No. 24-203

In the
Supreme Court of the United States

DAVID SNOPE, AN INDIVIDUAL AND RESIDENT OF BALTIMORE COUNTY, ET AL.,

Petitioners,

v.

ANTHONY G. BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MARYLAND, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE SECOND AMENDMENT LAW CENTER, INC., CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, FEDERAL FIREARMS LICENSEES OF ILLINOIS, INC., SECOND AMENDMENT DEFENSE AND EDUCATION COALITION, LTD., OPERATION BLAZING SWORD-PINK PISTOLS, AND MINNESOTA GUN OWNERS CAUCUS IN SUPPORT OF PETITIONERS

C.D. Michel
Counsel of Record
Anna M. Barvir
Konstadinos T. Moros
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
(562) 216-4444
CMichel@michellawyers.com
Counsel for Amicus Curiae

September 23, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

AMICUS CURIAE STATEMENT OF INTEREST

Second Amendment Law Center, Inc. ("2ALC") is a nonprofit corporation in Henderson, Nevada. 2ALC defends the individual rights to keep and bear arms as envisioned by the Founders. 2ALC also educates the public about the social utility of firearm ownership and provides accurate historical, criminological, and technical information to policymakers, judges, and the public.[1]

Founded in 1875, California Rifle & Pistol Association, Incorporated ("CRPA"), is a nonprofit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting shooting sports, providing education, training, and competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, and members of the public. In service of these ends, CRPA regularly participates as a party or amicus in firearm-related litigation.

---

[1] No counsel for a party authored this brief in whole or in part, nor did such counsel or any party make a monetary contribution to fund this brief. No person other than the amicus parties, its members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Parties were notified that this brief would be filed on August 26, 2024, in compliance with Rule 37.2.

Federal Firearms Licensees of Illinois, Inc. is an Illinois not-for-profit corporation that represents federally licensed gun dealers across the State of Illinois.

Second Amendment Defense and Education Coalition, Ltd. ("SADEC"), is an Illinois not-for-profit corporation. SADEC is dedicated to the defense of human and civil rights secured by law including, in particular, the right to bear arms. SADEC's activities are furthered by complementary programs of litigation and education.

Operation Blazing Sword, Inc., a/k/a Operation Blazing Sword-Pink Pistols comprises two organizations, Operation Blazing Sword and Pink Pistols, which together advocate on behalf of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") firearm owners, with specific emphasis on self-defense issues. Operation Blazing Sword maintains a network of over 1,600 volunteer firearm instructors in nearly a thousand locations across all fifty states. Pink Pistols, which was incorporated into Operation Blazing Sword in 2018, is a shooting society that honors gender and sexual diversity and advocates for the responsible use of firearms for self-defense. Membership is open to anyone, regardless of sexual orientation or gender identity, who supports the rights of LGBTQ firearm owners.

Finally, Minnesota Gun Owners Caucus ("MGOC") is a 501(c)(4) nonprofit organization incorporated under the laws of Minnesota with its principal place of business in Shoreview, Minnesota. MGOC seeks to protect and promote the right of citizens to keep and

bear arms for all lawful purposes. MGOC serves its members and the public through advocacy, education, elections, legislation, and legal action. MGOC's members reside both within and outside Minnesota.

SUMMARY OF ARGUMENT

Our nation's historical tradition of firearms regulation affirms a clear principle: the most commonly owned semi-automatic rifles and their components cannot be banned. Today, such rifles include the AR-15 platform and similar semiautomatic rifles. Indeed, modern Americans overwhelmingly own these firearms for self-defense, home protection, and sporting purposes.[2] Banning these popular rifles today would be as unprecedented as banning muskets and Kentucky Rifles in the Founding era, or Winchester rifles and Colt revolvers during Reconstruction. So-called "assault weapon" bans not only lack support from our historical tradition; they stand in direct opposition to it.

This brief explores the two Second Amendments that have emerged from the lower courts since *Bruen*. The first generally aligns with the faithful application of *Bruen* to modern firearm possession and usage. The second, however, reflects an intent to erode *Bruen* by introducing granular analyses that distort and diminish the right much like the now-discredited two-step "means-ends scrutiny" test before *Bruen*. Under this latter approach, litigants face almost

[2] *See* Emily Guskin, et al., *Why do Americans own AR-15s?*, Wash. Post (Mar. 27, 2023), https://wapo.st/3IDZG5I.

insurmountable odds in prevailing on most Second Amendment claims.

While this Court cannot resolve every structural inconsistency between competing circuits in a single case, it can take a critical first step. By granting certiorari in this case, the Court can reconcile these conflicting interpretations and restore a unified national understanding of the Second Amendment. Indeed, this case presents an ideal opportunity to clarify that (1) *Bruen* establishes a straightforward, one-step test; (2) all firearms are "bearable arms" under the Constitution and may be banned only if they are both "dangerous and unusual"; and (3) military use is not a historically justified reason to ban otherwise common arms. The time has come to rein in those lower courts attempting to contort *Bruen*.

Finally, this amicus brief revisits the historical underpinnings of the Second Amendment. Although familiar to the Court, these principles bear repeating in light of the Maryland decision and similar misguided rulings. The Second Amendment was designed, in large part, to ensure that the People retain the means to defend themselves, whether from foreign invaders or domestic tyranny. This history unequivocally demonstrates the unconstitutionality of Maryland's law.

ARGUMENT

I. The Two Second Amendments

Since *Bruen*, some courts have applied this Court's analysis faithfully to challenges involving bans on

common firearms and magazines. *See, e.g.*, *Miller v. Bonta*, 699 F. Supp. 3d 956, 1011 (S.D. Cal. 2023), *appeal held in abeyance*, No. 23-2979, 2024 WL 1929016 (9th Cir. Jan. 26, 2024); *see also Barnett v. Raoul*, 671 F. Supp. 3d 928, 948 (S.D. Ill.), *vacated sub nom. Bevis v. City of Naperville, Illinois*, 85 F.4th 1175 (7th Cir. 2023), *cert. denied sub nom. Harrel v. Raoul*, 144 S. Ct. 2491 (2024). But as the length of these citations suggests, any district court that adheres to *Bruen* can expect to see its work promptly dismantled on appeal. That is because circuits generally favorable to Second Amendment rights, including the Fifth, Eighth, and Eleventh Circuits, never hear cases about "assault weapon" bans or magazine capacity restrictions—because states within those jurisdictions have not passed such laws. Instead, only states with a polity hostile to the Second Amendment ban these common arms, and their laws are upheld by circuit courts with judges reflecting those policies.

To be sure, some differences in outcomes based on reasonable differences in judicial philosophy and interpretation are to be expected. But the current split seems to go beyond good-faith disagreements. Rather, a pattern has emerged where some courts appear to operate with a deliberate intent to subvert the Second Amendment, as clarified in *Bruen*.

Consider *Duncan v. Bonta*, a Ninth Circuit case challenging California's ban on magazines holding more than ten rounds. The case has been percolating since 2017 and was previously remanded by this Court following *Bruen*. *See Duncan v. Bonta*, 142 S. Ct. 2895 (2022) (mem.). After remand, the district court again struck down California's law under the *Bruen*

framework. *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1255 (S.D. Cal. 2023). In a seemingly unprecedented move, however, the Ninth Circuit en banc panel that had heard the previous appeal reassumed control of the case—bypassing the typical three-judge panel—to ensure a preordained result. Order 1, *Duncan v. Bonta*, No. 23-55805 (9th Cir. Sept. 28, 2023), ECF No. 3.

As noted by Judge VanDyke in his dissent:

> Apparently, even summary reversal by the Supreme Court has not tempered the majority's zeal to grab this case as a comeback, stay the district court's decision, and make sure they—not the original three-judge panel—get to decide the emergency motion (and ultimately, the eventual merits questions) in favor of the government. I think it is clear enough to everyone that a majority of this en banc panel will relinquish control of this case only when it is pried from its cold, dead fingers. And I think it is clear enough to everyone why.

Id. at 5 (VanDyke, J. dissenting).

Judge VanDyke's dissent also revealed, for the first time, the questionable circumstances under which the Ninth Circuit granted en banc review of California's first appeal in 2020 following the plaintiffs' initial victory. Apparently, the Ninth Circuit had missed its own deadline for en banc review but circumvented its

rules to proceed regardless. As Judge VanDyke explained:

> [I]n the end, a discrete collection of judges—again, not the entire court—struck a 'compromise,' circumvented our own rules, and allowed the en banc call to move forward. But only in this one case. The agreement was made to call this case but drop the en banc calls in two other cases—including a death penalty case. Priorities.

Id. at 7.

Another stark example of the ongoing effort to undermine the Second Amendment is the very case currently under review. As the Petitioners have noted, as was the case in *Duncan*, bizarre circumstances marked the appellate journey of this case. For instance, a three-judge panel deliberated for over a year, only for the Fourth Circuit to suddenly decide to "rehear" the case en banc—without even waiting for the panel's ruling. Pet.App. 98a, at n. 2 (Richardson, J., Niemeyer, J., Agee, J., Quattlebaum, J., and Rushing, J., dissenting).

Gun rights litigants stand little chance of success when the system is so evidently stacked against them. As dissenting Ninth Circuit judges put it, "[i]f the protection of the people's fundamental rights wasn't such a serious matter, our court's attitude toward the Second Amendment would be laughably absurd." *Duncan v. Bonta*, 83 F.4th 803, 808 (9th Cir. 2023) (Bumatay, J., Ikuta, J., R. Nelson, J., and VanDyke,

J., dissenting). The Ninth Circuit's hostility toward the right to keep and bear arms has even attracted the attention of Justice Gorsuch, who noted that state governments enjoyed an *undefeated 50-0 record* in Second Amendment cases before that court before *Bruen*. *United States v. Rahimi*, 602 U.S. --, 144 S. Ct. 1889, 1909 (2024) (Gorsuch, J., concurring). The streak continues. Before long, government defendants' record on Second Amendment cases will rival only John Wooden's record on the basketball court—with the most glaring difference being that UCLA's opponents encountered much fairer referees than do today's Second Amendment plaintiffs.

The post-*Bruen* era has thus become a tale of the two Second Amendments. Americans lucky enough to live in jurisdictions where circuit courts honor the Second Amendment generally see their rights upheld. But for those in circuits like the Fourth, Seventh, or Ninth, where the *Bruen* decision is met with defiance, defeat is virtually guaranteed. This Court's usual practice of allowing issues to percolate in the lower courts—while often wise in its restraint—is being exploited by those who show little regard for judicial supremacy and stare decisis. As long as the Court exercises laudable restraint, those pursuing unlaudable goals will continue to contort *Bruen*. Now is the time to act.

II. *Bruen* Is a One-Step Test

The Fourth Circuit's majority opinion erred from the outset by dooming Petitioners in the so-called "first step" of the *Bruen* analysis, claiming that AR-15s are not even "arms" under the Second

Amendment's plain text. Pet.App. 26a-27a. But of course, there is no "first step." The Court in *Bruen* expressly, clearly, and unquestionably rejected a two-step test in favor of a one-step analysis. Indeed, the Court could not have been clearer when it observed that "[d]espite the popularity of th[e] two-step approach, *it is one step too many*." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19 (2022) (emphasis added). The Court later reaffirmed the simplicity of the *Bruen* test in *Rahimi*, explaining that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." 144 S. Ct. at 1898. Even still, lower courts have embraced an approach that this Court never intended, adding unnecessary analytical steps that help modern antigun laws evade historical scrutiny.

To be sure, for there to be a viable Second Amendment challenge, the right to keep and bear arms must at least be *implicated*. *Bruen*, 597 U.S. at 19. Just as a First Amendment free speech case must involve speech, a Second Amendment case must involve the peaceable use or ownership of arms. This is a commonsense prerequisite, not some independent "step" requiring extensive analysis. It certainly should not be a shield the government can hide behind to avoid its burden under *Bruen*.

This is especially important because supposed "plain text" analyses often drift into historical analysis anyway. For example, a recent Ninth Circuit decision examined whether nonviolent felons are among "the People" the Second Amendment protects. To do so, the panel had to conduct an extensive

historical analysis, tracing the meaning of "the People" all the way back to English common law. *United States v. Duarte*, 101 F.4th 657, 672 (9th Cir. 2024), *reh'g en banc granted, opinion vacated*, 108 F.4th 786 (9th Cir. 2024).[3] Unless the right to keep and bear arms is clearly not implicated at all, historical analysis is often required to even discern the meaning of the text in the first place—further proving that *Bruen* stands for a one-step historical test.

But in the short time since *Bruen* was decided, the purported "first step" has allowed courts to inject undue granularity into the analysis of whether the Second Amendment is implicated. This distorted focus helps sustain antigun laws by framing the activity in a way that, by design, fails the "first step."

In *Bruen*, there was no such extensive analysis. The Court simply concluded that "the plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct—carrying handguns publicly for self-defense." *Bruen*, 597 U.S. at 4. It did not define the conduct at issue in *Bruen* as "carrying handguns publicly for self-defense without first demonstrating good cause to a government official." Yet that is the sort of thing lower courts have done in the wake of *Bruen*. *See, e.g.*, Order 30, *Cal. Rifle &*

[3] While Amici believe that the *Duarte* panel erred in embracing the illegitimate two-step test, its ruling was otherwise sound, standing for the principle that our historical tradition supports disarming only those who are found to be dangerous. It is, therefore, no surprise that the Ninth Circuit promptly granted en banc review to reverse the panel.

Pistol Ass'n, Inc. v. Los Angeles Cnty. Sheriff's Dep't, No. 23-cv-10169 (C.D. Cal. Aug. 20, 2024), ECF No. 52 (refusing to temporarily enjoin over $900 in fees related to concealed handgun licenses because plaintiffs did not sufficiently describe their proposed course of conduct under "step one," even though the court agreed the government presented no historical evidence to justify its fees).

In short, any law that affects the right of an American to peaceably acquire, possess, use, or carry bearable arms must be backed by historical tradition. That is *Bruen*'s fundamental holding. It is not for any inferior court to ask whether particular aspects of the Second Amendment right are "really worth insisting upon." *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). And yet the Fourth Circuit has seized upon the new two-step test taking root in the lower court to parse the analysis so finely as to justify the absurd conclusion that mere possession of a common rifle falls outside the scope of the Second Amendment. The Court should grant certiorari and seize the opportunity to clarify that *Bruen* is a straightforward one-step historical test and put an end to the rebellion against this Court's Second Amendment precedents.

III. The Second Amendment Protects All Bearable "Arms," Not Just Firearms in Common Use for Self-defense

The Fourth Circuit reasoned that "while the Second Amendment jealously safeguards the right to possess weapons that are most appropriate and typically used for self-defense, it emphatically does not stretch to encompass excessively dangerous

weapons ill-suited and disproportionate to such a purpose." Pet.App. 26a. Based on that premise, the court concluded that "the AR-15 is a combat rifle that is both ill-suited and disproportionate to self-defense. *It thereby lies outside the scope of the Second Amendment*." *Id.* at 46a (emphasis added). But the idea that an arm must be "in common use for self-defense" to implicate the Second Amendment comes neither from the Amendment's text nor the precedents of this Court. While this inquiry may have some bearing on whether a given law aligns with our Nation's historical tradition, it is irrelevant to the determination of whether an item is an "Arm" within the scope of the right.

The plain text of the Second Amendment guarantees the individual right "to keep and bear Arms." U.S. Const. amend. II. It "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*, 554 U.S. at 582) (emphasis added). And it includes the use of arms for both "offensive *or* defensive action." *Id.* at 32 (emphasis added).[4]

---

[4] Moreover, while self-defense is no doubt an important function of the Second Amendment right, it is not the only "lawful purpose" protected. *See, e.g., Heller*, 554 U.S. at 624 (discussing "lawful purposes *like* self-defense," implying the existence of other such lawful purposes). Even the dissenting opinion in *Bruen* seemed to acknowledge this when it explained that "Some Americans use guns for legitimate purposes, such as sport (e.g., hunting or target shooting), certain types of employment (*e.g.*, as a private security guard), or self-defense." *Bruen*, 597 U.S. at 89 (Breyer, J., dissenting). Indeed, if a state could ban any firearms except those most commonly used for self-defense, then many

There can thus be no serious question about whether AR-15s qualify as "arms." They are indisputably "weapon[s] of offence" that a person "takes into his hands, or useth in wrath to cast at or strike another." *Heller*, 554 U.S. at 581 (citing Founding-era dictionaries). Whether restrictions on AR-15s or similar firearms are ultimately constitutional is a separate matter, but it is fundamentally unserious to claim that they are not even "arms" protected by the Second Amendment.

Even if self-defense use was determinative, survey data shows that 61.9 percent of respondents own firearms like the AR-15 specifically for home defense. *See* William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* at 33 (May 13, 2022), available at https://bit.ly/3yPfoHw. Whatever politicians or the Fourth Circuit might think citizens "need" for effective self-defense is beside the point. The fact that Americans possess these firearms and magazines in significant numbers for lawful purposes, *including* self-defense, is sufficient. Their choices deserve "unqualified deference." *Bruen*, 592 U.S. at 26; *see also Heller*, 554 U.S. at 629 ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.").

In short, whether the AR-15 qualifies as an "Arm" under the Second Amendment should be a

---

common hunting rifles could be banned without violating the Second Amendment.

straightforward question, yet the Fourth Circuit failed to get it right. Other courts have made this same "error." *See, e.g.*, *Bevis,* 85 F.4th at 1197 (holding that a ban on popular rifles and magazines does not implicate the Second Amendment because the semiautomatic AR-15 is not a protected "Arm" as a threshold matter). This Court should grant review to correct it.

IV. Suitability for Military Purposes, Without More, Does Not Eliminate Second Amendment Protection Because the Second Amendment Also Exists to Allow the People to Be Armed for the Common Defense

A. The limits of *Heller*'s discussion of M-16 rifles and similar weapons.

Like the Seventh Circuit in *Bevis*, the Fourth Circuit incorrectly ruled that a firearm's military use renders it unprotected by the Second Amendment, centering its analysis on the AR-15's resemblance to the fully automatic M-16. Pet.App. 31a. But the Fourth Circuit read too much into *Heller*'s discussion of the M-16. It was not meant to exclude any firearm with superficial similarities to the M-16 from Second Amendment protection.

Instead, the Court emphasized that certain "dangerous and unusual weapons that are most useful in military service—such as the M-16—can be banned despite the prefatory clause's ostensible mandate that the right to bear arms be connected to a well-regulated militia…." *Rupp v. Becerra*, 401 F. Supp. 3d 978, 986 (C.D. Cal. 2019), *vacated and remanded sub nom. Rupp v. Bonta*, 2022 WL 2382319 (9th Cir. June 28, 2022). In other words, the *Heller* Court was

anticipating concerns that the application of its historical "common use" test—which could permit the government to ban some firearms that are used by the military—might conflict with the Second Amendment's stated militia purpose. 554 U.S. at 267. By citing the M-16, the Court provided an example of a *military* weapon the banning of which *might* be consistent with the Second Amendment despite the militia clause, *assuming* it is not in common use.[5]

The erroneous conflation of the actual historical standard (i.e., "dangerous and unusual") with any gun that is used by the military has taken hold in more than just the Fourth and Seventh Circuits. For instance, in *United States v. Berger*, the Eastern District of Pennsylvania dismissed the idea that the Second Amendment protects firearms used by the military or police as "absurd." No. 22-CR-00033, 2024 WL 449247, at *9 (E.D. Pa. Feb. 6, 2024). But what is truly "absurd," not to mention ahistorical, is confining the Second Amendment to only those firearms *not* used by the military or police. Such a rule would have left muskets unprotected during the Founding era because they were the standard small arms used by both sides of the Revolutionary War. Certainly, military use alone does not place a firearm beyond the Second Amendment's scope.

None of this is to say that weapons used by the military that *are* shown to be "dangerous and

[5] Tellingly, the authors of both *Heller* and *Bruen* did not believe that rifles such as the AR-15 are so "like" the M-16 that they lack Second Amendment protection. *See Friedman v. City of Highland Park*, 577 U.S. 1039, 1039 (2015) (Thomas, J., and Scalia, J., dissenting).

unusual" are protected. As one district court explained, weapons "useful *solely* for military purposes" are outside the scope of the Second Amendment. *Duncan v. Bonta*, No. 17-cv-1017, 2023 WL 6180472, at *17 (S.D. Cal. Sept. 22, 2023) (emphasis added). But semiautomatic rifles like the AR-15, tens of millions of which are owned by civilians, are not in the same category as warheads, chemical weapons, stealth bombers, or other weapons that have never been in civilian hands and, in any case, are not "instruments that constitute bearable arms." *Heller*, 554 U.S. at 582.

B. The Second Amendment exists for both individual defense and the common defense, meaning that semiautomatic rifles that may be useful in combat are protected.

The Second Amendment was written by men who had just revolted against a tyrannical government. They sought to guarantee that the People would have a final recourse should the new government they were forming turn tyrannical, or if a foreign invader tried to topple the Republic. Tench Coxe, delegate to the Constitutional Convention, wrote that "[w]hereas civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, ... the people are confirmed by the article in their right to keep and bear their private arms." A Pennsylvanian, *Remarks on the First Part of the Amendments to the Federal Constitution*, Phila. Fed. Gazette, June 18, 1789, at 2, col. 1 (as quoted in Fed. Gazette, June 18, 1789). Coxe reaffirmed this view in 1813, writing that "militia"

members,[6] "have all the right, even in profound peace, to purchase, keep and use arms of every description", deeming this militia "the army of the constitution." Whiting, *supra* n.6, at 652.

Several other founders and their contemporaries felt similarly. For example, Noah Webster, the famous early American lexicographer and later a member of the Connecticut House of Representatives from 1802–1807, wrote that "[b]efore a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution Proposed by the Late Convention Held at Philadelphia* (1787), reprinted in *Pamphlets on the Constitution of the United States*, at 56 (Paul Ford ed., 1888). Unlike in Europe, the United States is less susceptible to tyrants enforcing unjust laws "because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States." *Id.*

This view not only dominated the Founding era but continued through the 19th Century. In a speech to the House of Representatives, Abolitionist Representative Edward Wade said the "right to 'keep

---

[6] While Coxe defined "militia members" as "all the free white males of the proper ages," he made clear that the right was not limited to just them. "Independently to own and to use their arms, is another of the rights of *all* Americans, which they have caused to be solemnly engraven on the immutable tablet of their public liberties." Samuel Whiting, et al., *Second American Edition of the New Edinburgh Encyclopœdia*, vol.1, part 2, at 662 (1813) (emphasis in original).

and bear arms,' is thus guarantied, in order that if the liberties of the people should be assailed, the means for their defence shall be in their own hands." *Slavery Question: Speech of Hon. Edward Wade of Ohio in The House of Representatives, August 2, 1856*, at 7 (Buell & Blanchard Publishers, 1856), *available at* https://digitalcommons.cedarville.edu/cgi/viewcontent.cgi?article=1025&context=pamphlet_collection (last visited Aug. 26, 2024). Senator Charles Sumner's "The Crime Against Kansas" speech likewise bristled at the notion that slavery opponents in Kansas should be disarmed of their Sharps rifles by the pro-slavery government: "Never was this efficient weapon more needed in just self defence, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached." Charles Sumner, *The Kansas Question, Senator Sumner's Speech, Reviewing the Action of the Federal Administration Upon the Subject of Slavery in Kansas* 22-23 (Cincinnati, G.S. Blanchard, 1856).

Thomas Cooley, the longtime Michigan Supreme Court Justice, added "[t]he right declared was meant to be a strong moral check against the usurpation and arbitrary powers of rulers, and as necessary and efficient means of regaining rights when temporarily overturned by usurpation." Thomas M. Cooley, LL.C., *The General Principles of Constitutional Law in the United States of America* 298 (1898).

Henry Campbell Black, the original author of the famous *Black's Law Dictionary,* emphatically wrote that "[t]he citizen has at all times the right to keep arms of modern warfare." Henry Campbell Black,

Handbook of American Constitutional Law 403-04 (1895). And Black was far from alone in singling out the "arms of modern warfare" as what the Second Amendment protected most of all; many others said the same. *See*, *e.g.*, John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 152 (1868) ("a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons.").[7]

Some courts have already accepted this clear historical verdict. A district court in Illinois, for example, explained that:

> During the founding era, '[i]t was understood across the political spectrum that the right ... might be necessary to oppose an oppressive military force if the constitutional order broke down.' Therefore, although 'most undoubtedly thought [the Second Amendment] even more important for self-defense and hunting' the additional purpose of securing the

[7] Many other examples have been detailed in a recent law review article by Amici's counsel. *See* C.D. Michel & Konstadinos Moros, *Restrictions "Our Ancestors Would Never Have Accepted": The Historical Case Against Assault Weapon Bans*, 24 Wyo. L. Rev. 89, 90 (2024). While the focus of that article was the anti-tyranny purpose, another forthcoming article covers the common defense rationale. *See* Robert Leider, *The Individual Right to Bear Arms for Common Defense* (Aug. 2, 2024), available at https://ssrn.com/abstract=4918009 (last accessed Aug. 26, 2024) (arguing that individual rights scholars and collective rights scholars both miss that "a broad right to keep and bear arms fulfills collective defense aims").

> ability of the citizenry to oppose an oppressive military, should the need arise, cannot be overlooked.

Barnett, 671 F. Supp. 3d at 940. And an Oregon state court recently observed that "all the experts agree, there was no clear distinction between private and military use at the time of statehood [in 1859]." *Arnold v. Kotek*, No. 22-cv-41008, 2023 Ore. Cir. LEXIS 3887, at *9-10 (Or. Cir. Ct. Harney Cnty. Nov. 24, 2023); *see also Bruen*, 597 U.S. at 37 ("19th-century evidence [i]s 'treated as mere confirmation of what the Court thought had already been established.' ").

This Court has also previously explained how history showed "that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents." *Heller*, 554 U.S. at 598. And the fact that the United States may be far removed from an imminent threat of tyrannical government or foreign invasion at the present time should not temper this Court's understanding of the import of the anti-tyrannical underpinnings of the Second Amendment. "However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once." *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting).

In sum, there can be no historical tradition of barring firearms just because they may be useful in

combat,[8] when one of the main purposes of the Second Amendment was as a "doomsday provision" for the People to protect themselves from a tyrannical government. *See Silveira*, 328 F.3d at 570 (Kozinski, J., dissenting). "Once one understands the history of tyrants resorting to taking away people's arms to suppress political opposition, *Heller* explains, one can see that the militia clause fits perfectly with the operative clause." *Duncan,* 2023 WL 6180472, at *6.

By granting certiorari, the Court has a chance to make clear that, while personal self-defense may be core to the Second Amendment, the common defense against foreign invaders or domestic tyrants remains another critical reason for the right to keep and bear arms. Given that, common semiautomatic rifles, which would be most useful to a modern citizen militia, may not be banned. Foreign invaders and tyrants are not repelled with pocket pistols.

---

[8] Detailed examination of Maryland's proposed historical analogues will need to await merits briefing. But it is worth noting just how much of an emphasis states defending bans on common firearms have placed on concealed carry laws of the 19th Century. Maryland is no exception, and the Fourth Circuit's historical analysis was packed with references to restrictions on the carry of things like bowie knives, dirks, clubs, sword canes, and other bladed and melee weapons. Pet.App. 59a-60a. Of course, the weapons of that era *actually* analogous to modern semiautomatic rifles are not bowie knives and the like. They are repeating firearms like Winchester rifles and Colt revolvers. Such firearms were never banned by any states, and restrictions on their open carry were frequently struck down. *See, e.g.*, *Andrews v. State*, 50 Tenn. 165, 187 (1871).

CONCLUSION

The Court's intervention is necessary to protect its recent ruling in *Bruen*, to correct errors in the analysis that have emerged in the lower courts since that landmark ruling, and to prevent the use of those errors to marginalize the exercise of the Second Amendment right by millions of firearms owners who live in parts of the country where the right is disfavored by the majority. The Court should grant the petition for a writ of certiorari.

September 23, 2024

Respectfully submitted,

C.D. Michel
Counsel of Record
Anna M. Barvir
Konstadinos T. Moros
Michel & Associates, P.C.
180 E. Ocean Blvd., Ste. 200
Long Beach, CA 90802
Telephone: (562) 216-4444
cmichel@michellawyers.com
Counsel for Amicus Curiae