No. 21-16756

In the
United States Court of Appeals for the Ninth Circuit

TODD YUKUTAKE AND DAVID KIKUKAWA,
Plaintiffs-Appellees,
v.
ANNE E. LOPEZ, in her Official Capacity
as the Attorney General of the State of Hawai'i,
Defendant-Appellant,
and
CITY AND COUNTY OF HONOLULU,
Defendant.

On Appeal from the United States District Court for the District of Hawaii

Supplemental Brief *Amicus Curiae* of Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Tennessee Firearms Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Coalition of New Jersey Firearm Owners, Connecticut Citizens Defense League, America's Future, U.S. Constitutional Rights Legal Defense Fund, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Plaintiffs-Appellees and Affirmance

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DISCLOSURE STATEMENT

The *amici curiae* herein, Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Tennessee Firearms Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Coalition of New Jersey Firearm Owners, Connecticut Citizens Defense League, America's Future, United States Constitutional Rights Legal Defense Fund, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A). These *amici curiae* are non-stock, nonprofit corporations, except for Restoring Liberty Action Committee, which is an educational organization, none of which has any parent company, and no person or entity owns them or any part of them.

The *amici curiae* are represented herein by Jeremiah L. Morgan, who is counsel of record; William J. Olson and Robert J. Olson, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. These *amici* are also represented herein by: John I. Harris of Schulman, Leroy & Bennett, P.C., 3310 West End Avenue, Nashville, Tennessee 37203; and Joseph

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The interest of the *amici curiae* is set forth in the accompanying motion for leave.

STATEMENT OF THE CASE

In 2019, Plaintiffs Todd Yukutake and David Kikukawa filed suit challenging two provisions of Hawaii law on Second and Fourteenth Amendment grounds. The first statute imposes a 10-day (since changed to a 30-day) window within which a person must acquire a handgun upon receiving a "permit to purchase" it. *See* Hawaii Revised Statutes (H.R.S.) § 134-2(e). The second requires certain gun owners to physically present their newly acquired firearms for police inspection within five days of purchase. H.R.S. § 134-3. Both restrictions are outliers within this Circuit and nationwide, as the vast majority of states do not condition the acquisition of firearms on government preclearance, time limits, or government inspection.

On August 16, 2021, the district court granted summary judgment for Plaintiffs, applying "intermediate scrutiny" to conclude that both challenged

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

provisions violated the Second Amendment. *See Yukutake v. Conners*, 554 F. Supp. 3d 1074 (D. Haw. 2021) ("*Yukutake I*"). On September 23, 2021, this Court stayed the district court's order with respect to the permit-use provision, allowing the injunction against the in-person inspection requirement to stay in effect.

Following completion of briefing, but before oral argument, the U.S. Supreme Court decided *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), repudiating the interest-balancing approach this Court has employed following *District of Columbia v. Heller*, 554 U.S. 570 (2008). Thereafter, this Court denied Hawaii's request to remand, and instead ordered supplemental briefing on the *Bruen* decision.

On March 14, 2025, a divided panel of this Court affirmed, holding that both of the challenged provisions violate the Second and Fourteenth Amendments. *See Yukutake v. Lopez*, 130 F.4th 1077 (9th Cir. 2025) ("*Yukutake II*"). First, the panel majority observed that the permit-use provision regulates "the acquisition, through purchase or otherwise, of a 'pistol or revolver,'" and reaffirmed that "the purchase and acquisition of firearms is conduct that is protected by the plain text of the Second Amendment." *Id.* at 1090 (citation omitted). Next, the panel majority analyzed *Bruen*'s "instructive" footnote 9, which contrasted the features of so-called

"may-issue" and "shall-issue" public carry licensing regimes, the latter of which were not at issue in *Bruen*. *Yukutake II* at 1094. Even so, the panel majority believed *Bruen* "*concluded* … the constitutional validity of such shall-issue licensing regimes…." *Yukutake II* at 1094 (emphasis added, cleaned up).

The panel majority then parted ways. Judge Collins believed *Bruen*'s footnote 9 broadly sanctioned all shall-issue, "background-check-based permitting system[s]," subject only to challenges for "abusive" features which "'deny ordinary citizens' their Second Amendment rights." *Yukutake II* at 1097. Based on this interpretation, Judge Collins applied "the same principles applied in evaluating permitting systems in the First Amendment context" — namely, a form of "intermediate scrutiny." *Id.* at 1097. Thus, Judge Collins required that Hawaii's permit-use provision "'be narrowly tailored to serve a significant governmental interest' and ultimately 'must leave open' the full exercise of Second Amendment rights." *Id.* at 1098. And, because the provision failed this standard, Judge Collins explained, it violated the Second Amendment.

In a separate concurrence, Judge Lee disagreed with Judge Collins' application of "a limited means-end inquiry borrowed from the First Amendment's caselaw…." *Yukutake II* at 1105 (Lee, J., concurring). Observing that *Bruen*

"shunned interest-balancing tests" altogether, Judge Lee would have "require[d] the government to provide a historical analogue to justify the temporal limit on firearm permits." *Id.* at 1105, 1108. And because Hawaii "failed to do so," Judge Lee agreed that the permit-use provision violated the Second Amendment. *Id.* at 1108.

The panel majority then reunited with respect to Hawaii's in-person inspection provision. Once again observing that a precondition on the ownership and possession of firearms "regulates conduct that is covered by the text of the Second Amendment," the panel majority held Hawaii to its historical burden. *Yukutake II* at 1100. And on this point, Hawaii only proffered "a set of colonial-era militia laws," which provided for the occasional inspection of arms already owned to ensure military readiness. *Id.* at 1101. Because Hawaii's in-person inspection provision differed on both of *Bruen*'s "how" and "why" analogical metrics, the panel majority concluded that this provision lacked a relevantly similar historical analogue and therefore violated the Second Amendment.

Finding all of Hawaii's gun control to be constitutional, Judge Bea dissented. Labeling the panel majority's conclusion that the Second Amendment presumptively protects the acquisition of firearms a "critical error," Judge Bea instead posited that "[t]he plain text of the Second Amendment does not wholly protect" such conduct.

Yukutake II at 1109 (Bea, J., dissenting). Instead, Judge Bea would have "recognize[d] a presumption of constitutionality when the regulations in question are facially neutral, ancillary regulations which impose conditions on acquisition of arms." *Id.* at 1110. To that end, Judge Bea would have required Plaintiffs to prove that the challenged provisions "effectively or in practice" denied them their Second Amendment rights. *Id.* Absent such proof, Judge Bea believed Plaintiffs' facial challenge should have failed. *See id.*

Hawaii then petitioned for rehearing *en banc*, which this Court granted on July 28, 2025, vacating the panel opinion. Thereafter, this Court ordered supplemental briefing on *Nguyen v. Bonta*, 140 F.4th 1237 (9th Cir. 2025), and *Ortega v. Grisham*, 148 F.4th 1134 (10th Cir. 2025). Order at 1 (Aug. 29, 2025), Dkt. 141; *see also* Dkts. 120-21, 134, 139.

Now *en banc*, Hawaii has proposed a number of theories largely tracking its prior arguments and seeking to codify Judge Bea's dissent. *See En Banc* Supplemental Brief of Defendant-Appellant ("Supp. Br.") (Oct. 13, 2025), Dkt. 148. Hawaii posits that *Bruen* "established a two-part test" for the Second Amendment and, "[w]hen a challenged law is part of a 'shall issue' regime, the analysis generally begins and ends at the first step." *Id.* at 7. To mount a

successful challenge to a shall-issue regime, Hawaii insists, a challenger "must show that the regime imposes 'meaningful constraints'" on Second Amendment rights, such that it "has 'the effect of eliminating'" the right to acquire firearms altogether. *Id.* at 10, 11. But if "citizens retain 'ample alternative means of acquiring' firearms," Hawaii argues, a "plaintiff cannot rebut the presumption of constitutionality…." *Id.* at 11.

SUMMARY OF ARGUMENT

This litigation has now entered its sixth year. During that time, the challenged provisions of Hawaii's outlier regime have twice been invalidated – first, under the deferential, "judge-empowering 'interest-balancing inquiry,'" and then under the purely textual and historical framework that this Court must apply now. This Court should reject Hawaii's invitation to now sidestep the Supreme Court's decisions in *Heller* and *Bruen*.

First, *Bruen* requires this Court to apply a *one*-step test: "text, as informed by history." *Bruen* at 19. This approach leaves no room for judges to absolve the government of its historical burden and instead impose atextual burdens on plaintiffs. Rather, *Bruen* made clear that *all* "firearm regulations" are presumptively unconstitutional, and "only if" the government bears its historical

burden "may" a court conclude otherwise. Accordingly, Hawaii cannot claim that its challenged regulations' purported inclusion within a "shall-issue" licensing regime somehow immunizes them from the historical scrutiny *Bruen* requires be conducted in every case that implicates the plain text. Nor can Hawaii shirk its burden by claiming its "constraint" is not "meaningful," or that "ample alternatives" exist. Hawaii's approach invites precisely the sort of unbounded judicial "judgment calls" that *Heller* and *Bruen* disallowed.

Second, this Court should again make clear that the Second Amendment's plain text "covers" the *acquisition* of all bearable "arms"– full stop. Constitutional rights protect those necessary, concomitant, and implied rights that are necessary for their exercise. If the First Amendment protected only writing instruments already possessed in 1789, then this *amicus* brief would be written with a quill pen on parchment. Thus, a regulation of the acquisition of firearms *necessarily* regulates the keeping and bearing of arms, and history confirms that the challenged provisions are unconstitutional.

ARGUMENT

I. *BRUEN* PRESUMES ALL "FIREARM REGULATIONS" ARE UNCONSTITUTIONAL ABSENT STATE-DEMONSTRATED RELEVANT HISTORICAL ANALOGUES.

A. *Bruen* Established a "One-Step" Test.

In *Heller*, the Supreme Court explained that courts are to analyze the Second Amendment using a textual and historical approach, because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them…." *Id.* at 634-35. That approach left no room for judicial preferences, judgment calls, or legislative deference. Indeed, "[t]he very enumeration of the right takes out of the hands of government … the power to decide on a case-by-case basis whether the right is really *worth* insisting upon." *Id.* at 634. Accordingly, in *Bruen*, the Supreme Court explained that *Heller* "demand[ed] a test rooted in the Second Amendment's text, as informed by history." *Id.* at 19.

Yet despite the simplicity of this analytical approach, result-oriented lower courts invented ways to resist its application. Following *Heller*, many courts adopted a "two-step approach" that combined a nominally originalist analysis married with the application of various tiers of "judge-empowering 'interest-balancing.'" *Bruen* at 19, 22. Other courts complicated *Heller* beyond

recognition. For example, this Circuit "use[d] what might be called a tripartite binary test with a sliding scale and a reasonable fit." *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1117 (S.D. Cal. 2017), *aff'd*, 742 F. App'x 218 (9th Cir. 2018). Seemingly designed from the ground up to reach predetermined results, these unintuitive and unpersuasive analyses almost invariably resulted in the upholding of all manner of atextual and ahistorical firearm regulations. Judicial preferences prevailed over "the traditions of the American people…." *Bruen* at 26.

Setting the record straight in *Bruen*, the Supreme Court explained that, although the "two-step approach" was popular, "it [wa]s one step too many." *Bruen* at 19. Thus, the Court made clear that *Heller* (and *Bruen*'s) approach had just *one* analytical step: "text, *as informed* by history." *Id.* (emphasis added).

This distinction is more than semantic. By treating the Second Amendment analysis as containing two discrete analytical steps, courts have created opportunities to reject challenges to *obvious* regulations of firearms under the Second Amendment's plain text, thereby absolving the government of its historical burden. Consider Hawaii's argument here. Claiming that *Bruen* "established a *two-part* test for determining whether a challenged firearm regulation violates the Second Amendment," Hawaii posits that this case may be resolved "begin[ning] and

end[ing] at the *first step*." Supp. Br. at 7 (emphasis added). In other words, Hawaii has taken the position that restrictions on the acquisition of firearms do not even *implicate* the Second Amendment's plain text, and no historical analysis is necessary. This is precisely the same "judge-empowering" (*Heller* at 634) approach that courts adopted pre-*Bruen*, only under a different name. *See, e.g., Mai v. United States*, 952 F.3d 1106, 1114 (9th Cir. 2020) (claiming 18 U.S.C. § 922(g)(4)'s ban on firearm possession likely "does not burden Second Amendment rights" under step one).

This Court should reject Hawaii's approach. *Bruen* explained that, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen* at 17. Likewise, *United States v. Rahimi*, 602 U.S. 680 (2024), further clarified that, "when the Government regulates *arms-bearing conduct*, … it bears the burden to 'justify its regulation.'" *Id.* at 691 (emphasis added). Here, Plaintiffs cannot acquire - and therefore cannot "keep" or "bear" - certain handguns without first complying with the challenged provisions. The challenged provisions obviously restrict "conduct" that the Second Amendment "covers," and nothing more is needed for Hawaii to be put to its

historical burden. Properly understood, the Second Amendment's plain text is a *subject-matter qualifier*, and this Court should treat it as such.

B. *Bruen* Directs That All "Firearm Regulations" Are Subject to Historical Scrutiny.

Both Hawaii and the panel dissent have posited that many restrictions on the acquisition of firearms are automatically constitutional — simply *immune* from historical review. *See* Supp. Br. at 7 ("the analysis generally begins and ends at the first step"); *Yukutake II* at 1110 (Bea, J., dissenting) (requiring challengers of portions of "shall-issue" regimes to prove not just infringement, but also "abus[e]"). Even Judge Collins denied that the permit-use provision must be "justified by a historical analogue." *Id*. at 1097. But this approach is no different from the tiered-scrutiny analysis of "core" rights and "the severity of [a] law's burden" that *Bruen* repudiated. *See Duncan v. Bonta*, 19 F.4th 1087, 1103 (9th Cir. 2021). This Court need look no further than *Bruen*'s explicit *holding* to the contrary to reject this proposition. *See Bruen* at 17 ("we hold").

Indeed, rather than sanctioning the approach being proposed here, *Bruen* explained that "the government *must demonstrate* that [its] *regulation* is consistent with this Nation's historical tradition of firearm regulation." *Id*. at 17 (emphasis added). And lest there be any doubt as to the stringency of this requirement, the

Court instructed not once — but *twice* — that "[*o*]*nly if*" the government bears its historical burden "*may* a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (emphasis added); *see also id.* at 24 ("[o]nly then").

Two points deserve mention. First, *Bruen*'s historical approach applies to all "firearm *regulation*[*s*]," no matter how minimal or severe their judicial characterization. *See Bruen* at 17, 24; *see also id.* at 19 (emphasis added) ("the government must affirmatively prove that its firearms *regulation* is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms"). A "regulation" is "an authoritative rule dealing with details or procedure."[2] It need not *destroy*, completely "deny,"[3] or even "meaningful[ly] constrain[]"[4] the Second Amendment right to be historically reviewable. Indeed, *Bruen*'s own author explained that "nothing … in *Heller* suggested that a law must rise to the level of the absolute prohibition at issue in that case to constitute a 'substantial burden' on the core of the Second Amendment right." *Jackson v. City & County of San Francisco*, 576 U.S. 1013, 1016 (2015) (Thomas, J., dissenting from denial of certiorari).

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[2] "Regulation," *Merriam-Webster* (last visited Nov. 13, 2025).

[3] *Yukutake II* at 1097.

[4] *B & L Prods., Inc. v. Newsom*, 104 F.4th 108, 118 (9th Cir. 2024).

Hawaii must bear its historical burden to justify its firearm regulations and, if it cannot, then the challenged provisions are unconstitutional.

Second, when a firearm "regulation" is challenged, courts are to presume its unconstitutionality at the outset. *See Bruen* at 24 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."). Historical analysis exists to *defeat* that presumption, if possible. Rather than setting up various firearm regulations to enjoy a presumption of *constitutionality*, justifying some sort of alternate analysis not found in *Bruen*, the Supreme Court has theorized only that certain "longstanding" regulations might survive historical scrutiny, "if and when" challenged. *Heller* at 626, 635. Hawaii's suggestion that its regulations are "presumptively constitutional" at the outset (Supp. Br. at 6) has no basis in the Supreme Court's methodology. That is *the opposite* of how the Court has analyzed "firearm regulations."

C. "Shall-Issue" Licensing Regimes Were Not at Issue in *Bruen*.

In its petition for rehearing, Hawaii asserted that "*Bruen held* that [shall-issue regimes] *are historically justified*…." Petition for Rehearing *En Banc* at 8 (Apr. 11, 2025), Dkt. 114 (emphasis added). In its brief, Hawaii posits that shall-issue regimes enjoy a "presumption of constitutionality" that Plaintiffs may rebut only if

the challenged provisions "eliminat[e] the ability … to acquire firearms." Supp. Br. at 10, 11. This argument turns *Bruen*'s presumption of *un*constitutionality on its head and misrepresents *Bruen*'s footnote 9.

Rather than blessing the inner workings of 43 different states' carry regimes which were *not at issue*, *Bruen* concerned only New York's "may-issue" public carry licensing regime. *Bruen* at 38 n.9. At no point did the Court *hold* that various states' unchallenged, unanalyzed licensing regimes were constitutional as a general matter, much less according to a historical tradition of licensing dating to the Founding. To suggest otherwise would mean the Court ruled based on how these 43 states' laws "appear[ed]" to operate. *Id.*

Moreover, the "shall-issue" licensing regimes briefly discussed (but not approved)[5] in *Bruen* are for *public carry* (not to acquire firearms) and are *entirely optional* in a majority of states, most of which offer licenses to their residents on a voluntary "shall-issue" basis. Indeed, the vast majority of these regimes (currently

[5] Only two Justices opined that "shall-issue licensing regimes are constitutionally permissible," merely reiterating what the *Bruen* "petitioners acknowledge[d]." *Bruen* at 80 (Kavanaugh & Roberts, JJ., concurring). Because "they all joined the majority opinion, however, these 'vanilla concurrences' have 'no impact' and 'count[] for nothing' legally." *Commonwealth v. Donnell*, 2023 Mass. Super. LEXIS 666, at *5 n.3 (Mass. Super. Ct. Aug. 3, 2023).

29 of the 43 that were "shall-issue" when *Bruen* was decided[6]) are "constitutional carry" jurisdictions where *no license is required* to carry a firearm (and thus no background check is needed before one may carry a firearm). *Bruen* acknowledged as much. *Bruen* at 13 n.1.

Rather than setting aside "shall-issue" licensing regimes for categorically different treatment under the Second Amendment, *Bruen*'s "opaque dicta" merely served a comparative purpose. *Yukutake II* at 1104 (Lee, J., concurring). What *Bruen did* "hold" was that "the government must demonstrate that [its] regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen* at 17.

D. This Court Should Repudiate Inquiries into "Meaningful Constraints" and "Ample Alternatives."

In *Heller*, the Supreme Court explained that "[i]t is no answer to say … that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller* at 629. In other words, a firearm regulation is to be analyzed according to the Second Amendment's text and historical context, not whether a judge believes the regulation is "no big deal."

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[6] *See* "Constitutional Carry/Unrestricted/Permitless Carry," *USCCA*, (last visited Nov. 17, 2025).

Contrary to this bedrock principle, Hawaii posits that "a law does not impose meaningful constraints where ordinary citizens retain 'ample alternative means of acquiring' firearms." Supp. Br. at 11. That is "judge-empowering 'interest-balancing,'" plain and simple. *Bruen* at 22.

As Justice Thomas has repeatedly explained, the "question under *Heller* is not whether citizens have adequate alternatives available for self-defense," but rather whether the historical tradition supports the regulation at issue. *Friedman v. City of Highland Park*, 577 U.S. 1039, 1042 (2015) (Thomas, J., dissenting from denial of certiorari). Thus, "nothing in our decision in *Heller* suggested that a law must rise to the level of the absolute prohibition at issue in that case to constitute a 'substantial burden' on the core of the Second Amendment right." *Jackson* at 1016 (Thomas, J., dissenting from denial of certiorari). The moment a judge begins to assess the sufficiency of *alternatives* to an individual's proposed course of conduct, they usurp "the power to decide on a case-by-case basis whether the right is *really worth* insisting upon" and they "conduct … anew" the "interest balancing" conducted by "the people" when they ratified the Second Amendment. *Heller* at 634-35. Thus, *Bruen*'s mandate is clear: "the traditions of the American people … demand[] our unqualified deference." *Bruen* at 26. This Court should follow that

mandate, and reject any inquiries into "meaningful constraints" or "ample alternatives" under the Second Amendment. The Second Amendment does not prohibit only "meaningful" infringements. It prohibits them all.

II. THE ACQUISITION OF FIREARMS IS PROTECTED BY THE SECOND AMENDMENT'S PLAIN TEXT AND CONFIRMED BY HISTORY.

Both Hawaii and the panel dissent deny that the Second Amendment's text protects acquiring firearms. *See* Supp. Br. at 7; *Yukutake II* at 1109 (Bea, J., dissenting). That assertion defies logic and departs from well-settled principles of constitutional interpretation, as well as the Second Amendment's historical context. This Court should reject these atextual and ahistorical theories outright, and reaffirm its prior holding that "the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense." *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017).

The Second Amendment's plain text necessarily "covers" the "conduct" at issue here. *Bruen* at 17. It is axiomatic that, "when a text authorizes a certain act, it implicitly authorizes whatever is a necessary predicate of that act." A. Scalia & B. Garner, Reading Law at 96 (Thomson/West: 2012). Thus, in order to "keep" or "bear" firearms, one first must acquire them, and the text must protect that

threshold act, too. Indeed, "[c]onstitutional rights … implicitly protect those closely related acts necessary to their exercise." *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring in the judgment). For this reason, the Supreme Court has explained that:

> [t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach — indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure. [*Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (citations omitted).]

If the First Amendment protects those "peripheral rights" necessary to effectuate its plain text, then so too must the Second Amendment. *See Bruen* at 70 ("The [Second Amendment] is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'"). To hold otherwise would be to create a "loophole"[7] that will undermine protections for *all* constitutional rights.

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[7] As one district court recently observed, "if buying (receiving) a gun is not covered by the Second Amendment's plain text, neither would selling one. So according to the Government, Congress could throttle gun ownership without implicating Second Amendment scrutiny by just banning the buying and selling of firearms. What a marvelous, Second Amendment loophole!" *United States v. Hicks*, 649 F. Supp. 3d 357, 360 (W.D. Tex. 2023), *rev'd on other grounds*, 2025 U.S. App. LEXIS 18297 (5th Cir. July 23, 2025).

History confirms what the text plainly protects. Rather than imposing preconditions or restrictions on the acquisition of new arms, American colonists found themselves scrambling to acquire more. In 1774, King George III had "prohibit[ed] the exportation from Great Britain of Gunpowder, or any sort of Arms or Ammunition…."[8] This "ban on importation … to the colonies," coupled with "gun confiscation" and the "seizure of American gunpowder" from communal stores, provided the "discrete spark of actual hostilities" that led to the American Revolution. N. Johnson, *et al.*, Firearms Law and the Second Amendment: Regulation, Rights, and Policy at 117 (1st ed. 2012). Thereafter, operating as part of the Second Continental Congress's Committee of Secret Correspondence, Ben Franklin secured French shipments of arms to the colonies.[9]

Thus, rather than seeking to impede, limit, or control the acquisition of firearms by the People, the Framers codified the Second Amendment to guarantee *unimpeded access* to arms as a direct response to British arms restrictions. *See Rahimi* at 720 (Kavanaugh, J., concurring) ("The Framers drafted and approved

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[8] Letter from Thomas Cushing to Benjamin Franklin (Dec. 30, 1774).

[9] J. Toussaint, "How Secret Meetings at Carpenters' Hall in Philadelphia Helped Secure America's Independence," *Phila. Today* (Oct. 31, 2025).

many provisions of the Constitution precisely to depart from rather than adhere to certain pre-ratification laws, practices, or understandings.").

Three years after the Constitution's ratification, Congress required "[t]hat every citizen so enrolled [in the militia] and notified, shall … *provide himself* with a good musket or firelock, … or with a good rifle, … and a quarter of a pound of powder…." Second Militia Act of 1792, 1 STAT. 271, 271 (emphasis added). In 1807, Tench Coxe "respectfully believed and … most anxiously suggested that measures for the immediate acquisition (by purchase, importation and manufacture) of muskets, rifles and pistols to arm our one million of effective free men … should be taken…."[10] And in 1814, Coxe observed that "[c]annon are constantly manufactured … for sale to associations of citizens, and to individual purchasers, for use at home, or for exportation."[11]

Thus, the founding generation *encouraged* and in fact *required* Americans to acquire arms. It defies logic to suggest that the same people who debated, fashioned, and ratified the Second Amendment designed it to protect only those

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[10] Letter from Tench Coxe to President Jefferson (Jan. 1807).

[11] T. Coxe, Statement of the Arts and Manufacturers of the United States of America, xlvii (1814).

weapons the People already possessed, while allowing the government to discourage, impede, and restrict the acquisition of firearms as Hawaii has done.

CONCLUSION

For the foregoing reasons, this court should affirm the judgment below or, alternatively, vacate the grant of *en banc* rehearing and reinstate the panel decision.

Respectfully submitted,

/s/ Jeremiah L. Morgan

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Supplemental Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Plaintiffs-Appellees and Affirmance, was made, this 20th day of November 2025, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/Jeremiah L. Morgan
Jeremiah L. Morgan
Attorney for *Amici Curiae*