

IN THE  
**Supreme Court of the United States**

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CUTBERTO VIRAMONTES, ET AL.,  
*Petitioners,*

v.

COOK COUNTY, ILLINOIS, ET AL.,  
*Respondents.*

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EDDIE GRANT, JR., ET AL.,  
*Petitioners,*

v.

RONNELL HIGGINS, IN HIS OFFICIAL CAPACITY AS  
COMMISSIONER OF THE CONNECTICUT DEPT OF  
EMERGENCY SERVICES AND PUBLIC TRANS., ET AL.,  
*Respondents.*

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**On Writs of Certiorari to the  
United States Court of Appeals for the  
Seventh and Second Circuits**

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**BRIEF OF *AMICI CURIAE* SECOND  
AMENDMENT DEFENSE AND EDUCATION  
COALITION AND AURORA SPORTSMEN'S  
CLUB IN SUPPORT OF PETITIONERS**

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## TABLE OF CONTENTS

|                                                                                                                                                                       | Page |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Table of Authorities .....                                                                                                                                            | iii  |
| Interest of Amici Curiae .....                                                                                                                                        | 1    |
| Summary of Argument .....                                                                                                                                             | 2    |
| Argument .....                                                                                                                                                        | 5    |
| I. Inferior Courts Are Ignoring Precedent .....                                                                                                                       | 5    |
| A. The Supreme Court Has Already Spoken                                                                                                                               | 10   |
| 1. Precedent or Considered Dicta Indicates<br>That a Majority of Supreme Court<br>Justices Already Agree That AR-15s Are<br>in Common Use. ....                       | 10   |
| 2. Inferior Courts Should Defer to<br>Considered Dicta of the Supreme Court<br>for its Predictive Value. ....                                                         | 14   |
| B. The Problem Isn't Going Away. ....                                                                                                                                 | 17   |
| II. The Remedy Lies in the Supreme Court's<br>Supervisory Power .....                                                                                                 | 26   |
| A. The Court Should Give Clear Instructions to<br>the Second and Seventh Circuits and<br>Explain the Effect of Its Holding on<br>Inconsistent Circuit Precedent ..... | 27   |

|                                                                                                                   |    |
|-------------------------------------------------------------------------------------------------------------------|----|
| B. The Court Should Use GVR Orders Where<br>an Intervening Merits Decision Undermines<br>a Pending Judgment. .... | 30 |
| Conclusion .....                                                                                                  | 32 |

## TABLE OF AUTHORITIES

Page(s)

## CASES

|                                                                                                    |                       |
|----------------------------------------------------------------------------------------------------|-----------------------|
| <i>Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n</i> ,<br>576 U.S. 787 (2015) ..... | 7                     |
| <i>Arizona v. Evans</i> ,<br>514 U.S. 1 (1995) .....                                               | 26                    |
| <i>B &amp; L Productions, Inc. v. Newsom</i> ,<br>104 F.4th 108 (9th Cir. 2024).....               | 24, 30                |
| <i>Barnett v. Raoul</i> ,<br>180 F.4th 1035 (7th Cir. 2026).....                                   | 2, 3, 9, 10, 30       |
| <i>Bevis v. City of Naperville</i> ,<br>85 F.4th 1175 (7th Cir. 2023).....                         | 28                    |
| <i>Bianchi v. Brown</i> ,<br>111 F.4th 438 (4th Cir. 2024).....                                    | 30                    |
| <i>Caetano v. Massachusetts</i> ,<br>577 U.S. 411 (2016) .....                                     | 3, 9                  |
| <i>City of Boerne v. Flores</i> ,<br>521 U.S. 507 (1997) .....                                     | 4, 30                 |
| <i>Dickerson v. United States</i> ,<br>530 U.S. 428 (2000) .....                                   | 4, 30                 |
| <i>District of Columbia v. Heller</i> ,<br>554 U.S. 570 (2008) .....                               | 3, 11, 16, 24, 25, 29 |

|                                                                                                    |            |
|----------------------------------------------------------------------------------------------------|------------|
| <i>Duncan v. Becerra</i> ,<br>265 F.Supp.3d 1106 (S.D. Cal. 2017).....                             | 19         |
| <i>Duncan v. Becerra</i> ,<br>970 F.3d 1133 (9th Cir. 2020) .....                                  | 19         |
| <i>Duncan v. Becerra</i> ,<br>988 F.3d 1209 (9th Cir. 2021) .....                                  | 19         |
| <i>Duncan v. Bonta</i> ,<br>19 F.4th 1087 (9th Cir. 2021).....                                     | 20, 24     |
| <i>Duncan v. Bonta</i> ,<br>2023 U.S.App.LEXIS 25723.....                                          | 22         |
| <i>Duncan v. Bonta</i> ,<br>49 F.4th 1228 (9th Cir. 2022).....                                     | 20         |
| <i>Duncan v. Bonta</i> ,<br>83 F.4th 803 (9th Cir. 2023).....                                      | 22         |
| <i>Ezell v. City of Chicago</i> ,<br>651 F.3d 684 (7th Cir. 2011) .....                            | 8          |
| <i>Frank v. Walker</i> ,<br>768 F.3d 744 (7th Cir. 2014) .....                                     | 29         |
| <i>Fresno Rifle &amp; Pistol Club, Inc. v. Van De Kamp</i> ,<br>965 F.2d 723 (9th Cir. 1992) ..... | 22         |
| <i>Friedman v. City of Highland Park</i> ,<br>577 U.S. 1039 (2015) .....                           | 10, 29, 30 |

|                                                                                                           |            |
|-----------------------------------------------------------------------------------------------------------|------------|
| <i>Friedman v. City of Highland Park</i> ,<br>784 F.3d 406 (7th Cir. 2015) .....                          | 11, 27, 29 |
| <i>Garland v. Cargill</i> ,<br>602 U.S. 406 (2024) .....                                                  | 9, 11      |
| <i>Harrel v. Raoul</i> ,<br>__ U.S.__, 144 S. Ct. 2491 (2024) .....                                       | 10, 11, 28 |
| <i>Heller v. District of Columbia</i> ,<br>670 F.3d 1244 (D.C. Cir. 2011) .....                           | 11, 12, 13 |
| <i>Hickman v. Block</i> ,<br>81 F.3d 98 (9th Cir. 1996) .....                                             | 23         |
| <i>Jackson v. City and Cnty. of San Francisco</i> ,<br>576 U.S. 1013 (2015) .....                         | 23         |
| <i>King v. Burwell</i> ,<br>576 U.S. 473 (2015) .....                                                     | 14         |
| <i>Knife Rights, Inc., v. Bonta</i> ,<br>__ F.4th __, 2026 U.S. App. LEXIS 20960 (9th Cir.<br>2026) ..... | 6          |
| <i>Lawrence v. Chater</i> ,<br>516 U.S. 163 (1996) .....                                                  | 31         |
| <i>Marbury v. Madison</i> ,<br>5 U.S. 137 (1803) .....                                                    | 4, 25      |
| <i>McCoy v. Mass. Inst. of Tech.</i> ,<br>950 F.2d 13 (1st Cir. 1991) .....                               | 15         |

|                                                                                         |                     |
|-----------------------------------------------------------------------------------------|---------------------|
| <i>McDonald v. City of Chicago</i> ,<br>561 U.S. 742 (2010) .....                       | 3, 8, 9, 11, 23, 31 |
| <i>Miller v. Gammie</i> ,<br>335 F.3d 889 (9th Cir. 2003) .....                         | 2                   |
| <i>Miranda v. Arizona</i> ,<br>384 U.S. 436 (1966) .....                                | 15                  |
| <i>Moore v. Madigan</i> ,<br>702 F.3d 933 (7th Cir. 2012) .....                         | 8                   |
| <i>N.Y. State Rifle &amp; Pistol Ass’n v. Bruen</i> ,<br>597 U.S. 1 (2022) .....        | 3, 20               |
| <i>Nat’l Rifle Ass’n of Am., Inc. v. City of Chicago</i> ,<br>567 F.3d 856 (2009) ..... | 9                   |
| <i>Newdow v. Peterson</i> ,<br>753 F.3d 105 (2d Cir. 2014) .....                        | 15                  |
| <i>Nguyen v. Bonta</i> ,<br>140 F.4th 1237 (9th Cir. 2025) .....                        | 7                   |
| <i>Nordyke v. King</i> ,<br>364 F.3d 1025 (9th Cir. 2004) .....                         | 23                  |
| <i>Peruta v. California</i> ,<br>582 U.S. 943 (2017) .....                              | 23                  |
| <i>Peruta v. San Diego Cty</i> ,<br>824 F.3d 919 (9th Cir. 2016) .....                  | 23                  |
| <i>Richards v. Newsom</i> ,<br>2026 U.S. App. LEXIS 26289 (9th Cir. 2026) .....         | 25                  |

|                                                                                                   |        |
|---------------------------------------------------------------------------------------------------|--------|
| <i>Rodriguez de Quijas v. Shearson/American Express, Inc.</i> ,<br>490 U.S. 477 (1989) .....      | 3      |
| <i>Schwab v. Crosby</i> ,<br>451 F.3d 1308 (11th Cir. 2006) .....                                 | 15     |
| <i>Silveira v. Lockyer</i> ,<br>312 F.3d 1052 (9th Cir. 2002) .....                               | 23     |
| <i>Silvester v. Becerra</i> ,<br>583 U.S. 1139 (2018) .....                                       | 22     |
| <i>Smith &amp; Wesson Brands, Inc. v. Estados Unidos Mexicanos</i> ,<br>605 U.S. 280 (2025) ..... | 9, 12  |
| <i>Snope v. Brown</i> ,<br>___ U.S. ___, 145 S. Ct. 1534 (2025) .....                             | 11, 30 |
| <i>Staples v. United States</i> ,<br>511 U.S. 600 (1994) .....                                    | 12     |
| <i>Teixeira v. Cnty. of Alameda</i> ,<br>873 F.3d 670 (9th Cir. 2017) .....                       | 23, 30 |
| <i>United States v. Bloom</i> ,<br>149 F.3d 649 (7th Cir. 1998) .....                             | 14     |
| <i>United States v. Hemani</i> ,<br>___ U.S. ___, 146 S. Ct. 1677 (2026) .....                    | 3      |

|                                                                                  |        |
|----------------------------------------------------------------------------------|--------|
| <i>United States v. Mack</i> ,<br>164 F.3d 467 (9th Cir. 1996) .....             | 23     |
| <i>United States v. Montero-Camargo</i> ,<br>208 F.3d 1122 (9th Cir. 2000) ..... | 16     |
| <i>United States v. Rahimi</i> ,<br>602 U.S. 680 (2024) .....                    | 3      |
| <i>Viramontes v. Cnty. of Cook</i> ,<br>2024 U.S. Dist. LEXIS 36145 .....        | 27, 28 |
| <i>Wellons v. Hall</i> ,<br>558 U.S. 220 (2010) .....                            | 31     |
| <i>Wilson v. Cook County</i> ,<br>937 F.3d 1028 (7th Cir. 2019) .....            | 28, 29 |
| <i>Wolford v. Lopez</i> ,<br>__ U.S. __, 146 S. Ct. 2032 (2026) .....            | 3      |
| <i>Yates v. United States</i> ,<br>356 U.S. 363 (1958) .....                     | 4, 32  |

## CONSTITUTION

U.S. Const. amend. II. 5-9, 11-13, 16, 17, 19-26, 29-31

## STATUTES

|                        |       |
|------------------------|-------|
| 28 U.S.C. § 2071 ..... | 4, 27 |
| 28 U.S.C. § 2072 ..... | 27    |
| 28 U.S.C. § 2106 ..... | 4, 32 |

## OTHER AUTHORITIES

- Blackman, Josh, *The Failed Lower Court Revolt*, September 2, 2025, Civitas Outlook, Civitas Institute, University of Texas at Austin. Available online at: <https://www.civitasoutlook.com/research/the-failed-lower-court-revolt-fa8785>.....5
- Blackman, Josh, *The Lower Court Revolt Continues in Boston*, Dec. 16, 2025. The Volokh Conspiracy, Reason Magazine. Available at: <https://reason.com/volokh/2025/12/16/the-lower-court-revolt-continues-in-boston/> .....5
- Devins, Neal & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U.L. Rev. (2021).....17
- Greenhouse, Linda, *Dissenting Against the Supreme Court's Rightward Shift*, N.Y. TIMES (Apr. 12, 2018),<https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html> [https://perma.cc/H473-3MRD] .....6
- Gross, Terry, *How the AR-15 Became the Bestselling Rifle in the U.S.*, NPR (Apr. 20, 2023).....13
- Helman, Arthur D., *Liberalism Triumphant? Ideology and The En Banc Process In The Ninth Circuit Court of Appeals*, 31 Wm. & Mary Bill of Rts. J. (2022) .17
- Lucy, William, “Judges, Distinguished,” *The New Oxford Companion to Law* 649, 650 (Peter Cane & Joanne Conaghan eds., 2008) .....13

18 Moore's Federal Practice - Civil § 134.03 (2025).16

## RULES

Supreme Court Rule 10.....4, 31

**INTEREST OF AMICI CURIAE<sup>1</sup>**

The Second Amendment Defense and Education Coalition, Ltd. (“SADEC”), is an Illinois not-for-profit corporation. SADEC is dedicated to the defense of human and civil rights secured by law including the right to keep and bear arms. SADEC’s activities are furthered by complementary programs of litigation and education.

SADEC does not issue stock and certifies that it has no parent corporation nor is any portion held by a publicly traded corporation.

Aurora Sportsmen’s Club (“ASC”) is a nonprofit corporation in Waterman, Illinois. ASC is the largest private shooting club in Illinois with 300 acres and over 3,000 members. ASC members have been greatly impacted by laws similar to the laws challenged in this case.

ASC does not issue stock and certifies that it has no parent corporation nor is any portion held by a publicly traded corporation.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no party or party’s counsel made a monetary contribution intended to fund its preparation or submission. No person other than amici, their members, or their counsel made such a contribution.

### SUMMARY OF ARGUMENT

SADEC was also an amicus in *Barnett, et al., v. Raoul, et al.*, 180 F.4th 1035 (7th Cir. 2026). In the opinion in that case, filed just 9 days after this Court granted certiorari in this matter, the Seventh Circuit reviewed a district court judgment that struck down a law essentially identical to one at issue here. The record in that case was developed after a four-day trial with extensive evidence admitted and considered by the trial court as to the characteristics of AR-15s, including that rifle’s development, history, popularity, and utility as a means of self-defense. The circuit court, in a 2-1 decision, construed the plaintiffs’ case as a facial challenge, and then spent a not inconsiderable portion of the opinion superficially analogizing a Twenty-first Century ban on “America’s most popular rifle” to Nineteenth Century regulations (in some states) of Bowie knives.<sup>2</sup>

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<sup>2</sup> The *Barnett* majority not only conflated restrictions on carrying Bowie knives in public with their possession generally, they failed to adequately address whether these Nineteenth Century laws and cases addressing Bowie knives would have even survived the Supreme Court’s 2022 *Bruen* analysis. Indeed, the entire Bowie knife canard is “empty formalistic reasoning” when one considers that not a single state outlaws the mere possession of Bowie knives today. Generally, when the reasoning or theory of prior courts’ decisions have been thoroughly re-adjudicated by an intervening higher authority, the earlier decisions should—at a minimum—be reviewed de novo to determine if that jurisprudence conforms to the newer and higher precedent, and if necessary, modified or overruled based on the new mode of analysis. *See generally, Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003). Furthermore, the decision about how a

Judge St. Eve wrote the opinion, joined by Judge Easterbrook, reversing the district court’s judgment and remanding with instructions to enter judgment for the government. Chief Judge Brennan filed a dissent. Despite this Court’s certiorari grant in this case, the mandate in *Barnett* was issued July 31, 2026.

SADEC’s interest in this case (now joined by ASC) is the same as it was in the *Barnett* case—they seek to make use of the orderly processes of our federal court system to uphold the antecedent, pre-existing, human right of self-defense that is preserved in the Second Amendment, especially as this right has already been interpreted by the precedents of this Court. Their primary obstacles to this preferred means of ensuring constitutional order are now being frustrated by recalcitrant circuit courts.

Eighteen years after this Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), even after further (remedial?) instructions on how to adjudicate Second Amendment claims in: *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Caetano v. Massachusetts*, 577 U.S. 411 (2016), *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), *United States v. Rahimi*, 602 U.S. 680 (2024), *United States v. Hemani*, \_\_ U.S. \_\_, 146 S. Ct. 1677 (2026), and *Wolford v. Lopez*, \_\_ U.S. \_\_, 146 S. Ct. 2032 (2026) — courts that are duty-bound to follow the precedents of

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later decision controls an earlier one is best left to the higher court whose precedent is controlling. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Chief Judge Brennan’s dissent performs this necessary analysis and is only superficially rebutted in the majority opinion.

the Supreme Court, are still commandeering its prerogative and duty—“to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Justice Marshall asked not once, but twice in that case, the not wholly rhetorical questions: “Why otherwise does [the Constitution] direct the judges to take an oath to support it?” *Id.* at 179. “Why does a judge swear to discharge his duties agreeable to the constitution of the United States, if that constitution forms no rule for his government?” *Id.*, at 180.

Marshall answers his own question, “[Because] the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; **and that courts**, as well as other departments, are bound by that instrument.” *Id.*, at 180. (emphasis added.)

While there are statutory limits on this Court’s authority to prescribe specific non-constitutional rules for federal courts, see 28 U.S.C. § 2071 et seq., the Supreme Court still possesses broad supervisory authority in its inherent duty to protect the integrity of the federal judicial system and the decisions made by this Court interpreting the Constitution. *See, e.g., Yates v. United States*, 356 U.S. 363 (1958), *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Dickerson v. United States*, 530 U.S. 428 (2000). *See also*: 28 U.S.C. § 2106 and Supreme Court Rule 10.

In Federalist No. 78—arguing that the one Supreme Court created by Article III is the weakest and least dangerous of the branches—Hamilton noted:

The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

While this check and balance between branches is foundational to our form of government, it isn't quite true when it becomes necessary to check the power of defiant subordinate courts. When its Constitutional decisions are being scorned, mocked, or just plain ignored by inferior courts, the U.S. Supreme Court can—and should—exercise the judicial equivalent of both FORCE and WILL to uphold this Court's precedents interpreting the Constitution.

## ARGUMENT

### I. Inferior Courts Are Ignoring Precedent<sup>3</sup>

The Seventh Circuit is not the only recalcitrant court resisting this Court's Second Amendment

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<sup>3</sup> And not just in Second Amendment cases. See Blackman, Josh, *The Failed Lower Court Revolt*, September 2, 2025, Civitas Outlook, Civitas Institute, University of Texas at Austin. Available online at: <https://www.civitasoutlook.com/research/the-failed-lower-court-revolt-fa8785>; see also Blackman, Josh, *The Lower Court Revolt Continues in Boston*, Dec. 16, 2025. The Volokh Conspiracy, Reason Magazine. Available at: <https://reason.com/volokh/2025/12/16/the-lower-court-revolt-continues-in-boston/>.

jurisprudence, nor even the worse. By far the most egregious re-offender for nearly two decades is the Ninth Circuit. Judge VanDyke's most recent frustration with his fellow jurists' cavalier treatment of the Second Amendment was on full display in his dissent from denial of en banc rehearing in *Knife Rights, Inc., v. Bonta*, \_\_ F.4th \_\_, 2026 U.S. App. LEXIS 20960 (9th Cir. 2026):

[...] Come hell or high water, *Heller* or *Bruen*, our court will find a way to uphold any weapons restriction that a liberal State can dream up. And the Supreme Court's occasional grant of certiorari and reversal has done nothing—and I mean that literally—to change our court's behavior. By now it's clear enough that, especially with regard to the Second Amendment, our court has fully adopted the operating principle of our former colleague Judge Reinhardt: the Supreme Court “can't catch ‘em all.”<sup>4</sup> In the real world, no boss would tolerate nearly two decades of repeated defiance from a subordinate. If the Supreme Court wants to do anything to ensure that the Second Amendment doesn't remain a second-class

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<sup>4</sup> Footnote 1 from the opinion: “That’s how “the famously liberal judge,” Stephen Reinhardt, justified his “open resistance, defiance even” to the Supreme Court. Linda Greenhouse, *Dissenting Against the Supreme Court's Rightward Shift*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html> [<https://perma.cc/H473-3MRD>].”

right in this country's most populous federal circuit, then something has to change.

Judge VanDyke continued:

So, what to do? I have a suggestion. The Supreme Court should consider summarily reversing some of our wayward Second Amendment decisions. To put it more colloquially, it's time for some benchslaps. Nothing less will give this court any pause before ultimately blessing every arms restriction it reviews.<sup>5</sup>

*Id.*, 2026 U.S. App. LEXIS 20960, \*82-83.

Other than summary reversals, what would a “benchslap” look like? It might take the form of a “grant, vacate, and remand *with instructions*” or this Court could expand its comments about bad circuit court decisions outside of the circuits the

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<sup>5</sup> This was footnote 2. “There is, of course, one notable post-Bruen exception to the otherwise hard-and-fast rule that the Second Amendment always loses in the Ninth Circuit. See *Nguyen v. Bonta*, 140 F.4th 1237 (9th Cir. 2025). It is literally the one exception that proves the rule. My colleagues are well aware of our court's reputation, and the majority of our court is thus understandably on the lookout for some inconsequential Second Amendment case where they can chalk up the extraordinary win—similar to how most law schools try to have at least one “conservative” faculty member so they can tout their intellectual diversity. Anybody who falls for such a weak charade is, to quote our Chief Justice, a chump. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 825, 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015) (Roberts, C.J., dissenting).”

certiorari writ was directed to, even if it can't vacate them. Amici, therefore, ask that this Court (re)state the governing rule with enough specificity to guide lower courts. On that Judge VanDyke has credible insider credentials.

Earlier Seventh Circuit decisions applied *Heller* and *McDonald* to invalidate firearm restrictions. On at least two prior occasions, it had successfully applied the *ratio decidendi* of these landmark Supreme Court's cases in this field.

The first case was *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (holding that the city cannot impose required training for exercising a fundamental right while outlawing that training within city limits). Even without the benefit of the *Heller* methodology's restatement in *Bruen*, the Seventh Circuit reached the correct result in a Second Amendment challenge to Chicago's gun laws a decade before *Bruen*. They did so by merely applying *Heller* and *McDonald*.

A second faithful application of this Court's pre-*Bruen* precedents was *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (the right to keep and bear arms includes the right to carry arms in public). The governments in both cases decided to let those decisions stand without seeking review. They read the room and knew they would lose. That is how precedent is supposed to work. After that, a decade passed, with much mischief in the circuit courts, before this Court issued *Bruen*—a decision that can fairly be classified as a “bench-nudge” on how to apply *Heller*. Alas, some courts felt the nudge, some didn't—some backslid.

Today the Seventh Circuit no longer seems interested in such careful jurisprudence. It now contends—with tens of millions of AR-15s already in the hands of law-abiding adults—that these rifles are not arms protected by the Second Amendment. In spite of a binding mode of analysis from *Bruen*, and vertical precedent (both holdings and considered dicta) already provided by this Court in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), *Garland v. Cargill*, 602 U.S. 406 (2024), and *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025), the Seventh Circuit has now abandoned its earlier track record of taking this Court’s Second Amendment jurisprudence seriously. Was the Seventh Circuit’s decision in *Barnett* emboldened by the apparent benign neglect this Court has afforded to the Ninth?

In a prior like-circumstance, the Seventh Circuit followed precedent, and principle, when it declined to presume overruling Supreme Court precedent. *Nat’l Rifle Ass’n of Am., Inc. v. City of Chicago*, 567 F.3d 856 (2009), *reversed and remanded by McDonald*, 561 U.S. 742 (2010) (noting that controlling precedent, though likely obsolete, precluded Fourteenth Amendment incorporation of the Second Amendment under any theory.) The Seventh Circuit even noted that its sister-circuit (the Ninth) had taken the bolder path, *id.* at 857, but declined, as a court of appeals, to usurp that power of the Supreme Court. *Id.* at 860.

Even in an earlier (interlocutory) iteration of *Barnett*—prior to the four-day trial—this Court denied certiorari in that case over the objection of Justice Alito, with Justice Thomas concurring in denial but

issuing a separate statement. *Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024). What should have been interpreted as a brushback pitch by the Seventh Circuit *Barnett* panel was ignored. Why?

Why indeed, when it should be obvious that a good faith reading of this Court’s precedent and considered dicta could have resolved this controversy.

### A. The Supreme Court Has Already Spoken

Though admittedly a crude rubric, at least six living—and one recently deceased—Supreme Court Justice has opined that the semiautomatic rifles at issue in this case are “common.”

#### 1. Precedent or Considered Dicta Indicates That a Majority of Supreme Court Justices Already Agree That AR-15s Are in Common Use.

In *Friedman v. City of Highland Park*, 577 U.S. 1039 (2015), Justice Thomas filed a dissent from denial of certiorari to the Seventh Circuit, which was joined by (the late) Justice Scalia:

[...] The City’s ban is thus highly suspect because it broadly prohibits **common** semiautomatic firearms used for lawful purposes. Roughly 5 million Americans own AR-style semiautomatic rifles. [citation omitted] The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. [citation omitted] Under our **precedents**, that is all that is

needed for citizens to have a right under the Second Amendment to keep such weapons.

*Id.* at 1042 (citing *Friedman v. City of Highland Park*, 784 F.3d 406, 415, n.3 (7th Cir. 2015); *McDonald*, 561 U.S. at 767-68; *Heller*, 554 at 628-29)) (emphasis added).

As noted above, in *Harrel v. Raoul*, \_\_ U.S.\_\_, 144 S. Ct. 2491 (2024), Justice Alito would have granted certiorari and in Justice Thomas’s concurrence in the denial he lamented the interlocutory posture of the case but also reminded the reader that “[t]he AR-15 is the most popular semi-automatic rifle” in America and is therefore undeniably **‘in common use today.’** *Id.* at 2492 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); and citing *Garland v. Cargill*, 602 U.S. 406, 430-31 (2024) (Sotomayor, J., dissenting) (describing “semiautomatic rifles” such as the AR-15 as **“commonly available”**) (Thomas, J., concurring in denial of certiorari).

The Supreme Court also denied certiorari to the Fourth Circuit in another challenge to a semiautomatic rifle ban. *Snope v. Brown*, \_\_ U.S. \_\_, 145 S. Ct. 1534 (2025). Once again, Justice Alito and Justice Gorsuch would have granted the petition. Though apparently withholding his vote for granting certiorari, Justice Kavanaugh (who was the dissenting circuit judge in the above-mentioned *Heller v. District of Columbia*, 670 F.3d 1244), issued a statement respecting the denial. He noted that “Americans today possess an estimated 20 to 30 million AR-15s. And AR-15s are legal in 41 of the 50 States, meaning that the

States such as Maryland that prohibit AR-15s are something of an outlier.” *Snope*, at 1534. (Kavanaugh, J., statement respecting denial of certiorari) (citing *Staples v. United States*, 511 U.S. 600, 612 (1994) (stating that AR-15s “traditionally have been widely accepted as lawful possessions”).

Given that millions of Americans own AR-15s and that a significant majority of the States allow possession of those rifles, petitioners have a strong argument that AR-15s are in “**common use**” by law-abiding citizens and therefore are protected by the Second Amendment under *Heller*. [citation omitted] If so, then the Fourth Circuit would have erred by holding that Maryland’s ban on AR-15s complies with the Second Amendment.

....

In short, under this Court’s **precedents**, the Fourth Circuit’s decision is questionable.

*Id.* at 1534-35 (citing *Heller v. District of Columbia*, 670 F.3d at 1286-88 (Kavanaugh, J., dissenting) (emphasis added). Justice Thomas issued another dissent explaining how to apply *Bruen* to this controversy and reiterating his observations that semiautomatic rifles are in common use. *Id.* at 1535-39 (Thomas, J., dissenting from denial of certiorari).

Writing for a majority in *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025), Justice Kagan observed that “[AR-15 and AK-47 rifles]

**are both widely legal and bought by many ordinary consumers.** (The AR-15 is the most popular rifle in the country....)” *Id.* at 298 (citing Terry Gross, *How the AR-15 Became the Bestselling Rifle in the U.S.*, NPR (Apr. 20, 2023) (emphasis added)).

If you are keeping track, that gives us four sitting and one deceased Justice of the Supreme Court who thinks it has already been persuasively established that semiautomatic rifles like the AR-15 are common—even ordinary—rifles (Justices Thomas, Kavanaugh, Sotomayor, Kagan, and the deceased Justice Scalia<sup>6</sup>). And while Justices Alito and Gorsuch have not expressly stated over their signatures in any published opinion that such rifles are common and ordinary, their assent to this proposition is strongly implied by opinions they have authored, joined, or in the dissents they have joined in the past.

As noted, Justices Thomas and Kavanaugh have already opined that this showing of “common use for lawful purposes” is the only threshold required for a finding that AR-15s are presumptively protected by the Second Amendment’s arms guarantee. Furthermore, both Justices have characterized this assertion as having a pedigree based on existing

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<sup>6</sup> Of course, a judge no longer sitting (retired or deceased) can exercise judicial power. But a revered judge’s opinion might have great persuasive effect based on: (1) acknowledged legal erudition, (2) fair-minded judge-craft, (3) a long career, and (4) a commitment to both intellectual rigor and fidelity to the law. *See* William Lucy, “Judges, Distinguished,” *The New Oxford Companion to Law* 649, 650 (Peter Cane & Joanne Conaghan eds., 2008).

Supreme Court *precedent* and not mere obiter dicta. See emphases from block quotes, *supra*.

With a line-up like this, one “would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it.” *King v. Burwell*, 576 U.S. 473, 499 (2015) (J. Scalia dissenting). Unless the inferior courts are betting they can get away with defying this Court, because—after all— “the Supreme Court can’t catch them all.” See *fn. 4, supra*.

## **2. Inferior Courts Should Defer to Considered Dicta of the Supreme Court for its Predictive Value.**

In *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998), *overruled on other grounds*, the Seventh Circuit (ironically) proffered a theory for why Supreme Court dicta are entitled to a greater deference than mere persuasiveness. Judge Easterbrook (double irony) wrote:

Even if the passage could be called dictum, it is not an aside unrelated to the subject of the case. The question had been briefed by the parties, so the statement was informed rather than casual; it is a considered expression by the Court supported by earlier cases ... that supply more extensive analysis and is not incompatible with any decision before or since.... It would ill serve the interests of litigants and the judicial system as a whole to row against the tide of such statements.... The Supreme Court often

articulates positions through language that an unsympathetic audience might dismiss as dictum—consider the catalog of rules in *Miranda v. Arizona*, 384 U.S. 436 ... (1966)—and it expects these formulations to be followed. [citation omitted] The Court can hear only a small portion of all litigated disputes; ***it uses considered dicta to influence others for which there is no room on the docket.*** Appellate courts that dismiss these expressions and strike off on their own increase the disparity among tribunals (for other judges are likely to follow the Supreme Court's marching orders) and frustrate the evenhanded administration of justice by giving the litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.

*Id.* at 653 (emphasis added).

The Seventh Circuit is not alone in this formulation. *See, e.g., Newdow v. Peterson*, 753 F.3d 105, 108 n.3 (2d Cir. 2014) (per curiam) (noting that circuit courts “have an obligation to accord great deference to Supreme Court dicta, absent a change in the legal landscape”) (internal quotation omitted); *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) (“We think that federal appellate courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement.”); *Schwab v. Crosby*, 451 F.3d 1308, 1325-

26 (11th Cir. 2006) (citing cases that give precedential value to Supreme Court dicta); *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc) (“As we have frequently acknowledged, Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding.”) (internal quotations omitted). *See also* 18 Moore’s Federal Practice - Civil § 134.03 (2025), n.11.1 (advising circuit courts to especially pay heed to the Supreme Court’s dicta) (listing cases).

The predictive value of this Court’s considered dicta and actual precedent already supports the proposition that AR-15s (along with their technological equivalents and accoutrements) are protected arms. So, what is driving the resistance in the lower courts? The *Heller* opinion predicted this too. In rejecting a freestanding “interest balancing” approach to protecting Second Amendment rights, Justice Scalia, writing for the majority, noted that “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” Because “[a] constitutional guarantee subject **to [a] future judges’** assessments of its usefulness is no constitutional guarantee at all.” *Id.*, 554 U.S. 570, 634. [italics in original, bold emphasis added]

Turns out Justice Scalia was right. In the post-*Heller* world, it has been those **future judges** of inferior courts who are making assessments annulling the constitutional guarantee that common and

ordinary rifles, already owned by millions of law-abiding citizens, are protected arms that *really* are *worth* insisting on keeping and bearing.

### **B. The Problem Isn't Going Away.**

The writs of certiorari in the present cases arose out of the Seventh and Second Circuits, who—as noted—are not even the worst offenders. That title belongs to the Ninth Circuit, which has shown little reticence toward treating the Supreme Court's Second Amendment jurisprudence (or the text of the amendment itself for that matter) as aspirational, rather than binding. Is that lack of reticence evidence of outright bias or a more innocent grumbling—but loyal opposition? Either way, there are gaps in Article III's chain of command that require redress by this Court.

Two recent law review articles make the case for bias. Both come to that conclusion based on an examination of a circuit court's en banc cases, both how they are decided and how they are chosen. Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. Rev. 1373 (2021); and Arthur D. Helman, *Liberalism Triumphant? Ideology and The En Banc Process In The Ninth Circuit Court of Appeals*, 31 Wm. & Mary Bill of Rts. J. 1 (2022).

The Devins & Larsen article postulates that;

En banc review is the one time when lower court judges have the potential to truly line up in teams—all those appointed by Democrats versus all those appointed by Republicans. En banc decisions thus

provide valuable and critical insight into the potential erosion of the nonpartisan norm in federal judicial decision-making. And these days, it is hard to ignore the warning signs of the en banc partisan team spirit, especially on high visibility issues that divide the parties.

The Helman article is more narrowly focused on the Ninth Circuit's patterns of balloting to determine whether to hear a case en banc, rather than studying case outcomes:

The focus of the [Helman] study is the court's en banc process. But analyzing the ideological orientation of the Ninth Circuit using that approach presents a special challenge. For all of the other circuits, it makes sense to look at the outcomes of the cases that are heard en banc, because all of the active judges take part in en banc decisions. But in the Ninth Circuit, en banc cases are heard and decided by a limited en banc court (LEBC) composed of the chief judge and ten judges selected at random from among the other 28 active judges. The only judicial activity that involves the participation of all of the court's active judges is the vote on whether to grant en banc rehearing - typically, of a case already decided by a three-judge panel.

Both articles conclude, that in recent years, some of our circuit courts are indeed exhibiting a bias that is apparent through the lens of their en banc

processes; and that this bias aligns with the political party most responsible for the appointment of judges in that circuit. Both articles note that their analysis reveals nuanced bias rather than the crude partisanship we see in elections or congressional debates. The Helman article is careful to point out that even though the Ninth Circuit is a “liberal court” that conservatives there are not shut out of the process.

With respect to the Ninth Circuit’s en banc practices, it is not necessary to rely on academic or statistical analysis. More than one judge sitting in the Ninth Circuit itself has called out irregular en banc procedures, along with what looks to the public like skewed results in cases adjudicating Second Amendment claims.

*Duncan v. Bonta* has been kicking around the Ninth Circuit for close to a decade. That suit (once again on this Court’s docket, see fn. 7 *infra*.) challenges California’s law banning future sales and mandating confiscation of existing detachable magazines for firearms (including AR-15s) that hold more than 10 rounds.

The case was initially won and the magazine ban struck down in the District Court. *Duncan v. Becerra*, 265 F.Supp.3d 1106 (S.D. Cal. 2017). The decision of the trial court invalidating the law on Second Amendment grounds was affirmed (with a dissent) by the Ninth Circuit three-judge panel. *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020). A majority of judges in that circuit voted to rehear the matter en banc. *Duncan v. Becerra*, 988 F.3d 1209 (9th Cir. 2021). The en banc panel, applying the now discredited

two-step analysis for Second Amendment claims, reversed and remanded the case. *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021).

Judge Bumatay wrote a dissent joined by Judges Ikuta, and R. Nelson that addressed the merits of en banc panel's opinion. *Id.* at 1140. Judge VanDyke, largely agreeing with Judge Bumatay's dissent, nevertheless wrote a solo dissent addressing what he perceives as a distinct anti-Second Amendment bias in the Ninth Circuit. *Id.* at 1159. That dissent is a tour-de-force of the Ninth Circuit's shabby treatment of Second Amendment rights.

A petition for certiorari was then filed with the U.S. Supreme Court. After this Court issued its opinion in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the *Duncan* petition for writ of certiorari was granted. Judgment was vacated, and the case was remanded to the Ninth Circuit for further consideration in light of *Bruen*, but without specific instructions. In Amici's view, applying Supreme Court precedent and considered dicta, should have resolved the *Duncan* case or controversy in the Ninth Circuit. It didn't.

Rather than send the case back to the trial court for adjudication under the new rules articulated in *Bruen*, the same en banc panel whose judgment was just vacated, ordered the parties to file additional briefs before the same en banc panel. Then without addressing the merits of that briefing, the en banc panel (rather redundantly) vacated its own judgment and sent the case back to the trial court to apply the *Bruen* analysis to the case. *Duncan v. Bonta*, 49 F.4th

1228 (9th Cir. 2022). Judges Bumatay and VanDyke again dissented.

On remand, the District Court once again found California's magazine ban unconstitutional after a hearing. California appealed and sought a stay (and here is where it gets interesting) rather than treat the case as a comeback to the same three-judge panel under Ninth Circuit General Order 3-6, the en banc panel derailed the case from that normal course of business and decided to issue an administrative (though modified) stay – once again over the separate dissents of Judges Bumatay and VanDyke.

In those dissents, both judges noted the irregularities of the procedures used to bypass the original three-judge panel under existing Circuit rules to place this case before the same en banc panel. Judge VanDyke even noted the absence of invoking the procedure to depart from procedure. He lamented that:

A lot about this is deeply troubling. First and foremost, we have rules for a reason. We operate under them every day. They should apply equally and consistently, unless and until we change those rules in the normal course. There is no exception for “cases that some of the judges on our court really, really care about.” That would be capricious and erode external and internal confidence in our court. If we lack the temerity to codify a “Second Amendment exception” in our en banc rules, we should have refrained from employing it behind the

double veil of "internal court matters" in which only some members of the court participated.

*Duncan v. Bonta*, 2023 U.S. App.LEXIS 25723 (9th Cir. Sept. 28, 2023)

Twelve days later, the same en banc panel, that had bypassed the three-judge panel in a comeback case, without an intervening vote under either the Federal or Circuit rules for en banc review, issued an indefinite stay of the District Court's judgment pending a decision by the same en banc panel on the merits. *Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023). Judge R. Nelson now joined Judge Bumatay's substantive dissent but wrote separately to note the irregularities in the en banc process. *Id.* at 807. Judge Bumatay's substantive dissent, was joined by Judges Ikuta, R. Nelson, and VanDyke. *Id.* at 808.

This pattern of procedural manipulation is not new. Justice Thomas previously criticized the Ninth Circuit's handling of Second Amendment cases in *Silvester v. Becerra*, 583 U.S. 1139, 1140, 1147–48 (2018) (Thomas, J., dissenting from denial of certiorari), noting that the circuit had repeatedly failed to apply ordinary principles of appellate review and had treated the Second Amendment as a "second-class right."

Nor are *Duncan* and *Silvester* the only instances of the Ninth Circuit's "special relationship" with the Second Amendment. It started with *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992) (the Second Amendment is some version of

a collective right and not incorporated against the states). The Ninth Circuit repeated the errors from *Fresno* in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), and *United States v. Mack*, 164 F.3d 467 (9th Cir. 1996). *Heller* and *McDonald* later abrogated the collective-right and non-incorporation premises on which those decisions relied.

The Ninth Circuit again rejected an individual-right claim in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002); rehearing en banc was denied, 328 F.3d 567 (9th Cir. 2003), and certiorari was denied, 540 U.S. 1046 (2003). Additional dissents from a denial of en banc review of Second Amendment claims were filed in *Nordyke v. King*, 364 F.3d 1025 (9th Cir. 2004), *cert. denied*, 543 U.S. 820 (2004).

Justices Scalia and Thomas filed dissents to a certiorari denial in *Jackson v. City and County of San Francisco*, 576 U.S. 1013 (2015), after the Ninth Circuit upheld San Francisco's local gun control ordinances. Justices Thomas and Gorsuch filed dissents to a certiorari denial in *Peruta v. California*, 582 U.S. 943 (2017), after an en banc panel of the Ninth Circuit upheld a California ban on bearing arms in public, nearly identical to the ban that was eventually struck down in *Bruen*. See *Peruta v. San Diego Cty*, 824 F.3d 919 (9th Cir. 2016).

An en banc panel of the Ninth Circuit reversed the holding of a three-judge panel that would have allowed a challenge to a zoning ordinance targeting gun stores in *Teixeira v. Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017), *cert. denied* at 584 U.S. 977 (2018). That obsolete case should have been retired after *Bruen*, but

it is still being cited in that circuit for the proposition that judges have the power to determine if a Second Amendment claim is “*really worth* insisting upon” [*Heller*, at 634] by applying a “meaningful constraint test” as a threshold inquiry, which is just another judicial balancing test by another name. See *B & L Productions, Inc. v. Newsom*, 104 F.4th 108 (9th Cir. 2024), *cert. denied* at 145 S. Ct. 1958 (2025).

Judge VanDyke in the Ninth Circuit has been keeping a running tally:

The majority defends our undefeated, 50-0 record against the Second Amendment by pointing out that the states in our circuit simply have “more restrained” gun-control laws than the states in other circuits. While the majority is apparently serious, this claim can't be taken seriously given that our circuit's jurisdiction includes states like California and Hawaii—which have enacted many of the most aggressive gun-control laws in the nation. The majority's failure to comprehend that reality underscores my point that **something other than objective and impartial application of the two-part test is driving the outcomes in our Second Amendment cases.**

*Duncan*, 19 F.4th at 1167 n.8 (emphasis added)

More recently, on August 27, 2026, Judge Lee, dissenting from another Ninth Circuit opinion, suggested that the contagion is spreading. Rights

adjacent to the Second Amendment are now also in jeopardy:

In recent years, California has enacted a series of laws restricting the people's ownership and use of firearms. Many have been found to violate the Second Amendment by three-judge panels of this court. [fn. omitted] And now the First and Fourth Amendments are at risk, too, at the hands of California's state government.

*Richards v. Newsom*, 2026 U.S. App. LEXIS 26289, \*65 (9th Cir. 2026). (Upholding state law compelling federal firearm dealers to install and maintain electronic surveillance at their own expense for the state's law enforcement purposes.) The omitted footnote lists the "Numerous other three-judge panel decisions [that] have found other California laws to be unconstitutional, but the Ninth Circuit has a tradition and history of calling en banc decisions that vindicate the Second Amendment." *Id.*

It is not just the public and litigants who are calling for something to be done about the chaos in the Ninth Circuit. Whether that court is the insurgency or a counterinsurgency depends on whether one views the Supreme Court's jurisprudence in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and its progeny as revolutionary acts, or this Court's regular conduct of business in its solemn duty— "to say what the law is." *Marbury*, 5 U.S. at 177 (1803).

Well, in this case, the Supreme Court has caught one of the bigger issues that Judge Reinhardt's strategy and its devotees would rather it hadn't. But

what to do about the cases that are still on this Court’s docket<sup>7</sup>, or already in the federal court pipeline? There is also still the question about what to do with pre-*Bruen* circuit precedents outside the Second and Seventh that have escaped this Court’s direct attention. Because unless the Court sends a stronger signal than it already has, history has already shown that those circuit-level cases will continue to generate inconsistent applications of this Court’s decisions.

Therein lies the conundrum at the heart of this amici’s interest in this case. How much of a nudge (or “benchslap”) will the Ninth Circuit (or any other recalcitrant court) need to comply with this Court’s precedents if this case only results in a bare-bones “grant-vacate-remand” (GVR) order for the other similar cases on the docket—with this Court trusting to an already disproven “charade” that the lower courts will “do the right thing”?

## **II. The Remedy Lies in the Supreme Court’s Supervisory Power**

Whether it is confronting actual bias or has justifiably lost patience with the institutional friction (sometimes labeled “percolation”— *See Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995), Ginsburg, J., dissenting) from the Circuit Courts, this Supreme Court must now take itself seriously and expressly address bad circuit precedent in Circuits other than

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<sup>7</sup> As of the date this brief is being filed, the following similar cases with certiorari petitions pending are *Duncan v. Bonta*, No. 25-198, *Gator’s Custom Guns v. Washington*, No. 25-153, and *Nat’l Assoc. for Gun Rights v. Lamont*, No. 25-421. And those are only the Second Amendment “hardware” cases.

the Second and Seventh, and/or issue any future GVR ***with specific instructions*** on how to comply with this Court's precedents.

**A. The Court Should Give Clear Instructions to the Second and Seventh Circuits and Explain the Effect of Its Holding on Inconsistent Circuit Precedent**

As noted in the Summary of Argument above, there are limits Congress places on all appellate courts. Even this court is bound by the Rules Enabling Act on non-constitutionally grounded general rules of practice, procedure and evidence, as long any such rule “shall not abridge, enlarge or modify any substantive right”, do not contradict any Act of Congress, and provide sufficient notice. 28 U.S.C. §§ 2071, 2072.

No doubt this Court should consider promulgating new rules for en banc proceedings in all the circuit courts. This should be done as a matter of course in this Court's supervisory capacity to ensure both the perception and actual integrity of the federal judicial system. And while this Court's supervisory power and its independent power of appellate review are analytically distinct concepts, they can look mighty similar when it comes to addressing inferior courts that are ignoring or mocking this Court's precedents. But that does not address what Judge VanDyke's “benchslap” looks like.

The case from the Seventh Circuit illustrates the point. In its March 2024 decision, the district court in *Viramontes v. Cnty. of Cook*, 2024 U.S. Dist. LEXIS 36145, struggled with the continued viability of Seventh Circuit precedents in the cases of *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015),

and *Wilson v. Cook County*, 937 F.3d 1028 (7th Cir. 2019). *Id.* at \*20-21. That district court also had to come to terms with the post-*Bruen* case of *Bevis v. City of Naperville*, 85 F.4th 1175 (7th Cir. 2023), *cert. denied in Harrel v. Raoul*, 144 S. Ct. 2491 (2024), because it felt duty bound to follow “Seventh Circuit precedent even if it believes those decisions are wrong or mistaken.” *Viramontes*, 2024 U.S. Dist. LEXIS 36145, \*20.

In its opinion in this case, the Court should make crystal clear—because the circuit courts who are in schism have apparently failed in their duty to both this higher Court and the lower trial courts—how circuit precedent becomes obsolete when the Supreme Court has spoken on an issue.

*Friedman* and *Wilson* are particularly egregious examples of pre-*Bruen* means-end reasoning that amici contend cannot survive *Bruen*, and the duty of fidelity lower courts owe to Supreme Court precedent. Not only did both cases employ verboten interest balancing tests, but they also didn’t even balance concrete policy objectives against a fundamental right. They reified some people’s “feelings” and then placed them over the constitutional text “shall not be infringed.”

If it has no other effect, Highland Park's ordinance may increase the public's sense of safety. Mass shootings are rare, but they are highly salient, and people tend to overestimate the likelihood of salient events. [...] If a ban on semiautomatic guns and large-capacity magazines reduces the

perceived risk from a mass shooting, and makes the public *feel* safer as a result, that's a substantial benefit. Cf. *Frank v. Walker*, 768 F.3d 744, 751 (7th Cir. 2014).

*Friedman* 784 F.3d at 412 (citations omitted) (emphasis added).

*Wilson* repeated the mistake when it held, along with its “sister circuits [that] had [found], that “reduc[ing] the overall dangerousness of crime” and making the public *feel* safer were “substantial” interests that justified the city’s action in adopting the Highland Park Ordinance. *Friedman*, 784 F.3d at 412 [...]” *Wilson*, 937 F.3d at 1036 (emphasis added). The “sister circuits” were the First, Third, Fourth, and Ninth.

When this Court denied certiorari in *Friedman*, Justices Thomas and Scalia dissented:

[...] [The Seventh Circuit] conceded that handguns — not “assault weapons” — “are responsible for the vast majority of gun violence in the United States.” *Id.*, at 409. Still, the court concluded, the ordinance “may increase the public’s sense of safety,” which alone is “a substantial benefit.” *Id.*, at 412. *Heller*, however, forbids subjecting the Second Amendment’s “core protection . . . to a freestanding ‘interest-balancing’ approach.” *Heller, supra*, at 634 [...]. This case illustrates why. If a broad ban on firearms can be upheld based on conjecture that the public might *feel* safer (while being

no safer at all), then the Second Amendment guarantees nothing.

*Friedman*, 577 U.S. at 1042-43 (italics in original).

Yet *Friedman* is still being cited by the Seventh Circuit. *Barnett*, 180 F.4th at 1054. Amici herein urge this Court to not only reverse-and-remand these two cases out of the Seventh [Viramontes] and Second [Grant] Circuits where its writ of certiorari ran to—but to also consider whether it should expressly indicate that the existing precedents in those circuits that these two cases relied upon—as well as similarly defective precedents in other circuits<sup>8</sup>—are now fallow, down to their root and branch.

### **B. The Court Should Use GVR Orders Where an Intervening Merits Decision Undermines a Pending Judgment**

This Court may exercise supervisory authority over inferior courts, and in fact has broader powers, when its decisions are interpreting and applying the Constitution as interpreted by this Court. *See*

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<sup>8</sup> E.g., The Ninth Circuit’s obsolete “meaningful constraint” balancing test from *Teixeira v. Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017), *cert. denied* at 584 U.S. 977 (2018), was recently used to uphold more gun control laws in *B & L Productions, Inc. v. Newsom*, 104 F.4th 108 (9th Cir. 2024), *cert. denied* at 145 S. Ct. 1958 (2025). *See also*: *Bianchi v. Brown*, 111 F.4th 438 (4th Cir. 2024), *cert. denied* *Snope v. Brown*, 145 S. Ct. 1534 (2025). That the Fourth Circuit should not be able to dodge the decision in this case, because the Supreme Court denied certiorari in *Snope*, should be obvious. But *Bruen* didn’t slow down the Ninth’s addiction to balancing tests either.

generally *Dickerson v. United States*, 530 U.S. 428, 437-438 (2000), and *City of Boerne v. Flores*, 521 U.S. 507, 517-521 (1997).

It also has the power within the federal judiciary to grant certiorari, vacate the judgment of any case properly before it, remand the case, and direct the entry of such appropriate judgment as may be just under the circumstances. 28 U.S.C. § 2106. *See also Lawrence v. Chater*, 516 U.S. 163 (1996), and *Wellons v. Hall*, 558 U.S. 220 (2010). The dissents filed in both *Lawrence* and *Wellons* were heard to complain that this standard is without limits and is itself a usurpation of the Supreme Court's power. But that critique was predicated on the danger of granting GVRs without identifying any controlling error of law. That is not what has been happening in the long train of Second Amendment cases since *Heller* and *McDonald*. Justices still sitting on this Court have already noted the errors of law by the lower courts in dissents and statements regarding denial of certiorari in Second Amendment cases.

Furthermore, Supreme Court Rule 10(a) itself suggests this remedy for when a circuit court's decision "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Rule 10(c)'s plain text provides that the Supreme Court can act when a circuit court "has decided an important federal question in a way that conflicts with relevant decisions of this Court."

In *Yates v. United States*, 356 U.S. 363 (1958), this Court found itself dealing with the same case after already reversing a judgment once because of lower court error. With “gentl[e] intimations” the Court left it to the lower court to enter a different judgment taking into account the error. But then found the case back on its docket again confronting a situation where “[...] the District Court appears not to have exercised its discretion in the light of the reversal of the judgment but, in effect, to have sought merely to justify the original sentence, [therefore] this Court has no alternative except to exercise its supervisory power over the administration of justice in the lower federal courts by setting aside the sentence of the District Court.” *Id.* at 366-67.

In other words, should this Court’s certiorari docket become part of the “percolation doctrine” when inferior courts fail to perform that function in good faith? Is this actually the heart of Judge VanDyke’s “benchslap” gambit? Amici suggests that, where this Court’s merits decision creates a reasonable probability that a pending judgment rests on an invalid legal premise, the Court should consider a GVR under § 2106 with appropriate instructions.

### Conclusion

The judgments out of the Second and Seventh Circuit must be reversed and remanded with ***specific instructions***. The Court should also state that circuit precedent inconsistent with its holding no longer controls in any circuit and should use appropriate GVR orders in pending cases materially affected by that holding.

Respectfully submitted,

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