No. 21-1194

In The Supreme Court of the United States

VIRGINIA DUNCAN, et al.,

Petitioners,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION, FPC ACTION FOUNDATION, JOHN LOCKE FOUNDATION, WILLIAM WIESE, AND INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Firearms Policy Coalition (FPC) is a nonprofit organization devoted to advancing individual liberty and defending constitutional rights. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy. Its historical research aims to discover the founders' intent and the Constitution's original meaning. And its legal research and advocacy aim to ensure that constitutional rights maintain their original scope. FPC is a plaintiff in *Bianchi v. Frosh*, a challenge to Maryland's prohibition on common semi-automatic rifles that is currently pending before this Court on petition for a writ of certiorari.

FPC Action Foundation (FPCAF) is a nonprofit organization dedicated to preserving the rights and liberties protected by the Constitution. FPCAF focuses on research, education, and legal efforts to inform the public about the importance of constitutional rights—why they were enshrined in the Constitution and their continuing significance. FPCAF is determined to ensure that the freedoms guaranteed by the Constitution are secured for future generations.

John Locke Foundation was founded in 1990 as an independent, nonprofit think tank. It employs

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[1] All parties received timely notice and consented to the filing of this brief. No counsel for any party authored the brief in any part. Only *amici* funded its preparation and submission.

research, journalism, and outreach to promote Locke's vision: responsible citizens, strong families, successful communities, individual liberty, and limited constitutional government.

William Wiese is the lead plaintiff in the first legal challenge to California's magazine bans enacted in Proposition 63 (2016) and Senate Bill 1446 (2015–2016 Reg. Sess.), *Wiese v. Bonta*, filed in the Eastern District of California on April 28, 2017, case no. 2:17-cv-00903-WBS-KJN.

Independence Institute is the nation's second-oldest state level think tank, founded in 1985 on the eternal truths of the Declaration of Independence. The scholarship and *amicus* briefs of the Institute's Research Director, David Kopel, and of the Institute's Senior Fellow in Constitutional Jurisprudence, Robert G. Natelson, have been cited in 9 U.S. Supreme Court cases. These include *Heller* and *McDonald*, under the name of lead *amicus* International Law Enforcement Educators and Trainers Association (ILEETA).

SUMMARY OF ARGUMENT

Lower courts have unabashedly defied this Court's Second Amendment precedents. Ignoring this Court's mandate that the Second Amendment is not a second-class right, lower courts have repeatedly diminished its protections.

The Ninth Circuit is especially hostile to the right to keep and bear arms. It has upheld every firearm restriction—over 50 so far—brought before it. And it has repeatedly demonstrated that it will uphold every firearm restriction it considers, no matter the violence done to the rule of law. Indeed, several of this Court's Justices and several Ninth Circuit judges have acknowledged the court's disdain for arms rights. By showing that it will uphold *every* arms restriction it encounters, the court has eliminated the Second Amendment's protections altogether.

This Court has held that arms in common use are constitutionally protected and cannot be banned. But several recalcitrant lower courts have renounced this Court's common use test and applied their own test instead.

The Ninth Circuit and some other circuit courts apply heightened scrutiny, despite this Court twice expressly rejecting interest-balancing tests for arms prohibitions.

The Seventh Circuit asks whether the arms were common at the time of ratification, whether the arms are useful in militia service, and whether alternative arms exist. This Court rebuffed each element of the Seventh Circuit's test, yet it remains controlling in its jurisdiction.

The Fourth Circuit applies a test that allows firearms to be banned if they are most useful in military service. This test disregards this Court's statements acknowledging that Founding-Era militiamen used

the same arms for militia service and home defense. Under the Fourth Circuit's test, virtually none of the arms owned in the Founding Era would have been protected by the Second Amendment.

What is more, five federal circuit courts have held that protected arms can be banned. If protected arms can be banned, then they are no different from unprotected arms, and Second Amendment protection is meaningless.

This Court should use its supervisory powers to cabin the lower courts' concerted resistance to its Second Amendment decisions. When lower courts behave as if their own views trump Supreme Court precedent, they undermine the legal system's credibility, fairness, and integrity.

One remedy is summary reversal, which sends a corrective message in the face of lower-court resistance. Here, the Ninth Circuit did not merely apply the incorrect standard, it disavowed this Court's test and applied its own. As audacious as that was, it is typical in Second Amendment challenges.

Certiorari should be granted to halt the lower courts' repeated and open defiance of this Court's precedents, and to hold California's magazine confiscation unconstitutional.

ARGUMENT

I. Lower courts are nullifying the Second Amendment.

A. The lower courts are effectively overruling *Heller*.

"It is this Court's prerogative alone to overrule one of its precedents." *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)) (brackets omitted). Yet ever since *District of Columbia v. Heller*, 554 U.S. 570 (2008), and despite this Court's later assurance that the Second Amendment is not a "second-class right" to be "singled out for special—and specially unfavorable—treatment," *McDonald v. City of Chicago*, 561 U.S. 742, 778–79, 780 (2010), lower courts have unabashedly defied this Court's precedents.

"[T]he lower courts . . . have departed from [*Heller*], engaging in narrowing from below." *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 703 n.1 (6th Cir. 2016) (en banc) (Batchelder, J., concurring).

The Second Circuit acknowledged the Second Amendment's second-class status in its jurisdiction, warning against "assum[ing] that the principles and doctrines developed in connection with the First Amendment apply equally to the Second," because "that approach . . . could well result in the erosion of hard-won First Amendment rights." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012).

The Tenth Circuit admits to treating the Second Amendment inferiorly because "[t]he risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015). The Third Circuit agreed that this was a "good reason" for second-class treatment, and established an especially weak form of intermediate scrutiny for Second Amendment challenges: "First Amendment standards" and "intermediate scrutiny for equal protection purposes" were "not appropriate" for the Second Amendment. *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey (ANJRPC I)*, 910 F.3d 106, 122 n.28 (3d Cir. 2018). Likewise, the Sixth Circuit, emphasizing the "cogent difference" between the Second Amendment and other rights, "caution[ed] against imposing too high a burden on the government to justify its gun safety regulations." *Tyler*, 837 F.3d at 691.

In *McDonald*, however, this Court stressed that "[t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." 561 U.S. at 783. Yet lower courts have disregarded *McDonald*'s teachings and used the Second Amendment's public safety implications as justification for flouting *Heller*.

B. The Ninth Circuit is especially hostile to the Second Amendment.

The Ninth Circuit has heard over 50 Second Amendment challenges and upheld the restriction in *every* case. *Duncan v. Bonta*, 19 F.4th 1087, 1165 (9th Cir. 2021) (en banc) (VanDyke, J., dissenting).

Whenever a three-judge panel holds a firearm restriction unconstitutional, the court inevitably upholds the law on rehearing en banc. *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) (upholding special-need requirement for a concealed-carry permit); *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc) (upholding county ban on new gun stores); *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc) (upholding ban on open handgun carriage); *Duncan*, 19 F.4th 1087 (upholding magazine confiscation); *see also McDougall v. Cty. of Ventura*, 23 F.4th 1095 (9th Cir. 2022) (vacating panel opinion holding unconstitutional COVID prohibition on the operation of gun stores and firing ranges and ordering rehearing en banc).

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

The Ninth Circuit's most recent Second Amendment case demonstrates the court's incorrigibility. In

McDougall, a three-judge panel held that Ventura County's COVID orders shuttering gun shops, ammunition shops, and firing ranges for 48 days violated the Second Amendment. Recognizing that the ruling will "face an en banc challenge" because "this is *always* what happens when a three-judge panel upholds the Second Amendment in this circuit," Judge VanDyke added an extraordinary "alternative draft opinion" upholding the restrictions for the future en banc court to use. 23 F.4th at 1119 (VanDyke, J., concurring). He noted that his alternative draft opinion would save the en banc court time while "demonstrat[ing] just how easy it is to reach any desired conclusion under our current [Second Amendment] framework." *Id.* at 1120.

It did not take a "prophet" to guess what happened next. *Id.* at 1119. After Ventura County declined to petition for rehearing, the Ninth Circuit *sua sponte* ordered rehearing en banc.[2]

Several Justices have noted the Ninth Circuit's disdain for the Second Amendment. *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari) ("The Ninth Circuit's deviation from ordinary principles of law is unfortunate, though not surprising. Its dismissive treatment of

[2] The Ninth Circuit appears poised in *McDougall* to continue its defiance of both this Court's Second Amendment and COVID-restriction precedents. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) ("This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise.").

petitioners' [Second Amendment] challenge is emblematic of a larger trend."); *Peruta v. California*, 137 S. Ct. 1995, 1997, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) ("The approach taken by the en banc court is indefensible."); *Jackson v. City & Cty. of San Francisco*, 576 U.S. 1013, 1014 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the [Ninth Circuit] here, have failed to protect it.").

Ninth Circuit judges have noticed the court's contempt for the right. *Young*, 992 F.3d at 860 (O'Scannlain, J., joined by Callahan, Ikuta, and R. Nelson, JJ., dissenting) ("[O]ur circuit has not merely demoted" the Second Amendment to "the status of 'a second-class right' but has extinguished its status as a right altogether."); *Peruta*, 824 F.3d at 956 (Callahan, J., joined by Bea and N.R. Smith, JJ., dissenting) ("[T]he Second Amendment is becoming . . . no constitutional guarantee at all.") (quotation omitted); *Mai v. United States*, 974 F.3d 1082, 1104–05 (9th Cir. 2020) (VanDyke, J., joined by Bumatay, J., dissenting from denial of rehearing en banc) ("[O]ur court just doesn't like the Second Amendment very much. We always uphold restrictions on the Second Amendment right to keep and bear arms. Show me a burden—any burden—on Second Amendment rights, and this court will find a way to uphold it.").

"There exists on [the Ninth Circuit] a clear bias—a real prejudice—against the Second Amendment."

Mai, 974 F.3d at 1104–05 (VanDyke, J., dissenting from denial of rehearing en banc). This case presents an ideal vehicle for this Court to reestablish the proper administration of justice in Second Amendment cases.

II. This Court has addressed arms prohibitions four times, but lower courts still invent their own tests.

A. *Heller* held that the Second Amendment protects arms "in common use."

Heller specifically addressed "*what* types of weapons" the Second Amendment protects. It protects arms that are "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. In other words, "the sorts of weapons protected" are "those 'in common use at the time.'" *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

In the Founding Era, "when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 624 (quoting *Miller*, 307 U.S. at 179) (brackets omitted). Thus, "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Id.* at 624 (quoting *Miller*, 307 U.S. at 179). Because "weapons used by militiamen and weapons used in defense of person and home were one and the same," protecting arms in common use is "precisely the way in which the Second Amendment's operative

clause furthers the purpose announced in its preface." *Id.* at 625 (citations omitted).

Therefore, "the pertinent Second Amendment inquiry is whether [the arms] are commonly possessed by law-abiding citizens for lawful purposes today." *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring) (emphasis omitted).[3]

The record here shows that Americans own roughly 115 million of the prohibited magazines, App.176, which account for "approximately half of all privately owned magazines in the United States," App.4–5. Additionally, the magazines "are lawful in at least 41 states and under Federal law." *Duncan*, 19 F.4th at 1155 (Bumatay, J., dissenting).

Firearms capable of holding over 10 rounds predate the Second Amendment by centuries and have only recently been banned by any state. *See id.* at 1154–55; *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey (ANJRPC II)*, 974 F.3d 237, 254–59 (3d Cir. 2020) (Matey, J., dissenting); David Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849 (2015).

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[3] The specific make and model of a particular arm need not be popular. Rather, the arm must be among "the sorts of weapons" or "of the kind" that are "in common use at the time." *Heller*, 554 U.S. at 624, 627. The function of the arm is what matters. Thus, *Heller* paid no attention to the Colt Buntline nine-shot revolver that Dick Heller sought to possess, and instead focused on the commonality of handguns in general.

B. Lower courts have improperly second-guessed the people's choices of common arms for self-defense and other lawful purposes.

According to *Heller*, "common" arms are protected, but "dangerous and unusual" weapons may be prohibited. 554 U.S. at 627. Among "common" arms, the choice belongs to the people. If legislatures could decide that some common arms are not necessary, the handgun bans in *Heller* and *McDonald* would have been upheld.

Heller affirmed that the people have the right to choose their preferred arms: "*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." 554 U.S. at 629 (emphasis added). *McDonald* similarly explained, "this right applies to handguns because they are the most preferred firearm in the nation to keep and use for protection of one's home and family." 561 U.S. at 767 (quotations omitted). Dissenting in *McDonald*, Justice Stevens summarized *Heller*'s reasoning: "The Court struck down the District of Columbia's handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their *popularity* for that purpose." 561 U.S. at 890 n.33 (Stevens, J., dissenting). Notably absent from *Heller* was any attempt to estimate how often handguns are fired in self-defense.

The Ninth Circuit, however, has established a contrary rule: parties challenging a ban on common arms must prove how often the banned arms are fired in self-defense. *Duncan*, 19 F.4th at 1105 (discussing

number of uses), 1107 ("Plaintiffs have offered little evidence that large-capacity magazines are commonly used, or even suitable" for self-defense). The First and Third Circuits have adopted a similar rule. *See Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019) ("[T]he record . . . offers no indication that the proscribed weapons have commonly been used for home self-defense purposes."); *ANJRPC I*, 910 F.3d at 122 ("the record does not show that LCMs are well-suited or safe for self-defense").

Besides flouting *Heller*'s plain language, the lower courts seemingly indulge in willful blindness. All magazine bans—including California's—implicitly concede that magazines with capacities over 10 rounds are well-suited for defense of self and others. For example, the California ban exempts retired law enforcement officers, current law enforcement officers, and security guards. Cal. Penal Code §§ 32400–55. All jurisdictions with magazine bans have similar exemptions. The arms of security guards and typical law enforcement officers are selected solely for defensive purposes and are especially suitable for defense of self and others in civil society. The National Sheriffs' Association's *amicus* brief in *Kolbe v. Hogan* detailed why many law enforcement leaders believe that the arms chosen by typical law enforcement officers—including magazines over 10 rounds—are often the best choice for ordinary citizens. Brief for National Sheriffs' Association et al. as Amici Curiae Supporting Petitioners, *Kolbe v. Hogan* (2017) (No. 17-127).[4]

[4] https://tinyurl.com/yckm4usd.

Moreover, the Second Amendment is not limited to self-defense. The right includes hunting, target practice, militia service, and other lawful activities, according to *Heller* and every federal circuit court that has addressed the issue. *See* David Kopel & Joseph Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 204–07 (2017).

Whether courts agree with the choices made by the people is immaterial. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. "To limit self-defense to only those methods acceptable to the government is to effect an enormous transfer of authority from the citizens of this country to the government—a result directly contrary to our constitution and to our political tradition." *Friedman v. City of Highland Park*, 784 F.3d 406, 413 (7th Cir. 2015) (Manion, J., dissenting).

C. Lower courts have expressly rejected this Court's "common use" test and applied their own tests instead.

1. Several lower courts apply heightened scrutiny interest-balancing tests.

The en banc Ninth Circuit expressly rejected this Court's common use test in this case:

> To regard an arms-related device's popularity as the source of its own constitutionality is . . .

> circular. Devices may become popular before their danger is recognized and regulated, or the danger of a particular device may be exacerbated by external conditions that change over time. And a device may become popular because of marketing decisions made by manufacturers that limit the available choices. . . . In any event, the prevalence of a particular device *now* is not informative of what the Second Amendment encompassed when adopted, or when the Fourteenth Amendment was added to the Constitution, or when the Second Amendment was declared incorporated into the Fourteenth Amendment and so applicable to state and local governments. . . .

Duncan, 19 F.4th at 1126–27 (brackets and quotations omitted).[5] Having disregarded this Court's test, the Ninth Circuit applied intermediate scrutiny instead. Several other circuits have done the same. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011); *N.Y. State Rifle & Pistol Ass'n v. Cuomo (NYSRPA I)*, 804 F.3d 242 (2d Cir. 2015); *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *ANJRPC I*, 910 F.3d 106; *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc) (alternative holding).

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[5] The Ninth Circuit is correct that many of today's common arms are not identical to the arms that were common at other times throughout history. The continuity between 1791, 1868, *Heller* in 2008, and *McDonald* in 2010 was the enduring rule that "dangerous and unusual" arms can be prohibited, and common arms may not.

This Court has addressed arms prohibitions on four occasions—*Heller*, *McDonald*, *Miller*, and *Caetano*—and it has never indicated that interest-balancing is appropriate. Instead, this Court twice expressly rejected such an approach. *Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a free-standing 'interest-balancing' approach."); *McDonald*, 561 U.S. at 785 ("In *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing."). Justice Breyer acknowledged that the *Heller* majority ruled out heightened-scrutiny interest-balancing:

> Respondent proposes that the Court adopt a "strict scrutiny" test. . . . But the majority implicitly, and appropriately, rejects that suggestion. . . .
>
> Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. . . . [A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

Heller, 554 U.S. at 688–89 (Breyer, J., dissenting).

Heller did not conduct a tiered scrutiny analysis; it considered neither data on handgun crime or defensive handgun use, nor any other social science evidence. Heightened scrutiny was also absent from *Caetano*. Further, the *Caetano* concurrence simply stated that because "stun guns are widely owned and accepted as a legitimate means of self-defense across the country[,] Massachusetts' categorical ban of such weapons therefore violates the Second Amendment." 577 U.S. at 420 (Alito, J., concurring).

"The Supreme Court has at every turn rejected the use of interest balancing in adjudicating Second Amendment cases." *Tyler*, 837 F.3d at 702–03 (Batchelder, J., concurring). Yet lower courts continue to disregard this Court's precedents and apply means-end scrutiny to bans on constitutionally protected arms—making difficult empirical judgments in an area in which they lack expertise.

2. The Seventh Circuit considers whether the arms were common in 1791, whether the arms are useful for militia service, and whether alternative arms exist.

The Seventh Circuit also rejected this Court's "common use" test. The court argued that "relying on how common a weapon is at the time of litigation would be circular." *Friedman*, 784 F.3d at 409. For "it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute

banning that it, so that it isn't commonly owned. A law's existence can't be the source of its own constitutional validity." *Id.*[6]

After discarding this Court's test, the Seventh Circuit invented its own: "whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and whether law-abiding citizens retain adequate means of self-defense." *Id.* (quotation and citations omitted).

The 2015 *Friedman* test is similar to the Massachusetts Supreme Judicial Court's test that this Court reversed in *Caetano* in 2016. *Caetano* explained that questioning whether arms were "in common use at the time of the Second Amendment's enactment . . . is inconsistent with *Heller*'s clear statement that the Second Amendment 'extends . . . to . . . arms . . . that were not in existence at the time of the founding.'" 577 U.S. at 412 (quoting *Heller*, 554 U.S. at 582). And questioning whether the arms "are readily adaptable to use in the military" was inappropriate because "*Heller* rejected the proposition 'that only those weapons useful

[6] As Judge Manion noted in dissent, "the law is full of [circular] tests, and this one is no more circular than the 'reasonable expectation of privacy' or the 'reasonable juror.'" *Friedman*, 784 F.3d at 416 (Manion, J., dissenting). Moreover, the circularity is not problematic because "[o]verwhelmingly, newly developed weapons are merely updated versions of weapons already in the marketplace." *Id.* at 416 n.5.

in warfare are protected.'" *Id.* (quoting *Heller*, 554 U.S. at 624–25).

Friedman's discursion on the availability of alternate arms also contradicted *Heller*: "It is no answer to say, as petitioners do, 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*, 554 U.S. at 629.

Nevertheless, *Friedman* remains binding precedent in the Seventh Circuit. Indeed, the Seventh Circuit upheld a similar ban on common arms in 2019, notwithstanding the 2016 *Caetano* decision; the circuit denied that there were "*any* authority or developments that postdate our *Friedman* decision that require us to reconsider that decision." *Wilson v. Cook Cty.*, 937 F.3d 1028, 1035 (7th Cir. 2019).

3. The Fourth Circuit considers whether the banned arms are "most useful in military service."

The Fourth Circuit also rejected this Court's common use test:

> Under the . . . popularity test, whether an arm is constitutionally protected depends not on the extent of its dangerousness, but on how widely it is circulated to law-abiding citizens by the time a bar on its private possession has been enacted and challenged. Consider, for example, short-barreled shotguns and machineguns. But for the statutes that have long

> circumscribed their possession, they too could be sufficiently popular to find safe haven in the Second Amendment. Consider further a state-of-the-art and extraordinarily lethal new weapon. That new weapon would need only be flooded on the market prior to any governmental prohibition in order to ensure it constitutional protection.

Kolbe, 849 F.3d at 141. The en banc court dismissed this Court's common use test as an "illogical popularity test." *Id.* at 143.

Instead of considering common use, the Fourth Circuit adopted a test that allows firearms to be banned if they "are most useful in military service." *Id.* at 135. Thus, the en banc *Kolbe* court held that "[b]ecause . . . large-capacity magazines are . . . 'weapons that are most useful in military service'—they are among those arms that the Second Amendment does not shield." *Id.*

But as *Heller* recognized, "[i]n the colonial and revolutionary war era, small-arms weapons used by militiamen and weapons used in defense of person and home were one and the same." 554 U.S. at 624–25 (quoting *State v. Kessler*, 289 Ore. 359, 368 (1980)) (brackets omitted). Ordinary people possessing weapons most useful for military service was "precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface." *Id.* at 625.

In *Miller*, an apparently collusive case with virtually no record and no brief filed by the defendants, the lack of evidence showing that the banned "weapon is any part of the ordinary military equipment" precluded this Court from taking judicial notice "that the Second Amendment guarantees the right to keep and bear such an instrument." 307 U.S. at 178; *Heller*, 554 U.S. at 623 (discussing Brian Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U.J.L. & LIBERTY 48, 65–68 (2008)). *Heller* clarified that *Miller* did not "mean that *only* those weapons useful in warfare are protected." 554 U.S. at 624 (emphasis added).

As Justice Alito later explained, "*Miller* and *Heller* recognized that . . . the Second Amendment . . . protects . . . weapons . . . regardless of any particular weapon's suitability for military use." *Caetano*, 577 U.S. at 419 (Alito, J., concurring).

The First and Second Circuits rightly rejected a military test, *Worman*, 922 F.3d at 36; *NYSRPA I*, 804 F.3d at 256, but the en banc Ninth Circuit here appeared willing to incorporate the test into its heightened scrutiny. Although the court ultimately declined to decide whether the military test is consistent with *Heller*—because it upheld the ban under heightened scrutiny anyway—it found "significant merit" in the argument that the magazines can be banned based on the *Kolbe* military test. *Duncan*, 19 F.4th at 1102.

Kolbe's test leaves unprotected every arm Founding-Era militiamen were required in 1791 to keep for militia service, effectively severing the Second

Amendment's operative clause from the purpose announced in its preface. The anti-historical military test violates *Miller* and *Heller*, undermines the right to self-defense, and defeats the purpose for which the Second Amendment was codified. *See Heller*, 554 U.S. at 599 ("[T]he purpose for which the right was codified" was "to prevent elimination of the militia.").[7]

Lower courts are free to criticize this Court's "common use" test, just as they can criticize any Supreme Court test. Lower courts are not free to refuse to apply a test required by this Court.

D. If protected arms can be banned, then Second Amendment protection is meaningless.

Several Circuits adjudicating arms prohibitions—including the Ninth Circuit here—have assumed that the prohibited arms were protected by the Second Amendment. *NYSRPA I*, 804 F.3d at 257; *ANJRPC I*, 910 F.3d at 117; *Heller II*, 670 F.3d at 1261; *Worman*, 922 F.3d at 36; *Fyock*, 779 F.3d at 997; *Duncan*, 19 F.4th at 1103; *Kolbe*, 849 F.3d at 138 (alternative holding). But then each of these courts proceeded to hold that the prohibitions do not violate the Second Amendment.

If protected arms can be completely banned, then they are no different from unprotected arms. Under

[7] A challenge to the Fourth Circuit's test as it applies to common semiautomatic rifles is currently pending before this Court on petition for a writ of certiorari in *Bianchi v. Frosh*, docket number 21-902.

Heller, "common" arms are protected, but "dangerous and unusual" arms are not. 554 U.S. at 627 ("[T]hat the sorts of weapons protected were those in common use at the time" is "supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.").[8] Yet despite *Heller*'s emphasis on the difference between common arms and those that are dangerous and unusual, they are all the same to the First, Second, Third, Fourth, Ninth, and D.C. Circuits. In those courts, the government can ban arms regardless of protection. Second Amendment protection, consequently, is meaningless.

III. This Court should use its supervisory powers to cabin the lower courts' concerted resistance to its Second Amendment decisions.

"Our decisions remain binding precedent until we see fit to reconsider them." *Bosse*, 137 S. Ct. at 2 (quoting *Hohn v. United States*, 524 U.S. 236, 252–53 (1998)). But the lower courts have consistently undermined *Heller*, over several Justices' objections.[9]

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[8] "A weapon may not be banned unless it is *both* dangerous *and* unusual." *Caetano*, 577 U.S. at 417 (Alito, J., concurring). A weapon that is "unusual" is the antithesis of a weapon that is "common." Thus, an arm "in common use" cannot be "dangerous and unusual," and is necessarily protected.

[9] *See Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (denouncing "noncompliance with our Second Amendment precedents" by "several Courts of Appeals"); *Jackson*, 576 U.S. at 1014 (Thomas, J., joined by Scalia, J., dissenting from

When a significant number of lower courts determine that their own views trump Supreme Court precedent, they threaten the ideal that courts are engaged in the law rather than politics. Indeed, a dissenting judge in this case alleged that "[t]he majority of our court distrusts gun owners" and argued that it "is simply not plausible" to suggest that "our judges' personal views about the Second Amendment and guns have not affected our jurisprudence." *Duncan*, 19 F.4th at 1159, 1166 (VanDyke, J., dissenting).

Enforcing precedents "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *State Oil Co. v. Khan*, 522 U.S. 3, 20

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denial of certiorari) ("lower courts" have "failed to protect" *Heller*'s holding); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (Noting "a distressing trend: the treatment of the Second Amendment as a disfavored right."); *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari) ("[T]he lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment."); *N.Y. State Rifle & Pistol Ass'n v. City of N.Y. (NYSRPA II)*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring) ("I share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*."); *id.* at 1544 (Alito, J., joined by Gorsuch, J., dissenting) (If "this case is representative of the way *Heller* has been treated in the lower courts . . . there is cause for concern."); *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., joined by Kavanaugh, J., dissenting from denial of certiorari) ("[A]s I have noted before, many courts have resisted our decisions in *Heller* and *McDonald*.").

(1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Noncompliance with this Court's precedents, in contrast, undermines "the Nation's confidence in the judge as an impartial guardian of the rule of law." *Bush v. Gore*, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting).

IV. The "bitter medicine" of summary reversal is warranted by blatant defiance from the lower courts.

Summary reversal is "bitter medicine," *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting), "usually reserved for cases where the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error," *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (quotation omitted). It "sends a corrective message, particularly in the face of resistance." Edward Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 613 (2016). Thus, it was appropriate where lower courts repeatedly failed to apply the appropriate standard under the Antiterrorism and Effective Death Penalty Act, *White v. Wheeler*, 577 U.S. 73 (2015), where the lower court "failed to apply the correct prejudice inquiry we have established," *Sears v. Upton*, 561 U.S. 945, 946 (2010), and where "the opinion below reflect[ed] a clear misapprehension of summary judgment standards in light of our precedents," *Tolan v. Cotton*, 572 U.S. 650, 659 (2014).

Here, summary reversal is appropriate to rebuke the open resistance to this Court's Second Amendment

doctrines. The Ninth Circuit disavowed this Court's test and applied its own. Audacious as it was, it has come to be expected. "With what other constitutional right would this Court allow such blatant defiance of its precedent?" *Rogers*, 140 S. Ct. at 1867 (Thomas, J., joined by Kavanaugh, J., dissenting from denial of certiorari).

CONCLUSION

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

Respectfully submitted,

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