No. 24-936

In The
Supreme Court of the United States

ANDREW HANSON, ET AL.,

Petitioners,

v.

DISTRICT OF COLUMBIA, ET AL.,

Respondents.

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

BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA AND SECOND AMENDMENT FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ADAM KRAUT
SECOND AMENDMENT FOUNDATION
12500 N.E. 10th Pl.
Bellevue, WA 98005
(425) 454-7012
akraut@saf.org

JOSEPH G.S. GREENLEE
Counsel of Record
ERIN M. ERHARDT
NATIONAL RIFLE ASSOCIATION OF AMERICA – INSTITUTE FOR LEGISLATIVE ACTION
11250 Waples Mill Rd.
Fairfax, VA 22030
(703) 267-1161
jgreenlee@nrahq.org

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INTEREST OF *AMICI CURIAE*[1]

The National Rifle Association of America (NRA) is America's oldest civil rights organization and foremost defender of Second Amendment rights. It was founded in 1871 by Union generals who, based on their Civil War experiences, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA has approximately four million members, and its programs reach millions more.

The Second Amendment Foundation (SAF) is a nonprofit membership organization founded in 1974 with over 720,000 members and supporters in every state of the union. Its purposes include education, research, publishing, and legal action focusing on the constitutional right to keep and bear arms.

Amici are interested in this case because the District of Columbia's ban on commonly possessed standard magazines violates the Second Amendment.

[1] Counsel for all parties received timely notice of *Amici*'s intent to file this brief. No counsel for any party authored this brief in any part. Only *Amici* funded its preparation and submission.

SUMMARY OF ARGUMENT

This Court held that bans on common arms violate the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The *Heller* Court applied the text-and-history test later expounded in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Analyzing the Second Amendment's plain text, *Heller* determined that the Second Amendment extends, prima facie, to all bearable arms. Proceeding to our nation's historical tradition of firearm regulation, *Heller* held that only "dangerous and unusual" arms may be banned, and because common arms are not unusual, a ban on common arms violates the Second Amendment.

Under *Heller*, this case is simple: because the magazines that the District of Columbia bans are common, the ban violates the Second Amendment.

But the D.C. Circuit misapplied this Court's precedents and consequently held that the District's ban on common arms is likely consistent with our nation's historical tradition of firearm regulation.

The court correctly concluded that the banned magazines are likely "arms" covered by the Second Amendment's plain text. But the court's plain text analysis nevertheless contradicted this Court's precedents in ways that will undermine the Second Amendment in future cases.

At the plain text stage, the D.C. Circuit required the plaintiffs to prove that the banned magazines are covered by the Second Amendment. *Heller*'s plain text analysis, however, establishes that the Second

Amendment presumptively protects all instruments that constitute bearable arms.

The court also considered whether the banned magazines are in common use in its plain text analysis. But *Heller* and *Bruen* demonstrate that this consideration—along with the question of whether the magazines are "dangerous and unusual"—must occur in the historical analysis.

In its historical analysis, the D.C. Circuit held that common magazines can likely be banned based on historical regulations on particularly dangerous weapons. But *Heller* made clear that arms cannot be categorically prohibited just because they are dangerous. Rather, an arm may be banned only if it is *both* dangerous *and* unusual. And since the court found that the magazines are common, they are necessarily not dangerous *and unusual*.

Specifically, the D.C. Circuit relied on nineteenth-century Bowie knife restrictions. But traditional regulations on *unprotected* arms cannot justify modern regulations on *protected* arms. And no evidence in this case indicates that Bowie knives were in common use at the time they were regulated.

Moreover, even if historical Bowie knife regulations were relevant, the D.C. Circuit did not identify a tradition of Bowie knife prohibitions. Rather, the court grouped together lesser, non-prohibitory regulations—including restrictions on concealed carry, enhanced penalties for criminal misuse, and taxes on ownership—to justify the District's possession ban on common arms. But this Court has repeatedly demonstrated that lesser, non-

prohibitory regulations cannot justify a possession prohibition.

Finally, the court improperly disregarded the fact that repeating arms capable of firing more than 10-consecutive rounds predate the Second Amendment's ratification by over two centuries and were never prohibited before the twentieth century.

This case presents the Court with the opportunity to resolve several splits among the federal Circuit Courts, including whether magazines are "arms," what constitutes "common use," whether "common use" should be considered in the plain text or historical inquiry, and whether the Second Amendment excludes weapons that are most useful for military service. The Court should grant the Petition for Certiorari to resolve the many circuit splits, reaffirm its precedents, and restore the right of Americans to possess common arms.

ARGUMENT

I. *Heller* held that common arms cannot be banned.

This Court held that bans on common arms violate the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Heller*, invalidating the District of Columbia's handgun ban, applied the test later expounded in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*:

> In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation. . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.

597 U.S. 1, 17 (2022).

Conducting the plain text analysis of the Second Amendment, *Heller* determined that "[t]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms." 554 U.S. at 582.

Proceeding to the historical tradition of firearm regulation, *Heller* held that common arms cannot be banned. *Heller* first determined that commonly possessed weapons are protected arms: "The traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Id.* at 624 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). Traditionally, therefore, "the sorts of weapons

protected were those 'in common use at the time.'" *Id.* at 627 (quoting *Miller*, 307 U.S. at 179).

As for prohibitions on particular arms, *Heller*'s extensive historical analysis identified only "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* This traditional regulation "fairly supported" *Heller*'s holding that the Second Amendment protects common arms because common arms are necessarily not dangerous *and unusual*. *Id.*; *see also Bruen*, 597 U.S. at 47 ("Drawing from this historical tradition [of restrictions on 'dangerous and unusual weapons'], we explained [in *Heller*] 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.'") (quoting *Heller*, 554 U.S. at 627).

Heller's "historical understanding of the scope of the right" was consistent with *Miller*—which held that short-barreled shotguns were not protected arms—because *Miller* established that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625.[2]

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[2] *Bruen* made clear that "dangerous and unusual" arms can become common—and thus protected—arms:

> Whatever the likelihood that handguns were considered "dangerous and unusual" during the colonial period, they are indisputably in "common use" for self-defense today. They are, in fact, "the quintessential self-defense weapon." [*Heller*, 554 U.S. at 629.] Thus, even if these colonial laws prohibited the carrying of handguns because they were considered

Concluding that the nation's tradition of firearm regulation allows only dangerous and unusual weapons to be banned, and that handguns—as "the most popular weapon chosen by Americans"—are common, *Heller* held that "a complete prohibition of their use is invalid." *Id.* at 629.

After *Heller*, this Court invalidated Chicago's handgun ban in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *McDonald* reaffirmed that the Second Amendment "applies to handguns because they are 'the most preferred firearm in the nation'" for self-defense. *Id.* at 767 (quoting *Heller*, 554 U.S. at 628–29).

In *Caetano v. Massachusetts*, this Court reversed a ruling that upheld a stun gun prohibition. 577 U.S. 411 (2016). Concurring, Justice Alito, joined by Justice Thomas, explained that because "stun guns are widely owned and accepted as a legitimate means of self-defense across the country[,] Massachusetts' categorical ban of such weapons therefore violates the Second Amendment." *Id.* at 420 (Alito, J., concurring).

Justice Thomas, joined by Justice Scalia, provided additional confirmation of this application of the Court's test in a dissent from a denial of certiorari:

> *Heller* asks whether the law bans types of firearms commonly used for a lawful

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> "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.

597 U.S. at 47.

> purpose. . . . Roughly five million Americans own AR-style semiautomatic rifles. The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. Under our precedents, *that is all that is needed* for citizens to have a right under the Second Amendment to keep such weapons.

Friedman v. City of Highland Park, Ill., 577 U.S. 1039, 1042 (2015) (Thomas, J., dissenting from the denial of certiorari) (citations omitted and emphasis added).

Thus, for arms prohibitions, "the pertinent Second Amendment inquiry is whether [the arms] are commonly possessed by law-abiding citizens for lawful purposes today." *Caetano*, 577 U.S. at 420 (Alito, J., concurring) (emphasis omitted).[3]

In sum, this Court's precedents establish that the plain text covers all bearable arms, and that historical tradition supports banning only dangerous and unusual weapons. Arms commonly possessed for

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[3] To be sure, the specific make and model of a particular arm need not be popular. Rather, the arm must be among "the sorts of weapons" or "of the kind" that are "in common use at the time." *Heller*, 554 U.S. at 624, 627. The function of the arm is what matters. Thus, *Heller* paid no attention to the Colt Buntline nine-shot revolver that Dick Heller sought to possess and instead focused on the commonality of handguns in general. *See United States v. Price*, 111 F.4th 392, 423–24 (4th Cir. 2024) (en banc) (Gregory, J., dissenting) ("[T]he *Bruen* step one inquiry into 'types of weapons' is general and therefore does not concern a specific firearm. . . . As long as the weapon is of a type in common use (a handgun or rifle, for example) the presumption applies.").

lawful purposes are not unusual and thus cannot be banned.

II. The D.C. Circuit injected several factors that contradict *Heller* into the plain text analysis.

The plain text analysis in this case should be simple: the plain text covers the banned magazines because they are bearable arms. *See Heller*, 554 U.S. at 582; *Caetano*, 577 U.S. at 411. The D.C. Circuit correctly concluded that the banned magazines "very likely are 'Arms' within the meaning of the plain text of the Second Amendment." *Hanson v. District of Columbia*, 120 F.4th 223, 232 (D.C. Cir. 2024). But the court's analysis contradicted this Court's precedents in ways that will undermine the Second Amendment in future cases.

A. It is not plaintiffs' burden to prove that the plain text covers bearable arms; rather, the Second Amendment extends prima facie to all bearable arms.

At the plain text stage, the D.C. Circuit required the plaintiffs to prove that the banned magazines "are 'Arms' within the meaning of the Second Amendment." *Hanson*, 120 F.4th at 232.

But *Heller*'s plain text analysis establishes that "[t]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms." 554 U.S. at 582; *see also Caetano*, 577 U.S. at 411. "In other words," *Heller* "identifies a presumption in favor of Second Amendment protection." *New York State Rifle*

& Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 257 n.73 (2d Cir. 2015); *see also Virginia v. Black*, 538 U.S. 343, 369 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (defining "prima facie evidence" as "'sufficient to establish a given fact'" and "'if unexplained or uncontradicted . . . sufficient to sustain a judgment in favor of the issue which it supports'") (quoting BLACK'S LAW DICTIONARY 1190 (6th ed. 1990)). Thus, in *Cuomo*, the Second Circuit appropriately struck down a ban on a pump-action rifle when the state failed to present any evidence regarding the rifle and "the presumption that the Amendment applies remain[ed] unrebutted." 804 F.3d at 257 n.73.

Here, the fact that the banned magazines are bearable arms should have been sufficient to trigger the historical analysis in which the government bears the burden of justifying its regulation with historical tradition. *See Heller*, 554 U.S. at 582; *Bruen*, 597 U.S. at 17, 24.

B. The "common use" consideration is part of the historical analysis—not the plain text analysis.

The D.C. Circuit considered whether the banned magazines are "in common use for a lawful purpose" in its plain text analysis. *Hanson*, 120 F.4th at 232 (quotation marks omitted). But *Heller* and *Bruen* demonstrate that this consideration must occur in the historical analysis.

Heller referred to "the *historical tradition*" of regulating "dangerous and unusual weapons." 554 U.S. at 627 (emphasis added). And *Bruen* explained

that the *Heller* Court was "[d]rawing from this *historical tradition*" of restricting "dangerous and unusual weapons" in holding that the Second Amendment protects arms "'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627) (emphasis added).

Moreover, the *Heller* Court considered that "historical tradition" in its own historical analysis. After completing the plain text analysis of the Second Amendment, 554 U.S. at 576–600, the Court began focusing on historical tradition, including "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century," *id.* at 605. Only after reviewing "Postratification Commentary," *id.* at 605–10, "Pre–Civil War Case Law," *id.* at 610–14, "Post–Civil War Legislation," *id.* at 614–16, "Post–Civil War Commentators," *id.* at 616–19, and Supreme Court precedents, *id.* at 619–26, did this Court identify the "historical tradition" of regulating "dangerous and unusual weapons" and protecting arms "in common use at the time," *id.* at 627.

What is more, the Court identified the tradition of regulating "dangerous and unusual weapons" in the same paragraph as other "longstanding" regulations, *id.* at 626–27, while promising to "expound upon the *historical justifications* for" those regulations at another time, *id.* at 635 (emphasis added).

III. The D.C. Circuit failed to follow *Heller*'s historical analysis.

The historical analysis in this case should be simple: the historical tradition shows that common arms cannot be banned. *See Heller*, 554 U.S. at 629. Yet the D.C. Circuit held that common magazines can likely be banned based on "historical regulations on particularly dangerous weapons" and "weapons particularly capable of unprecedented lethality." *Hanson*, 120 F.4th at 237. That holding contradicts this Court's precedents in several respects.

A. Arms can be banned only if they are *both* dangerous *and* unusual.

The D.C. Circuit concluded that the District's magazine ban is consistent with "historical restrictions on particularly dangerous weapons and on the related category of weapons particularly capable of unprecedented lethality." *Hanson*, 120 F.4th at 237. But "[i]f *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous." *Caetano*, 577 U.S. at 418 (Alito, J., concurring). Rather, this Court has made clear that a weapon may be banned only if it is *both* dangerous *and* unusual.

As noted above, *Heller*'s historical analysis identified only "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" 554 U.S. at 627. Thus, in *Caetano*, after determining that the Massachusetts Supreme Judicial Court's analysis of whether stun guns were "unusual" was flawed, the Court declined to consider whether stun guns qualified as "dangerous." 577 U.S. at 412. If dangerousness

alone sufficed to justify a prohibition, the Court would have proceeded to consider the dangerousness of stun guns. Justice Alito, joined by Justice Thomas, made this point explicitly in a concurring opinion:

> As the *per curiam* opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual. Because the Court rejects the lower court's conclusion that stun guns are "unusual," it does not need to consider the lower court's conclusion that they are also "dangerous."

Id. at 417 (Alito, J., concurring) (citing *Heller*, 554 U.S. at 636); *see also Miller v. Bonta*, 699 F. Supp. 3d 956, 969 (S.D. Cal. 2023), *appeal held in abeyance*, No. 23-2979, 2024 WL 1929016 (9th Cir. Jan. 26, 2024) ("The Supreme Court carefully uses the phrase 'dangerous and unusual arms,' while the State, throughout its briefing, refers to 'dangerous [or] unusual arms.' That the State would advocate such a position is disheartening.") (brackets in original).

The D.C. Circuit correctly concluded that the banned magazines, given their "wide circulation" and use "for self-defense," likely "are in common use for self-defense today." *Hanson*, 120 F.4th at 233. Under this Court's precedents, the analysis should have ended there and the District's ban should have been held unconstitutional.

B. Historical regulations on *unprotected* arms cannot justify modern regulations on *protected* arms.

The court below upheld the District's magazine ban based on nineteenth-century restrictions on Bowie knives. *Hanson*, 120 F.4th at 237–38.

Since the banned magazines are "in common use," *id.* at 233, the historical Bowie knife restrictions should be relevant only if the government proves that Bowie knives were also in common use at the time they were regulated.

Traditional regulations on unprotected arms cannot justify modern restrictions on protected arms. Thus, *Heller* recognized "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" while invalidating a modern handgun ban because handguns are protected arms and historical regulations on unprotected "dangerous and unusual weapons" were irrelevant. *See* 554 U.S. at 627, 629. If the historical prohibitions on unprotected arms were valid analogues for a modern prohibition on protected arms, *Heller* would have upheld the handgun ban.

Similarly, *Bruen* asserted that "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 [including handguns] that are unquestionably in common use today." 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627). In other words, even historical handgun bans could not justify a modern handgun ban if handguns are protected now but historically were not.

Therefore, for any of the historical Bowie knife restrictions that the D.C. Circuit relied on to be relevant, the government should have been required to prove that Bowie knives were protected arms at the time they were regulated. But the government failed to do so.

C. The D.C. Circuit equated lesser restrictions—such as regulations on the manner in which arms could be carried—with possession prohibitions to establish a historical tradition.

Even if historical Bowie knife regulations were proper analogues for modern regulations on common arms, the D.C. Circuit did not identify a tradition of Bowie knife prohibitions. Rather, the court grouped together what it described as regulations "outlawing their possession, carry, sale, enhancing criminal penalties, or taxing their ownership." *Hanson*, 120 F.4th at 237.

In fact, none of the laws cited by the court prohibited the possession or sale of Bowie knives. *See id.* at 237–38. Rather, the court relied on laws from two states and one territory that forbade the carry of Bowie knives. *Id.* But these laws from Texas in 1871, Arkansas in 1881, and the Arizona Territory in 1889 are too few in number to establish a tradition. *Bruen* doubted that "three colonial regulations could suffice to show a tradition," 597 U.S. at 46, and also declined to "give disproportionate weight to a single state statute and a pair of state-court decisions," *id.* at 65. The laws are also too late in time to establish a tradition. *Bruen* repeatedly discounted nineteenth-century evidence that contradicted earlier evidence.

See, e.g., *id.* at 36 ("[P]ost-Civil War discussions of the right . . . 'do not provide as much insight into [the Second Amendment's] original meaning as earlier sources.'") (quoting *Heller*, 554 U.S. at 614). Such evidence is "secondary" and may only be "treated as mere confirmation of what . . . ha[s] already been established" by earlier evidence. *Id.* at 37 (quoting *Gamble v. United States*, 587 U.S. 678, 702 (2019)).

Moreover, before the twentieth century, only one state banned the possession of any particular knife, and the law imposing that ban was held to violate the Second Amendment. *See id.* at 27 ("[I]f some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality."). In 1837, Georgia forbade the possession, carry, or sale of "Bowie, or any other kinds of knives, manufactured and sold for the purpose of wearing, or carrying the same as arms of offence or defence, pistols, dirks, sword canes, spears, &c. . . . save such pistols as are known and used, as horseman's pistols, &c." 1837 Ga. Laws 90. Hawkins Nunn was convicted of violating this law by "having and keeping about his person, and elsewhere, a pistol[.]" *Nunn v. State*, 1 Ga. 243, 247 (1846). The Supreme Court of Georgia held the law unconstitutional, ruling that the Second Amendment protects the right "to keep and bear arms of *every description*" and that only the concealed carry of those

arms may be prohibited. *Id.* at 251 (emphasis added).[4] In response, the 1837 law was expressly repealed and replaced with a law forbidding the concealed carry of the same arms that had been prohibited by the 1837 law—but, consistent with *Nunn*, the new law did not prohibit the possession, sale, or open carry of those arms. 1852 Ga. Laws 269.[5]

As for the remaining regulations the D.C. Circuit relied on—restrictions on concealed carry, enhanced penalties for criminal misuse, and taxes on ownership—such restrictions cannot justify a modern possession prohibition. *Bruen* held that lesser historical restrictions—including "restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms"—cannot justify "broadly prohibiting the public carry of commonly used firearms." 597 U.S. at 38. Similarly, *United States v. Rahimi* reaffirmed that lesser historical restrictions—including laws requiring sureties for threatening

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[4] *Nunn* is sometimes read as striking down only the ban on carrying pistols openly. But in order to "dispose finally of this case" and order that "the judgment of the court below must be reversed, and the proceeding quashed," the court had to invalidate Nunn's conviction for "having" the pistol as well. *Nunn*, 1 Ga. at 245, 247, 251. Indeed, it would be nonsensical for the court to hold the ban on openly carrying pistols unconstitutional without holding the ban on possessing pistols unconstitutional. Rather, the *Nunn* court held "that portion of the statute which entirely forbids [the pistol's] use" unconstitutional, except for the concealed carry ban, which it deemed "valid." *Id.* at 251.

[5] This law forbade the concealed carry of "any pistol (except horseman pistols,) dirk, sword in a cane, spear, bowie knife, or any other kind of knives manufactured and sold for the purpose of offence and defence[.]" 1852 Ga. Laws 269.

behavior or preventing carrying in a terrifying manner—cannot justify laws that "broadly restrict arms use by the public generally." 602 U.S. 680, 698 (2024). For the same reason, lesser, non-prohibitory restrictions—such as laws regulating the manner of carry or enhancing penalties for criminal misuse—cannot justify the broad prohibition on possessing common arms at issue here.

D. Repeating arms with greater than 10-round capacities predate the Second Amendment by over two centuries and were never prohibited before the twentieth century.

The court below recognized that "weapons capable of holding or shooting more than ten rounds without reloading have existed since the Founding" and that "there is no historical tradition either of prohibiting them or of regulating the number of rounds a gun could hold." *Hanson*, 120 F.4th at 240.

Indeed, repeating arms predate the Second Amendment by roughly three centuries; repeating arms utilizing magazines predate the Amendment by over one century; the Founders embraced repeating arms—including Joseph Belton's 16-shot firearm during the Revolutionary War and Joseph Chambers's 12-shot muskets and 226-shot swivel guns purchased by the U.S. military and Pennsylvania militia in the early nineteenth century; myriad repeating arms with greater than 10-round capacities were invented in the nineteenth century—including the commercially successful 16-shot Henry Rifle in 1861 and the overwhelmingly popular Winchester Rifles starting in 1866; and semiautomatic firearms were invented in

1885, while detachable box magazines were invented in 1862. David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. 223, 232–36, 254–57, 268–83 (2024). Despite continuous technological advancements over hundreds of years and their widespread popularity in the nineteenth century, neither the sale nor possession of repeating arms of any capacity were ever banned in America. *Id.* at 369–70.

This tradition is of greater consequence than the D.C. Circuit realized. Because repeating arms with greater than 10-round capacities predate the Second Amendment and were common by the ratification of the Fourteenth Amendment, *Bruen* seemingly precludes analogizing to historical restrictions for Bowie knives. In adjudicating a modern-day restriction on the carrying of handguns, the *Bruen* Court considered only historical regulations on the carrying of handguns. The Court did not consider any laws regulating the carrying of Bowie knives, slungshots, dirks, daggers, brass knuckles, razors, or any other non-handgun for which carry was historically restricted.

IV. The decision below intensifies splits among the federal Circuit Courts.

"The contours of *Bruen* continue to solidify in district and appellate courts across the nation, and yet there is no consensus." *United States v. Claybrooks*, 90 F.4th 248, 256 (4th Cir. 2024). This case features several issues on which there is no consensus and in fact deepens several circuit splits.

A. Lower courts are divided over whether magazines are "arms."

This Court "ha[s] never squarely addressed what types of weapons are 'Arms' protected by the Second Amendment." *Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024) (Statement of Thomas, J.). Specifically, it has "le[ft] open essential questions such as what makes a weapon 'bearable,' 'dangerous,' or 'unusual.'" *Id.*

The federal circuits have split over the issue, including whether magazines are arms.

Here, the D.C. Circuit held that the banned magazines "very likely are 'Arms' within the meaning of the plain text of the Second Amendment" because "[a] magazine is necessary to make meaningful an individual's right to carry a handgun for self-defense." *Hanson*, 120 F.4th at 232. And "[t]o hold otherwise would allow the government to sidestep the Second Amendment with a regulation prohibiting possession at the component level, 'such as a firing pin.'" *Id.* (quoting *Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017)).

The First Circuit merely "assume[d] that [magazines] are 'arms' within the scope of the Second Amendment." *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 43 (1st Cir. 2024).

The en banc Ninth Circuit, by contrast, held that magazines with over 10-round capacities "fall clearly within the category of accessories, or accoutrements, rather than arms." *Duncan v. Bonta*, No. 23-55805, 2025 WL 867583, at *9 (9th Cir. 2025) (en banc).

B. Lower courts are divided over whether "common use" should be considered in the plain text or historical inquiry.

"There is no consensus on whether the common-use issue belongs at *Bruen* step one [plain text] or *Bruen* step two [history]." *Bevis v. City of Naperville, Ill.*, 85 F.4th 1175, 1198 (7th Cir. 2023).

The Second Circuit considers "common use" in the plain text inquiry. *Antonyuk v. James*, 120 F.4th 941, 981 (2d Cir. 2024). The Fifth Circuit previously did, too. *United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023), *rev'd and remanded*, 602 U.S. 680 (2024). Likewise, the D.C. Circuit here "assume[d], without deciding, this issue falls under *Bruen* step one." *Hanson*, 120 F.4th at 232 n.3.

By contrast, the Seventh Circuit "assume[d] (without deciding the question) that this is a step two inquiry" under the historical analysis. *Bevis*, 85 F.4th at 1198. Noting that "[t]his question has divided panels of our court," four dissenting judges on the Ninth Circuit agreed that "the 'common use' inquiry best fits at *Bruen*'s second step," although the majority in the case did not resolve the issue. *Duncan*, No. 23-55805, 2025 WL 867583, at *36 (Bumatay, J., dissenting) (quotation marks omitted).

The en banc Fourth Circuit wrestled with this split in *Price*. The nine-judge majority considered common use in its plain text inquiry, while Judge Niemeyer in concurrence, Judge Quattlebaum joined by Judge Rushing also in concurrence, and Judge Richardson in dissent all agreed that "common use falls under *Bruen*'s historical tradition step." *Price*, 111 F.4th at

415 (Quattlebaum, J., concurring) (describing the judges' various approaches).

C. Lower courts are divided over whether the Second Amendment excludes arms that are most useful in military service.

The First Circuit determined that "weapons that are most useful in military service" are "outside the ambit of the Second Amendment." *Ocean State Tactical, LLC*, 95 F.4th at 48 (quoting *Heller*, 554 U.S. at 627). The en banc Fourth Circuit reached the same conclusion. *Bianchi v. Brown*, 111 F.4th 438, 459 (4th Cir. 2024) (en banc). And the Seventh Circuit similarly held that the Second Amendment does not protect arms "that may be reserved for military use." *Bevis*, 85 F.4th at 1194.

Yet the D.C. Circuit here rejected the conclusion reached by the First, Fourth, and Seventh Circuits:

> The Supreme Court in *Heller* did not hold, however, that Second Amendment protection does not extend to weapons that are "most useful" in the military context. Rather, the Court acknowledged that the Second Amendment protects those weapons that are "in common use at the time," but not "dangerous and unusual weapons." That means that some "weapons that are most useful in military service" do not receive Second Amendment protection.

Hanson, 120 F.4th at 233 (quoting *Heller*, 554 U.S. at 627).

D. Lower courts are divided over what constitutes "common use."

"Still," the en banc Fourth Circuit noted, "the Supreme Court has not elucidated a precise test for determining whether a regulated arm is in common use for a lawful purpose." *Price*, 111 F.4th at 403.

The issue divided the federal Circuit Courts before *Bruen*. *See Hollis v. Lynch*, 827 F.3d 436, 448–49 (5th Cir. 2016) (summarizing the different methods courts had adopted). It continues to divide the courts post-*Bruen*.

The D.C. Circuit here determined that the banned magazines likely "are in common use for self-defense today" based on their "sufficiently wide circulation" and "disputed facts in the record about the role of [the magazines] for self-defense." *Hanson*, 120 F.4th at 233. Four dissenting judges on the Ninth Circuit found "common use" because "magazines holding more than ten rounds are the *most common* magazines in the country" and "come standard with the most popular firearms sold nationwide." *Duncan*, No. 23-55805, 2025 WL 867583, at *29 (Bumatay, J., dissenting).

The First Circuit, however, rejected the assertion that "the constitutionality of arms regulations is to be determined based on the ownership rate of the weapons at issue." *Ocean State Tactical, LLC*, 95 F.4th at 51. Rather, the court determined, "such statistics are ancillary to the inquiry the Supreme Court has directed us to undertake." *Id.* The First Circuit focused instead on how a challenged regulation "might burden the right of armed self-defense"—regardless of the weapons' commonality. *Id.* at 45.

According to the en banc Fourth Circuit, to determine common use, "courts can look to statistics regarding weapons commonly used in crimes versus weapons commonly chosen by law-abiding citizens for self-defense. And courts can also . . . apply common sense and consider whether there are any reasons a law-abiding citizen would want to use a particular weapon for a lawful purpose." *Price*, 111 F.4th at 405.

In sum, this case presents the Court with the opportunity to resolve several splits among the federal Circuit Courts.

CONCLUSION

The Court should grant the Petition for Certiorari to resolve the many circuit splits, reaffirm its precedents, and restore the right of Americans to possess common arms.

Respectfully submitted,

JOSEPH G.S. GREENLEE
Counsel of Record
ERIN M. ERHARDT
NATIONAL RIFLE ASSOCIATION OF AMERICA – INSTITUTE FOR LEGISLATIVE ACTION
11250 Waples Mill Rd.
Fairfax, VA 22030
(703) 267-1161
jgreenlee@nrahq.org

ADAM KRAUT
SECOND AMENDMENT
FOUNDATION
12500 N.E. 10th Pl.
Bellevue, WA 98005
(425) 454-7012
akraut@saf.org

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