.5 (the "challenged statute"), which provides:

> (a) A person carrying a firearm pursuant to a license issued under section 134-9 shall not intentionally, knowingly, or recklessly enter or remain on private property of another person while carrying a loaded or unloaded firearm … unless the person has been given express authorization to carry a firearm on the property by the owner, lessee, operator, or manager of the property.
> (b) For purposes of this section, express authorization to carry or possess a firearm on private property shall be signified by:

---

[5] A. McAvoy, "Hawaii Allows More Concealed Carry After US Supreme Court Ruling, but Bans Guns in Most Places," *The Hill* (June 2, 2023).

> (1) Unambiguous written or verbal authorization; or
> (2) The posting of clear and conspicuous signage at the entrance of the building or on the premises, by the owner, lessee, operator, or manager of the property, or agent thereof, indicating that carrying or possessing a firearm is authorized….
> (e) Any person who violates this section shall be guilty of a misdemeanor.

Thus, Hawaii criminalized *by default* the possession of firearms on private properties held open to the public — including the many stores, gas stations, and restaurants one may expect to visit upon leaving their home, and where "confrontation can surely take place...." *Bruen* at 33. Section 134-9.5 effectively prohibits, whether "presumptively or outright, the carrying of a handgun on 96.4% of the publicly accessible land in Maui County." Petition Appendix ("Pet.App.") 174a.

Soon after Act 52's enactment in June 2023, Petitioners sued Respondent, challenging several of the Act's provisions under, *inter alia*, the Second and Fourteenth Amendments to the U.S. Constitution. Two months later, the district court granted in part and denied in part Petitioners' motion for temporary restraining order and preliminary injunction. As relevant here, the district court preliminarily enjoined enforcement of Section 134-9.5, finding that Petitioners' "as-applied challenge regarding private property held open to the public is likely to succeed." Pet.App.157a; *see also* Pet.App.216a.

As the district court explained, "[t]o the extent that § 134-E [now § 134-9.5] regulates private properties held open to the public, it is covered by the Second Amendment's plain text." Pet.App.151a. Accordingly, the district court held Respondent to her historical burden under *Bruen*. In support of Section 134-9.5's novel default rule, Respondent proffered: (i) five laws from the colonial period, between 1715 and 1771; (ii) *no laws* from the Founding era; and (iii) only three laws from the Reconstruction era, from 1865 to 1893. *See* Pet.App.153a-156a.

These eight laws, the district court explained, were too few and too dissimilar to justify Section 134-9.5. Most "prohibit[ed] carrying firearms on enclosed premises or plantations" only. Pet.App.156a. And the only law to reach beyond enclosed locations — New Jersey's 1771 enactment — was necessarily an outlier, and could not be "'representative' of the laws applicable throughout the Nation." Pet.App.157a. Thus, Section 134-9.5 could "[]not be constitutionally permitted" under the Second and Fourteenth Amendments. Pet.App.152a.

In 2024, in consolidated appeals to both California and Hawaii statutes, a Ninth Circuit panel unanimously reversed the district court's order. Contrasting Hawaii's private-property law with California's analogous *Bruen*-response provision, the panel observed that "Hawaii's law allows a property owner to consent [to firearms] orally, in writing, or by posting appropriate signage on site," as opposed to California's requirement of "consent *only* by 'clear[] and conspicuous[]'" signage. Pet.App.56a-57a. The

panel believed this distinction had historical significance.

Analyzing the same laws that Respondent had proffered in the district court as relevant historical analogues, the panel divided these laws into two groups. The first — consisting of three colonial-era laws and one 1893 Oregon law — "prohibited the carry of firearms onto subsets of private land, such as plantations or enclosed lands." Pet.App.60a. These laws plainly "did not apply to property that was generally open to the public," and their "primary aim … was to prevent poaching," and so the panel discounted them. Pet.App.61a. However, the second set containing just *two* laws — from New Jersey (1771) and Louisiana (1865) — were deemed to have "contained broader prohibitions, banning the carrying of firearms onto *any* private property without the owner's consent." *Id.* Based on these two enactments, the panel "conclude[d] … that the Nation has an established tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property." Pet.App.62a. Accordingly, the panel held, "Hawaii's modern law falls well within th[at] historical tradition." Pet.App.63a. In contrast, the panel found that California's private-property law had "no historical support" for limiting the manner in which a property owner may express their consent. *Id.* Thus, the panel "conclude[d] that Plaintiffs in the California cases [we]re likely to succeed on the merits." Pet.App.64a.

Citing conflicts between the panel's historical analysis and *Bruen*'s methodology, Petitioners urged

the Ninth Circuit to rehear the case *en banc*. In January 2025, the Ninth Circuit denied Petitioners' request, drawing dissents from eight judges in two opinions. In the lengthier dissent, Judge VanDyke observed that "the panel … failed to identify any Founding-era tradition" justifying Section 134-9.5, relying instead on "an anti-poaching colonial law and … a discriminatory Reconstruction era Black Code." Pet.App.171a (VanDyke, J., dissenting). Indeed, as Judge VanDyke explained, the 1865 Louisiana law "was enacted as part of Louisiana's notorious Black Codes that sought to deprive African Americans of their rights...." Pet.App.187a. Not only was this law's "'intent … to discriminate, rather than to advance public safety,'" but also it was "a one-of-a-kind law, even in comparison to other Reconstruction era laws." Pet.App.188a-189a. Aside from Louisiana's Black Code, no other Reconstruction-era law applied beyond "'enclosed premises.'" Pet.App.189a. It was, according to that dissent, "a clear 'outlier' in its era...." *Id.*

SUMMARY OF ARGUMENT

When this Court vindicated the pre-existing, "general right to public carry" in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, it explained that "there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place.'" That statement should have foreclosed most attempts to limit where Americans can bear arms. But rather than comply with this Court's pronouncement, a number of anti-gun states have moved their chips to the center, hoping the Court is bluffing. For example, as part of an omnibus statute banning firearms in

nearly every public location, Hawaii banned the possession of firearms on private properties held open to the public. Unfortunately, but unsurprisingly, the Ninth Circuit rubber-stamped this infringement on the thinnest of historical grounds. In Hawaii, it is as if *Bruen* was never decided.

The lower courts' disrespect of the Second Amendment — and this Court's precedents — has gone on for far too long. Although this case is easily resolvable under *Bruen*'s basic framework, this Court can use this opportunity to deprive the lower courts of one of their favorite tools of historical revisionism: overreliance on Reconstruction-era firearm regulations. Indeed, the Ninth Circuit upheld Hawaii's atextual and ahistorical regime using just *two* historical laws — and one was part of Louisiana's Black Codes.

That sort of firearm regulation should carry no weight under *Bruen*. Not only does the Reconstruction era fail to inform Founding-era views, but also that period saw mass noncompliance with the Second Amendment, as belligerent Southern states "systematically thwarted" the rights of newly freed slaves. These racially motivated disarmament tactics were so pervasive that even facially neutral gun control laws are suspect, as many had "selective or pretextual enforcement" against disfavored racial and ethnic minorities. Accordingly, this Court should reject the Ninth Circuit's reliance on the racist Louisiana analogue, and others like it.

But perhaps more important than what this Court should say is what this Court *should not say*. In prior Second Amendment opinions, this Court has included a number of dicta about matters that were not at issue. Invariably, the lower courts seized on these statements, for example, to exempt many firearm regulations from historical review, going so far as to claim that certain regulations do not even *implicate* the Second Amendment's plain text. It is doubtful that was this Court's intention, and there is a simple solution: this Court should answer the question presented, and decline to foray into tangential matters. As several examples make clear, result-oriented lower courts will rule against the Second Amendment using whatever tools possible. These *amici* urge this Court to stop facilitating its own subversion with ill-considered dicta. The lower courts are perfectly capable of watering down this Court's Second Amendment precedents — this Court need not make it easier for them.

ARGUMENT

I. RACIST AND DISCRIMINATORY BLACK CODES DO NOT DEMONSTRATE A FOUNDING-ERA TRADITION OF FIREARM REGULATION.

A. "Tradition" Consisting of Just Two Anachronistic Firearm Regulations Fails under this Court's Second Amendment Methodology.

In *Bruen*, this Court held that, to justify a firearm regulation, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition...." *Id.* at 17. But this Court cautioned that "not all history is created equal." *Id.* at 34. Because "'[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*,'" this Court has "generally assumed that the scope of the protection applicable to the … States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.* at 34, 37 (collecting cases). Accordingly, "19th-century evidence [i]s 'treated as mere confirmation of what the Court thought had already been established'" and, "to the extent later history contradicts what the text says, the text controls." *Id.* at 37, 36. In other words, courts hearing Second Amendment cases are to "'apply[] faithfully the balance struck by the *founding generation* to modern circumstances.'" *United States v. Rahimi*, 602 U.S. 680, 692 (2024) (emphasis added). Prior or subsequent

history can confirm the intent of the Framers, but such history alone cannot speak for them.

Consistent with these precedents, this Court should ask whether Section 134-9.5 comports with a *Founding-era* tradition of firearm regulation — one that is both "well-established and representative" of the nation, as opposed to consisting of mere "outliers." *Bruen* at 30, 65. But that methodology presents a serious problem for the opinion below. *See* Pet.App.171a (VanDyke, J., dissenting) ("the panel … failed to identify any Founding-era tradition"). In fact, the Ninth Circuit upheld Section 134-9.5 based on just *one* colonial enactment and *one* Reconstruction-era enactment. *See* Pet.App.62a. Yet with respect to the former, this Court expressed "doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation" — much less *one*. *Bruen* at 46; *see also* at 49 ("there is no evidence that the [colonial] statute survived"). And as for the latter, this Court has explained that "post-Civil War discussions … 'do not provide as much insight into [the Second Amendment's] original meaning as earlier sources.'" *Id.* at 36. Consequently, *Bruen*'s plain language forecloses the result reached below, and nothing more is needed for this Court to reverse.

B. Reconstruction-Era Firearm Regulations Were Racially Motivated and Selectively Enforced, and Deserve No Weight.

Despite this case's straightforward resolution under *Bruen*, there is another reason why this Court should reverse. The Ninth Circuit placed precisely

half of its reliance on a single firearm regulation from 1865 Louisiana, which was enacted "*before* Louisiana was even readmitted to the Union" after the Civil War. Pet.App.188a (VanDyke, J., dissenting). This law "prohibited 'carry[ing] fire-arms on the premises or plantation of any citizen, without the consent of the owner or proprietor, other than in lawful discharge of a civil or military order.'" Pet.App.187a (VanDyke, J., dissenting). Although this law appeared racially neutral on its face, it was a part of Louisiana's Black Codes, which were designed to "systematically thwart[]" the Second Amendment rights of newly freed slaves. *Bruen* at 60. Indeed, this era of Louisiana's history was marked by racial animus.[6]

Consider some of Louisiana's other enactments during this time. In 1865, the state "enacted legislation prohibiting blacks from carrying firearms without a license, a restriction not imposed on whites." *McDonald v. City of Chicago*, 561 U.S. 742, 847 (2010) (Thomas, J., concurring in part and concurring in the judgment). Localities also discriminated against newly freed slaves. In July 1865, for example, the Town of Opelousas, Louisiana enacted an ordinance providing that "[n]o freedman, who is not in the military service, shall be allowed to carry fire-arms or any kind of weapons, within the limits of the Town of

---

[6] *See also Ramos v. Louisiana*, 590 U.S. 83, 112 (2020) (Sotomayor, J., concurring) ("the racially biased origins of the Louisiana and Oregon laws uniquely matter here").

Opelousas, without … special permission...."[7] These local restrictions persisted for decades after the Civil War. In "1899, for instance, Cheneyville, Louisiana passed an ordinance that aimed to restrain the 'custom among a certain class of worthless negroes to carry concealed weapons upon their persons.'"[8]

Of course, even when Southern firearm restrictions did not openly discriminate, "selective or pretextual enforcement" practices persisted. *Bruen* at 58. Indeed,

> facially neutral gun control laws continued to disarm Blacks. Some states passed laws that focused on the class of firearm, like Tennessee, Arkansas, and Florida. They criminalized specific guns, like the Winchester rifle,[9] which was described by Ida B. Wells as "hav[ing] a place of honor in every black home … used for that protection which the law refuses to give." The[y] also barred generally affordable guns in

---

[7] "Ordinance by the Board of Police of Opelousas, Louisiana, as Printed in a New Orleans Newspaper," *Freedmen & S. Soc'y Project* (Feb. 2, 2025).

[8] J. Aimonetti & C. Talley, *Race*, Ramos, *and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193, 208 (2021).

[9] A prime example of the facially neutral yet racially motivated gun control laws of the era was Florida's ban on "a Winchester or other repeating rifle … without first taking out a license...." 1893 Fla. Laws 71-72, An Act to Regulate the Carrying of Firearms, ch. 4147, §§ 1-4. Unsurprisingly, Florida's "may-issue" license cost a prohibitively expensive "one hundred dollars," payable in the form of a surety bond. *Id.*

> legislation like the "Saturday Night Special Laws," which limited the use of any pistols other than army or navy revolvers.[10]

In Reconstruction-era Virginia, for example, the state legislature enacted facially neutral "tax laws to disarm the Black population, by imposing 'exorbitant business or transaction taxes' on all firearms to ensure that Blacks would be unable to purchase such goods."[11] Advocates of this taxing scheme "appealed to racist rhetoric in support," decrying "the negro … cowardly practice of 'toting' guns...."[12] The Southern states' message was clear: *a Second Amendment for me, but not for thee.*

This racially motivated oppression persisted well into the early 20th century. Describing the discriminatory enforcement of a state gun control law in 1941, Florida Supreme Court Justice Rivers Buford observed:

> I know something of the history of this legislation. The original Act of 1893 was

---

[10] C. Blaha, *Looking at the Text, History, and Tradition of the Second Amendment - "Steeped in Anti-Blackness*," 22 U. MD. L.J., RACE, RELIGION, GENDER & CLASS 289, 294-95 (2022).

[11] "How We Got Here: The Racially-Motivated History of Gun Laws and Crime Control," *Race, Racism and the Law* (Jan. 6, 2019).

[12] S. Halbrook, "To Bear Arms for Self-Defense: A 'Right of the People' or a Privilege of the Few? Part 2," *Federalist Society* (Mar. 31, 2020).

> passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. *The statute was never intended to be applied to the white population and in practice has never been so applied.* [*Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring in the judgment) (emphasis added).]

Not even Europeans were safe from the selective enforcement of gun control laws. In 1909, the Supreme Court of Florida upheld the denial of one Giocomo Russo's application for a permit to carry a pistol, noting that local officials had doubted his "good moral character"[13] and discounted the character affidavits that Lorenzo Fucarino and Nicolo Arcuri had submitted on his behalf. *State ex rel. Russo v. Parker*, 49 So. 124, 125 (Fla. 1909). This case was decided during a time of widespread animus against Italian immigrants. In 1891, the largest single mass lynching in U.S. history occurred in New Orleans, where "a mob of 10,000 people … dragged 11 Sicilians from their

---

[13] *Cf. Antonyuk v. James*, 120 F.4th 941, 981 (2d Cir. 2024) (upholding New York's "good moral character" firearm licensing requirement as a "proxy for dangerousness").

cells and lynched them...."[14] In 1910, the year after *Russo* was decided, Florida had its own similar experience.[15]

Of course, this is hardly the sort of history on which to justify modern firearm restrictions. *See Bruen* at 58 (discounting historical prohibitions that were "selective[ly] or pretextual[ly] enforce[d]" as "too slender a reed on which to hang a historical tradition of restricting the right to public carry"). Indeed, while Founding-era historical context elucidates original meaning, it is also true that "history can be probative of what the Constitution does *not* mean," and "many provisions of the Constitution [were intended] to depart from rather than adhere to certain pre-ratification laws, practices, or understandings." *Rahimi* at 720 (Kavanaugh, J., concurring). Similarly, because the Reconstruction era saw mass noncompliance with the Second Amendment — designed with the openly stated intent to eradicate the right to keep and bear arms for a large portion of Americans — this Court should treat the firearm regulations of the time with the highest degree of suspicion. Indeed, it is far more likely that the Fourteenth Amendment's incorporation of the Second Amendment against belligerent Southern states was a repudiation of the firearm regulations of the time, than an endorsement of them.

---

[14] "Under Attack," *Library of Cong*. (last visited Nov. 21, 2025).

[15] "Italians Lynched in Tampa Street; Accused of Shooting Employe of Cigarmakers, They Are Taken from Officers," *N.Y. Times* (Sept. 21, 1910).

Louisiana's Black Codes may be part of our history, but they are not part of our heritage. This Court should reverse the Ninth Circuit's erroneous reliance on Louisiana's 1865 enactment.

II. THIS COURT SHOULD DECIDE ONLY THE QUESTION PRESENTED, AND AVOID BURYING METHODOLOGICAL LANDMINES FOR LOWER COURTS TO EXPLODE.

For years, this Court declined to review Second Amendment decisions, while granting certiorari in all manner of appeals implicating other provisions of the Bill of Rights. Expressing a growing frustration with this apparent hesitance to decide controversial firearm issues, Justice Thomas repeatedly denounced the Second Amendment's disparate treatment as that of a "'second-class right'" and "constitutional orphan." *Silvester v. Becerra*, 583 U.S. 1139, 1149 (2018) (Thomas, J., dissenting from denial of certiorari). But with the recent grants of certiorari in *Bruen*, *Rahimi*, and now two Second Amendment cases this term,[16] it would seem that this Court has turned a new page. These *amici* welcome this Court's recent willingness to hear Second Amendment challenges to firearm regulations.

But these *amici* urge this Court to limit its opinions to resolving the questions presented. Consider this Court's "first in-depth examination of the Second Amendment" in *Heller*, which by its own telling

---

[16] *See United States v. Hemani*, No. 24-1234.

did not purport to "clarify the entire field" of Second Amendment law. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Even so, *Heller* contained an array of dicta, ranging from the identification of supposedly "presumptively lawful regulatory measures," including prohibitions on certain categories of persons from possessing firearms, to a discussion of "M-16 rifles," neither of which had any relationship with whether the District of Columbia *could ban handguns*. *Id.* at 627 & n.26.

Although reasoned justification for a decision is necessary for lower courts to faithfully apply this Court's precedents, these *amici* submit that this Court's Second Amendment dicta have inadvertently caused far more harm than good. Indeed, result-oriented lower courts repeatedly have latched onto excerpts from this Court's dicta to free the government from its burden to provide relevant historical analogues. Such dicta have been used to sow confusion and, ultimately, to subvert the test that this Court directed "must" be conducted. *See Bruen* at 17. Accordingly, these *amici* urge this Court to address *only* the question presented here, avoiding the temptation to opine on tangential matters not before the Court. To illustrate this problem, below are just a few examples of the ways the lower courts have elevated this Court's dicta above its actual holdings, subverting this Court's precedents.

A. *Heller*'s "Presumptively Lawful Regulatory Measures."

In likely anticipation that *Heller*'s landmark holding would be politically controversial, this Court asserted that "the right secured by the Second Amendment is not unlimited." *Id.* at 626. Unsurprisingly, this statement has become a favorite introduction for anti-gun lower courts to cite just prior to issuing a ruling against gun rights. *See, e.g., LaFave v. County of Fairfax*, 149 F.4th 476, 482 (4th Cir. 2025); *United States v. Peterson*, 150 F.4th 644, 650 (5th Cir. 2025); *United States v. Duarte*, 137 F.4th 743, 750 (9th Cir. 2025). So common is this refrain that its prefatory invocation renders a case's eventual outcome all too predictable.

But what followed in *Heller* has been far more damaging. After qualifying that the Second Amendment is "not unlimited," this Court stated:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [*Heller* at 626-27.]

Of course, nothing in *Heller* could cast doubt on these tangential issues, as they were not before the Court. Nevertheless, having identified this random assortment of regulations that were *not at issue* in

Heller, this Court then described them as "presumptively lawful regulatory measures...." *Id.* at 627 n.26. The lower courts took that statement and ran.

Consider the Tenth Circuit's recent decision in *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024). Invoking *Heller*'s "presumptively lawful regulatory measures" as a "*safe harbor* list," the Tenth Circuit broadly declared that "an aged-based condition or qualification on the sale of arms" fell "*outside of the scope* of the Second Amendment[]" altogether. *Id.* at 119-20 (emphases added). It did not matter that the law at issue was an obvious "firearm regulation" under *Bruen*'s plain terms. To the contrary, in the Tenth Circuit, anything falling within *Heller*'s dicta "not only survive[s] *Bruen* and *Rahimi*, [but] also presumptively do[es] not burden the Second Amendment" at all. *Ortega v. Grisham*, 148 F.4th 1134, 1146 (10th Cir. 2025). Other circuits have adopted similar theories, claiming various firearm regulations fall outside the Second Amendment's plain

text.[17] This cannot possibly be what this Court intended.

As *Heller* itself noted, and in an apparent nod to the historical methodology later articulated in *Bruen*, these "regulatory measures" all shared the same feature: this Court assumed them to be "*longstanding*." *Heller* at 626 (emphasis added). Properly understood, *Heller* presumed that certain firearm regulations would have a sufficient historical basis to survive review, "if and when" challenged. *Id.* at 635. But *Heller* did not exempt any "regulatory measures" from the Second Amendment altogether. Yet many lower courts have elevated this isolated dictum over the Second Amendment's plain text and *Bruen*'s plain holding, and challengers to firearm regulations are continuing to suffer these unintended consequences below.

B. *Heller*'s References to "Common Use."

In 1939, this Court explained that the Second Amendment protects the citizen ownership and use of

---

[17] *See, e.g.*, *United States v. Vereen*, 152 F.4th 89, 94 (2d Cir. 2025) ("We hold that § 922(a)(3) is a lawful regulation on the commercial sale of firearms that does not meaningfully constrain New Yorkers' ability to keep or bear arms. Even absent a historical analogue, then, it is constitutional under the Supreme Court's decisions...."); *Rhode v. Bonta*, 145 F.4th 1090, 1106 (9th Cir. 2025) ("'conditions and qualifications on the commercial sale of arms'" are challengeable only if "they 'meaningfully constrain' the right to keep and bear arms"); *Duarte* at 750 ("continu[ing] to foreclose Second Amendment challenges to § 922(g)(1), regardless of whether an underlying felony is violent or not").

"ordinary military equipment." *United States v. Miller*, 307 U.S. 174, 178 (1939). Later calling the implications of this historical truth on modern machineguns "startling," *Heller* thought "that *Miller*'s 'ordinary military equipment' language must be read" in light of Founding-era militias' use of weapons that were "in common use at the time." *Id.* at 624, 627 (quoting *Miller* at 179). Since *Heller*, the lower courts have perverted — inverted — "common use" into an atextual burden that claimants must bear, saddling litigants with factual inquiries that this Court never intended.

Consider the Seventh Circuit's mind-boggling conclusion that the *only* "Arms the Second Amendment is talking about are weapons *in common use for self-defense*." *Bevis v. City of Naperville*, 85 F.4th 1175, 1192 (7th Cir. 2023) (emphasis added).[18] Imposing "common use" as a threshold burden for challengers to bear "at the first step of the *Bruen* analysis," the Seventh Circuit remanded a challenge to a ban on so-called "assault weapons" and "large-capacity magazines" for convoluted factfinding

---

[18] Of course, that sort of reasoning would mean that not even the colonist's *musket* would be protected by the Second Amendment. Ironically, some anti-gun judges have suggested that the Second Amendment *only* protects muskets. *See Commonwealth v. Caetano*, 26 N.E.3d 688, 694 (Mass. 2015) ("Because the stun gun … was not in common use at the time of the enactment of the Second Amendment, we conclude that stun guns fall outside the protection of the Second Amendment."), *rev'd*, *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (per curiam); *see also Rahimi* at 692 ("applying the protections of the right only to muskets and sabers" would be "mistaken").

on their commonality and propriety "for individual self-defense...." *Id.* at 1195.

What the Seventh Circuit concluded preliminarily, the Fourth Circuit held conclusively. In *Bianchi v. Brown*, 111 F.4th 438, 452-53 (4th Cir. 2024), the Fourth Circuit declared that the ubiquitous AR-15 is simply "not 'in common use today for self-defense.'" And picking up where the Fourth and Seventh Circuits left off, the Second Circuit recently posited that "the 'in common use' analysis … fall[s] under the first step of *Bruen*." *Nat'l Ass'n for Gun Rights v. Lamont*, 153 F.4th 213, 234 (2d Cir. 2025) (petition for certiorari pending). The *Lamont* district court's opinion was even more direct: "Plaintiffs have the burden of making the initial showing that they are seeking to possess or carry firearms that are in common use today for self-defense...." *Nat'l Ass'n for Gun Rights v. Lamont*, 685 F. Supp. 3d 63, 88 (D. Conn. 2023) (quotations omitted).

Of course, this approach has no basis in text, history, or this Court's methodology. This Court made clear that the term "Arms" means "'[w]eapons of offence, or armour of defence,'" and "'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another,'" and includes "all firearms" as originally understood. *Heller* at 581. Thus, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms," not just those that are "common" or widely "use[d]." *Id.* at 582. Moreover, self-defense against common criminals was *not* the only reason the Founders codified the Second Amendment. Primarily,

the Founders sought to "prevent elimination of the militia," and to preserve the "security of a free State." *Id.* at 599, 597. Limiting the Second Amendment's presumptive protections to *popular* weapons that serve just *one* secondary purpose contravenes the intent of the Framers. Yet multiple lower courts have used this Court's "common use" dicta to authorize just that.

C. *Heller*'s Lone Reference to "Dangerous and Unusual Weapons."

When this Court discussed "common use" in *Heller*, it simultaneously referenced a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 627. As *Bruen* later elaborated, those historical regulations pertained to "the *carrying* of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" *Id.* at 47 (emphasis added). In other words, *Bruen* made clear that historical regulations of public *carry* only inform the scope of public *carry*.

Despite *Bruen*'s clarification, the lower courts have abused *Heller*'s "dangerous and unusual" dicta to suggest that purportedly "dangerous" weapons may be *banned* altogether — including some of the most popular firearms in the country. Indeed, the Second Circuit has opined that governmental "[d]efendants may attempt to demonstrate" that firearms are "*unprotected* dangerous and unusual weapons by showing … that the weapons are *unusually dangerous*...." *Nat'l Ass'n for Gun Rights*, 153 F.4th at 227 (emphases added). Relatedly, the Seventh Circuit has interpreted the amorphous notions of

dangerousness and unusuality as actually speaking to a weapon's "military" character, theorizing that "militaristic weapon[s] such as the AR-15" — what this Court described as "the most popular rifle in the country"[19] — may be banned. *Bevis* at 1199. And seeking to one-up even these revisionist theories, the U.S. Department of Justice recently proposed an even mushier standard to criminalize ownership of certain unregistered firearms: that governments can ban "*particularly* dangerous weapons that [a]re *uniquely* susceptible to criminal misuse."[20] But no matter how it is phrased, the result is the same: an end-run around the Second Amendment, based on a judge's predilection that a weapon is too "dangerous," "militaristic," or "criminal" for the people's own good.

Once again, such application of *Heller*'s dicta does not survive historical scrutiny, and it further demonstrates the need for the narrow approach urged here. Blackstone made clear that historical regulations of "dangerous and unusual weapons" simply prohibited "breach[es] of the peace" caused by the unjustified brandishing of openly carried weapons in public.[21] Indeed, prior generations long understood

---

[19] *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 297 (2025).

[20] Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 30, *Silencer Shop Found. v. BATFE*, No. 6:25-cv-00056-H (N.D. Tex. Nov. 20, 2025), ECF No. 60 (emphasis added).

[21] 4 W. Blackstone, Commentaries on the Laws of England 142, 148-49 (John Taylor Coleridge ed., 1825).

that "[t]he 'arms' here meant [in the Second Amendment] are those of a soldier. … The citizen has at all times the right to keep arms of modern warfare."[22] Yet contrary to these historical sources, the lower courts continue to read *Heller*'s dicta as authorizing categorical bans on firearms — even popular ones. *See Bevis* at 1197 ("Because it is indistinguishable from [a] machine gun, the AR-15 may be treated in the same manner without offending the Second Amendment."); *accord Nat'l Ass'n for Gun Rights*, 153 F.4th at 241. *But see Smith & Wesson Brands, Inc.* at 297 ("The AR-15 is the most popular rifle in the country."). These *amici* urge this Court to avoid use of similar spongy language in its opinion resolving "sensitive places" cases, including this one.

D. *Bruen*'s Footnote 9 Discussion of "Shall-Issue" Licensing Regimes.

Perhaps the most abused of this Court's dicta comes from *Bruen*'s footnote 9. In *Bruen*, this Court invalidated New York's "may-issue" licensing regime, which had granted licensing officials the discretion to "deny ordinary citizens their right to public carry." *Id.* at 38 n.9. In that footnote, this Court briefly contrasted New York's "may-issue" regime with the seeming "shall-issue" regimes of states whose laws were not at issue in *Bruen*. *See id.* (noting how certain regimes "appear[]" to operate). No doubt this Court had no intention of opining on the constitutionality of

---

[22] H.C. Black, Handbook of American Constitutional Law § 203 (2d ed. 1897).

hundreds of laws across dozens of unchallenged regimes in the absence of a "case" or "controversy" before it. Nonetheless, some courts have read *Bruen*'s footnote 9 to have definitively "*concluded* … the constitutional validity of … shall-issue licensing regimes...." *Yukutake v. Lopez*, 130 F.4th 1077, 1094 (9th Cir.) (quotations omitted, emphasis added), *vacated, reh'g en banc granted*, 144 F.4th 1119 (9th Cir. 2025); *see also Md. Shall Issue, Inc. v. Moore*, 116 F.4th 211, 222 (4th Cir. 2024) ("hold[ing] that non-discretionary 'shall-issue' licensing laws are presumptively constitutional and generally do not 'infringe' the Second Amendment … under step one of the *Bruen* framework"). Not only that, one court posited that *Bruen* in fact blessed the constitutionality of *all features* of "shall-issue" regimes, no matter how tangential, ahistorical, or burdensome, so long as those features do not "effectively deny" Second Amendment rights. *See Md. Shall Issue* at 224.

Distorting *Bruen* even further, other courts have even exempted from historical analysis threshold restrictions on the *acquisition* of arms, even though most "shall-issue" regimes *Bruen* identified are entirely *optional*. *See Bruen* at 38 n.9; 13 n.1 (noting "constitutional carry" jurisdictions). Indeed, courts have used footnote 9 to widely bless permitting regimes on *acquisition* and *possession*, even though this Court's analysis focused on *carry* licenses only. For instance, the Fifth Circuit recently approved both the National Firearms Act's "suppressor-licensing scheme" to *possess* a silencer as "presumptively constitutional," *Peterson* at 652, and federal age-related background check delays on firearm

acquisition as "presumptively lawful," *McRorey v. Garland*, 99 F.4th 831, 839 (5th Cir. 2024), on the theory that *Bruen*'s footnote 9 controlled. Somehow, the lower courts have converted even this portion of *Bruen* into a "judge-empowering 'interest-balancing inquiry.'" *Bruen* at 22.

This expansive application of *Bruen*'s footnote 9, which the lower courts have used as a cudgel to preclude numerous challenges to firearm regulations, is impossible to square with *Bruen*'s methodological holding, which requires the government to justify *all* "firearm regulations" as "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 34. Thus, it would seem that even the most benign of this Court's comparisons can and will be twisted by anti-gun judges to evade application of the *Bruen* methodology.

E. *Bruen*'s Assumption that Certain Locations Qualify as "Sensitive Places."

In *Heller*, this Court cited firearm restrictions in "sensitive places such as schools and government buildings" as among those "longstanding" regulations it believed to be "presumptively lawful." *Id.* at 626; 627 n.26. Curiously, when *Bruen* revisited this topic, this Court specified only a subset of government buildings, and abandoned any mention of schools.[23] Specifically, *Bruen* "assume[d] it settled" that only

---

[23] Indeed, *Bruen* acknowledged that, during Reconstruction, "'colored people [went] armed to school'" for their own protection. *Id.* at 61.

"legislative assemblies, polling places, and courthouses" were historical "'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment." *Id.* at 30 (quoting D. Kopel & J. Greenlee, *The "Sensitive Places" Doctrine*, 13 Charleston L. Rev. 205, 229-236, 244-247 (2018), and Brief for Independent Institute as *Amicus Curiae* at 11-17). But even with respect to this narrowed subset of locations, at least one historical example exists to rebut that assumption, and it demonstrates the risks inherent with this Court engaging in theoretical discussions about presumed historical traditions that are not before the Court.

Among the sources this Court cited in *Bruen*, the only arguably Founding-era polling-place restrictions were from 1776 Delaware and 1787 New York. *See* Kopel & Greenlee, *supra*, at 235-36; Brief for Independent Institute, *supra*, at 13. Delaware's prohibition was codified in its state constitution — but only in 1776. *See* Del. Const. of 1776, art. XXVIII. Indeed, when Delaware adopted its next constitution in 1792, its polling-place restriction was removed. *See* Del. Const. of 1792. Of course, as this Court explains, "transitory" restrictions "deserve little weight," making New York's 1787 restriction an "outlier." *Bruen* at 69, 70. It therefore is unclear whether *Bruen*'s historical assumption even as to polling places would survive closer scrutiny. There is simply no need for this Court to wade into these sorts of historical assumptions.

***

To be sure, this Court's precedents have vindicated the pre-existing Second Amendment right, and provided a path for ensuring that original public meaning controls. But the dicta interjected into this Court's precedents creates impediments for challengers to firearm regulations — allowing lower courts to fashion novel and atextual hurdles and impediments that this Court likely never intended. If this Court believed such dicta was necessary to provide guardrails for the lower courts, to prevent them from being overzealously pro-gun, that notion has been disproven. In fact, the opposite is true — the lower courts have weaponized this Court's dicta to undermine its Second Amendment holdings and uphold all manner of atextual and ahistorical firearm regulations without analysis. Rather than continuing its trend of unnecessary elaboration, these *amici* urge this Court should decide only the question presented, and refrain from providing the lower courts with additional fodder to undermine this Court's precedents.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

JOHN I. HARRIS III
SCHULMAN, LEROY & BENNETT, P.C.
3310 West End Avenue
Ste. 460
Nashville, TN 37203

OLIVER M. KRAWCZYK
AMBLER LAW OFFICES, LLC
115 S. Hanover St.
Ste. 100
Carlisle, PA 17013

MIKE BOOS
CITIZENS UNITED
1006 Pennsylvania Ave, SE
Washington, DC 20003

ROBERT J. OLSON*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for Amici Curiae

November 24, 2025