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 A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 25 OTHER STATES IN SUPPORT OF PETITIONERS


JOHN B. MCCUSKEY
*Attorney General*
OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

MICHAEL R. WILLIAMS
*Solicitor General*
*Counsel of Record*

SPENCER J. DAVENPORT
*Assistant Solicitor General*

*Counsel for* Amicus Curiae *State of West Virginia*

[additional counsel listed after signature page]

## QUESTION PRESENTED

Whether the Second Amendment to the United States Constitution allows a categorical ban on arms that are indisputably common throughout the United States and overwhelmingly used for lawful purposes (generally) and self-defense (specifically).

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**TABLE OF AUTHORITIES**
(*continued*)

**Page(s)**

**TABLE OF AUTHORITIES**
(*continued*)

**Page(s)**



**Statutes**

**TABLE OF AUTHORITIES**
(*continued*)

**Page(s)**

**Other Authorities**

**TABLE OF AUTHORITIES**
(*continued*)

**Page(s)**

## INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Sometimes, old habits die hard. For too long, the Second Amendment went dormant, offering only limited rights in a narrow universe of cases in a way inconsistent with history. But in recent years, the Court has recognized again that the Amendment is a "fundamental" preexisting right that is "deeply rooted in this Nation's history and tradition." *McDonald* v. *City of Chicago*, 561 U.S. 742, 750, 767 (2010). Now, constitutional text and history are the polestar for reviewing firearm regulations. This historical inquiry will often require courts to "reason[] by analogy." *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1, 28 (2022). What it *doesn't* require is "means-end scrutiny," *id.* at 19, which is "just window dressing for judicial policymaking," *Duncan* v. *Bonta*, 19 F.4th 1087, 1148 (9th Cir. 2021) (en banc) (Bumatay, J., dissenting).

While this Court has pushed for renewed respect toward the Second Amendment, things have played out differently below. *Amici* States have seen firsthand how courts across the country have struggled to "afford the Second Amendment the respect due [to] an enumerated constitutional right." *Silvester* v. *Becerra*, 583 U.S. 1139, 1140 (2018) (Thomas, J., dissenting from denial of certiorari). And courts upholding local bans on so-called assault weapons and standard-capacity magazines (relabeled as large-capacity magazines) are especially prone to "contorting" traditional constitutional principles and subordinating genuine Second Amendment interests.

---

[*] Under Supreme Court Rule 37.2, *amici* timely notified counsel of record of their intent to file this brief.

*Harrel* v. *Raoul*, 144 S. Ct. 2491, 2492 (2024) (statement of Thomas, J., concerning denial of certiorari).

That story repeats here. The majority below started on the right track, finding that "the Second Amendment's plain text covers" plus-ten magazines and "are in common use for self-defense today." Pet.App.12a. But it still concluded that banning these weapons is consistent with our Nation's tradition of firearm ownership. In so deciding, the court below analogized the District's plus-ten magazine ban to nineteenth-century restrictions on Bowie knives, a uniquely dangerous blade that came to be associated with dueling and frontier violence. The majority found this analogy appropriate because both sets of laws shared the "same [supposed] basic purpose." Pet.App.24a. Both laws were thought to "inhibit then unprecedentedly lethal criminal activity by restricting or banning weapons that are particularly susceptible to, and were widely used for, multiple homicides and mass injuries." Pet.App.24a-25a.

But by rewriting *Heller*'s "in common use" test to add a dangerousness element, lower courts have continued to interest balance under a different name. At bottom, lower courts have decided that criminal misuses of firearms (as in mass shootings) justify complete bans on certain arms. They then use questionable analogical reasoning to justify that result. Both *Heller* and *Bruen* already rejected that sort of "subjective dangerousness" reasoning, and the Court should do so again here. And while the majority below said that the plus-ten magazine ban was comparable to laws that addressed weapons capable of unprecedented lethality, it could only get there by limiting the Second Amendment solely to individual self-defense. Viewing the Second Amendment through the correct lens—that it protects the right to bear arms for community defense,

too—the historical analogues the majority relied on below fail.

The decision here shows that analogies under *Bruen* are helpful only when courts have an underlying theory about how to identify the relevant similarity. Unfortunately, many courts still don't grasp the underlying principles of the Second Amendment. In these courts, the Second Amendment has become uniquely "subject to the whimsical discretion of federal judges." *Bianchi* v. *Brown*, 111 F.4th 438, 483 (4th Cir. 2024) (Richardson, J., dissenting), *petition for cert. filed*, *Snope* v. *Brown*, No. 24-203 (Aug. 21, 2024). So "[i]f the Second Amendment is ever going to provide any real protection, something needs to change." *Duncan*, 19 F.4th at 1160 (9th Cir. 2021) (VanDyke, J., dissenting).

## SUMMARY OF ARGUMENT

**I.** *Heller* recognized an individual right to possess and carry arms. Although the right is not unlimited, exceptions must be based on history and tradition. The country has no history and tradition of banning arms in common use for lawful purposes. So the District's ban on plus-ten magazines is unconstitutional under *Heller*.

**II.** But the majority below—like other courts before it—circumvented *Heller* and struck down the law. It did so by seizing on a single sentence in *Bruen* that says that "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." Pet.App.27a (quoting *Bruen*, 597 U.S. at 27). In the majority's view, improvements in firearms technology, such as the development of semiautomatic weapons, are "dramatic technological changes"; likewise, mass shootings are "unprecedented societal concerns" that did not exist at the Founding. See

Pet.App.26a-31a. But *Heller* set the level of generality at "dangerous and unusual arms," 554 U.S. at 627, which means that this Court already accounted for technological changes and societal concerns in firearms. By adding a separate dangerousness element to *Bruen*, courts have continued to balance subjective, judge-driven interests under a different name.

**III.** Making matters worse, courts are incorrectly analogizing. To analogize well, courts need to start with what the Second Amendment covers. And although this Court has said (on several occasions) that the Second Amendment protects more than just the individual right to self-defense, lower courts have limited the Second Amendment to protect only that one right—excluding firearms that (in their view) resemble firearms used in military service.

In finding that the plus-ten magazine ban is consistent with the Nation's tradition of firearm ownership, the majority below analogized the law to restrictions on Bowie knives because both sets of laws addressed "weapons capable of unprecedented lethality." Pet.App.25a. But laws banning Bowie knives and the like targeted weapons that were useful for criminal purposes *and* had no public-defense value. So Bowie-knife bans might be an apt comparator only if courts ignore the public-defense aspect and improperly limit the Second Amendment's purpose to individual self-defense against crime.

The decision below also doesn't engage with history in the right way. In looking to history, this Court has said that "not all history is created equal." *Bruen*, 597 U.S. at 34. Nineteenth-century Bowie-knife bans were less common than handgun bans. Yet *Bruen* said that the handgun bans were insufficient to establish a national tradition allowing a ban on carrying handguns. What's

more, courts below have forgotten to consider whether their selected analogues were constitutional at the time they were enacted.

## REASONS FOR GRANTING THE PETITION

### I. *Heller*'s "In Common Use" Test Controls, And It Shows That The District's Ban Is Unconstitutional.

*Heller* recognized that courts cannot categorically ban arms that are in common use. To do that, *Heller* "began with a 'textual analysis' focused on the 'normal and ordinary' meaning of the Second Amendment's language." *Bruen*, 597 U.S. at 20 (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 576-77, 578 (2008)). That analysis suggested that the Amendment's operative clause—"the right of the people to keep and bear Arms, shall not be infringed"—"guarantee[s] the individual right to possess and carry weapons in case of confrontation" that does not depend on service in the militia. *Heller*, 554 U.S. at 592. And the Second Amendment has an expansive scope: "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; see also *id.* at 581 (relying on founding-era "source [that] stated that all firearms constituted 'arms'").

After holding that the Second Amendment protected an individual right to self-defense, *Heller* "relied on the historical understanding of the Amendment to demark the limits on the exercise of that right." *Bruen*, 597 U.S. at 21. The Court read *United States* v. *Miller*, 307 U.S. 174 (1939), as recognizing that a historical tradition that prohibited "the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 627. This historical

tradition dovetailed with the historical practice of the militia "bring[ing] the sorts of lawful weapons that they possessed at home to militia duty"—weapons that were "in common use at the time." *Id.* at 627 (cleaned up). Taken together, *Heller* said that the Second Amendment protects arms "in common use," so those arms cannot be banned. That's why the Court held that the District's ban on handguns was unconstitutional. *Id.* at 636.

*Bruen* and *Rahimi* built on *Heller*'s framework, directing courts to examine the Nation's "historical tradition of firearm regulation" to help delineate the right's contours. *Bruen*, 597 U.S. at 17. If a "new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances," then the regulation is lawful under the Second Amendment. *United States* v. *Rahimi*, 602 U.S. 680, 692 (2024) (cleaned up). Although the Court did not provide an "exhaustive survey" of relevant similarities, it did identify two indicators that should guide analogical reasoning: "how" and "why" the regulations burden the right to keep and bear arms. *Bruen*, 597 U.S. at 29. In other words, whether past and present regulations impose a "comparable burden" (how) and whether that burden is "comparably justified" (why) are "central" considerations when reasoning by analogy. *Id.* So a historical precursor does not need to be a "dead ringer" or a "historical twin," but it needs to be "analogous enough to pass constitutional muster." *Id.* at 30.

Under a straightforward application of *Heller*, *Bruen*, and *Rahimi*, then, the District's ban on magazines holding more than ten rounds of ammunition is unconstitutional. Both the majority and dissent below found that "plus-ten magazines are arms in common use by law-abiding

citizens for the lawful purpose of self-defense." Pet.App.83a; see Pet.App.11a. As the dissent noted, "Americans have in their hands and homes an estimated 100 million plus-ten magazines," and these magazines come standard with many of the Nation's most popular firearms. Pet.App.84a. Indeed, during a week-long period in which California's magazine capacity ban was ruled unconstitutional, law-abiding gun owners likely purchased more than a million of these magazines—far more than the 200,000 stun guns that convinced at least some Justices that stun guns are in common use. See Samuel R. Vasilopulos, *Trouble* Bruen *for Assault Weapon Bans: A Feature-Based Analysis of the Second Amendment*, 45 N. ILL. U.L. REV. 135, 166-67 (2024); see *Caetano* v. *Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring in the judgment) ("While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country.").

*Heller*'s survey of history and tradition also confirms that "[t]here is no history and tradition of banning arms in common use for lawful purposes." Pet.App.77a. If that weren't enough, the Nation's historical tradition shows that "[f]irearms with greater than ten round capacities existed even before our Nation's founding, and the common use of [so-called large-capacity magazines] for self-defense is apparent in our shared national history." *Duncan* v. *Bonta*, 83 F.4th 803, 814 (9th Cir. 2023) (Bumatay, J., dissenting) (en banc). And rifle magazines of more than ten rounds had become common by the time the States ratified the Fourteenth Amendment. Vasilopulos, *supra*, at 167; David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 851 (2015).

In sum, *Heller* said that because handguns are "in common use," the District's "complete prohibition of their use is invalid." 554 U.S. at 629. That's true too for the District's ban on plus-ten magazines. Especially given the prevalence of similar anti-historical bans, the Court should grant the petition to say as much.

## II. Courts Use Tortured Analogies As Means To Covertly Engage In Interest Balancing.

**A.** The majority acknowledged *Heller*'s "in common use" test," Pet.App.12a, as well as the lack of any tradition of regulating plus-ten magazines. Pet.App.26a. But the court still decided that right-on-point history was irrelevant because of the "societal concern with mass shootings or other widespread homicidal criminality" supported by "dramatic technological changes [that have] vastly increased [firearms'] capacity and the rapidity of firing." Pet.App.26a. And so it considered the District's proposed historical analogues to see if the regulation was consistent with the Nation's alleged historical tradition of restricting "weapons particularly capable of unprecedented lethality." Pet.App.19a.

By continuing to analogize even after finding common use, the majority went off course. This Court explained in *Bruen* that its two-step approach is aimed at determining whether a challenged law is "consistent with this Nation's historical tradition of firearm regulation." 597 U.S. at 17. Historical analogues are in service of this objective. By continuing to analogize *after* it had already found that plus-ten bans are inconsistent with the Nation's historical tradition, the majority made analogical reasoning the objective rather than a tool to determine the relevant historical tradition. See also *Del. State Sportsmen's Ass'n, Inc.* v. *Del. Dep't of Safety & Homeland Sec.*, 664 F. Supp.

3d 584, 599 (D. Del. 2023) (dismissing existence of multi-shot firearms during the founding eras in favor of unprecedented societal concerns), *aff'd*, 108 F.4th 194 (3d Cir. 2024), *cert. denied sub nom.*, *Gray* v. *Jennings*, No. 24-309, 2025 WL 76443 (U.S. Jan. 13, 2025). The majority viewed analogical reasoning as the tail that wags the dog. This reasoning gets things backwards. By *Bruen*'s express terms, any test that would justify a ban on magazines possessed in the hundreds of millions cannot be consistent with the Second Amendment.

**B.** Worse, while *Bruen* expressly repudiated interest balancing, lower courts—like the majority below—continue to balance interests under the guise of analogical reasoning. These courts have latched on to the "dramatic technological changes" and "unprecedented societal concerns" language from *Bruen* to justify complete bans on assault weapons and certain magazines. See Pet.App.27a-31a; *Bianchi*, 111 F.4th at 463-64; *Duncan* v. *Bonta*, No. 23-55805, 2025 WL 867583, at *13 (9th Cir. Mar. 20, 2025) (en banc); *Hartford* v. *Ferguson*, 676 F. Supp. 3d 897, 907 (W.D. Wash. 2023); *Del. State Sportsmen's Ass'n, Inc.*, 664 F. Supp. 3d at 598.

The logic in these cases is as simple as it is wrong: *Bruen* says to account for "unprecedented societal concerns." Lower courts think mass shootings are "unprecedented." Pet.App.27a-28a. And they note how modern firearms "do not have the propensity to jam or misfire," which makes them a "dramatic technological change." Pet.App.27a-28a; but see, *e.g.*, *Duncan*, 2025 WL 867583, at *13 n.5 ("The Founders likely could not have imagined the weaponry available today, so in that sense every Second Amendment case involves dramatic technological changes."). So bans on items dubbed

"assault weapons" and "large-capacity magazines" are said to be constitutional.

But arguments about "dramatic technological changes" are incompatible with *Heller*'s "in common use" test. The "in common use" test looks at arms that are in common use by Americans *now*, which necessarily includes advancements in firearm technology. *Bruen* put this commonsense notion into action by rejecting historical "laws [that] prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons'" at that time; those laws would "provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today." *Bruen*, 597 U.S. at 47. And *Heller* set the level of generality for bannable arms at "dangerous and unusual weapons"—note the conjunction there. 554 U.S. at 627. It did so even though "the Court was told that the handguns at issue there are used in an extraordinary percentage of this country's well-publicized shootings, including the large majority of mass shootings." Pet.App.88a-89a (cleaned up). So "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano*, 577 U.S. at 418 (Alito, J., concurring in the judgment).

Underlying the "in common use" test is the idea that the American people—not the government—choose their desired arm. In *Heller*, it mattered that "the American people have considered the handgun to be the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. In the same way, Americans have chosen firearms whose magazines hold more than ten rounds of ammunition for many lawful purposes. See *Duncan*, 2025 WL 867583, at *29 (Bumatay, J., dissenting) (noting that

"magazines holding more than ten rounds are the *most common* magazines in the country").

By adding a dangerousness test designed to override the "in common use" test, courts have adopted "the very sort of means-end scrutiny that *Bruen* explicitly forbids courts from applying in the Second Amendment context." *Bianchi*, 111 F.4th at 479 (Gregory, J., concurring). Nothing has changed except that courts now "cloak[] interest balancing under the guise of 'tradition.'" *Duncan*, 2025 WL 867583, at *47 (Bumatay, J., dissenting) (comparing Ninth Circuit's analysis pre- and post-*Bruen* and noting "little" change). Worse, "even the regulations that failed in *Heller* or *Bruen* would survive" the lower courts' dangerousness test. *Id.* at *52 (VanDyke, J., dissenting).

The Court should grant the petition to remind them of what analogies are meant to do—and repudiate any effort to use them to backdoor old, flawed logic back into the test.

## III. Courts Are Incorrectly Analogizing.

Even if analogies were necessary here, they weren't used correctly. To analogize well, courts need to know the Second Amendment's purpose. *Heller* confirmed that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. Although *Heller* clarified that the Second Amendment covers individual self-defense, it noted other lawful purposes for keeping and bearing arms, such as preserving the militia and hunting. *Id.* at 599. But after *Heller* and *Bruen*, courts have narrowed the Second Amendment to protect only keeping and bearing arms for individual self-defense against crime. *E.g.*, Pet.App.11a; *Bianchi*, 111 F.4th 438; *Bevis* v. *City of Naperville*, 85 F.4th 1175 (7th Cir. 2023), *cert. denied*, *Harrel* v. *Raoul*,

No. 23-880, 144 S. Ct. 2491 (July 2, 2024). Narrowing the scope of the right to personal self-defense alone results in inapt analogies that limit Second Amendment rights. And courts shouldn't be allowed to read the Amendment's expressly stated purpose of preserving the militia out of the Constitution.

### A. The Second Amendment Goes Beyond The Individual Right To Self-Defense.

The Second Amendment right is not a right "granted by the Constitution" but "is a pre-existing natural right which is recognized and protected by the Constitution." David B. Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson For The World*, 59 SYRACUSE L. REV. 235, 236 (2008). "The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" *Heller*, 554 U.S. at 592.

The right is preexisting because it provides the means to protect all other rights. Legal theorists such as William Blackstone have described it as an "auxiliary" right that "serve[s] principally" as a "barrier[] to protect and maintain inviolate the three great and primary rights[] of personal security, personal liberty, and private property." 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 140 (1803); see also *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) (citing Blackstone's works as the "preeminent authority on English law for the founding generation"). In that way, the right to keep and bear arms "serve[s] the purpose of protecting the people against governmental oppression or tyrannical usurpation of power." Douglas

Walker, Jr., *Necessary to the Security of Free States: The Second Amendment as the Auxiliary Right of Federalism*, 56 AM. J. LEGAL HIST. 365, 368 (2016). Indeed, the right has sometimes been seen as a protection for the States themselves from the same threat. See Bertrall L. Ross II, *Inequality, Anti-Republicanism, and Our Unique Second Amendment*, 135 HARV. L. REV. F. 491, 497 (2022).

Because of its importance, since our Nation's founding, the Second Amendment has sought to preserve the "ancient right" to keep and bear arms. *Heller*, 554 U.S. at 599. And preservation is the Amendment's only goal: it "has no other effect than to restrict the powers of the national government." *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1875). These restrictions are designed to allow "individual self-defense," which this Court has explained is "the central component of the Second Amendment." *McDonald*, 561 U.S. at 767 (cleaned up).

And there is "no doubt, on the basis of both text and history, that the Second Amendment conferred an *individual* right." *Heller*, 554 U.S. at 595 (emphasis added). This Court has emphasized the individualized nature of the right, too, declaring that there is no more "acute" need than the "defense of self, family, and property." *McDonald*, 561 U.S. at 767. Indeed, the individual right to arms for self-defense is "deeply rooted in this Nation's history and tradition." *Id.* at 767 (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997)).

While this Court has focused on the core individual right to self-defense, see *Bruen*, 597 U.S. at 19-20; *Heller*, 554 U.S. at 599, it has never limited the right to individual self-defense. "[P]reserving the militia" and "hunting" are additional legitimate reasons "Americans valued the

ancient right." *Heller*, 554 U.S. at 599; see also *id.* at 636-37 (Stevens, J., dissenting) (framing the question in *Heller* as "[w]hether [the Second Amendment] … protects the right to possess and use guns for [lawful] nonmilitary purposes like hunting and personal self-defense"). So "the original public meaning of the Second Amendment" contemplates "an individual right to possess firearms for both self *and* collective defense." *United States* v. *Grizzard*, No. CR-24-197, 2024 WL 4859104, at *4 (W.D. Okla. Nov. 21, 2024); see also, *e.g.*, *United States* v. *Nutter*, 624 F. Supp. 3d 636, 644 (S.D.W. Va. 2022) (explaining how bans can "reach the core purposes of the Second Amendment, preventing individuals from using firearms to defend themselves (and from engaging in collective defense, should that become relevant to modern life)").

Both *Heller* and *Bruen* confirm that the right to "bear arms" includes the right "of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citation omitted); *Bruen*, 597 U.S. at 31; see also *Heller*, 554 U.S. at 581 (noting that the definition of "arms" included "instruments of offence *generally* made use of in war" (citation omitted)). As *Heller* explained, the right to keep and bear arms "was by the time of the founding understood to be an individual right protecting against *both* public *and* private violence." 554 U.S. at 594 (emphasis added). And the text's prefatory clause proclaims that one of its purposes was to preserve the "militia." The militia, of course, did not exist to promote individual self-defense. Rather, it was "useful in repelling invasions and suppressing insurrections," "render[ed] large standing armies unnecessary," and enabled the people to be "better able to resist tyranny," *id.* at 597-98.

### B. Narrowing *Heller* To Only Self-Defense Leads To Poor Analogical Reasoning.

After *Heller* and *Bruen*, courts have narrowed the Second Amendment to protect keeping and bearing arms *exclusively* for individual self-defense against crime. See, *e.g.*, Pet.App.119a-120a (district court opinion); *Bianchi*, 111 F.4th at 451-52 (rejecting communal self-defense); *Bevis*, 85 F.4th at 1199 ("[T]he relevant question is what are the modern analogues to the weapons people used for individual self-defense."); *Del. State Sportsmen's Ass'n, Inc.*, 664 F. Supp. 3d at 602; *Kolbe* v. *Hogan*, 849 F.3d 114, 137 (4th Cir. 2017); *Friedman* v. *City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Cuomo*, 804 F.3d 242, 263 (2d Cir. 2015); see also *Del. State Sportsmen's Ass'n, Inc.* v. *Del. Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 207 (3d Cir. 2024) (Roth, J., concurring). When evaluating the constitutionality of gun control laws, modern cases contain virtually no discussion of the Second Amendment's military objective—the one aim provided in the Amendment's text.

Consider the Seventh Circuit, which said that firearms used by the military may be banned, whether as a matter of text or history. *Bevis*, 85 F.4th at 1197. This argument flips *Heller* on its head. In *Heller*, this Court rejected the argument that handguns could be banned from private use because the Second Amendment protected only ownership of firearms in connection with militia service. The Court held that the Second Amendment did not *only* protect the use of arms for militia purposes but rather for *all* lawful purposes, including individual self-defense. *Heller*, 554 U.S. at 581, 627.

The decision below, like other decisions embracing the same rationale, reads *Heller*'s statement that the Second

Amendment *protects* individual self-defense as a silent endorsement that self-defense *limits* the Amendment's protections, too. Pet.App.12a. That choice effectively reads the Amendment's stated purpose of preserving the militia out of the Constitution altogether. The dissent below rightly rebutted that this Court has "often noted other lawful purposes for keeping and bearing arms, in addition to self-defense," but said that either formulation worked fine in the case because the majority presumed that plus-ten magazines are in common use by law-abiding citizens for self-defense. Pet.App.83a & n.171.

That's right as far as the "in common use" test goes, but it matters what the Second Amendment protects for the analogical inquiry. "Why and how the regulation burdens the right are central to this inquiry." *Rahimi*, 602 U.S. at 692. So a court that believes that the Second Amendment exclusively protects individual self-defense against crime will be more likely to find a "reasonable regulation" than a court who recognizes that the Amendment additionally protects the right to bear arms for community defense.

The majority below shows why. After rejecting many analogues, the majority upheld the plus-ten magazine ban because it viewed the regulation as analogous to "historical restrictions on particularly dangerous weapons and on the related category of weapons particularly capable of unprecedented lethality." Pet.App.19. The specific laws to which the court pointed included restrictions on Bowie knives, sawed-off shotguns, and machine guns. Pet.App.19, 23. Other courts have used those same analogies to uphold similar laws. See *Bianchi*, 111 F.4th at 467-71; *Bevis*, 85 F.4th at 1199-1202; *Duncan*, 2025 WL 867583, at *16-17; *Hartford*, 676 F. Supp. 3d at

904; *Del. State Sportsmen's Ass'n, Inc.*, 664 F. Supp. 3d at 600.

While at first this analogy seems reasonable, they get the laws regulating Bowie knives and the like backwards. These weapons were banned for two reasons: "(1) these weapons were particularly useful for criminal purposes, *and* (2) these weapons had no military or public defense value." William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1499-1500 (2024) (emphasis added). For instance, the majority below cited a Tennessee case that sustained a conviction of a man who concealed a Bowie knife. Pet.App.20a-21a. The majority relied on one paragraph from the case for its analogue analysis: "the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons … could not be employed advantageously in the common defence of the citizens." Pet.App.21a (quoting *Aymette* v. *State*, 21 Tenn. 154, 158 (1840)). But the majority omitted a key part of the Tennessee court's statement—that "[t]hese weapons would be useless in war." *Aymette*, 21 Tenn. at 158; accord *Hill* v. *State*, 53 Ga. 472, 475 (1874) (calling a Bowie knife a "relic[] of past barbarism" that would not be "necessary for a militiaman"); *English* v. *State*, 35 Tex. 473, 477 (1872) ("Were a soldier on duty found with [a Bowie knife] about his person, he would be punished for an offense against discipline."), *abrogated on other grounds by Bruen*, 597 U.S. at 64-67.

*Aymette* wasn't an outlier in acknowledging the collective-defense aspect of the Second Amendment. *Aymette*'s view that arms useful for militia service fell within the core of the Second Amendment is consistent with other nineteenth-century courts. See, *e.g.*, *Fife* v.

*State*, 31 Ark. 455, 458 (1876) ("[T]he arms which [the Second Amendment] guarantees American citizens the right to keep and to bear, are such as are needful to, and ordinarily used by a well regulated militia."); *State* v. *Smith*, 11 La. Ann. 633, 633 (1856) ("The arms there [in the Second Amendment] spoken of are such as are borne by a people in war, or at least carried openly."). Legal treatises agreed that the Second Amendment protected arms useful for militia service. See Baude, *supra*, at 1500 (collecting treatises). While courts debated whether handguns were arms or how far States could go in regulating public carry, "not even the most restrictive courts debated whether rifles and muskets designed for military use fell within the 'arms' protected by the right to keep and bear arms." *Id.* at 1500-01.

This Court also understood that the right to keep and bear arms includes *at least* those arms appropriate for militia service. "[W]hen called for service [able-bodied] men were expected to appear bearing arms supplied by themselves and … *in common use* at the time." *Miller*, 307 U.S. at 179 (emphasis added); see also *Heller*, 554 U.S. at 636 (Stevens, J., dissenting) (noting that it is "clear that [the Second Amendment] *does* encompass the right to use weapons for certain military purposes"). The inquiry then is not whether the weapon is dangerous but whether it is "dangerous *and* unusual." *Heller*, 554 U.S. at 627. So M-16 rifles and the like have been permissibly banned because they are dangerous and not in common use, see *Heller* v. *District of Columbia*, 670 F.3d 1244, 1288 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), while AR-15s and other plus-ten arms cannot be categorically banned because they are in common use, *id.*

Despite this, both the Fourth and Seventh Circuits have declared that so-called assault weapon bans are

constitutional because they prohibit weapons that are useful for military service. See *Bevis*, 85 F.4th 1175; *Bianchi*, 111 F.4th 438. Both courts understood *Heller* to divide arms into two categories: military arms (the M-16 rifle) and civilian arms for self-defense (a handgun). *Bevis*, 85 F.4th at 1195; *Bianchi*, 111 F.4th at 450-51. And both courts found that semiautomatic rifles were closer to military arms than to self-defense arms, so those weapons were categorically unprotected by the Constitution. *Bevis*, 85 F.4th at 1195; *Bianchi*, 111 F.4th at 461.

But neither the Fourth nor the Seventh Circuit grappled with caselaw or treatises that found that military arms were within the core of the right. Nor did they look at "legislative precedents, from the Assize of Arms in 1181 through the Militia Act of 1792, all of which compelled ordinary citizens to have military arms at the ready." Baude, *supra*, at 1501; see, *e.g.*, Assize of Arms 1181, 27 Hen. 2 (Eng.); Statute of Winchester 1285, 13 Edw. 1 Stat. Wynton c. 6 (Eng.); Act of May 8, 1792, ch. 33, 1 Stat. 271. Instead, these cases focus on the Second Amendment right of individual self-defense to the exclusion of other aspects of the right. From there, courts focus on the "dangerous and unusual" dicta in *Heller* to find that AR-15s and the like could be banned. *Bevis*, 85 F.4th at 1190. This wayward analysis begins at the foundational level—the historical understanding of the right to keep and bear arms.

The majority below at least rejected the district court's view that the Second Amendment does not protect weapons that are "most useful" in the military context. See Pet.App.11a. But the majority's proper view of the Second Amendment on that matter did not carry over to its analogical inquiry. It missed that Bowie knives were poor analogues precisely because they had no military or

public defense value. And it missed that machineguns were never in common use.

### C. Courts Must Better Scrutinize Their Analogues.

Cherry-picked history doesn't help anybody. In *Bruen*, this Court explained that "when it comes to interpreting the Constitution, not all history is created equal." 597 U.S. at 34. The same is true for analogues. What principle lies behind the historical analogue also matters. Pet.21-22. Drawing historical principles at too high a level of generality would "swallow[] the entire Second Amendment." *Duncan*, 2025 WL 867583, at *46 (Bumatay, J., dissenting). In practice, the majority below and courts elsewhere hunt for a historical analogue to validate a regulation even if it is a poor fit and ignore historical analogues that confirm the invalidity of the restriction.

Start with the relevant history, which shows that repeating arms with greater than 10-round capacities predate the Second Amendment and were common by the ratification of the Fourteenth Amendment. See Vasilopulos, *supra*, at 167; Kopel, *The History of Firearm Magazines*, *supra*, at 851. That should end the historical analysis. This Court in *Bruen* considered only historical regulations on the carrying of handguns—it did not consider any laws regulating any other non-handgun for which carry was historically restricted. That's because "historical firearm regulations are obviously more likely to be relevant analogues for modern firearm restrictions." *Duncan* v. *Bonta*, 695 F. Supp. 3d 1206, 1250 (S.D. Cal. 2023). And so when a regulation has a dead ringer that speaks conclusively to the regulation's constitutionality, the analysis ends.

Next, the relevant historical analogues the majority identified do not rescue the District's law. While dozens of state and territorial legislatures enacted laws about Bowie knives, "[p]rohibitory laws for these blades are fewer than the number of bans on carrying handguns." David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. 223, 382 (2024). And *Bruen* found that the handgun laws were insufficient to establish a national tradition allowing a ban on carrying handguns. *Bruen*, 597 U.S. at 38-39. What's more, even in the jurisdictions where Bowie knives were banned, there was "little evidence of actual prosecutions for simply possessing a bowie knife … [the] law was generally disregarded." *Duncan*, 695 F. Supp. 3d at 1251 (citing *Day* v. *State*, 37 Tenn. 496, 499 (1858) ("It is a matter of surprise that these sections of this act [a law prohibiting the concealed carrying of Bowie knives], so severe in their penalties, *are so generally disregarded* in our cities and towns.") (emphasis added)).

A larger issue with determining a relevant historical analogue is that courts do not consider whether their chosen historical governmental regulation honored constitutional rights. One example is an 1837 Georgia law banning most handguns and "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." 1837 Ga. Acts 90, § 1. The Supreme Court of Georgia declared the 1837 statute unconstitutional to the extent it limited one's constitutional right to carry arms openly. *Nunn* v. *State*, 1 Ga. 243, 251 (1846). *Heller* relied on *Nunn* in recognizing the scope of the Second Amendment. See *Heller*, 554 U.S. at 612. Add on top of that, the States that "entirely banned carry of Bowie knives, daggers, or other arms are almost entirely the same as the few that excessively restricted

handgun carry." Kopel and Greenlee, *supra*, at 386. And *Bruen*, of course, shows that those sorts of laws are unconstitutional. So an historical analogue can only be useful if it itself would have been constitutional—something the majority below didn't even consider.

So the Court should grant the petition to remind lower courts that it's not enough just to find a ban or two that's arguably similar. Courts must also consider their pervasiveness, their constitutionality, and the degree to which *more* similar weapons and firearms *were* permitted.

* * *

Since *Bruen*, courts have purported to use text, history, and tradition to determine whether firearm law restrictions are consistent with this Nation's historical tradition of firearm regulation. In practice, however, lower courts have continued to use whatever means necessary to uphold laws that have prevented most citizens in those jurisdictions from exercising the right to bear arms. Until this Court steps in, this will continue happening.

## CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

JOHN B. MCCUSKEY
*Attorney General*

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

MICHAEL R. WILLIAMS
*Solicitor General*
*Counsel of Record*

SPENCER J. DAVENPORT
*Assistant Solicitor General*

*Counsel for* Amicus Curiae *State of West Virginia*

## ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

TREG TAYLOR
Attorney General
State of Alaska

TIM GRIFFIN
Attorney General
State of Arkansas

JAMES UTHMEIER
Attorney General
State of Florida

CHRIS CARR
Attorney General
State of Georgia

RAÚL LABRADOR
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

BRENNA BIRD
Attorney General
State of Iowa

KRIS KOBACH
Attorney General
State of Kansas

RUSSELL COLEMAN
Attorney General
State of Kentucky

LIZ MURRILL
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ANDREW BAILEY
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

JOHN FORMELLA
Attorney General
State of New Hampshire

DREW WRIGLEY
Attorney General
State of North Dakota

BRIDGET HILL
Attorney General
State of Wyoming

DAVE YOST
Attorney General
State of Ohio

GENTNER DRUMMOND
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

MARTY JACKLEY
Attorney General
State of South Dakota

KEN PAXTON
Attorney General
State of Texas

DEREK BROWN
Attorney General
State of Utah

JASON MIYARES
Attorney General
State of Virginia