No. 24-936

IN THE

Supreme Court of the United States

ANDREW HANSON, TYLER YZAGUIRRE, ERIC KLUN, AND NATHAN CHANEY,
Petitioners,

v.

DISTRICT OF COLUMBIA AND PAMELA A. SMITH, IN HER OFFICIAL CAPACITY AS CHIEF OF THE D.C. METROPOLITAN POLICE DEPARTMENT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

GEORGE LESTER LYON, JR.
BERGSTROM ATTORNEYS
1929 Biltmore Street, NW
Washington, DC 20009
(202) 669-0442
gll@bergstromattorneys.com

EDWARD M. WENGER
Counsel of Record
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK, PLLC
2300 N Street NW
Suite 643
Washington, DC 20037
(202) 737-8808
emwenger@holtzmanvogel.com

Counsel for Petitoners

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REPLY BRIEF

The District's argument, for the most part, is that this case isn't the right one to address a constitutional issue that has perplexed the lower courts. It argues that there is no circuit split because the *outcome* of this case is consistent with others, while it ignores that multiple "courts have decided the same legal *issue[s]*"—e.g., what is an "arm"—"in opposite ways, based on their holdings in different cases with very similar facts." Stephen M. Shapiro et al., Supreme Court Practice § 4.3, at 4-11 (11th ed. 2019). It laments the "undeveloped" record, yet it never once describes what evidence the current record lacks to fully and finally resolve this case. And it insists that the "decision below is correct," even though the D.C. Circuit upheld a categorical ban on an astoundingly common arm despite *Heller*'s proclamation that "[w]hatever the reason" an arm is "chosen by Americans" for lawful purposes, "a complete prohibition of their use is invalid" if the American public elects to make their use "common." *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

Not one of the District's arguments counsels in favor of withholding certiorari. The sole legal question and answer (which requires no additional factual development) is, in Judge Walker's parlance, the following: In "*Heller*, [this] Court held that the government cannot categorically ban an arm in common use for lawful purposes. Magazines holding more than ten rounds of ammunition are arms in common use for lawful purposes. Therefore, the government cannot ban them." App. 48. Courts throughout the Country have misapplied this test in a wide variety of ways, and the more confusion that

arises with each additional incorrectly reasoned opinion, the more the lower courts backslide into the sort of interest balancing this Court warned against in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), if not open rebellion to *Heller*'s central holding. For these reasons and those that follow, the Court should grant the petition for a writ of certiorari.

ARGUMENT

I. THE CIRCUITS REMAIN INCONTROVERTIBLY SPLINTERED OVER SEVERAL LEGAL ISSUES CRITICAL TO THE SECOND AMENDMENT ANALYSIS.

In a tremendous example of placing form well above substance, the District insists that the lower courts need no clarity regarding how they are to adjudicate Second Amendment challenges to categorical arms bans. In the District's view, because the repeatedly fractured circuit court decisions have (so far) upheld bans on Standard Capacity Magazines, it matters not that the analysis of any one circuit differs from that of all the other circuits. On this point, the District is mistaken.

To begin, none of the circuits have yet correctly applied *Heller* and *Bruen* to this issue. A number of dissenting circuit court judges have, however, advocated for the correct result, which severely undermines the sense of uniformity that the District tries to concoct.[1] That said, the conflict with this

[1] *See, e.g.*, App. 48–99 (Walker, J., dissenting); *Duncan v. Bonta*, 131 F.4th 1019, 1069 (9th Cir. 2025) (en banc) (VanDyke,

Court's precedent, on its own, counsels in favor of granting this petition. *See infra* at 11–13.

This case, moreover, does not present a run-of-the-mine "'novel question' that 'could benefit from further attention in the court[s] of appeals.'" BIO at 15 (quoting *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting)). The issue here has (in some form) existed since the Court decided *Heller* in 2008. The lower courts consistently misapplied that watershed case and diluted the Second Amendment protection that the Court thought it had fortified. Throughout the Nation, they perpetuated this erosion through the vehicle of means-end scrutiny.

In 2022, the Court decided *Bruen* to, among other things, "expressly reject[] the application of any 'judge-empowering "interest-balancing inquiry." *Bruen*, 597 U.S. at 22–23 (citing *Heller,* 554 U.S. at 634; *McDonald v. City of Chicago*, 561 U.S. 742, 790–91 (2010)). And because past is often prologue, since *Bruen*, "attention" from the lower courts has accomplished nothing but further deterioration of the Second Amendment's protection.

This depreciation not only creates an irreconcilable conflict with *Heller* and *Bruen*, but it also has led to a wide divergence of the ways the lower courts have (mis)applied the Second Amendment inquiry to categorical arms bans. To be certain, Petitioners

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J., dissenting); *Bevis v. City of Naperville*, 85 F.4th 1175, 1204 (7th Cir. 2023) (Brennan, J., dissenting); *Bianchi v. Brown*, 111 F.4th 438, 483 (4th Cir. 2024) (en banc) (Richardson, J., joined by Niemeyer, J., Agee, J., Quattlebaum, J., and Rushing, J., dissenting).

maintain that, under *Heller*, the undisputed commonality of Standard Capacity Magazines, coupled with the District's failure to demonstrate that they are not used for lawful purposes, means that the District's ban is unconstitutional. But even if this Court were to bless relitigating *Heller's* holding that the Second Amendment protects arms that are in common use (and it should not), the inconsistent application of the *Bruen* test, the consistent return of the lower courts to interest balancing, and the importance of this issue, all require this Court's intervention.

The splits among the lower courts over these issues are real and intractable. Some courts hold that the common-use inquiry belongs at *Bruen* Step One,[2] notwithstanding that *Heller* held that *all* bearable arms are presumptively protected. *Heller*, 554 U.S. at 582. Some say that it belongs at *Bruen* Step Two.[3] And some assume the answer without deciding it,[4] even though this issue dictates whether the government or a Second Amendment challenger carries the burden of proof.

Moreover, some courts hold that Standard Capacity Magazines are not "arms" for purposes of the

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[2] *See, e.g.*, *United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023) (resolving common use at step one), rev'd, 602 U.S. 680 (2024).

[3] *See, e.g.*, *Bevis*, 85 F.4th at 1198 (assuming common use is part of step two).

[4] *See, e.g.*, App. 9 n.3.

Second Amendment,[5] some hold that rifles aren't either,[6] and others (like the court below) recognize (correctly) that they are.[7] The answer to this question, in turn, dictates whether the Second Amendment applies at all.

To be certain, *each* circuit that has addressed a Second Amendment challenge to a categorial arms ban (in general) or a Standard Capacity Magazine ban (in particular) has bungled the inquiry. At a minimum, however, the wide variety of analytical approaches means that they can't all be right. After *Heller*, the lower courts twisted and contorted this Court's Second Amendment analysis, resulting in an interest-balancing inquiry that deprived law-abiding Americans throughout the Nation from exercising their preexisting, fundamental right to defend themselves in public. Now, even after *Bruen,* the same circuits that denied ordinary citizens their right to carry a gun outside the home are upholding laws making it all but impossible to do so.

Heller sought to put to the rest the issue of what arms the Second Amendment protects, "for we will have to consider [it] eventually." 554 U.S. at 624. So, this Court should reject the District's farcical claim that this is nothing but a "'novel question' that 'could benefit from further attention in the court of appeals.'" BIO 15 (quoting *Spears*, 555 U.S. at 270 (Roberts,

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[5] *See, e.g.*, *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368, 2022 U.S. Dist. LEXIS 227097, 2022 WL 17721175, at *4 (D.R.I. 2022).

[6] *See, e.g.*, *Bevis*, 85 F.4th at 1198.

[7] *See, e.g.*, App. 9.

C.J., dissenting)). The time for clarity is now, and that clarity cannot come from anywhere other than this Court.

II. NO VEHICLE ISSUE COUNSELS IN FAVOR OF DENIAL.

Even though (curiously) the District seems to think that the Second Amendment issue present in this case is indeed worthy of the Court's attention,[8] it nonetheless argues that this isn't the case to address it. It points, first, to the purportedly "'preliminary,' 'abbreviated,' 'early,' and 'undeveloped'" record. BIO at 21 (quoting App. 5, 14, 18, 32). It also gestures at the other preliminary-injunction factors. Neither argument, however, counsels in favor of withholding review here.

A. No additional factual development can salvage the District's categorical ban.

Despite the District's record-related mantra, the posture of this case is no impediment. First, the Court routinely grants certiorari from denials of preliminary injunctions when the grant would establish the correct constitutional standard. *See, e.g.*, *Fulton v. Philadelphia*, 593 U.S. 522 (2021); *NIFLA v. Becerra*, 585 U.S. 755 (2018); *Obergefell v. Hodges*, 576 U.S. 644 (2015). Where "there is some important and clear-

[8] *See* BIO at 23 ("Although petitioners labor mightily to create a sense of urgency that the Court must grant *this* petition, see Pet. 26-29, there are many cases in courts across the country where the issues raised in the petition will soon be teed up for this Court's review on a proper trial or summary judgment record.") (emphasis in original).

cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Stephen M. Shapiro et al., Supreme Court Practice § 4.18 (10th ed. 2013) (collecting cases). Given the undisputed lack of clarity among the circuit courts, *see supra* at 2–6, addressing this issue now is not only appropriate but imperative.

Moreover, additional factual development would make no difference. Had the court below applied *Heller* and *Bruen* faithfully, the purely legal question Judge Walker identified would have required no additional factual development at all: In "*Heller*, [this] Court held that the government cannot categorically ban an arm in common use for lawful purposes. Magazines holding more than ten rounds of ammunition are arms in common use for lawful purposes. Therefore, the government cannot ban them." App. 48. Since at least 2011, the D.C. Circuit has noted that "magazines holding more than ten rounds are indeed in 'common use.'" *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1261 (D.C. Cir. 2011). And the record here contains unrebutted material establishing that (1) the overwhelming majority of self-defense handguns sold legally to law-abiding citizens come stock with Standard Capacity Magazines, and (2) a majority of individuals owning Standard Capacity Magazines choose to do so for self-defense. At no point throughout any stage of the litigation has the District suggested that it had, or could have, evidence to rebut what has been in the record since the earliest stages of this case.

Even if the Court were to allow this case to proceed to *Bruen*'s history-and-tradition inquiry (and it should

not), the District has never provided any information or argument whatsoever as to the sort of factual development it desires. Nor could it. For purposes of *Bruen* Step Two, the question here is simply whether the United States has a Founding Era history and tradition of banning commonly possessed arms to ensure people cannot fire rapidly without pausing to reload. Answering that question requires assessing historic statutory and regulatory firearms restrictions; i.e., *legal* analysis. Petitioners and the District each provided their competing statutory and regulatory analyses to the district court and the D.C. Circuit, and both the district court and D.C. Circuit assessed those competing submissions. Returning this case to the district court would, to be certain, accomplish nothing, which Judge Walker recognized when he advocated for entry of a *permanent* injunction in his dissent. App. 99.

Finally, this case is not, as the District would have it, "very similar to *Harrel v. Raoul*, 144 S. Ct. 2491 (2024), where this Court denied several similar petitions for certiorari of interlocutory orders, and where the parties then engaged in additional discovery on remand as the cases proceeded towards trial." BIO at 22. That case addressed (primarily) a so-called "assault-weapons" ban, and the Seventh Circuit's analysis turned (largely) on its (mistaken) equation of the civilian AR-15 rifle with the military M-16 machine gun. *See Bevis*, 85 F.4th at 1195. In that case, the Seventh Circuit remanded for a determination whether the banned semi-automatic rifles had a relevantly similar "firing rate," "kinetic energy," "muzzle velocity," and "effective range" to the fully automatic M-16. *Id.* at 1196. This case, in

contrast, deals exclusively with Standard Capacity Magazines. Rather than the sort of hard-science analysis relevant to, e.g., the kinetic energy of a rifle round, the question here (as discussed *supra*) requires nothing of the sort. Indeed, other than its ipse dixit, the District makes no real attempt to back up its claim that this case should be resolved the same way the Court addressed *Raoul*.

B. The other preliminary-injunction factors cannot manufacture a vehicle problem.

Next, the District asserts that the balance of the equities and the question whether irreparable harm arose provide alternative grounds for affirmance. Not so.

To begin with, a Second Amendment violation inflicts a per se irreparable injury. This is so because irreparable harm arises anytime a constitutional infringement is suffered. The Court has so held for fifty years. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.); *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) (citing *Elrod*, 427 U.S. at 373); *Tandon v. Newsom*, 593 U.S. 61, 64 (2021) (per curiam). And although those cases do in fact address First Amendment injuries, the District makes no attempt to explain why that matters for purposes of the irreparable-injury prong. Indeed, its attempt to distinguish a First Amendment injury from a Second Amendment injury runs headlong into this Court's admonition that the Second Amendment may not be treated as "a second-class right, subject to an entirely different body of rules than the other Bill of Rights

guarantees," *Bruen*, 597 U.S. at 70 (quoting *McDonald*, 561 U.S. at 780).

Had the D.C. Circuit correctly concluded that Petitioners' Second Amendment injury is indeed irreparable, the balance of the equities would tilt dramatically in favor of them. Because the Second Amendment itself emerges from interest balancing by the people and leaves no room for the third branch of government to determine whether the rights it protects are "*really* worth insisting upon," *Heller*, 554 U.S. at 634 (emphasis in original), the balance of the equities tilts decidedly for Petitioners. And, because "enforcement of an unconstitutional law is always contrary to the public interest," *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) ("enforcement of an unconstitutional law vindicates no public interest"), this prong cannot salvage the District's argument.

And, finally, Judge Walker's ultimate conclusion remains correct. A permanent injunction, rather than a preliminary one, is appropriate where, as here, the correct "'holding at this stage makes a certain outcome inevitable.'" App. 99 & n. 233 (quoting *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017*)*. Because "D.C.'s ban 'merits invalidation under *Heller*,'" the Court here can (and should) grant certiorari, and then issue a *permanent* injunction, thus rendering moot the District's misguided focus on the other preliminary-injunction inquiries.

III. THE D.C. CIRCUIT'S ULTIMATE CONCLUSION CANNOT BE SQUARED WITH *HELLER* OR *BRUEN*.

Finally, the District is wrong that the D.C. Circuit got it right. As noted throughout Petitioners' filings (as well as by Judge Walker), if an arm is in common use for lawful purposes, it cannot be categorically banned. Full stop. The District's contrary argument requires only two small rejoinders.

First, automatic weapons *aren't* categorically banned. The National Firearms Act of 1934 makes it more difficult to acquire one, and perhaps prohibitively expensive for most people, but law-abiding citizens can still own one. Second, there *aren't* 700,000 automatic weapons in civilian hands. There are at last count 741,146 automatic weapons in the Bureau of Alcohol, Tobacco, Firearms and Explosives' national registry, of which 7,872 are registered in the District of Columbia.[9] Most of those, however, were manufactured after May 19, 1986, which means they can only be possessed by law enforcement and dealers to law enforcement. *See* 18 U.S.C. § 922(o). Only pre-May 1986 machine guns may be possessed by civilians, and the best information regarding that number is roughly 118,000, and that far smaller figure itself includes automatic weapons owned by law

[9] Firearms Commerce in the United States ANNUAL STATISTICAL UPDATE 2021, Exhibit 8: National Firearms Act Registered Weapons by State. As of FY 1999, there were 277,362 machine guns in the NFA registry. Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms. Commerce in Firearms in the United States, Table B.3—National Firearms Act Registered Weapons by State, FY 1999.

enforcement entities, rather than civilians.[10] In other words, the District is wrong both on the law and on the facts.

Next, the District lambastes Petitioners for purportedly "suggesting that '*whatever* the reason' arms become commonly possessed, 'a complete prohibition of their use . . . [is] invalid." BIO at 29 (quoting Pet. 15 (emphasis in BIO)). The problem for the District is that this statement is no "suggestion" by Petitioners. It is a direct quote from *Heller*: "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." *Heller*, 554 U.S. at 629.

Therein lies the ultimate problem for the District. *Heller* held what it held, which is "that the government cannot categorically ban an arm in common use for lawful purposes." App. 48 (Walker, J., dissenting). The District may not agree with *Heller* or *Bruen*, but neither it nor the lower courts are at liberty to transgress those holdings. At bottom, Standard Capacity Magazines are indisputably common and incontrovertibly used for lawful purposes. Under *Heller*, Petitioners need show no more to demonstrate that the law must be enjoined, and this Court's intervention is necessary to prevent more lower courts from eroding the fundamental,

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[10] *See* Legislation to Modify the 1968 Gun Control Act: Hearings Before the H. Comm. on the Judiciary, 99th Cong. 1153, 1165 (1986) (statement of Stephen Higgins, Director of the ATF).

preexisting right that the Second Amendment enshrined.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

EDWARD M. WENGER
Counsel of Record
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK, PLLC
2300 N Street NW
Suite 643
Washington, DC 20037
(202) 737-8808
emwenger@holtzmanvogel.com

GEORGE LESTER LYON, JR.
BERGSTROM ATTORNEYS
1929 Biltmore Street, NW
Washington, DC 20009
(202) 669-0442
gll@bergstromattorneys.com

Counsel for Petitioners