

No. 26-46

IN THE
Supreme Court of the United States

NUNZIO CALCE, et al.,
Petitioners,

v.

CITY OF NEW YORK, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Second Circuit

**Brief *Amicus Curiae* of
Gun Owners of America, Gun Owners Fdn.,
Tennessee Firearms Assoc.,
Tennessee Firearms Fdn.,
Coalition of New Jersey Firearm Owners,
America's Future,
Citizens United, Citizens United Fdn., and
Conservative Legal Defense and Educ. Fund
in Support of Petitioners**

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INTEREST OF THE *AMICI CURIAE*¹

Amici Gun Owners of America, Gun Owners Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, Coalition of New Jersey Firearm Owners, America’s Future, Citizens United, Citizens United Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* are currently litigating state and federal constitutional challenges to various arms bans nationwide. *See Gun Owners of Am., Inc. v. Raoul*, No. 23-1010 (U.S.), *cert. denied*, *Harrel v. Raoul*, 144 S. Ct. 2491 (2024) (Illinois ban on “assault weapons” and “large-capacity magazines”); *Federal Firearms Licensees of Ill. v. Pritzker*, No. 24-3063 (7th Cir.) (same); *Crump v. Katz*, No. CL26000201-00 (Va. Cir. Ct. Lancaster County) (Virginia ban on the same; preliminarily enjoined June 30, 2026).

¹ It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT

In *Caetano v. Massachusetts*, 577 U.S. 411 (2016), this Court reversed a state-court judgment that “the Second Amendment does not extend to stun guns,” explaining that such a holding “contradict[ed] this Court’s precedent” in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Caetano*, 577 U.S. at 411, 412 (per curiam). Thereafter, in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), this Court explained that the Second Amendment’s “general definition” of “Arms” “covers modern instruments that facilitate armed self-defense,” citing *Caetano*’s “stun guns” in support. *Id.* at 28. Thus, following *Caetano* — and certainly now after *Bruen* — it seems clear that bans on these electronic arms are constitutional nonstarters. Indeed, seemingly every jurisdiction that previously banned stun guns now has been brought into compliance with the Second Amendment, whether by legislative repeal or constitutional challenge.² Every jurisdiction, that is, except for New York City.

STATEMENT OF THE CASE

This case involves a challenge to New York City’s outlier ban on (i) stun guns — close-quarters, contact-based defensive weapons, and (ii) tasers — stun guns’ projectile-firing variants. State law bans ordinary Americans from possessing either type of electronic arm, irrespective of one’s licensure to carry firearms.

² See Eugene Volokh, “R.I. Stun Gun Ban Struck Down,” *Reason* (Mar. 15, 2022) (collecting states and various counties).

See N.Y. Penal Law § 265.01(1). However, following *Avitabile v. Beach*, 368 F. Supp. 3d 404 (N.D.N.Y. 2019), enforcement of the State’s ban has been permanently enjoined as to New York *State* officials. Meanwhile, New York City separately bans the possession of stun guns. See N.Y.C. Admin. Code § 10-135. The sum total is that City officials can enforce *both* provisions, and so the possession of *all* electronic arms in New York City is a crime.

In 2021, Petitioners filed suit in the Southern District of New York, challenging the City’s ban on Second and Fourteenth Amendment grounds. And after nearly four years of litigation, including this Court’s intervening *Bruen* decision, the district court ultimately issued a merits ruling on the parties’ cross-motions for summary judgment in March of 2025. That ruling rejected Petitioners’ challenge on the theory that Petitioners had failed to show that the Second Amendment was even *implicated* at the threshold.

First, the district court cited *Heller* for the proposition that “[t]he Second Amendment ‘does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.’” Petition Appendix (“Pet.App.”) 18a (quoting *Heller*, 554 U.S. at 625). Inferring that this means the Second Amendment extends *only* to those weapons “that are ‘in common use at the time’” — and no others — the district court set about resolving whose burden it was to prove “common use.” Pet.App.19a, 21a. Indeed, the district court accepted “common use” as a limitation on *all* Second Amendment activity — not just “the

‘bear[ing]’ (*i.e.*, carrying) of arms,” but also “the ‘keep[ing]’ (*i.e.*, possession)”³ of arms, too.

Characterizing *Bruen*’s framework as a “two-step Second Amendment test,” the district court then posed two alternative “common use” approaches. Under the first, proving “common use” would be *Petitioners*’ burden to bear at the Second Amendment’s plain text. *See* Pet.App.22a. Thus, not only would *Petitioners* have to assert that they belonged to “the people” and wished to “keep” or “bear” weapons restricted by the City’s ban, but *also* they would have to prove that the electronic arms in question were sufficiently common so as to qualify as “Arms” at the outset. *See id.* Under the second approach discussed by the district court, *Petitioners* would bear no such textual burden to prove “common use.” Rather, it would be the *government*’s burden to show that electronic arms are *not* in “common use” as part of its historical burden. *See id.*

Claiming “the weight of authority” supported the first approach, the district court ultimately saddled *Petitioners* with the “common use” burden, rejecting a “quick[] and conclusive[]” textual analysis as “far too facile...” Pet.App.22a, 23a. As the court rationalized, if *Petitioners* were correct that “common use” was *not* a textual limitation on the right to keep and bear arms, then Second Amendment challenges could proceed “whenever a regulation has the slightest connection to guns.” Pet.App.23a (quoting *Mills v. New York City*, 758 F. Supp. 3d 250, 264 (S.D.N.Y.

³ *Wolford v. Lopez*, 225 L. Ed. 2d 494, 506 (2026).

2024)). *But see* *Wolford v. Lopez*, 225 L. Ed. 2d 494, 506, 504 (2026) (requiring historical analysis when a “law place[s] any restrictions” on any “implement[] used for offense or defense”).

Thus, the district court required Petitioners to present “substantial statistical evidence showing the popularity” of electronic arms to proceed beyond *Bruen*’s textual qualifier. Pet.App.29a-30a (quoting *Jones v. Bermudez*, 2019 U.S. Dist. LEXIS 25371, at *22 n.7 (S.D.N.Y. Feb. 14, 2019)). And, because Petitioners had “not provided any studies, reports, or data for the Court to conduct a ‘statistical inquiry’ into whether stun guns and tasers are in common use,” the district court ended its analysis there. Pet.App.30a-31a. At no point did the district court analyze the historical tradition or engage with Respondents’ proffered historical regulations of “non-firearm weapons.” Pet.App.14a.

Finally, with respect to this Court’s *Caetano* decision, the district court dismissed its holding as “overstate[d].” Pet.App.33a. Implying that this Court only reversed *reasoning* while expressing no view on the Massachusetts court’s *holding* or *judgment*, the district court treated stun guns’ constitutional protection as an open question. *See* Pet.App.34a.⁴ As

⁴ *But see Black v. Cutter Lab’s*, 351 U.S. 292, 297 (1956) (“This Court ... reviews judgments, not statements in opinions.”); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (“in reviewing the decision of a lower court, it must be affirmed if the result is correct ‘although the lower court relied upon a wrong ground or gave a wrong reason’”).

the district court theorized, this Court “did not ... conclusively determine, because it was not required to, that stun guns and tasers are in ‘common use.’” *Id.* Thus, the district court denied Petitioners’ motion for summary judgment and upheld New York City’s outlier ban on electronic arms.

In an April 13, 2026 summary order, a panel of the Second Circuit affirmed. Citing a prior panel that had required a textual “common use” showing in a criminal appeal,⁵ the panel agreed that Petitioners “bear the burden of proof” on the “common use” question. Pet.App.4a. And, finding that Petitioners “failed to adduce evidence to satisfy *Bruen* step one” below, the Second Circuit “decline[d] to consider” any “additional materials” on “common use” that Petitioners presented on appeal. Pet.App.4a. Accordingly, based on the record before it, the Second Circuit claimed “summary judgment in favor of [Respondents] was appropriate.” Pet.App.5a.

SUMMARY OF ARGUMENT

The fact that this case is “*Caetano 2.0*” (Petition at 1) speaks volumes about the lower courts’ respect — or lack thereof — for this Court’s precedents. Far too many lower courts, including the Second Circuit, continue to flout this Court’s Second Amendment holdings in increasingly inventive ways. Sometimes,

⁵ See *United States v. Gomez*, 159 F.4th 172, 177 (2d Cir. 2025) (finding that a handgun “with an obliterated serial number” is not an “Arm” entitled to presumptive protection because it is “not ... ‘in common use today for self-defense’”).

this subversion takes the form of elevating this Court’s dicta above its clear holdings, which produces results that are impossible to square with *Bruen*’s methodology. Other times, the lower courts simply ignore inconvenient precedents to achieve their desired result. Failure to quell this lower-court rebellion when it occurs will only undermine public confidence in the judicial system.

This Court should grant certiorari for two reasons in addition to those presented in the Petition. First, there is a deepening circuit split on the “common use” issue. Contrary to this Court’s precedents, the Second Circuit requires that challengers of firearm regulations bear the initial burden of statistically proving a given weapon is “in common use.” Should they fail to do so, the penalty is that the Second Amendment challenge fails at the threshold — the weapon ostensibly is not an “Arm” under the plain text, and the government bears no historical burden whatsoever. That approach splits with the Third and Sixth Circuits, which do not require any atextual subtests to clear this Court’s intuitive subject-matter qualifier. Although the approach of the Third and Sixth Circuits is obviously correct, no doubt that alone will fail to convince the Second to change its ways. This Court should grant the Petition to resolve this disarray.

Second, the opinion below joins a long line of Second Circuit cases that reject this Court’s most basic Second Amendment precepts. This open rebellion should not go unaddressed, as it will only embolden anti-gun jurisdictions to ignore and subvert this Court’s precedents even further. Such defiance

requires this Court aggressively to police the inferior courts, employing summary reversals in appropriate cases. To borrow a term from one frustrated Ninth Circuit jurist, these sorts of “benchslaps” are long overdue, and they finally may bring belligerent circuits into compliance with this Court’s precedents. This case is a prime candidate for such a quick and easy reversal.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE DEEPENING CIRCUIT SPLIT ON “COMMON USE.”

A. The Courts Below Erred by Elevating Dicta Above This Court’s Express Holdings.

The Second Amendment guarantees “the right of the people to keep and bear Arms.” In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court instructed that the term “Arms” means “[w]eapons of offence, or armour of defence,” and “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another,” and includes “all firearms” as originally understood. *Id.* at 581. And, because the Constitution must protect enumerated rights in modern contexts, this Court explained that “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* at 582. Applying those principles in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), this

Court vacated a judgment of the Supreme Judicial Court of Massachusetts that had held that stun guns are not protected by the Second Amendment.

Then, in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), this Court further elaborated that the Second Amendment’s “general definition” of “Arms” “covers modern instruments that facilitate armed self-defense,” such as “stun guns.” *Id.* at 28 (citing *Caetano*, 577 U.S. at 411-12). Thus, this Court instructed that, “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” *Id.* at 17. And ultimately, “*we use history* to determine which modern ‘arms’ are protected by the Second Amendment....” *Id.* at 28 (emphasis added). Even so, not even historical tradition can justify “laws restricting ... weapons that are unquestionably in common use today.” *Id.* at 47.

Finally, in *Wolford v. Lopez*, 225 L. Ed. 2d 494 (2026), this Court recently reiterated that the Second Amendment’s plain text covers “any form of ‘Arms,’ *i.e.*, any weapon customarily used for offensive or defensive purposes,” and that such term plainly “refers to implements used for offense or defense.” *Id.* at 506, 504. Should a “law place any restrictions” on the keeping or bearing of such an implement, then it is “presumptively unconstitutional” and the government must bear its historical burden. *Id.* at 506.

In blatant contravention of these principles, the courts below required something *more* at *Bruen*’s threshold textual inquiry. Rather than acknowledge that stun guns and tasers are bearable instruments

that “facilitate armed self-defense” (*Bruen*, 597 U.S. at 28) and therefore are entitled to presumptive protection under the Second Amendment’s plain text, the Second Circuit demanded that Petitioners *prove* that these weapons are “in common use today for self-defense.” Pet.App.4a. Without this statistical evidentiary showing, the panel declined to proceed any further under *Bruen*, thereby absolving Respondents of their historical burden.

That is not how “common use” works. As this Court explained in *Heller*, bans on weapons in common use are simply “invalid.” *Heller*, 554 U.S. at 629. But that does not mean the Second Amendment protects *only* that which is common. Indeed, “*we use history* to determine which modern ‘arms’ are protected by the Second Amendment,” not statistics on their modern popularity. *Bruen*, 597 U.S. at 28 (emphasis added). This Court “explained ... that the Second Amendment protects only the *carrying* of weapons that are those ‘in common use at the time,’ as opposed to those that ‘are highly unusual in society at large.’” *Id.* at 47 (emphasis added). Thus, at most, this Court has treated “common use” as a limitation on the types of weapons people could *publicly carry*, not what they could *own or possess* generally.

In other words, “common use” serves at most two analytical roles under this Court’s precedents. First, “common use” is sufficient *but not necessary* to invalidate an arms ban, as the people’s modern preferences will trump even a historical tradition of regulation. See *Bruen*, 597 U.S. at 47 (“even if ... colonial laws prohibited the carrying of handguns

because they were considered ‘dangerous and unusual weapons’ in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today”). And second, this Court has signaled that “common use” may serve as a limitation on public carry. *See id.* (“[d]rawing from” historical laws “prohibit[ing] the carrying of ‘dangerous and unusual weapons’” to “explain[] ... that the Second Amendment protects only the carrying of weapons that are those ‘in common use at the time’”); *see also United States v. Rahimi*, 602 U.S. 680, 697 (2024) (discussing “‘going armed’ laws, a particular subset of the ancient common-law prohibition on affrays,” which “prohibited ‘riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land’”). But at no point has this Court instructed that an evidentiary showing of “common use” is required to demonstrate that a weapon is an “Arm.” In fact, in its latest explication of the *Bruen* framework in *Wolford*, this Court never even mentioned “common use.” *See generally Wolford*, 225 L. Ed. 2d 494.

B. The Second Circuit’s Position Clashes with Those of the Third and Sixth Circuits, Necessitating This Court’s Review.

Not only is the Second Circuit’s conception of “common use” at odds with this Court’s precedents, but it also splits with decisions of the Third and Sixth Circuits. Rather than saddling Second Amendment claimants with the burden of conducting an open-

ended statistical inquiry to a judge's satisfaction, these courts faithfully applied this Court's textual guidance.

United States v. Bridges, 150 F.4th 517 (6th Cir. 2025), was a Second Amendment appeal from a criminal conviction for possessing an unregistered machinegun in violation of federal law. *See* Petition at 11. There, the Sixth Circuit had no trouble concluding that a handgun modified to fire fully automatically was an "Arm" entitled to presumptive protection under the Second Amendment's plain text. Indeed, the machinegun in question qualified as "any thing that a man ... takes into his hands, or useth in wrath to cast at or strike another," a "bearable" instrument, and indeed, a "*firearm*." *Bridges*, 150 F.4th at 524 (emphasis added) (quoting *Heller*, 554 U.S. at 581-82). Thus, the machinegun was "undoubtedly an 'Arm[]' that one can 'keep and bear.'" *Id.* "Common use" played no role in the Sixth Circuit's threshold textual inquiry.

And since the Petition was filed, this split has only deepened. Recently in *ANJRPC, Inc. v. Att'y Gen. N.J.*, 2026 U.S. App. LEXIS 21156 (3d Cir. July 17, 2026), the en banc Third Circuit struck down New Jersey's ban on so-called "assault firearms" and "large capacity ammunition magazines." There, the Third Circuit expressly declined New Jersey's invitation to "conclude that only weapons in common use are 'Arms' governed by the plain text of the Second Amendment." *Id.* at *35. As the Third Circuit explained, "*Bruen*'s first step is fundamentally a textual inquiry. ... Yet 'common use' appears nowhere in the Second Amendment's text. Nor is it 'an inherent part of the

definition of “Arm.” ... Common use has no bearing on those definitions.” *Id.* at *36.

While these courts have gotten “common use” right, the opinion below flouts this Court’s precedents on a crucial aspect of *Heller* and *Bruen*’s methodology — one that makes all the difference at the threshold, and was outcome-determinative here. This Court should grant the Petition to resolve the deepening circuit split on “common use.”

II. THIS COURT’S REVIEW IS NECESSARY TO “BENCHSLAP” THE INCREASINGLY BELLIGERENT SECOND CIRCUIT AND REAFFIRM THAT THE SECOND AMENDMENT IS NOT A “SECOND-CLASS RIGHT.”

Expressing growing frustration with the Ninth Circuit’s near-perfect record of ruling *against* the Second Amendment, Ninth Circuit Judge Lawrence VanDyke recently observed that, “[c]ome hell or high water, *Heller* or *Bruen*, our court will find a way to uphold any weapons restriction.... 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.” *Knife Rts., Inc. v. Bonta*, 2026 U.S. App. LEXIS 20960, at *82 (9th Cir. July 16, 2026) (VanDyke, J., dissenting from denial of rehearing en banc). Thus, Judge VanDyke offered a “modest proposal” — this Court “should consider summarily reversing some of [the Ninth Circuit’s] wayward Second Amendment decisions. To put it more colloquially, it’s time for some benchslaps.” *Id.*

A “benchslap” is an “evocative” play on words, referring to a “judge’s sharp rebuke of counsel, a litigant, or perhaps another judge.” *Knife Rts., Inc.*, 2026 U.S. App. LEXIS 20960, at *100 (VanDyke, J., dissenting from denial of rehearing en banc). And when directed toward a lower court, a benchslap can be “a form of stern judicial correction designed to impose public shame for improper ... judicial conduct.” *Id.*

Aside from the Ninth Circuit, there is perhaps no circuit more deserving of a Second Amendment benchslap than the Second. To say that the Second Circuit has been hostile to firearm ownership would be an understatement. Indeed, the opinions below are only the latest installments in the Second Circuit’s ongoing rebellion against this Court’s Second Amendment precedents — which undoubtedly will continue absent this Court’s decisive intervention. A short survey of the Second Circuit’s cases demonstrates the issue.

Consider the Second Circuit’s initial reaction to this Court’s landmark *Heller* decision, which rejected adoption of a “freestanding ‘interest-balancing’ approach.” *Heller*, 554 U.S. at 634; *see also McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010) (“In *Heller* ... we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.”). Rather than *follow Heller*’s textual and historical framework, the Second Circuit almost immediately rebelled against it, adopting a form of tiered interest-balancing scrutiny based on whether, in judges’ assessments, a firearm

regulation “substantially burden[ed] the Second Amendment.” *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012).⁶

Thus began a long line of interest-balancing cases that stopped only with *Bruen*. Soon after *Decastro*, in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), the Second Circuit upheld New York’s discretionary “proper cause” licensing requirement under “intermediate scrutiny” — the same requirement this Court rejected in *Bruen*. Then, in *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), the court upheld bans on ubiquitous semiautomatic rifles and ammunition magazines that admittedly “millions” of “Americans own[ed],” apparently on the theory that New York nevertheless had a “substantial” interest in infringing the Second Amendment right. *Id.* at 255, 261. Then, in *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), the Second Circuit upheld onerous licensing restrictions on the transportation of firearms outside the home, claiming “public safety” was a “compelling” enough governmental interest to do so. *Id.* at 62. And the same was true in *Libertarian Party v. Cuomo*, 970 F.3d 106 (2d Cir. 2020), another challenge to New York’s firearm licensing requirements rejected under “intermediate scrutiny.”

⁶ Prior to *Decastro*’s rejection of *Heller*’s plain terms, the Second Circuit claimed in *Maloney v. Cuomo*, 554 F.3d 56, 58 (2d Cir. 2009), that it was “settled law ... that the Second Amendment applies only to limitations the federal government seeks to impose on this right.” *Cf. McDonald*, 561 U.S. 742 (incorporating the Second Amendment against the states).

Although *Bruen* expressly repudiated the Second Circuit’s “judge-empowering” approach (597 U.S. at 22), *Bruen* did little to change the Second Circuit’s hoplophobia. Rather, the Second Circuit has adapted, finding new ways to uphold all manner of gun control. For example, contrary to this Court’s admonition not to “declare the island of Manhattan a ‘sensitive place’ simply because it is crowded” (*id.* at 31), the Second Circuit did just that in *Antonyuk v. James*, 120 F.4th 941 (2d Cir. 2024). There, the Second Circuit curiously claimed that historical tradition supports disarmament in “quintessentially crowded areas and public forums” after all. *Id.* at 1019.

Antonyuk’s approving citation of Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. 67 (2023), might explain why. See *Antonyuk*, 120 F.4th at 969 n.14. Taking issue with *Bruen*’s rigorous, rights-protective framework, Professor Charles urges sympathetic lower courts to “engage in the time-honored practice of ‘narrowing Supreme Court precedent from below.’” Charles, *supra*, at 149. Maligning this nation’s historical tradition as “the dead hands of the past,” Charles recommends that, “though the Supreme Court may desire to sit as a superlegislature over nationwide gun policy, lower courts ... need not easily cede the people’s ultimate authority.” *Id.* at 71, 155. The Second Circuit appears to have taken this recommendation to heart, and it seems the court will continue “narrowing” this Court’s precedents from below, as long as this Court allows.

This sort of belligerence “is a virus that may spread if not promptly eliminated.” *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 146 S. Ct. 541, 545 (2024) (Alito & Thomas, JJ., dissenting from denial of certiorari). Summary reversal here may assist the Second Circuit in understanding that the Second Amendment is not a “second-class right.” *Bruen*, 597 U.S. at 70.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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