No. 24-1046

In the Supreme Court of the United States

JASON WOLFORD, ET AL.,
Petitioners,
v.
ANNE E. LOPEZ, Attorney General of Hawaii,
Respondent.

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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding, in direct conflict with the Second Circuit, that Hawaii may presumptively prohibit the carry of handguns by licensed concealed carry permit holders on private property open to the public unless the property owner affirmatively gives express permission to the handgun carrier?

2. Whether the Ninth Circuit erred in solely relying on post-Reconstruction Era and later laws in applying Bruen's text, history and tradition test in direct conflict with the holdings of the Third, Fifth, Eighth and Eleventh Circuits?

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Buckeye Institute works to restrain governmental overreach at all levels of government. The Buckeye Institute files lawsuits and submits amicus briefs to fulfill its mission. As it pertains to this case, The Buckeye Institute has been active in advocating for the constitutional right to keep and bear arms. See, *e.g.*, *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1 (2022); *Herrera* v. *Raoul*, 144 S. Ct. 2491 (2024) (cert. denied); *Antonyuk* v. *James*, No. 24-795, 2025 WL 1020368 (U.S. Apr. 7, 2025) (cert. denied); *Wilson* v. *Hawaii*, 145 S. Ct. 18 (2024) (cert. denied); *Doe* v. *Columbus*, Delaware C.P. No. 23-cv-H-02-0089 (Ohio).

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

SUMMARY OF THE ARGUMENT

This Court in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), affirmed that the Second Amendment protects an individual right to keep and bear arms. In *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), the Court incorporated that right against the states. *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1 (2022), then reinforced the applicability of the Second Amendment to the states and clarified the standard for analyzing Second Amendment claims. Yet, despite being "bound to adhere to the controlling decisions" of this Court on constitutional issues, *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982), some lower state and federal courts have refused to follow these precedents.

This case reflects a broader pattern of resistance that undermines the Court's authority and risks relegating the Second Amendment to second-class status. Litigants and the public rightly question the rule of law when courts "mouth the correct legal rules . . . while avoiding those rules' logical consequences." *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting). The Court should grant certiorari to reaffirm its authority and correct the Ninth Circuit's deviation.

ARGUMENT

"[Chief Justice] John Marshall has made his decision; now let him enforce it." [2]

I. The Binding Nature of Supreme Court Precedent

There are times when presidents, legislators, and judges are so unhappy with the rulings of the Supreme Court that they either subtly or openly defy the Court. Usually, it is subtle, but occasionally, it is more overt. But, of course, lower courts "are bound to adhere to the controlling decisions of the Supreme Court." *Hutto*, 454 U.S. at 375.

Justice Rehnquist explained the danger of allowing inconsistent appellate decisions to stand, warning that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower [ ] courts no matter how misguided the judges of those courts may think it to be." *Id.*

Moreover, the appearance of result-oriented jurisprudence—particularly in politically charged cases—undermines public confidence, regardless of whether the suspicion is warranted. As Professor Evan Caminker writes,

> If federal law means one thing to one court but something else to another, the

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[2] Attributed to President Andrew Jackson, 1832. Stephen Breyer, Assoc. Just., U.S. Supreme Court, University of Pennsylvania Law School Commencement Remarks (May 19, 2003), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_05-19-03.

> public might think either or both courts unprincipled or incompetent, or that the process of interpretation necessarily is indeterminate. Each of these alternatives subverts the courts' efforts to make their legal rulings appear objective and principled.

Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 853–54 (1994).

Professor Caminker remarks that "[c]onsiderable anecdotal evidence suggests that when judges care deeply about a particular legal issue but disagree with existing precedent, they often attempt to subvert the doctrine and free themselves from its fetters by stretching to distinguish the holdings of the higher court." *Id.* at 819. Professor Bhagwat agrees, writing that while "outright defiance" remains exceedingly rare," "both evidence and observation suggest that more subtle, subterranean defiance, [than direct noncompliance] through means such as reading Supreme Court holdings narrowly, denying the logical implications of a holding, or treating significant parts of opinions as dicta, is far from unusual." Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and The nature of the "Judicial Power"*, 80 B.U. L. Rev. 967, 986 (2000).

II. Judicial resistance to precedent undermines constitutional rights.

Lower court resistance following *Brown* v. *Board of Education*, 347 U.S. 483 (1954), provides a cautionary example of how disfavored precedent can be evaded despite clear holdings. See, *e.g.*, *Flemming* v. *S.C. Elec. & Gas. Co.,* 128 F. Supp. 469, 470 (E.D.S.C. 1955) (holding that *Brown* applied only to "the field of public education"), *rev'd*, 224 F.2d 752 (4th Cir. 1955); *Lonesome* v. *Maxwell*, 123 F.Supp. 193 (D.Md. 1954) (upholding a "whites only" golf course), *rev'd sub nom*. *Dawson* v. *Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir.1955). This is not to suggest that the Court, in the years following *Brown*, should have enacted all the Civil Rights Act's protections by judicial fiat. But the early post-*Brown* cases, which gave lip service to precedent while declining to apply it, show how the pattern of evasion can undermine precedent.

A. Lower Courts' Resistance to Second Amendment Precedent since *Heller*

Some courts at both the state and federal levels have declined to apply *Heller's* holding or *Bruen's* test. Lower courts resisted *Heller* by minimizing its framework or crafting analytical alternatives like the two-step test. See *Rogers* v. *Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting). Courts seized on dicta (*e.g.*, "presumptively lawful" regulations) to avoid meaningful analysis. See Leo Bernabei, Bruen *as* Heller*: Text, History, and Tradition in the Lower Courts*, 92 Fordham L. Rev. Online 1, 11 (2024).

One example of the lower courts refusing to apply *Heller* is *Peruta* v. *County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016). There, the District Court for the Southern District of California upheld an ordinance allowing the carrying of weapons outside of the home only with "good cause." The Ninth Circuit initially reversed and remanded, but sitting *en banc*, held that the general public had no Second Amendment right to carry concealed weapons. This holding was narrower than the district court's decision but still qualified the individual right. Two members of this Court found the approach taken by the *en banc* court to be "indefensible" and "untenable." *Peruta* v. *California*, 582 U.S. 943 (2017) (Thomas, J., dissenting from the denial of cert.).

Judicial resistance to *Heller* was not surprising. As Professors Reynolds and Denning noted shortly after the opinion was published, "[e]xperience with other seemingly groundbreaking Supreme Court decisions in recent years, such as *United States* v. *Lopez*, suggests that lower-court foot-dragging may limit *Heller's* reach . . . ." Glenn H. Reynolds & Brannon P. Denning, Heller*'s Future in the Lower Courts*, 102 Nw. U. L. Rev. 2035, 2035 (2008). They observed that, at the time, it was "impossible to review the Second Amendment jurisprudence from the federal courts of appeals . . . without noting two things: a significant hostility toward individual rights arguments and a surprisingly deep investment in their own case law, despite its rather tenuous anchor in the Supreme Court's decisions." *Id.* at 2038. Expected or not, where lower courts refuse to apply this Court's precedent, they deny citizens their fundamental rights and

return the Second Amendment to a second-class status.

Following *Bruen*, lower courts have continued to disregard this Court's precedent. Some state and federal courts have applied *Bruen* so narrowly as to give it no meaning. See, *e.g.*, *People* v. *Rodriguez*, 171 N.Y.S.3d 802, 806 (N.Y. Sup. Ct. 2022); see also *Rocky Mountain Gun Owners* v. *Polis*, 701 F. Supp. 3d 1121, 1138 n.13 (D. Colo. 2023)(claiming to "perform the analysis as instructed," but stretching *Bruen* because of "reservations that turning to a particular historical era should dispositively determine how we conceive of and defend certain rights"), *appeal dismissed*, 2024 WL 5010820 (10th Cir. Aug. 23, 2024). Some courts have expressed outright defiance. See *Frey* v. *Nigrelli*, No. 21 CV 05334, 2023 WL 2929389, *5 (S.D.N.Y Apr. 13, 2023) (denying injunction to prevent enforcement of licensing regime on the basis that "while *Bruen* did away with means end scrutiny when considering whether a law violates the Second Amendment, the Court must still consider the parties' hardships and the public interest when deciding on whether to issue an injunction") (internal citations omitted). As some lower courts did with *Heller*, some courts avoid *Bruen* by "upholding modern laws based on loose, or only a few, historical predecessors . . . jettison[ing] historical inquiry entirely by fashioning a *Bruen* 'Step Zero' or by relying on pre-*Bruen* circuit precedent." Bernabei, *supra*, at 15.

B. The Ninth Circuit's Pattern of Defiance

Though the Ninth Circuit is not unique in its resistance to *Bruen*, it is a repeat offender. See, *e.g.*, *Duncan* v. *Bonta*, 133 F.4th 852 (9th Cir, 2025) (en

banc) (Bumatay, J., dissenting) (citing *Duncan* v. *Bonta*, 19 F.4th 1087, 1140 (9th Cir. 2021) (en banc) (Bumatay, J., dissenting); *Duncan* v. *Bonta*, 83 F.4th 803, 808 (9th Cir. 2023) (en banc) (Bumatay, J., dissenting)). The Ninth Circuit is complicit with the Hawaii Supreme Court's apparent resistance to follow this Court's Second Amendment jurisprudence. One might see this resistance as a blatant challenge to the Court's judicial directives on the Second Amendment, but such a view is entirely reasonable. In *Wilson* v. *Hawaii*, the Supreme Court of Hawaii determined that the "Spirit of Aloha" was more important than this Court's reasoning and holdings. 154 Haw. 8, 27 (2024). Not so dissimilar, the Ninth Circuit emulates the ethos of the late Judge Reinhardt, adhering to a spirit of "open resistance, defiance even, toward [the] Supreme Court" rather than the spirit *and the letter* of the laws that it is meant to apply. Linda Greenhouse, *Dissenting Against the Supreme Court's Rightward Shift*, N.Y. Times (Apr. 12, 2018).[3]

This Court in *Bruen* emphasized that few places were "sensitive" at the founding. 597 U.S. at 30. Yet the Ninth Circuit stretched that category below to cover 96.4% of Maui County's public land. Worse, it relied on post-Civil War laws rooted in racial animus. Such precedents are legally and morally illegitimate. See Stephen Halbrook, *The Right to Bear Arms: A Constitutional Right of the People or a Privilege of the Ruling Class?* 299 (2021); *Kipke* v. *Moore*, 695 F. Supp. 3d 638, 659 (D. Md. 2024).

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[3] https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html.

The Ninth Circuit's errant analysis in this case is hardly surprising, considering that it has consistently engaged in interest balancing while attempting to disguise it as *Buren's* history and tradition test. This "sleight of hand" has not been lost on dissenting Ninth Circuit judges:

> Although they try to disclaim it now, make no mistake—[interest balancing] is what the majority has been doing and continues to do. . . . Look at the majority's language pre-Bruen and post-Bruen and notice how little has changed (even after the majority attempts to mask its defiance):

MAJORITY PRE-*BRUEN*	**MAJORITY POST-*BRUEN***
"[L]arge-capacity magazines tragically exacerbate the harm caused by mass shootings." *Duncan*, 19 F.4th at 1109	"Mass shootings are devastating for the entire community, and large-capacity magazines exacerbate the harm." *Duncan*, 133 F.4th at 859
"California's ban on large-capacity magazines imposes only a minimal burden on the exercise of the	"California's law imposes only a minimal burden on the right of armed self-defense.

Second Amendment right." *Duncan*, 19 F.4th at 1104	*Duncan*, 133 F.4th at 880 n.11
"[W]e conclude that California's ban is a reasonable fit, even if an imperfect one, for its compelling goal of reducing the number of deaths and injuries caused by mass shootings." *Duncan*, 19 F.4th at 1110	"Its prohibition on a weapon's component that serves the sole function of enabling a specific, and especially dangerous, use of a firearm fits neatly within the tradition" of banning especially dangerous weapons. *Duncan*, 133 F.4th at 881
"California's ban on large-capacity magazines is a reasonable fit for the compelling goal of reducing gun violence." *Duncan*, 19 F.4th at 1111	"California's modern law['s] . . . justification for burdening the right to armed self-defense" [fits the need] to protect innocent persons from infrequent but devastating harm." *Duncan*, 133 F.4th at 877

Duncan, 133 F.4th at 914 (9th Cir. 2025) (Bumatay, J., dissenting) (citations cleaned up).

The open disdain for this Court's jurisprudence, which led the Ninth Circuit to refuse to properly analyze a constitutional claim, is "indefensible" and "untenable," *Peruta*, 582 U.S. at 943 (Thomas, J., dissenting from the denial of cert.). Accordingly, immediate and drastic action from this Court is warranted.

III. This case is an effective and appropriate vehicle to address the questions presented.

The lower courts' continued noncompliance with *Heller* and *Bruen* demonstrates the urgent need to reiterate the applicability of the Second Amendment to the states. Hawaii may believe its history and culture are unique and warrant a different approach to firearms issues, but it remains part of the United States and, as such, is subject to the U.S. Constitution. This case clearly presents the critical question of how to determine where and when "people" can "bear" arms.

While Hawaii asserts that it is the "Aloha" state, it is not friendly to all people. In 2021, 27 people were murdered. 714 were subjected to rape. 2,208 endured aggravated assault. See Department of the Attorney General of Hawaii, *A Review of Uniform Crime Reports* 6 (2021). Perhaps they could have averted being victimized if they could just exercise their right to bear arms. These victims of violent crime in the "Aloha" state will never know. But the Court has the power to let Hawaiians have the ability to protect themselves in public.

Beyond addressing the circuit splits identified by Petitioners, this case warrants this Court's consideration for three other reasons. First, this case is an effective vehicle to clarify that courts should disregard historical laws that prevented disfavored individuals from exercising their right to keep and bear arms not because the firearms were dangerous, but because of racial animus. Second, the Court can clarify here that the "sensitive places" example in *Bruen* was not "specific guidance" but rather was an illustrative example of proper Second Amendment analysis. Finally, intervention by this Court is desperately needed to ensure adherence to its precedent. The Ninth Circuit, along with some other lower courts, have purposefully misappplied, narrowed, or outright ignored *Heller* and *Bruen*. The analysis in those decisions ranges from "inexplicable" and "unexplained," *Felkner* v. *Jackson*, 562 U.S. 594, 598 (2011), to a "judicial middle finger to the Supreme Court." *Duncan*, 133 F.4th at 890 (9th Cir. 2025) (Nelson, J., dissenting).

If renegade or misguided courts are allowed to ignore this Court's Second Amendment precedent, or "narrow" it out of existence, "then the safety of all Americans [will be] left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe." *Caetano* v. *Massachusetts*, 577 U.S. 411, 422 (2016) (Alito, J., concurring in the judgment).

CONCLUSION

As this Court has repeatedly stated, "[t]he government of the United States has been emphatically termed a government of laws, and not of men." *Marbury* v. *Madison*, 5 U.S. 137, 163 (1803). This Court should grant the petition and reverse the Ninth Circuit.

Respectfully submitted,

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May 5, 2025