No. 24-936

In the

Supreme Court of the United States

ANDREW HANSON, et al.,

Petitioners,

v.

DISTRICT OF COLUMBIA, et al.,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* NATIONAL SHOOTING SPORTS FOUNDATION, INC., IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST[1]

The National Shooting Sports Foundation, Inc. ("NSSF"), is the firearm industry's trade association. Founded in 1961, NSSF's mission is to promote, protect, and preserve hunting and shooting sports. NSSF has approximately 10,000 members—including thousands of federally licensed manufacturers, distributors, and sellers of firearms, ammunition, and related products. NSSF has a clear interest in this case. Its members engage in the lawful production, distribution, and sale of constitutionally protected arms. When a territory like the District of Columbia tries to categorically ban such an arm, that action threatens NSSF members' businesses and infringes on their and their customers' constitutional rights.

Unfortunately, the District of Columbia is not alone in enacting such laws. NSSF has challenged a number of similar restrictions in courts across the Nation. For instance, NSSF was a petitioner in *Barnett v. Raoul*, No. 23-879 (U.S.), which challenged an Illinois law banning the same ammunition feeding devices that the District has now banned (and more), where the Seventh Circuit reversed a preliminary injunction against such a law. While this Court denied certiorari, Justice Alito would have granted the petition, and Justice Thomas wrote separately to underscore the problems with Illinois' law and the Seventh Circuit's approach. *See Harrel v. Raoul*, 144 S.Ct. 2491 (2024). Justice Thomas noted that the

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[1] Counsel of record were given notice of this filing. No counsel for any party authored this brief in whole or in part. No entity or person, aside from *amicus*, its members, and its counsel, made any monetary contribution toward this brief.

Seventh Circuit was poised to "ultimately allow[] Illinois to ban America's most common civilian rifle," "[b]y contorting [the] guidance our precedents provide" and "contriv[ing]" a test "unmoored from both text and history." *Id.* at 2492-93. And he urged the Court to at some point "consider the important issues presented by these petitions." *Id.* at 2492.

This case is one of many that present the same important issues as the Illinois case. *See also, e.g.*, *Ocean State Tactical v. Rhode Island*, No. 24-131 (U.S.); *Snope v. Brown*, No. 24-203 (U.S.). And the decision below makes many of the same errors that the Seventh Circuit made (and that other Circuits have made elsewhere). Absent this Court's intervention, the District (and its neighbors) will be empowered to ban America's most common arms. And other states, territories, and Circuits inclined to resist this Court's clear teachings will take note that they may continue to do so unfettered. NSSF accordingly submits this brief in support of petitioners.

SUMMARY OF THE ARGUMENT

The decisions below blessing the District of Columbia's ban on common arms defy this Court's instructions at nearly every turn. From the jump, the district court held that some of the most popular ammunition feeding devices—that come standard with most modern firearms, including America's "quintessential self-defense weapon"—are not even "arms" under the Second Amendment. And it held that the atextual military-use test applied by numerous circuits before *Bruen* (and some after) is *not* unmoored from *Heller* and somehow survived *Bruen*'s clear teachings on the correct Second Amendment

analysis. A split panel of the D.C. Circuit thankfully disagreed (creating a circuit split in the process), but the majority still could not bring itself to hold that ammunition feeding devices are "arms" either. Instead, it revived other pre-*Bruen* tactics, and merely presumed for the sake of argument that such devices are "arms." The majority also transplanted *Heller* and *Bruen*'s historical common-use inquiry into *Bruen*'s threshold plain-text analysis and twisted the question beyond recognition. And while the majority purported to apply *Bruen*'s historical-tradition test, the supposed tradition it distilled is not just disanalogous from the District's ban on common arms, but indistinguishable from rational-basis review.

That alone justifies this Court's review. But the problems go deeper still. In *Bruen*, this Court warned courts against gifting legislatures a "regulatory blank check" with which to restrict the keeping and bearing of arms. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 30 (2022). Yet the D.C. Circuit did exactly that. Despite acknowledging that none of the District's historical traditions were like its ban on common arms, the majority justified the law by inventing a tradition of banning "weapons that are particularly capable of unprecedented lethality." App.19-23. But as Judge Walker pointed out in dissent, "the relative dangerousness of a weapon is *irrelevant* when [a] weapon belongs to a class of arms commonly used for lawful purposes." App.89 (quoting *Caetano v. Massachusetts*, 577 U.S. 411, 418 (2016) (Alito, J., concurring in the judgment)). The D.C. Circuit's contrary and "nuanced approach" essentially greenlights outright bans of every modern semiautomatic firearm—even the handguns that

Heller deemed protected, and that the District claimed then (as it does now with "large" ammunition feeding devices) contribute to "mass shootings" and "widespread … criminality." App.26-30; *District of Columbia v. Heller*, 554 U.S. 570, 682 (2008) (Breyer, J., dissenting).

Unfortunately, the D.C. Circuit is not alone in its defiance and derogation of this Court. The First, Fourth, Seventh, and Ninth Circuits have all reached the same substantive result, blessing bans on some of the most popular arms in America via the same path of resuscitating pre-*Bruen* decisions instead of faithfully following *Bruen*. And that pattern will continue until and unless this Court intervenes to make clear to the lower courts that *Heller* and *Bruen* meant what they said. "The very enumeration of the [Second Amendment] 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 (majority op.). "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* It is disheartening that this Court must step in once again just to make that clear—but the sheer volume of lower-court decisions flouting that teaching confirms beyond cavil that this Court's intervention is now imperative, either in this case or in any of the other recent, pending, and coming petitions raising similar issues.

ARGUMENT

I. The Decision Below Defies This Court's Precedents.

A. The D.C. Circuit Replaced This Court's "Plain-Text" and Common-Use Inquiries With Its Own Pre-*Bruen* Test and Policy Preferences.

1. Under *Heller*, *Bruen*, and *Rahimi*, the threshold inquiry here should have been straightforward. The District prohibits the general public from possessing some of the most popular ammunition feeding devices in the country—those with the capacity to accept more than ten rounds. App.147. Because the Second Amendment's plain text covers "keep[ing]," the only question at the threshold is whether ammunition feeding devices are "Arms." The answer is easy: Yes.

As *Heller* explained and *Bruen* reiterated, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Bruen*, 597 U.S. at 28 (quoting *Heller*, 554 U.S. at 582); *accord Caetano*, 577 U.S. at 411 (per curiam). That includes "any thing that a man … takes into his hands, or useth in wrath to cast at or strike another," *Heller*, 554 U.S. at 581, which ammunition feeding devices surely are. As their name suggests, feeding devices are not passive holders of ammunition, like a cardboard cartridge box of yore; they are integral to the design of semiautomatic firearms and the mechanism that makes them work, actively feeding ammunition into the firing chamber. *Duncan v. Becerra*, 970 F.3d 1133, 1146 (9th Cir. 2020). A semiautomatic firearm equipped with a feeding device is indisputably a "thing that a man … takes into his hands," *Heller*, 554 U.S.

at 581, and a "bearable" instrument that "facilitate[s] armed self-defense," *Bruen*, 597 U.S. at 28.

Not even the D.C. Circuit was willing to embrace the District's contrary position that ammunition feeding devices are not covered by the plain text *at all*, which would essentially mean that semiautomatic firearms are not either. App.115-116. But the majority could not bring itself to hold that they are presumptively protected by the Second Amendment's plain text alone. Instead, it held that *Bruen*'s "step one" plain-text inquiry "encompasses" a middle step beyond the plain text, where a citizen must show that the arm in question is "in 'common use' for a lawful purpose, such as self-defense." App.9 (quoting *Bruen*, 597 U.S. at 47).

That (il)logic flouts this Court's clear teachings. "In keeping with *Heller*," *Bruen* used the phrase "plain text" three times to describe the textual inquiry into whether conduct is presumptively protected, 597 U.S. at 17, 32, 33, and it dispensed with that inquiry in a few short paragraphs, which simply looked to the most common "definitions" of the key terms in "the Second Amendment's text" (i.e., "the people," "keep," "bear," and "Arms"), *id.* at 31-33. *Rahimi* doubled-down on that approach, making clear that the threshold inquiry—and the only question on which the challenger bears the burden—is simply whether a law restricts "arms-bearing conduct." *United States v. Rahimi*, 602 U.S. 680, 691 (2024).

That is not to say that whether a particular arm is "in common use," or is better categorized as "dangerous and unusual," is irrelevant. But there is no *Bruen* Step 1.5. The plain text says nothing about

common use, which is why that consideration matters only at the historical-tradition stage. Indeed, that is the only way to make sense of *Heller* and *Bruen*'s repeated finding that "colonial laws" creating a "historical tradition of prohibiting the carrying of dangerous and unusual weapons" cannot justify restrictions on the possession and use of weapons that are "in common use today" for lawful purposes. *See, e.g.*, *Bruen*, 597 U.S. at 21, 47 (quoting *Heller*, 554 U.S. at 627).

Neither *Heller* nor *Bruen* embraced the illogical proposition that some arms are not "Arms" at all under the plain text of the Second Amendment if they are deemed "dangerous and unusual" as opposed to "in common use for lawful purposes." In both cases, this Court simply theorized that the government could restrict certain arms by showing that a challenged prohibition falls "within the tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" as opposed to those "in common use." *Heller*, 554 U.S. at 627. By reasoning otherwise, the majority flipped the burden of proof, and made nonsense of this Court's clear instruction.[2]

2. If the D.C. Circuit were set on smuggling the common use test into *Bruen*'s textual inquiry, at least it could have properly defined and applied the relevant historical tradition. As Judge Walker made abundantly clear in his dissent, had the majority done

[2] The majority's threshold reasoning also contradicts its later (and meritorious) rebuttal to the (incorrect) position taken by the district court and numerous circuits that certain arms are "outside the scope of the Second Amendment because they are most useful in military service." App.11-12; *see* pp.2-3, *infra*.

so, its decision would have been much shorter, and the judgment would have come out the other way. App.83-86. Indeed, the majority essentially admitted as much, positing that asking what is typically possessed by law-abiding citizens for lawful purposes *must* be the wrong question, because if it were the right question (as *Heller* and *Bruen* make clear that it is), then that would restrict the government's ability to ban whichever firearms it thinks should be banned. App.11-13.

It should go without saying that it is not for states or lower courts to grade this Court's handiwork or rewrite its opinions. And under a faithful application of this Court's opinions, the ammunition feeding devices the District has banned are plainly in common use. *See* App.12 (ultimately "presum[ing]" that to be true). As Judge Walker extensively documented (and the majority never disputed), "Americans have in their hands and homes" millions of magazines that have a capacity greater than ten rounds. App.84; *see also, e.g.*, NSSF, *Detachable Magazine Report, 1990-2021*, at 3 (2024), https://rb.gy/0l8qkv. And those magazines are just as plainly commonly owned for lawful purposes, including self-defense. Indeed, they "'come standard' with many of the nation's most popular firearms, including '[m]illions of semiautomatic pistols, the "quintessential self-defense weapon"' for the American people." App.84 (quotation omitted).[3]

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[3] *See also, e.g.*, *Gun Digest 2018*, at 386-88, 408 (Jerry Lee & Chris Berens eds., 72d ed. 2017); NSSF, *Modern Sporting Rifle Comprehensive Consumer Report* 31 (July 14, 2022), https://rb.gy/x6lzzn (69% of detachable rifle magazines have a capacity of 20 or 30 rounds).

Accordingly, what the D.C. Circuit said over a decade ago is even more true today: "There may well be some capacity above which magazines are not in common use but … that capacity surely is not ten." *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1261 (D.C. Cir. 2011). Ammunition feeding devices that accept more than ten rounds are "typically possessed by law-abiding citizens for lawful purposes." *See Heller*, 554 U.S. at 625. And under this Court's precedent, that should have been the end of the matter, as "the Second Amendment protects" the right to keep and bear "weapons that are … 'in common use.'" *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627).

The majority refused to follow that precedent (or acknowledge those facts). Instead, it construed the common-use test as relating "only" to "instances of" "active employment" of a weapon in self-defense. App.10 (citing *Bianchi v. Brown*, 111 F.4th 438, 460 (4th Cir. 2024) (en banc)). But *Heller* described the Second Amendment as protecting arms "*typically possessed* by law-abiding citizens for lawful purposes," 554 U.S. at 624-25 (emphasis added), not arms typically fired at would-be attackers. And far from backing away from that sensible proposition, *Bruen* juxtaposed the phrase "weapons that are those 'in common use at time'" with the phrase "those that 'are highly unusual in society at large.'" 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627). That juxtaposition makes sense only if the "uses" that matter include keeping and bearing—conduct Americans commonly participate in when it comes to the ammunition feeding devices the District has chosen to ban.

The D.C. Circuit's (mis)characterization and (mis)application of the plain-text and common-use inquiries betrays its (mis)understanding that the scope of the right to keep and bear arms depends in part on what the government thinks is *necessary* to exercise it. In the majority's eyes, whether American citizens need "more than a couple rounds" in an ammunition feeding device for "self-defense" is a "disputed" question for another day. App.12. But when *Bruen* rejected means-end balancing as "one step too many," 597 U.S. at 19, it took "out of the hands of government" for all time "the power to decide" what the people really *need* for their own self-defense or other lawful purposes, *id.* at 23 (quoting *Heller*, 554 U.S. at 634).

Under *Bruen,* the only question the court should have asked is whether American citizens *have chosen* the relevant ammunition feeding devices for lawful purposes. And the answer is a resounding yes. *See* pp.8-9, *supra*; App.84-86 (Walker, J., dissenting). The majority's decision to sheepishly "presume" that reality "for present purposes," App12, is eerily reminiscent of the rights-defying course charted by the many decisions this Court overruled in *Bruen*. *See, e.g.*, *Worman v. Healey*, 922 F.3d 26, 30 (1st Cir. 2019); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015); *Heller II*, 670 F.3d at 1261. This Court should make clear (once again) that such an approach to fundamental rights is fundamentally wrong. That alone is enough to justify this Court's intervention.

B. The D.C. Circuit's Effort to Gound Its Holding in History Defies This Court's Cases Yet Again.

1. Not content with misconstruing this Court's plain-text and common-use inquiries, the D.C. Circuit bungled the historical-tradition analysis too. This Court has repeatedly recognized that, in light of this Nation's historical tradition, only those arms that are *both* dangerous *and* unusual may be banned. *See Bruen*, 597 U.S. at 21; *Heller*, 554 U.S. at 627. The D.C. Circuit blew past that tradition, holding instead that the government may respond to public-safety concerns by disarming law-abiding citizens of any and all arms that the legislature considers "particularly capable of unprecedented lethality." App.19, 23.

That ahistorical proposition is not just an invitation to perform impermissible interest-balancing; it is indistinguishable from rational-basis review. After all, it is the rare restriction on arms that the government will *not* claim targets particularly lethal weapons in the name of public safety. *See* App.19, 26-31. If states have carte blanche to enact ever more restrictive measures so long as they are grounded in such concerns, then virtually anything will be justified as long as it is rational. And if that were really all it took to withstand Second Amendment scrutiny, then *Heller* and *Bruen* would have come out the other way. After all, the District certainly maintained—and the majority acknowledged—that it was legislating to respond to the danger of handgun violence and shootings. *See Heller*, 554 U.S. at 634, 636. As did New York in defending its outlier permitting regime in *Bruen*. Yet

though this Court accepted that premise in both cases, neither law survived.

2. Given the gulf between the supposed "tradition" the D.C. Circuit deduced and the one this Court has repeatedly recognized, it should come as no surprise that the majority cited no historical precedents remotely resembling the District's ban. In fact, the majority failed to identify any historical law that removed from the civilian market a single type of arm that had long been kept and used for lawful purposes. That is because none exists. Instead, most of the historical laws the majority discussed did not ban any types of arms at all, let alone ban anything typically possessed by law-abiding citizens for lawful purposes or commonly used for self-defense.

For instance, the majority invoked a grab-bag of nineteenth-century "restrictions on Bowie knives or similar blades, and to a lesser extent pocket pistols," that were enacted in response to "rising murder rates and an outpouring of public concern." App.19-21. But those laws prohibited only the concealed carry of such arms (or carry with intent to do harm) or provided heightened punishments for using one in the commission of a crime. *See* Response.Br.48-49, *Barnett v. Raoul*, Nos. 23-1825, 23-1826, 23- 1827, & 23-1828 (7th Cir. June 20, 2023), Dkt.56 ("*Barnett*.Response.Br."); David Kopel, *Bowie Knife Statutes 1837-1899*, Reason.com (Nov. 20, 2022), https://rb.gy/tgf9ue. While *Bruen* of course does not demand "a historical *twin*," 597 U.S. at 30, restrictions on how people may carry and use "dangerous and unusual" arms are not remotely analogous to laws that, like the District's, not only "broadly restrict

arms" lawfully used "by the public generally," *Rahimi*, 602 U.S. at 682, but take the extreme step of banning them outright, "in the home and everywhere else," App.91 (Walker, J., dissenting). So even putting aside that those nineteenth century laws are likely "too little" and "too late," App.91-92, they are plainly not proper analogues for a flat ban on some of the most popular ammunition feeding devices in the country.

The majority's subsequent reference to bans "on sawed-off shotguns" and "machine guns" fares no better. In fact, the majority did not even try to claim that either of those weapons has ever been commonly owned "by law-abiding citizens for lawful purposes." *See Heller*, 554 U.S. at 625. On the contrary, it confirmed that "sawed-off shotguns" were "popular" only in the hands of criminals and "gangsters," and that "bans on machine guns" are "insufficient to support a tradition of regulating magazines in and of themselves." App.23-24. The majority's ultimate conclusion—that those laws nevertheless justify the District's ban on certain ammunition feeding devices—defies common sense. And it elides that an arms ban can pass muster only if the banned arms are "*both* dangerous *and* unusual." *Caetano*, 577 U.S. at 417 (Alito, J., concurring in the judgment).

The D.C. Circuit's breezy (mis)characterization of the history of machineguns also overlooks that when fully automatic submachineguns first hit the markets in the 1920s, the people did not respond by clamoring to buy them *en masse*. *See* Barnett.Response.Br.8-9. They instead responded all throughout the country by restricting or banning them almost immediately. Indeed, within a decade, more than half the states had

restricted their possession and use, and the federal government followed suit not long thereafter. *See id.*; *see also Garland v. Cargill*, 602 U.S. 406, 430-32 (2024) (Sotomayor, J., dissenting). Contrast that with the Nation's tradition vis-à-vis multi-shot firearms and their ammunition feeding devices. Firearms capable of firing more than ten rounds have been around for centuries, yet "[a]t the time the Second Amendment was adopted, there were no laws restricting ammunition capacity." David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 864 (2015). And while semiautomatics equipped with feeding devices holding ten-plus rounds have been on the civilian market since the turn of the twentieth century, not a single state in the Union (or Congress) restricted the manufacture, sale, or possession of magazines or other ammunition feeding devices *until the 1990s*.

To be sure, a handful of states enacted laws restricting the firing capacity of semiautomatic firearms in the 1920s, contemporaneous with their enactment of restrictions on *fully* automatic firearms that had just started to make their way onto civilian markets in very limited numbers. *See* 1927 Mich. Pub. Acts 887, 888; 1927 R.I. Acts & Resolves 256, 256-57; 1933 Minn. Laws ch. 190. But those laws were soon either repealed or replaced with laws that restricted *only* fully automatic firearms—which, unlike semiautomatics, were (as noted) never widely adopted by law-abiding citizens for lawful purposes. *See* 1959 Mich. Pub. Acts 249, 250; 1959 R.I. Acts & Resolves 260, 260, 263; 1963 Minn. Sess. L. ch. 753, at 1229. And none of those laws—which were outliers even in the brief period when they were on the books—was

ever understood to apply to magazines or other feeding devices, regardless of capacity, Kopel, *supra* at 864-66; App.18-19.

The first state law restricting magazine capacity did not come until 1990—two centuries after the founding and well over a century after the ratification of the Fourteenth Amendment. *See* 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. §2C:39-1(y), -3(j)).[4] And the vast majority of states still today allow law-abiding citizens to decide for themselves what ammunition capacity best suits their needs. As for the federal government, it did not regulate magazine capacity until 1994, when Congress temporarily banned ammunition feeding devices with a capacity of more than ten rounds. *See* Pub. L. No. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)). Unlike the District's ban, however, that federal law was time limited, and Congress let the law expire in 2004 after a study by the Department of Justice revealed that it had produced "no discernible

[4] Before 1990, only D.C. restricted magazines themselves—and even that restriction dates back only to 1975. In 1932, Congress passed a local D.C. law prohibiting the possession of firearms that "shoot[] automatically or semiautomatically more than twelve shots without reloading." Act of July 8, 1932, Pub. L. No. 72-275, §§1, 14, 47 Stat. 650, 650, 654 (1932), *repealed via* 48 Stat. 1236 (1934), *currently codified as amended at* 26 U.S.C. §§5801-72. At the time, the law was not understood to sweep up ammunition feeding devices; indeed, when Congress enacted the National Firearms Act just two years later, it imposed no restrictions on magazines. *See* Pub. L. No. 73-474, 48 Stat. 1236 (1934). But after the District achieved home rule in 1975, the new D.C. government interpreted the 1932 law to "outlaw[] all detachable magazines and all semiautomatic handguns." Kopel, *supra*, at 866. (*Heller*, of course, invalidated the latter portion.)

reduction" in violence with firearms across the country. Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, Rep. to the Nat'l Inst. of Just., U.S. Dep't of Just. 96 (2004), https://rb.gy/yolfu8.

3. Perhaps realizing that its historical analogues are inapt, the majority caveated that its "identification of a relevant historical tradition" ultimately depended "upon the" broad notion that states may regulate "weapons that are particularly capable of unprecedented lethality and not … upon the regulation of Bowie knives," sawed-off shotguns, or machine guns "specifically." App.21-25. But that conducts the historical-tradition analysis at a far higher level of abstraction than this Court's cases tolerate.

Rahimi is illustrative. When analyzing whether 18 U.S.C. §922(g)(8) is consistent with historical tradition, the Court did not start by slotting the law into a broad or sweeping abstract category focused only on the law's aim. It examined how the law actually works—i.e., by authorizing state actors to disarm someone only after a "judicial determination[]" that the person "likely would threaten or had threatened another with a weapon," and even then only for a "limited duration"—and compared that to how the government's proffered historical analogues worked. 602 U.S. at 699. That makes eminent sense, since the whole point of embracing a historical-tradition mode of analysis is to get courts out of the business of making subjective assessments, like whether one arm or another is "particularly"

problematic or "susceptible" to criminal use, despite being widely chosen by the American public for lawful purposes. App.24-25.

4. In the end, the D.C. Circuit did not identify any historical support for the District's flat ban on certain ammunition feeding devices. It instead divined a legislative prerogative to restrict the people's access to arms that have been rendered more effective owing to "technological" advancements, premised on the need to curb the "unprecedented societal concern" of "mass shootings" and "other widespread homicidal criminality." App.26-30.

The consequences of that "nuanced approach" are perverse. App.26-27. Technological advancements that improve the accuracy, capacity, and functionality of firearms are exactly what law-abiding citizens want, as they increase the chances of hitting one's target and decrease the risk of causing collateral damage in a stressful self-defense situation. To be sure, those same qualities unfortunately are also often attractive to individuals determined to commit heinous criminal acts. *See* App.29-30. But if the government could ban any arm that is "uncommonly dangerous," App.23 & n.7, in the hands of those who would use it to inflict maximum injury, then it is hard to see what modern arms it could not ban. Indeed, much of what the D.C. Circuit said about why the magazines the District now deems too "large" are supposedly different from their historical predecessors could be said equally of semiautomatic handguns or rifles without regard to the magazine with which they are equipped.

That is precisely why our historical tradition is one of protecting arms that are commonly chosen by law-abiding citizens, not focusing on how dangerous arms would be in the hands of criminals. *See Caetano*, 577 U.S. at 418 (Alito, J., concurring in the judgment). Simply put, advancements in accuracy and capacity that are welcomed by law-abiding citizens are not the sort of "dramatic technological changes" with which *Bruen* was concerned—as evidenced by the Court's emphatic focus on whether arms are "in common use *today*." 597 U.S. at 47 (emphasis added). To say that is not to deny that there are some who have misused the arms the District has banned for unlawful—indeed, awful—purposes. But that was equally true of the handguns banned in *Heller* and *Bruen*. The *Heller* dissenters protested that handguns "are specially linked to urban gun deaths and injuries" and "are the overwhelmingly favorite weapon of armed criminals," 554 U.S. at 682 (Breyer, J., dissenting), as did the *Bruen* dissenters, who homed in specifically on "mass shootings," 597 U.S. at 83, 86-87, 132. The majorities in both cases did not dispute those points; they just found them irrelevant to whether handguns are constitutionally protected, because that question does not turn on whether arms are misused by criminals. It turns on whether law-abiding citizens commonly own and use them for lawful purposes. *See, e.g.*, *Bruen*, 597 U.S. at 28.

In sum, *Bruen* was not an invitation for lower courts to do everything just the same as before, which some new window dressing. And even accepting that the District's late-breaking effort to ban ammunition feeding devices that Americans have lawfully kept and borne for a century implicates "unprecedented societal

concerns or dramatic technological changes," no amount of "nuance[]" can justify deeming an outright ban on arms analogous to a concealed carry law or restrictions on long-unlawful firearms that are "highly unusual in society at large." *Bruen*, 597 U.S. at 27, 47. The D.C. Circuit's contrary conclusion strays far from this Court's teachings.

II. The Question Presented Is Exceptionally Important.

Whether and when the government may ban—and even confiscate from law-abiding citizens—common arms is an issue of incredible importance. After all, the scope of the right to keep and bear arms depends, first and foremost, on what arms it covers. And that issue has taken on even greater practical significance since *Bruen*, as several of the states that expressed open hostility to this Court's decision responded with protest legislation imposing even *greater* restrictions on which arms law-abiding citizens may keep and bear. Yet, as the decision below demonstrates, the same courts that were reversed in *Bruen* for refusing to take *Heller* at face value are now doing the same thing all over again with *Bruen*.

Consider the Seventh Circuit's recent decision resuscitating its own pre-*Bruen* precedent to uphold a ban on long-lawful arms. *Bevis v. City of Naperville*, 85 F.4th 1175 (7th Cir. 2023). There, the court reached the remarkable conclusion that the most common rifle in America is not even an "Arm" within the meaning of (or covered by the plain text of) the Second Amendment because it is purportedly more useful in military service, *id.* at 1192-97—a legally (and factually) erroneous proposition even the D.C.

Circuit expressly rejected, creating a circuit split regarding whether the Second Amendment's presumptive protection turns on whether an arm is more or less militaristic. App.11. Making matters worse, the Seventh Circuit rejected a challenge to a magazine ban, much like the District's here, without so much as mentioning text *or* historical tradition. *Bevis*, 85 F.4th at 1197.

The en banc Fourth Circuit walked a similar rights-defying line in *Bianchi*, where it too held that arms commonly possessed by law-abiding citizens for lawful purposes are outside the scope of the Second Amendment entirely because they are purportedly "most useful in military service" and (by the court's estimation) unnecessary for "the typical self-defense situation." 111 F.4th at 453. A petition for certiorari challenging that decision, and exposing the thin reed of history on which the Fourth Circuit ultimately hung its hat, is currently pending before this Court. *See* Pet'n for Writ of Certiorari, *Snope v. Brown*, No. 24-203 (U.S. filed Aug. 21, 2024).

Similarly, when the First Circuit was confronted with a ban on half the magazines in America, it was willing (like the D.C. Circuit below) only to assume without deciding that the ban implicated the Second Amendment. *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 49 (1st Cir. 2024). The First Circuit then relied on *Bevis* to deny protection to these ubiquitous arms, on the theory that magazines that come standard-issue with all manner of semiautomatic firearms are especially "dangerous" because they can be used in AR-15 rifles, which the court deemed "'almost the same gun as the M-16

machinegun.'" *Id.* at 48-49. And the court relied on historical analogies that even the D.C. Circuit dubbed not only irrelevant, but "silly." App.15-16. A petition challenging that untenable decision—which creates even more confusion amongst the circuits when juxtaposed with the decision below—likewise is pending before this Court. *See* Pet'n for Writ of Certiorari, *Ocean State Tactical, LLC v. Rhode Island*, No. 24-131 (U.S. filed Aug. 2, 2024).

The Third Circuit, meanwhile, recently refused to even consider a challenge to Delaware's magazine and firearms ban on the equally remarkable theory that individuals who wish to possess banned arms would not be entitled to relief *even if the law is likely unconstitutional* because "they already own" other arms that Delaware has not (yet) seen fit to ban. *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 205 (3d Cir. 2024). *But see Heller*, 554 U.S. at 629 ("It is no answer to say … that it is permissible to ban … handguns so long as … other firearms … [are] allowed.").

The en banc Ninth Circuit's actions in *Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023), are likewise eerily reminiscent of the Circuit's pre-*Bruen* patterns. After this Court vacated an earlier en banc decision upholding California's magazine ban and remanded for re-analysis in light of *Bruen*, *see Duncan*, 142 S.Ct. 2895 (2022), the en banc court instead remanded to the same district court that had already held the ban unconstitutional, which unsurprisingly did so again, in an opinion that exhaustively examined the historical record, 695 F.Supp.3d 1206 (S.D. Cal. 2023). The Ninth Circuit, however, would have none of it.

The court bypassed the ordinary appellate-review process, reconvened an en banc panel now composed mostly of non-active judges, and granted an "emergency" stay over the dissent of most of the active judges, in an opinion that cited *Bruen* only for the truism that "'the right secured by the Second Amendment is not unlimited.'" 83 F.4th at 805-07. And just a few days ago, that same en banc court held that some of the most common magazines in America (that come standard with some of the most popular firearms in the Country), are neither "Arms" protected by the Second Amendment, nor "necessary" for lawful use by law-abiding citizens. *Duncan v. Bonta*, --- F.4th ---, 2025 WL 867583, at *7-10 (9th Cir. Mar. 20, 2025).

All of that vividly "illustrates why this Court must provide more guidance" on which arms the Second Amendment protects. *Harrel*, 144 S.Ct. at 2492 (Thomas, J.). Absent the absolute clearest of instructions, lower courts will continue "contorting" this Court's cases to uphold arms bans, producing a parade of ever-more confused and contradictory opinions aligned only in being utterly "unmoored from both text and history." *Id.*; *see* App.14 (acknowledging "uncertainty" "[e]ven with … guidance from *Bruen*"). The time has come for this Court to step in—either in this case or in one of the many others raising these issues—provide the guidance lower courts profess to lack, and ensure that law-abiding citizens in outlier states that do not share the founding generation's respect for the right to keep and bear arms do not have their constitutional rights trampled all over again.

CONCLUSION

This Court should grant the petition for certiorari.

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