No. 24-203

In the

Supreme Court of the United States

DAVID SNOPE, ET AL.,
Petitioners,

v.

ANTHONY G. BROWN, in his official capacity as Attorney General of Maryland, ET AL.,
Respondents.

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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

David C. Tryon
Counsel of Record
Alex M. Certo
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

QUESTION PRESENTED

Whether the Constitution permits the State of Maryland to ban semiautomatic rifles that are in common use for lawful purposes, including the most popular rifle in America.

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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 policies in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute assists executive and legislative branch policymakers by providing ideas, research, and data to enable lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs. As it pertains to this case, The Buckeye Institute has been active in advocating for the constitutional right to keep and bear arms. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

SUMMARY OF ARGUMENT

The meaning and scope of the Second Amendment have long been debated and ratiocinated. However, in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this

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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 provided the notice required by Rule 37.2.

Court settled many of those debates. In *McDonald* v. *City of Chicago, Ill.*, 561 U.S. 742 (2010), it incorporated those protections and applied them to the states. Finally, in *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1 (2022), and *United States* v. *Rahimi*, 144 S. Ct. 1889 (2024), the Court reinforced and clarified the proper mode of analysis for Second Amendment challenges.

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 either ignored or outright refused to apply *Bruen*. The refusal to follow this Court's precedent is not a new phenomenon—especially in politically charged situations. The tendency to stray from recent precedent has been manifest in Second Amendment jurisprudence since *Heller*.

Litigants and the public may take the cynical view that Justice O'Connor voiced, noting that lower court judges "know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting). They may also see deviations from this Court's holdings as attempts to properly apply precedent to new facts or even to anticipate how this Court might rule. In this case, however, the Fourth Circuit distorted this Court's Second Amendment framework and missapplied it.

It remains for this Court to function as the final authority and promote uniformity on federal constitutional issues throughout the federal and state

judiciaries. The Court should, therefore, grant the petition to stop the lower courts' and state legislators' continued misapplication of the Court's Second Amendment jurisprudence.

ARGUMENT

I. Academic Views of Resistance to Hierarchical Precedent

This Court has been clear: Lower courts are bound to adhere to the controlling decisions of the Supreme Court. See *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.*

Nonetheless, commentators have observed that lower courts often do not follow this Court's precedent. "Instead of adhering to the most persuasive interpretations of the Court's opinions, lower courts often adopt narrower readings." Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L.J. 921 (2016). Professor Re calls this practice "narrowing from below," while Professor Ashutosh Bhagwat refers to it as "underruling." Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Fed. Courts, & The Nature of the "Judicial Power"*, 80 B.U.L. Rev. 967, 970 (2000). Regardless of the name applied though, the practice "challenges the authority of higher courts and can generate legal disuniformity." Re, *supra*, at 921.

Professor Bhagwat posits that underruling has actually become more prevalent in the modern age, arguing that "[t]he past three or four decades [of the 20th century] have witnessed a fundamental change in attitudes within the federal judiciary regarding the proper function and role of the United States Supreme Court in the judicial hierarchy." Bhagwat, *supra*, at 967. He suggests that counter-hierarchical tendencies in the lower courts are, in fact, a good thing, and that efficiency favors allowing lower courts to anticipate changes in direction at the Supreme Court and save the litigants the trouble of having "to go all the way to the Supreme Court to overturn a precedent which is widely acknowledged to be moribund." *Id.*

Where a decision has long been held in disrepute, for example, *Lochner* v. *New York*, 198 U.S. 45 (1905) or *Korematsu* v. *United States*, 323 U.S. 214 (1944), which were discredited but not expressly overruled for decades, Professor Bhagwat's inclination that lower courts should save litigants the trip carries some weight. But that rationale does not apply here, a mere two years after *Bruen.* Indeed, at least some lower courts are side-stepping the Court's directives.

Professor Bhagwat also argues that avoiding the straight jacket of hierarchical precedent promotes "percolation" of issues through the courts of appeals. Bhagwat, *supra*, at 979. Percolation and disagreement certainly serve a purpose in judicial decision making and a "temporary disuniformity of federal law can assist the Court in learning from experience." Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4, 65 (1998). But that percolation comes at a cost—particularly in cases like this (and

other Second Amendment cases) where "concerns about equality and fair notice would tip the scales in favor of uniformity in the definition of criminal offenses." *Id.* at 66. Other costs include "legal uncertainty, unprotected reliance, inability to plan and excessive litigation." *Id.* In many cases, percolation might not be worth the cost. *Id.* Further, true "percolation" assumes the lower courts are faithfully applying a newly articulated rule to different factual situations, not the wholesale abandonment of that rule. Professor Bhagwat's suggested avoidance approach is an echo of Judge Reinhardt's more blatant "open resistance, defiance even, toward [the] Supreme Court . . . ." Linda Greenhouse, *Dissenting Against the Supreme Court's Rightward Shift,* N.Y. Times (April 12, 2018).[2] When asked about his record number of reversals, he "took it with a smile. 'They can't catch 'em all,' he said." *Id.* Fortunately, Professor Bhagwat's apparent willingness to reject binding Supreme Court precedent is not the majority position in the academy, and more importantly, this Court has soundly rejected it.

Allowing lower court decisions that appear to ignore governing precedent presents another problem for the federal judiciary as an institution. Scholars, judges, and citizens have seen shadows of result-oriented jurisprudence underlying the underruling of politically charged cases. Regardless of the merits of these suspicions, when the Court allows a decision that seems plainly at odds with precedent—

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

particularly a politically charged issue—its legitimacy can suffer. As Professor Evan Caminker writes:

> If federal law means one thing to one court but something else to another, the 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, [rather 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." Bhagwat, *supra*, at 986.

Indeed, Justice O'Connor voiced the concern that some lower court judges "know how to mouth the correct legal rules with ironic solemnity while

avoiding those rules' logical consequences." *TXO Prod. Corp.*, 509 U.S. at 500 (O'Connor, J., dissenting). The Fourth Circuit's decision in this case not only avoids *Bruen's* logical conclusion, but it did so while reading into the Court's test restrictions that defy the Second Amendment's text, history, and tradition.

II. Judicial resistance to hierarchical precedent requires the Court's correction.

Lamentably, some of our jurisprudential history demonstrates how, without this Court's reinforcement of its decisions, obdurate lower court judges can frustrate unfashionable constitutional rights when they do not like the Court's directives. Some of the grossest—and most shameful—examples of lower courts "underruling" this Court's clear holdings occurred immediately following this Court's in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Despite the Court's plain holding that "separate but equal" facilities were "inherently unequal," some courts, deploying language that would make modern readers cringe, clung to the discredited rule in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), taking great pains to avoid *Brown's* logical conclusion. 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"); *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), *aff'd*, 350 U.S. 877 (1955). It seems that some judges could not accept the concept that all men really are "created equal." The Declaration of Independence ¶ 2 (U.S. 1776).

And another "constitutional revolution led by the Supreme Court—via its *Lopez* and *Morrison* decisions limiting congressional power under the Commerce Clause—essentially petered out in the face of lower-court resistance." Glenn H. Reynolds & Brannon P. Denning, Heller's *Future in the Lower Courts*, 102 Nw. U. L. Rev. 2035, 2038 (2008) (*Heller's Future*) (citing *United States* v. *Lopez*, 514 U.S. 549 (1995) and *United States* v. *Morrison*, 529 U.S. 598 (2000)). Following *Lopez*, Professors Reynolds & Denning "undertook a survey of lower court decisions in which Commerce Clause challenges were raised to ascertain the impact of *United States v. Lopez* in the lower courts." Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark. L. Rev. 1253, 1253 (2003). They concluded that, with few exceptions, "the lower courts tended to limit the holding in *Lopez* to its facts and to treat it as an isolated case, or at least as commanding no more than minimal scrutiny to ensure that the Government make some showing of a connection between regulated activity and interstate commerce." *Id.* at 1253–254. Professors Reynolds and Denning later observed that in light of *Gonzales* v. *Raich*, 545 U.S. 1 (2005), "lower court reluctance to read *Lopez* and *Morrison* looked prescient." *Heller's Future*, *supra*, at 2038. Except for rare circumstances, see *Nat'l Small Bus. United* v. *Yellen*, No. 5:22-CV-1448-LCB, 2024 WL 899372 (N.D. Ala. Mar. 1, 2024), their prediction appears to be correct, see, *e.g.*, *United States* v. *Bron*, 709 F. App'x 551, 553 (11th Cir. 2017) (distinguishing *Lopez* and upholding a conviction for unlawful intrastate possession of a firearm).

And already some commentators have suggested that lower courts may resist this Court's recent decision in *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024). See, *e.g.*, Josh Blackman, *Much Ado About Chevron*, reason (June 30, 2024).[3]

These are but a few examples of judicial predilections resisting vertical directives.

III. Judicial Resistance to This Court's Second Amendment Decisions

The constitutional rights preserved by the Second Amendment are "not [ ] second-class right[s], subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (citing *McDonald*, 561 U.S. at 780). But this fundamental right seems to engender more hostility—both legislative and judicial—than most any other constitutional right. And some lower courts still have not accepted the Court's clear directive that they must fully recognize and honor this right.

In the aftermath of *Heller's* holding that the Second Amendment conferred an individual right to keep and bear arms some courts expressed disagreement with that conclusion. Whether out of an earnest attempt to apply a new rule to new facts or the "subterranean defiance" recognized by Professor Bhagwat, some courts at both the state and federal levels failed to enforce it. For example, in *People* v. *Abdullah*, 870 N.Y.S.2d 886, 887 (N.Y. Crim. Ct. 2008), a New York court "underruled" *Heller* on the basis that its ban on

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[3] https://reason.com/volokh/2024/06/30/much-ado-about-chevron/.

home firearm possession was not a complete ban, and *Heller* had not been expressly incorporated into the Fourteenth Amendment and did not apply to the states. The *Abdullah* court premised its nonincorporation holding on a pre-*Heller* Second Circuit case, *Bach* v. *Pataki*, 408 F.3d 75 (2d Cir. 2005), which was subsequently overruled in *McDonald*. But this help came too late for Mr. Abdullah, whose conviction was affirmed.

Yet, even after this Court decided *McDonald*, lower courts continued to find ways to distinguish *Heller* and frustrate its holding. *E.g., Silvester* v. *Becerra,* 583 U.S. 1139 (2018) (Thomas, J., dissenting from the denial of cert.) (discussing lower courts' resistance to *McDonald* and *Heller*).

> Instead of following the guidance provided in *Heller*, these courts minimized that decision's framework. See, *e.g.*, *Gould* v. *Morgan*, 907 F.3d 659, 667 (C.A.1 2018) (concluding that our decisions "did not provide much clarity as to how Second Amendment claims should be analyzed in future cases"). They then "filled" the self-created "analytical vacuum" with a "two-step inquiry" that incorporates tiers of scrutiny on a sliding scale.

Rogers v. *Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of cert.). Some courts simply seized the "presumptively lawful" dicta in *Heller* and outright refused to conduct any further analysis. See, *e.g.*, 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.) (emphasis added).

Bruen itself, of course, arose from cramped readings of *Heller* and a challenge to a New York licensing scheme that essentially prohibited the carrying of firearms outside of the home absent a showing of a particular need, even when an applicant had acquired a license for hunting and target practice. The Second Circuit held that the statute, which effectively banned individuals from bearing arms in contravention of *Heller*, passed constitutional muster under the intermediate scrutiny test. See *Kachalsky* v. *County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

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 . . . ." *Heller's Future*, *supra*, at 2035. 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.

Despite further admonishment in *Bruen*, lower courts have continued to neglect 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*, No. 23-CV-02563-JLK, 2023 WL 8446495, at *13 n.13 (D. Colo. Nov. 13, 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"). 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.

The present case should not have been so hard.

Heller explained the Second Amendment protects "the sorts of weapons protected were those 'in common use at the time.'" *Heller*, 554 U.S. at 627 (quoting *United States* v. *Miller*, 307 U.S. 174, 179 (1939)). Further, "banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' would fail constitutional muster." *Id* at 628–629 (internal citation omitted). Certainly among rifles, AR-15-style rifles are Americans' most favored firearm. Pet. at 7–11. And it is rarely used other than legally. "It does not take a Nobel laureate to figure out that if Americans own 400 million guns and 400 million gun crimes are not being committed, that Americans are using their guns for something other than crime." *Miller* v. *Bonta*, 699 F. Supp. 3d 956, 1007 (S.D. Cal. 2023), *appeal held in abeyance*, No. 23-2979, 2024 WL 1929016 (9th Cir. Jan. 26, 2024). Indeed, the percentage of American-owned AR-15s used illegally is almost infinitesimal. See, *e.g.*, *Miller* v. *Bonta*, 542 F. Supp. 3d 1009, 1040 (S.D. Cal. 2021), *vacated and remanded on other grounds*, No. 21-55608, 2022 WL 3095986 (9th Cir. Aug. 1, 2022) ("[M]ost national estimates suggest assault weapons are used in crimes less than 7% of the time."); see also *id.* at 1049 (noting that—contrary to common perceptions—three studies concluded that "assault weapons" are used in "mass shootings" only 8.25%, 10.3%, or 22%, of the time, respectively); Nicholas Johnson et. al., *2024 Supplement for Firearms Law and the Second Amendment: Regulation, Rights, and Policy* 108 (2024) ("Recent studies show no deterrent effects between [ ] 'assault weapon' bans and mass shootings."); see generally Stephen Halbrook, *America's Rifle, The Case For the AR-15* (2022); *id.* at

13 ("The AR-15 Is As American As Apple Pie—And Not An "'Assault Weapon.'"). If there is any firearm other than the handguns mentioned in *Heller* for lawful purposes, the AR-15 would be it. See also Bill Bandy, *It Is Really Worth Insisting Upon: A New Test for the Second Amendment*, 60 Hous. L. Rev. 197, 230 (2022) ("*Heller I* held that the Second Amendment protected weapons 'in common use,' and it is hard to argue the most popular firearms and accessories are not protected under that test.").

Instead of following *Heller* and *Bruen* to the logical conclusion that America's most popular rifle, owned by millions of law-abiding citizens, is protected by this inalienable right, the Fourth Circuit (like some other courts) limited the right to keep and bear arms only "for the purpose of self-defense," Pet. App. 21a. See also *id.* at 14a (holding that "the covered firearms are not within the scope of the constitutional right to keep and bear arms for self-defense").

As the Fourth Circuit noted, self-defense is a "central component" of the right to keep and bear arms guaranteed by the Second Amendment. *Id.* However, while citing this proposition, the Fourth Circuit ignored the rather definitive language and intent of *Heller* when it acknowledged the will of the people—namely that they are the ones who selected pistols for defensive use—even though it is also true that the overwhelming number of homicides are committed with handguns. See, *e.g.*, *Miller* v. *Bonta*, 699 F. Supp. 3d at 968, *appeal held in abeyance*, 2024 WL 1929016 (concluding that "less than .00001832% [of AR-15s] were used in homicides"). By the lower court's reasoning, guns that are most commonly used in

crime—regardless of legal usage—should be banned and only others allowed. And that reasoning would mean that rifles—including and perhaps especially AR-15s, which are rarely used in crime—should be constitutionally protected. But in *Heller*, the Court looked to the people's selection of firearms for legal purposes, not some "expert's" or judge's view of what firearms people *should be* permitted to use to defend themselves. The Second Amendment protects a right of the people—not a right of the experts to choose for the people.

But because of its sympathy for the state to try to stave off more horrific crimes by criminals, the Fourth Circuit took its eye off the ball of the Court's jurisprudence. It rationalized its decision by asserting that "*Bruen* implies that a weapon must be 'in common use today for self-defense' to be within the ambit of the Second Amendment." Pet. App 44a. However, while the lower court may have *inferred* that limitation, it is a stretch to say that *Bruen implied* such a limitation.

Because self-defense is a central component of the Second Amendment, cases where the challenged law clearly burdens that component are easy. Thus, for example, *Heller* and *Bruen* struck down the challenged laws with "little difficulty." *Bruen*, 597 U.S. at 32. But where other components of the Second Amendment may be concerned, the task may not be as easy. But see *Miller*, 307 U.S. at 178 (asking whether the firearm at issue had "some reasonable relationship to the preservation or efficiency of a well regulated militia"). The difficulty of the task does not, however, give lower courts free rein to abdicate their duty to fully and faithfully analyze the law.

The Fourth Circuit's opinion should have acknowledged from the beginning that the AR-15 is the single most popular rifle owned by Americans, but that—unfortunately—some demented individuals have committed horrific crimes using these firearms. It should have acknowledged that but nonetheless found that Maryland's reaction to ban *anyone and everyone* from owning these popular firearms, overstepped its authority. Indeed, Maryland used an emotionally charged—but incorrect—term, referring to the AR-15 and other semi-automatic rifles as "assault weapons." The U.S. Army manual is very clear on what constitutes an "assault weapon." An assault weapon is a selective fire rifle that can be set to fire either in a semi-automatic mode or a fully automatic—or machine gun mode. U.S. Army, Foreign Science and Technology Center, ST-HB-07-03-74, *Small Arms Identification and Operation Guide–Eurasian Communist Countries* 105 (1974). Further, As recently as 2022, the Associated Press Stylebook advised using the term "semi-automatic rifle" and to "[a]void *assault rifle* and *assault weapon*, which are highly politicized terms that generally refer to AR- or AK- style rifles designed for the civilian market, but convey[ ] little meaning about the actual functions of the weapon." APStylebook (@APStylebook), X (formerly Twitter) (July 13, 2022, 3:58 PM).[4]

The concurrence (comprising of six judges also in the majority) below disappointingly suggests that a majority vote can supersede the Constitution: "Why

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[4] https://x.com/APStylebook/status/1547309549488640000?s=20&t=FDkbWHKu2wUkJUbMQ6IATw.

even have a ballot box when our laws are fossilized in a history book? That's no way to foster a democracy, but it's an effective way to paralyze one. Of course, the Court doesn't require 'a law [to be] trapped in amber.'" Pet. App. 79a. The concurrence's pronouncement first ignores or mischaracterizes the foundation of our government—we live in a *constitutional* republic, not a pure democracy. As such, we hew to the Constitution first, and the ballot box second.

Further, since the court derides protection of technological advances in "arms" protected by the Constitution, would the court allow Maryland to ban all but the quill and pen under the guise that the founders did not anticipate computers, the internet, Twitter (now "X"), Instagram, and other advancements that facilitate and amplify harms propagated by libel and incitements to riots? Of course the law is not trapped in amber—that is why the Constitution allows for technological improvements and protects those improvements even when a few in our society abuse those constitutionally-protected advancements.

And as always with those that disparage lawfully owned firearms, the concurrence employs charged language to blame "one man" and "an AR-15." See *id.* The concurrence never recognized the multiple life-saving uses of AR-15s. See, *e.g.*, *Miller* v. *Bonta*, 699 F. Supp. 3d at 967–68, *appeal held in abeyance*, 2024 WL 1929016 (recounting stories of a pregnant woman protecting herself and her 11-year-old daughter with an AR-15 from intruders, and a disabled 61 year-old man doing the same); *Miller* v. *Bonta*, 542 F. Supp. 3d at 1034, *vacated and remanded on other grounds*, 2022

WL 3095986 (recounting additional, similar stories). In any event, the few horrific uses of firearms should not control whether AR-15 bans are constitutional. But certainly the principal opinion and the concurrence below would have a bit more credibility if they showed a little more respect for the millions of law-abiding AR-15 owners.

The Fourth Circuit's open disdain for the Second Amendment, which led it to improperly analyze a constitutional claim, is "indefensible" and "untenable." *Peruta*, 582 U.S. at 943 (Thomas, J., dissenting from the denial of cert.). "By contorting what little guidance [the Court's] precedents provide" on the definition of protected arms, *Harrel* v. *Raoul*, 144 S. Ct. 2491, 2492 (2024) (Thomas, J., statement on the denial of cert.), the Fourth Circuit obtained its results-oriented outcome. The Court should not allow this to stand.

IV. The judicial resistance in this case—and similar "assault weapons" ban cases—requires the Court's immediate action.

"The [Fourth] Circuit's decision illustrates why this Court must provide more guidance on which weapons the Second Amendment covers." *Id.* (Thomas, J., statement on the denial of cert.). Just as many courts are showing disdain towards the right to keep and bear arms, so are legislators—which of course has necessitated court action.

Ten states—California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New York, and Washington—the District of Columbia, and some cities have enacted laws that generally ban the sale, manufacture, and transfer of

so-called "assault weapons." Consequently, there have been and continue to be numerous cases challenging these laws:

- *Capen* v. *Campbell*, No. 24-1061 (1st Cir. appeal filed Jan. 17, 2024);
- *Nat'l Ass'n for Gun Rts.* v. *Lamont*, No. 23-1162 (2nd Cir. appeal filed Aug. 16, 2023);
- *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.* v. *Platkin*, No. 24-2415 (3rd Cir. appeal filed Aug. 6, 2024);
- *Miller* v. *Bonta*, No. 23-2979 (9th Cir. appeal filed Oct. 23, 2023);
- *Worman* v. *Healey*, 922 F.3d 26, 37 (1st Cir. 2019) (finding Massachusets "restriction on semiautomatic assault weapons . . . does not heavily burden the core right of self-defense in the home"), *abrogated by Bruen*, 597 U.S. 1;
- *New York State Rifle & Pistol Ass'n, Inc.* v. *Cuo*mo, 804 F.3d 242, 262 (2d Cir. 2015) (upholding New York and Connecticut's bans on "assault weapons"), *abrogated by Bruen*, 597 U.S. 1;
- *Bevis* v. *City of Naperville, Illinois*, 85 F.4th 1175, 1195 (7th Cir. 2023) (upholding Illinois' ban on the AR-15 because it was not similar enough to firearms that are used for individual self-defense), *cert. denied sub nom. Harrel* v. *Raoul*, 144 S. Ct. 2491 (2024); see *Miller* v. *Bonta*, No. 23-2979, 2024 WL 1929016, at *1 (9th Cir. Jan. 26, 2024) (holding case in abeyance and maintaining stay of district court

opinion striking down California's ban on modern semiautomatic firearms);

- *Hanson* v. *D.C.*, 671 F. Supp. 3d 1, 16 (D.D.C. 2023) (finding magazines with more than 10 rounds "fall outside of the Second Amendment's scope because they are most useful in military service and because they are not in fact commonly used for self-defense").

Given that the states most likely to attempt these bans are also in federal circuits that have shown the Fourth Circuit's disdain for the right to keep and bear arms and have upheld these bans or similar laws, it is unlikely that a circuit split will emerge from the states and cities banning these firearms commonly owned for lawful purposes. See *Annual Gun Law Scorecard*, Giffords Law Center[5] (ranking states based on the stringency of their firearm laws). For example, at least nine states have attempted to evade Congress's prohibition on imposing liability on the firearms industry by creating "public nuisance" causes of action.[6] Eight of these states also have bans on "assault weapons," and the ninth is similarly located in a hostile circuit.

Forcing law-abiding citizens who live in hostile jurisdictions to forgo their Second Amendment rights

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[5] https://giffords.org/lawcenter/resources/scorecard/ (last visited Aug. 27, 2024).

[6] See Cal. Civ. Code § 3273.52; Colo. Rev. Stat. § 6-27-105; Del. Code Ann. tit. 10, § 3930; Haw. Rev. Stat. Ann. § 134-102; H.D. 947, 2024 Leg., 446th Sess. (Md. 2024); 815 Ill. Comp. Stat. Ann. 505/2BBBB; N.J. Stat. Ann. § 2C:58-35; N.Y. Gen. Bus. Law § 898-b; Wash. Rev. Code Ann. § 7.48.330.

until the legislature in another state passes a similar law, and that law is struck down by a circuit court that is not hostile to the Second Amendment, perpetuates an injustice on those law-abiding citizens. Waiting to rule on this issue encourages blatant "open resistance, defiance even, toward [the] [ ] Court . . . ." Greenhouse, *supra*. It encourages judges who believe the Court "can't catch 'em all,'" *id.*, to continue to act out.

This case presents the Court with the perfect opportunity to prevent such an injustice and promote judicial economy by deciding the question presented. The *en banc* Fourth Circuit divided on the question presented and teed up both sides of the debate for this Court's consideration. Contrary to Professor Bhagwat's percolation theory, waiting for the hostile courts to erroneously agree with the majority below will not likely provide the Court with any additional information. And it is unknown if non-hostile courts will ever have the opportunity to address the question. The Court should put an end to the debate now rather than allowing unnecessary litigation and injustice to continue.

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). The Court should not allow a few hostile lower courts to undermine the highest law in the land. The Court should grant the petition and reverse the Fourth Circuit Court of Appeals.

Respectfully submitted,

David C. Tryon
Counsel of Record
Alex M. Certo
The Buckeye Institute
88 East Broad Street
Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org