

Nos. 25-238, 25-566

In the Supreme Court of the United States

CUTBERTO VIRAMONTES, ET AL., PETITIONERS

v.

COOK COUNTY, ILLINOIS, ET AL.

EDDIE GRANT, JR., ET AL., PETITIONERS,

v.

RONNELL HIGGINS, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF
EMERGENCY SERVICES AND PUBLIC PROTECTION,
ET AL.

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SEVENTH AND SECOND CIRCUITS*

**BRIEF FOR LUKE SMITH MORGAN AND JACOB D.
CHARLES AS AMICI CURIAE IN SUPPORT OF
RESPONDENTS**

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INTEREST OF AMICI*

Amici curiae are constitutional law scholars who have written extensively on the Second Amendment and

* All parties have been informed of the filing of this amici curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

firearms law. Their scholarship has been published in leading law journals and cited by courts across the country. Amici have studied Second Amendment doctrine's relation to other constitutional-rights doctrines and closely followed judicial decisions applying *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022). They are well situated to explain how the Second Amendment framework fits into the constellation of individual-rights adjudication and the risks that may arise without this Court's clarifications.

Jacob D. Charles is an Associate Professor of Law at Pepperdine University Caruso School of Law. His scholarship focuses on Second Amendment doctrine and theory. He is the co-author of a leading Second Amendment casebook, *The Second Amendment: Gun Rights And Regulation* (Foundation Press, 2025). His scholarship has appeared or is forthcoming in the *Harvard Law Review Forum*, *Columbia Law Review*, *University of Chicago Law Review*, *Virginia Law Review*, *Duke Law Journal*, and others. See, *e.g.*, *Bruen's Tenth Amendment Problem*, 93 U. Chi. L. Rev. (forthcoming 2027) (with Jonah Gelbach); *Ancillary Rights*, 173 U. Penn. L. Rev. 1269 (2025); *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. 67 (2023); *Violence and Nondelegation*, 135 Harv. L. Rev. F. 463 (2022) (with Darrell A. H. Miller); *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 Mich. L. Rev. 581 (2022).

Luke Smith Morgan is an Assistant Professor of Law at Campbell University Norman Adrian Wiggins School of Law, with teaching focused on public law courses including civil procedure, federal courts, and

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SUMMARY OF THE ARGUMENT

This Court has long prescribed a two-step framework for evaluating constitutional claims. Step 1 asks whether the provision invoked applies at all; that is, whether the challenged regulation or the claimant’s conduct falls within the boundaries of the relevant constitutional guarantee. Only if so will the court, at the second step, determine whether the challenged law or regulation passes constitutional muster. This two-step framework—consisting of “coverage” and “protection,” respectively—applies in some way to nearly all constitutional claims.

The Second Amendment is no different. In *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), this Court adopted a framework under which courts first ask whether “the Second Amendment’s plain text covers an individual’s conduct” and, if so, whether the government has shown, in the face of a presumption of unconstitutionality, that the challenged regulation “is consistent with [this] Nation’s historical tradition of firearm regulation.” *Id.* at 17, 24. *Bruen* rejected the

means-end scrutiny that the courts of appeals had applied at the second step. But it described their coverage analysis—which asked whether regulated conduct fell “outside the scope of the right as originally understood”—as “broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, as informed by history.” *Id.* at 18-19 (citation omitted).

Last Term, in *United States v. Hemani*, 608 U.S. 772 (2026), and *Wolford v. Lopez*, 609 U.S. 185 (2026), the Court reiterated the two-step nature of the inquiry. *Wolford* restated that first step as involving three “subsidiary questions”: whether the challenged regulation applies to a member of “the people,” whether it concerns “Arms,” and whether it restricts “keep[ing]” or “bear[ing].” 609 U.S. at 195 (brackets in original). Those questions were not in dispute in *Wolford*, and the Court had no occasion to explain how they apply when they are contested. They could potentially be read, however—and Justice Jackson warned in dissent that they *would* be read—to reduce *Bruen*’s first step to a mere formality, such that “any law that regulates the carrying of firearms is presumptively unconstitutional.” 609 U.S. at 243 (Jackson, J., dissenting). Amici write to explain why the Court should instead confirm that *Bruen*’s coverage step requires what *Heller* envisioned: a meaningful analysis into the boundaries of the right that the Second Amendment codified.

The stakes of getting Second Amendment coverage analysis correct are tremendous. A coverage step that does nothing would largely repeat the errors that produced *Bruen*’s course correction. Before *Bruen*, the courts of appeals routinely *assumed*, without deciding, that claimants’ conduct fell within the Second

Amendment’s boundaries and proceeded to means-end scrutiny. Because the step-one inquiry screened out almost nothing—apart from the regulations that *Heller* itself appeared to bless—all analysis was shunted into the second step. Means-end scrutiny buckled under this load, with courts sustaining regulations under a form of intermediate scrutiny that turned out to be overly forgiving. This Court rejected that approach. But an empty first step would place the same pressure on *Bruen*’s historical-tradition second step. Courts could perceive that they face a choice between invalidating laws regulating conduct well outside the historically understood boundaries of the right or stretching historical analogies past their breaking points in order to sustain those laws. The first course would turn the Second Amendment into a vehicle for claims it was never understood or intended to support; the second would water down its protections.

Nor can a coverage step premised solely on literal text reliably produce sensible outcomes. Rather, it risks being both overinclusive and underinclusive. Read literally, it will deem presumptively unconstitutional regulations of grenades, explosives, portable nuclear devices, and handguns with obliterated serial numbers, to name just a few examples of cases in which it was never thought problematic for the government to regulate. From there, courts and litigants will be forced to find and parse historic analogues to test that presumption. They may fail to do so, and in so doing either extend the right to an unreasonable and unanticipated degree or distort *Bruen*’s test to avoid such an extension and thereby undermine its goal of to restraining judicial discretion. At the same time, a semantically literal test threatens to be underinclusive, failing to reliably extend

the right to protect activity implicating the core of its historically understood meaning. Various laws and regulations that affect firearms—such as those governing ammunition, acquiring or selling a firearm, or training at a range—do not implicate the Amendment’s plain text, understood as its literal, semantic meaning. The lower courts, recognizing as much, have already begun to improvise tests the text does not contain.

There is a better solution. The Second Amendment protects “the right of the people to keep and bear Arms”—a right that, as this Court has explained, the Amendment “codified” rather than created. *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Amendment’s plain text, therefore, refers to a “right” with historically understood boundaries—and identifying those boundaries is part of reading the text, not a departure from it. This Court should take this first post-*Wolford* opportunity to confirm that *Bruen*’s first step requires meaningful analysis, in which courts determine whether the people, firearms, and conduct at issue fall within the right as understood when it was codified, drawing on history that “elucidates how contemporaries understood the text.” *Wolford*, 609 U.S. at 213-214 (Barrett, J., concurring) (citation omitted).

ARGUMENT

I. This Court’s Individual Rights Precedents Contemplate A First Step That Determines The Scope Of The Right

A. Constitutional adjudication separates the scope of a right from the strength of its protection

The adjudication of most constitutional rights claims begins with a threshold inquiry into their scope. The First Amendment, for instance, protects “the freedom of speech,” but for decades, this Court has recognized categories of expression—obscenity, defamation, incitement, fraud, true threats, and the like—that “lie outside the bounds of the First Amendment’s protection.” *Counterman v. Colorado*, 600 U.S. 66, 72 (2023). In the Fourth Amendment context, the Court has articulated standards to determine when a government act counts as a “search” or “seizure,” as well as to define the “persons, houses, papers, and effects” protected by the Amendment from such intrusions. *Chatrie v. United States*, 609 U.S. 605, 619-623 (2026) (citation omitted). And a criminal defendant’s Sixth Amendment right “to be confronted with the witnesses against him” has been construed to reach only statements by those who “bear testimony.” *Ohio v. Clark*, 576 U.S. 237, 243 (2015) (citation omitted).

These robust coverage tests serve crucial interests in removing whole categories of unmeritorious claims from constitutional scrutiny. Excluding tangential claims at the threshold ensures that protection of the constitutional core remains strong. A right whose every peripheral claim proceeds to the protection stage is a

right whose protection must, sooner or later, be diluted. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 415 (1992) (Blackmun, J., concurring in judgment) (“If we are forbidden to categorize * * * we shall reduce protection across the board.”). Categorical threshold rules reduce the strain on judicial and litigants’ resources. They also provide certainty: for the people, who can more easily understand the legal status of conduct; for regulators, who can more readily craft rules that meet their constitutional obligations; and for courts, who can rule with certainty and predictability. Workable, meaningful coverage tests therefore instrumentally serve the rule of law. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (“Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law.”).

B. *Heller* defined the boundaries of the Second Amendment right by reference to the historical scope of a pre-existing right

In 2008, this Court held in *District of Columbia v. Heller* that the Second Amendment protects an individual’s right to possess a handgun for self defense, striking down the District of Columbia’s ban on handgun possession in the home. 554 U.S. 570, 635 (2008). The Court observed that the “first salient feature” of the Second Amendment’s operative clause was that it “codifies a ‘right of the people,’” *id.* at 579, and that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right,” *id.* at 592. Thus, the Court looked beyond the plain text to that pre-existing right’s historical contours to determine what the Amendment protects—and it found limits. “Like most rights,” the Court said,

“the right secured by the Second Amendment is not unlimited.” *Id.* at 626. Indeed, the Court explicitly referenced the “exceptions” “included” in the pre-existing right secured by the First Amendment and stated that “[t]he Second Amendment is no different.” *Id.* at 635.

For instance, *Heller* explained that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes,” *id.* at 625, and described that “important limitation on the right to keep and carry arms” as “fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons,’ ” *id.* at 627 (citation omitted). It called “startling” a reading of *United States v. Miller*, 307 U.S. 174 (1939), that would have cast doubt on federal restrictions on machine guns. *Id.* at 624. And it described a list of “longstanding” measures—including prohibitions on possession by felons and the mentally ill, restrictions in sensitive places, and “conditions and qualifications on the commercial sale of arms”—as “presumptively lawful.” *Id.* at 626-627 & n.26. These statements share a common premise: that the right’s historical boundaries determine its coverage. Under *Heller*, the history is inseparable from the text.

C. *Bruen* replaced the court of appeals’ second step, not their first

After *Heller*, the lower courts developed a two-step framework. As the Third Circuit described, the courts asked “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional.” *United States v.*

Marzzarella, 614 F.3d 85, 89 (2010) (citation omitted); see *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17-18 (2022) (describing the framework). In practice, as Part II explains, the first step often went unperformed.

Bruen rejected the lower courts’ second step, holding that the Court’s precedent “do[es] not support applying means-end scrutiny in the Second Amendment context.” 597 U.S. at 19. But it affirmed the first step—under which the government could prevail by showing that “the challenged law regulates activity falling outside the scope of the right as originally understood”—as “broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, as informed by history.” *Id.* at 18-19 (citation omitted). Moreover, *Bruen* did not cast doubt on *Heller*’s recognition of categorical limits on the Amendment’s scope. Two members of the majority concurred to emphasize as much, see *id.* at 80-81 (Kavanaugh, J., concurring), and the majority made clear that its object was to ensure that the Second Amendment was *not* “subject to an entirely different body of rules than the other Bill of Rights guarantees,” *id.* at 70 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion)). In *United States v. Rahimi*, 602 U.S. 680 (2024), the Court focused on clarifying step two of the framework because there was no dispute at step one. Last Term is when questions over step one came to the Court.

D. *Wolford* restated the first step in textual terms

In *Wolford v. Lopez*, the Court reaffirmed that *Bruen*’s framework “involves two steps.” 609 U.S. 185, 195 (2026); see also *United States v. Hemani*, 608 U.S.

772, 780 (2026) (describing two steps, with the first focused on “whether the Amendment’s terms cover the conduct in question”). The Court described the first step as a “determin[ation] [of] whether the law * * * clashes with the ‘plain text’ of the Amendment’s language.” *Wolford*, 609 U.S. at 195 (quoting *Bruen*, 597 U.S. at 24). It then articulated “three subsidiary questions” to guide that Step 1 inquiry: “First, does the law apply to ‘the people’—which is to say, to ‘all members of the political community’? Second, does it concern any form of ‘Arms,’ *i.e.*, any weapon customarily used for offensive or defensive purposes? Third, does the law place any restrictions on either the ‘keep[ing]’ (*i.e.*, possession) or the ‘bear[ing]’ (*i.e.*, carrying) of arms?” *Wolford*, 609 U.S. at 195 (internal citations omitted) (brackets in original). Echoing *Bruen*, the Court stated that if the claimant’s conduct implicated all three subsidiary questions, the challenged law would be deemed “presumptively unconstitutional,” and the government would need to justify it by reference to regulatory tradition. *Id.* at 196.

None of those literal text questions was contested in *Wolford*. “No party dispute[d] that petitioners are among ‘the people’ protected by the Second Amendment or that they seek to ‘bear,’ *i.e.*, to carry, ‘arms.’” 609 U.S. at 202. Instead, the state argued that, under background principles of property law, the right to bear arms did not include armed entry onto another’s property without the owner’s consent. The Court held that argument, which rested on “historical materials and precedents,” to be “out of place at *Bruen*’s first step,” explaining that at that step “the question is simply whether a challenged law falls within the Second Amendment’s ‘plain text.’” *Id.* at 204-205 (citation omitted). As such, the Court had

no occasion to explain how courts should analyze a contested coverage question.

Wolford did, however, preserve *Heller* and *Bruen*’s insistence that history gives text its meaning. The definitions at the heart of the “subsidiary questions”—“the people” as members of the political community, “Arms” as weapons customarily used for offense or defense, and “keep” and “bear” as possess and carry—are drawn from *Heller*’s analysis of the Amendment’s originally understood meaning. *Heller*, 554 U.S. at 579-592. The *Wolford* Court likewise reaffirmed the theoretical foundation of resort to history, reiterating that the Amendment “codified a *pre-existing* right,” *Wolford*, 609 U.S. at 193 (quoting *Heller*, 554 U.S. at 592), and that the right is subject to “important limitation[s],” *Heller*, 554 U.S. at 627. Justice Barrett, concurring, explained that courts at the first step must “look to history that ‘elucidates how contemporaries understood the text.’” *Wolford*, 609 U.S. at 213-214 (Barrett, J., concurring).

Wolford’s restatement could, however, be read more broadly. Justice Jackson warned in dissent that “the upshot of the majority’s view of *Bruen*’s first step,” at least under one reading of it, is “that any law that regulates the carrying of firearms is presumptively unconstitutional.” *Wolford*, 609 U.S. at 243 (Jackson, J., dissenting). Petitioners and the United States embrace a version of that reading here. See Pet. Br. 26-28; U.S. Amicus Br. 8-9. Several courts of appeals, by contrast, have continued to resolve challenges at the first step since *Wolford*. See *United States v. Berger*, 189 F.4th 333, 339-341 (3d Cir. 2026); *United States v. DeFelice*, No. 25-920, 2026 WL 2588603 (2d Cir. Sep. 2, 2026) (per curiam); *United States v. Clerfe*, 186 F.4th 141, 146 (3d Cir. 2026).

II. An Empty First Step Would Repeat The Error That Produced *Bruen* And Distort The Protection The Second Amendment Affords

Coverage and protection are conceptually distinct, but in practice they decide cases together. An analytically defunct threshold places heavier demands on the step-two inquiry. The attempts by some theorists to make First Amendment protection absolute, for example, resulted in a narrow understanding of what counts as covered speech, for “rights whose coverage is too broad are likely to offer little in the way of protection.” Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265, 276 (1981). The relationship is, in a word, “hydraulic.” Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. 99, 118 (2023). See *Gundy v. United States*, 588 U.S. 128, 166-167 (2019) (Gorsuch, J., dissenting) (“When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines.”). The history of Second Amendment doctrine in the lower courts since *Heller* is largely a history of that dynamic. See Luke Smith Morgan, *The Second Amendment After Doctrine* (forthcoming 2027), <https://dx.doi.org/10.2139/ssrn.7286538>.

A. Before *Bruen*, assumed coverage distorted the protection inquiry

While the lower courts after *Heller* correctly erected a recognizable two-step framework, they did not employ a particularly scrutinizing first step. Instead, many treated *Heller*’s acknowledgment of “longstanding” and “presumptively lawful” regulations, 554 U.S. at

626-627 & n.26, as a litmus test, presuming that any regulations that overlapped with these areas were lawful (thus ending their analysis). As the Third Circuit observed, many federal appellate courts “characterized the ‘presumptively lawful’ language in *Heller* as dicta,” but “[e]ven so, these courts relied on the *Heller* ‘dicta’ to reaffirm the constitutionality” of challenged laws. *United States v. Barton*, 633 F.3d 168, 171 (2011). More often, courts simply assumed without deciding that the challenged law governed conduct that implicated the Second Amendment right and proceeded to means-end scrutiny. See, e.g., *Kanter v. Barr*, 919 F.3d 437, 447 n.9 (7th Cir. 2019) (referring to “defer[ring] the threshold historical scope inquiry and proceed[ing] directly to means-end scrutiny” as the “‘prudential approach’”); *United States v. Masciandaro*, 638 F.3d 458, 474 (4th Cir. 2011) (“[I]t is unnecessary to explore * * * the question of whether and to what extent the Second Amendment right recognized in *Heller* applies outside the home.”).

As a consequence, means-end scrutiny had to carry the entire weight of Second Amendment adjudication, whether that adjudication involved claims at the right’s periphery or at its core. To sustain regulations that no one seriously considered unconstitutional, courts applied a weak version of intermediate scrutiny. That deference, however, did not stay at the periphery. In Professor Joseph Blocher and Eric Ruben’s statistical analysis of post-*Heller* cases, courts selected intermediate scrutiny 79 percent of the time, and those claims had a 10 percent success rate. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 Duke L.J. 1433, 1496 (2018). Members of this Court came to view the result as the treatment of the Second Amendment as

“a second-class right.” *Friedman v. City of Highland Park*, 577 U.S. 1039, 1039 (2015) (Thomas, J., dissenting from the denial of certiorari). *Bruen* responded by replacing the second step. But the deference *Bruen* condemned was, in significant part, the hydraulic consequence of missing coverage analysis.

B. An empty first step would place the same pressure on *Bruen*’s historical tradition test

If, as Justice Jackson warned, nearly every firearm regulation conceivable would trigger the Amendment’s coverage under *Wolford*’s gloss on *Bruen*’s first step, the pattern risks repeating itself. Under such an approach, most firearm regulations will arrive at the second step presumptively unconstitutional, and the government will bear the burden of identifying a historical tradition that justifies each.

That burden is poorly suited as a blanket rule to be applied to all firearms regulations, even to those that govern conduct outside the historical right. When conduct falls outside of the right’s historically understood boundaries, there will frequently be no regulatory tradition upon which to base an analogy. The conduct may have been governed by general property, tort, or criminal law, leaving no firearm-specific footprint, as *Wolford* demanded. It may have been too rare, or too plainly unprotected, to prompt legislation. Or it may have involved technology that did not yet exist. See Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. 67 (2023). Under an empty first step, the government could lose in the cases it should most readily win.

Courts confronting such cases face two likely options, neither optimal. First, they can invalidate laws regulating conduct the Second Amendment never protected, simply because they conclude the proffered historical analogues are too far afield—such as for laws criminalizing the possession of firearms with obliterated serial numbers. *E.g.*, *United States v. Price*, 635 F. Supp. 3d 455 (S.D. W. Va. 2022), rev’d, 111 F.4th 392 (4th Cir. 2024) (en banc). Or, they could sustain such laws by reasoning from historical “principles” at ever higher levels of generality, until nearly any modern regulation can be matched with some historical justification. In *United States v. Rahimi*, this Court correctly recognized that the historical inquiry does not demand a “historical twin” and is not “a law trapped in amber.” 602 U.S. 680, 691-692 (2024) (quoting *Bruen*, 597 U.S. at 30). But, as Justice Barrett cautioned, “a court must be careful not to read a principle at such a high level of generality that it waters down the right.” *Id.* at 740 (Barrett, J., concurring). The more unmeritorious or peripheral cases that reach the second step, the more generic historical analogies will likely become. Such is the path means-end scrutiny traveled before *Bruen*. An effective coverage doctrine, screening out claims that fall outside of the right’s historical boundaries, will ensure that the historical inquiry remains demanding in cases in which it properly applies.

III. A Purely Textual First Step Would Be Both Over-inclusive And Underinclusive

Should *Bruen*’s coverage step be reduced to the semantic meaning of the Amendment’s literal text, the three “subsidiary questions” would not merely fail to screen out claims beyond the right’s boundaries. They

would also work to exclude conduct the right has long been understood to protect. The threshold test would err in both directions, expanding the right beyond the historical scope codified by the Amendment, but allowing inroads into the core of the right.

A. Overinclusiveness

Explosives, machine guns, and similar military weapons. *Wolford* defined “Arms” as “any weapon customarily used for offensive or defensive purposes.” 609 U.S. at 195. Read literally, that description reaches grenades, rocket launchers, machine guns, and other explosive devices. Before and after *Bruen*, the courts of appeals consistently rejected Second Amendment challenges to restrictions on such weapons. See, e.g., *United States v. Morgan*, 150 F.4th 1339 (10th Cir. 2025); *United States v. Tagg*, 572 F.3d 1320 (11th Cir. 2009); *United States v. McCartney*, 357 F. App’x 73 (9th Cir. 2009) (unpublished); *United States v. Fincher*, 538 F.3d 868 (8th Cir. 2008); see also *United States v. Ocker-Mullen*, No. 20-cr-00313, 2024 WL 2834845, at *4 (M.D. Pa. June 4, 2024) (grenades). However, under a literalist first step, such restrictions would be presumptively unconstitutional. Their ultimate validity would depend on the government’s success in finding a historical analogue, even as *Heller* itself described as “startling” a reading of precedent that would have cast doubt on federal restrictions on machine guns. 554 U.S. at 624. Some judges have read *Wolford*’s language more narrowly, reasoning that the “offensive or defensive *purposes*” it contemplates do not include uses best suited to military force. *Association of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 183 F.4th 211, 285 n.8 (3d Cir. 2026) (emphasis added) (Shwartz, J., dissenting). In so doing, they

understand the text by reference to the historical purposes of the right the text codified—exactly what a meaningful first step requires.

The problem does not stop at conventional weapons. The Seventh Circuit has observed that, without a meaningful threshold inquiry, even “a nuclear weapon such as the now-retired M388 Davy Crockett system, with its 51-pound W54 warhead,” would fall within the Amendment’s literal text. *Bevis v. City of Naperville*, 85 F.4th 1175, 1182 (7th Cir. 2023). The United States has declined to foreclose that possibility. See Br. for the United States as Amicus Curiae at 12, *Granata v. Campbell*, No. 25-1918 (1st Cir. Jan. 28, 2026). Its answer in this case is not a constitutional principle but an assurance about demand. See U.S. Amicus Br. 17-18.

Untraceable firearms. The problem is not confined to exotic weapons. Federal law prohibits possessing a firearm whose serial number has been removed, obliterated, or altered. 18 U.S.C. 922(k). As some lower court judges have concluded, a handgun with a defaced serial number is still a weapon customarily used for defensive purposes, and possessing one is “keeping” it. *United States v. Price*, 111 F.4th 392, 426 (4th Cir. 2024) (Richardson, J., dissenting). Under a literal first step, Section 922(k) would be presumptively unconstitutional. And, as Judge Richardson’s dissent in *Price* indicates, it may be difficult for the government to identify appropriate analogues, regardless of whether there is any reason to believe that the right as historically understood would preclude the government from enacting such a law.

Committing a Crime of Violence. Nor is the problem confined to weaponry. A literal-text-only first step could render presumptively unconstitutional laws that

no one contends raise any constitutional concern whatsoever. Federal law provides mandatory imprisonment for one who “carries a firearm” “during and in relation to any crime of violence or drug trafficking crime” or even “possesses a firearm” in furtherance of those activities. 18 U.S.C. 924. But if *Wolford* is read to reduce step one to a dictionary checklist of “people,” “arms” and “keep or bear,” then the bank robber charged under 924(c) has a cognizable claim that punishing his bearing of a handgun is presumptively unconstitutional. *Cf. United States v. Green*, No. 25-50841, 2026 WL 2790680, at *1 (5th Cir. Sep. 17, 2026) (“The Supreme Court has not issued a post-*Bruen* opinion addressing whether or how § 924(c) implicates the Second Amendment.”). The fact that such a claim would fail at step two is besides the point. It should not even get through the door because using a gun to rob a bank is far outside the historically understood scope of the preexisting right enshrined in the Second Amendment. See, e.g., *United States v. Risner*, 129 F.4th 361, 368 (6th Cir. 2025) (reaffirming prior circuit precedent concluding that “the historical understanding of the right to keep and bear arms does not extend to the use of a firearm for an unlawful purpose”).

B. Underinclusiveness

The same literalism that admits too much also excludes too much. *Wolford* described “keep[ing]” as “possession” and “bear[ing]” as “carrying.” 609 U.S. at 195 (brackets in original). Many laws that burden the right regulate neither.

Acquisition and ammunition. As courts have frequently acknowledged, the right to keep and bear arms would mean little if the government could freely prohibit acquiring arms or the ammunition necessary to use

them. *E.g.*, *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (“[W]ithout bullets, the right to bear arms would be meaningless.”). But a person seeking to buy a firearm does not yet “possess” one. Nor does a restriction on purchasing ammunition, in the narrowest sense, regulate the possession or carrying of an “Arm.” A textually literal first step thereby would seem to permit inroads on the core of the right. For example, in *United States v. Clerfe*, the Third Circuit held that a conviction for arms trafficking did not implicate the Second Amendment because the defendant’s conduct “involved *dispossessing* himself of firearms,” and “[r]eading ‘keep Arms’ to include ‘giving away Arms’ would conflict with the most basic rule of constitutional interpretation.” 186 F.4th 141, 146 (2026). *Amici* do not disagree with the Third Circuit that arms trafficking should not be covered by the Second Amendment, but note that the court’s textually literal reading applies with equal force to the conventional sale of weapons to qualified purchasers within the United States.

Training and proficiency. *Heller* recognized that, as historically understood, “to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use.” 554 U.S. at 617-618 (quoting Thomas M. Cooley, *General Principles of Constitutional Law in the United States of America* 271 (1880)). The Seventh Circuit accordingly held that a municipal ban on firing ranges implicated the Second Amendment, reasoning that “[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use.” *Ezell v. City of Chicago*, 651 F.3d 684, 704 (2011). Firing a weapon at a range is neither possessing nor carrying it.

So, a first step that asks only whether a law restricts possession or carrying would exclude conduct that *Heller* itself understood the right to include.

C. The lower courts are already (or still) improvising beyond the text

Confronted with these challenges, the courts of appeals have begun devising their own divergent approaches. The Fifth Circuit has treated restrictions on purchasing firearms as restrictions on keeping and bearing them. *Elite Precision Customs, LLC v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 25-11206, 2026 WL 2796983 (Sep. 18, 2026). In so doing, the court explicitly departed from the text, writing that “it is well established in the American legal tradition that the right to keep firearms logically entails the right to purchase them as well.” *Id.* at *3. The Second Circuit, on the other hand, has held that restrictions on purchasing and selling arms fall within the text only if they “meaningfully constrain” the underlying right to keep and bear arms, *DeFelice*, 2026 WL 2588603, at *4, again supplying a test not found in the Amendment’s “plain text,” *id.* at *3. That lower courts are finding it impossible to answer coverage questions without departing from the plain text suggests the necessity of clarifying *Wolford*.

IV. This Court Should Clarify That The First Step Asks What The Codified Right Encompasses

The Court need not depart from *Bruen* or *Wolford* to correct these problems. It need only confirm, consistent with those decisions, that the “plain text” of the Second Amendment refers to a pre-existing right, such that coverage requires attention to how *that right* was understood when codified by the Amendment.

Amici agree that the first step begins with the text. See *Food & Drug Admin. v. Alliance for Hippocratic Med.*, 602 U.S. 367, 378 (2024) (“Therefore, we begin as always with the precise text of the Constitution.”). The risk is instead that lower courts may *stop* at the text, and divorce that text from its historical context. The Second Amendment does not protect “keep[ing] and bear[ing] Arms” in the abstract. It protects “*the right of the people to keep and bear Arms*,” and provides that this right “shall not be infringed.” This text identifies the object of the Amendment’s protection as an existing right, bounded as that right then was. Or, as *Heller* put it, “[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’” 554 U.S. at 592. One cannot conduct a “plain text” analysis without inquiring into the historically understood dimensions of that right. See, e.g., *Wolford*, 609 U.S. at 213-214 (Barrett, J., concurring); *Bruen*, 597 U.S. at 25 (“[R]eliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate” than other approaches).

This approach does not require courts to abandon textual fidelity or to import their own policy judgments. Rather, it conforms to the ordinary methodology of construing constitutional language: ask what the words meant to those who ratified them in order to determine the meaning of the right the Amendment codified. That is the inquiry Justice Barrett described—one that looks to “history that ‘elucidates how contemporaries understood the text.’” *Wolford*, 609 U.S. at 213-214 (Barrett, J., concurring) (citation omitted).

The Court should confirm that the first step of the *Bruen* framework requires a meaningful inquiry into whether the people, arms, and conduct at issue fall within the right the Second Amendment codified, informed by the historical understanding of that right. Such a holding would align the Second Amendment with every other guarantee in the Bill of Rights, rather than subjecting it to “an entirely different body of rules.” *Bruen*, 597 U.S. at 70 (quoting *McDonald*, 561 U.S. at 780 (plurality opinion)). Conducting a robust historical analysis to determine the scope of a right is not new; as noted, this historical inquiry has informed the boundaries of many other constitutional rights. Courts ask whether the place or item searched falls within the Fourth Amendment’s scope, whether a statement is testimonial before applying the Confrontation Clause, and whether a person is in custody before the Fifth Amendment privilege attaches—“despite no mention of custody in the ‘plain text’ of the Amendment.” *Bevis*, 85 F.4th at 1194 (citing *New York v. Quarles*, 467 U.S. 649, 654 (1984)). In each instance, coverage turns on the words as understood against the legal tradition they codified. Therefore, a historically informed “search for the correct meaning of ‘Arms’ for the Second Amendment is consistent with our approach to its companions in the Bill of Rights.” *Ibid.*

This approach would also keep faith with *Heller*, *Bruen*, and *Wolford*. This Court has recognized that *Heller* “demands a test rooted in the Second Amendment’s text, as informed by history,” *Bruen*, 597 U.S. at 19, and that *Heller* relied on “text and history” in “suggesting the outer limits of the right,” *id.* at 22. *Bruen*, too, contemplated using history “to determine which modern ‘arms’ are protected.” *Id.* at 28. And *Wolford*

acknowledged that the right contains historical limits “not in every way coterminous with the Amendment’s literal language.” 609 U.S. at 196. Thus, as Justice Barrett suggested, courts must “look to history that ‘elucidates how contemporaries understood the text’” at *Bruen*’s first step. *Wolford*, 609 U.S. at 213-214 (Barrett, J., concurring) (citation omitted).

Finally, reaffirming that the Second Amendment requires a meaningful coverage step would protect the right itself, by reserving the demanding historical inquiry *Bruen* prescribed for the claims to which it was meant to apply.

CONCLUSION

The Court should reaffirm a two-step methodology for adjudicating Second Amendment claims that includes a meaningful first step that properly encapsulates the scope of the pre-existing right that the Second Amendment protects.

Respectfully submitted.

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