No. 23-7517

In the
Supreme Court of the United States

CHRISTOPHER L. WILSON,
Petitioner,

v.

STATE OF HAWAII,
Respondent.

On Petition for Writ of Certiorari to the Hawaii Supreme Court

BRIEF OF NATIONAL ASSOCIATION FOR GUN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The right to keep and bear arms is a fundamental right that existed prior to the Constitution. The right is not in any sense granted by the Constitution. Nor does it depend on the Constitution for its existence. Rather, the Second Amendment declares that the pre-existing "right of the people to keep and bear Arms shall not be infringed." The National Association for Gun Rights ("NAGR")[1] is a nonprofit membership and donor-supported organization with hundreds of thousands of members nationwide. The sole reason for NAGR's existence is to defend American citizens' right to keep and bear arms. In pursuit of this goal, NAGR has filed numerous lawsuits seeking to uphold Americans' Second Amendment rights. NAGR has a strong interest in this case because the guidance the Court will provide in its resolution of this matter will have a major impact on NAGR's ongoing litigation efforts in support of Americans' fundamental right to keep and bear arms.

SUMMARY OF ARGUMENT

In *State v. Wilson*, 154 Haw. 8, 543 P.3d 440 (2024), the Supreme Court of Hawaii flagrantly defied this Court's Second Amendment precedents. The state court went far beyond expressing mere disagreement with *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of the filing of this brief.

597 U.S. 1 (2022). Rather, it expressed disdain and contempt.

It would be one thing if the defiance expressed in *Wilson* were an isolated occurrence. Unfortunately, it is not. *Wilson* is merely the latest (and perhaps the most flagrant) example of a lower court defying *Bruen*. This is especially the case with respect to the lower federal courts' review of firearms bans. Since *Bruen*, there have been 14 contested firearms ban cases. The government is 14-0. Despite *Bruen's* admonition, the lower courts have continued to treat the right to keep and bear arms as a second-class right. NAGR hopes the Court will use this case to send a forceful rebuke to these courts lest "anarchy [] prevail within the federal judicial system." Cf. *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982) (per curiam).

ARGUMENT

I. Supreme Court of Hawaii to the United States Supreme Court: "You Ain't the Boss of Me!"

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court held that a law burdening the right to keep and bear arms is constitutional only if it "is consistent with this Nation's historical tradition" of firearm regulation. *Id.* at 17. Accordingly, in resolving a Second Amendment challenge, a court "must conduct" a "historical inquiry" to determine if the challenged regulation is analogous to a historical regulation. *Id*. Thus, history is the veritable foundation upon which *Bruen* was built.

Henry Ford had a different view of history. He famously said, "History is bunk."[2] The Supreme Court of Hawaii wholeheartedly agrees, and in *State v. Wilson*, 154 Haw. 8, 543 P.3d 440 (2024), the lower court channeled Ford when it wrote:

> *Bruen's* command to find an old-days "analogue" undercuts the other branches' responsibility . . . Time-traveling to 1791 or 1868 to collar how a state regulates lethal weapons . . . is a dangerous way to look at the federal constitution. The Constitution is not a "suicide pact." [citation omitted]. We believe it is a misplaced view to think that today's public safety laws must look like laws passed long ago.

Id., 543 P.3d at 454.

The court capped off its anti-*Bruen* screed with a pithy pop culture quotation:

> As the world turns, it makes no sense for contemporary society to pledge allegiance to the founding era's culture, realities, laws, and understanding of the Constitution. "The thing about the old days, they the old days." *The Wire: Home*

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[2] In context he said: "History is bunk. What difference does it make how many times the ancient Greeks flew their kites?" Henry Ford as quoted in Special to the New York Times, *History is Bunk, says Henry Ford*, *New York Times*, October 29, 1921, available at https://www.nytimes.com/1921/10/29/archives/history-is-bunk-says-henry-ford-what-difference-does-it-make-he.html.

> *Rooms* (HBO television broadcast Sept. 24, 2006) (Season Four, Episode Three).

Id. at 454–55. But that pop culture reference clearly fails to capture the spirit of the lower court's defiance of the authority of this Court. That defiance is more aptly captured by a different quotation: "You ain't the boss of me!"[3]

In this brief, NAGR will discuss several other cases that highlight the lower courts' defiance of *Bruen* to demonstrate that such widespread defiance of this Court's authority is nothing short of a constitutional crisis. To quell that crisis this Court should repudiate the Hawaii Supreme Court in powerful and unambiguous terms.

II. The Lower Courts Are in Open Defiance of *Bruen*

In *McDonald v. City of Chicago*, Ill., 561 U.S. 742 (2010), this Court stated that the right recognized in *D.C. v. Heller*, 554 U.S. 570 (2008), is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees . . ." *Id.* at 780. Quoting this passage, *Bruen* again insisted that the lower courts stop treating the Second Amendment right as a second-class right. *Id.*, 597 U.S. at 70. Indeed, it could be said that the whole point of *Bruen* was to call on the lower courts to stop their unwavering deference to legislative burdens on the right to keep and bear arms. *Id.*, 597 U.S. at 26 (such deference is contrary to what the "Constitution demands").

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[3] *O Brother, Where Art Thou?* (Joel Coen, dir., 2000).

Unfortunately, the lower courts are still not listening. It would be one thing if the Hawaii Supreme Court's defiance in *Wilson* were an outlier or even unusual. Sadly, it is not. Far from being unusual, such defiance is the norm. Nowhere is this more evident than in firearms ban cases. *Heller* overturned D.C.'s handgun ban and *McDonald* overturned Chicago's. As far as NAGR is aware, these are the **only** ultimately successful federal challenges to any firearms ban. History has proven that when faced with a ban on a weapon in common use, a plaintiff's only path to relief runs through this Court,[4] because the lower courts are in more or less open defiance of *Bruen* and *Heller*. There have been 14 contested post-*Bruen* firearms ban cases. And in decisions manifestly at odds with this Court's precedents, the lower courts have – without a single exception – upheld every ban, including bans of arms in common use for lawful purposes. As set forth below, shoddy reasoning and flimsy pretexts have characterized these decisions.

1. *Duncan*: The Ninth Circuit Continues its Hijinks

In *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (en banc), the Ninth Circuit upheld California's ban on firearm magazines with a capacity in excess of ten rounds. Two years ago, this Court entered a GVR order with instructions for further consideration in light of *Bruen*. *Duncan v. Bonta*, 142 S. Ct. 2895

[4] See *Duncan v. Bonta*, 19 F.4th 1087, 1165 (9th Cir. 2021) (VanDyke, J., dissenting) ("[W]e have had at least 50 Second Amendment challenges since *Heller* . . . all of which we have ultimately denied.").

(2022). On remand, in an extremely thorough and well-reasoned opinion, the district court applied *Bruen* to hold that the California statute violates the Second Amendment. *Duncan v. Bonta*, 2023 WL 6180472 (S.D. Cal. Sept. 22, 2023).

In a highly irregular move, the previous en banc panel swooped in without a vote of the circuit judges and stayed the injunction entered by the district court over a blistering dissent by Judge Bumatay (joined by Judges Ikura, Nelson, and VanDyke). *Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023). Judge Bumatay's dissent summarized the Ninth Circuit's defiance of *Bruen*:

> If the protection of the people's fundamental rights wasn't such a serious matter, our court's attitude toward the Second Amendment would be laughably absurd. . . . Last year, the Supreme Court had enough of lower courts' disregard for the Second Amendment. It decisively commanded that we must no longer interest-balance a fundamental right and that we must look to the Second Amendment's text, history, and tradition to assess modern firearm regulations. . . .
>
> Despite [*Bruen's*] clear direction, our court once again swats down another Second Amendment challenge. On what grounds? Well, the majority largely doesn't think it worthy of explanation. Rather than justify California's law by looking to our historical tradition as *Bruen* commands, the majority resorts to

> simply citing various non-binding district court decisions. There's no serious engagement with the Second Amendment's text. No grappling with historical analogues. No putting California to its burden of proving the constitutionality of its law. All we get is a summary order, even after the Supreme Court directly ordered us to apply *Bruen* to this very case. The Constitution and Californians deserve better.

Id. at 808–09 (Bumatay, J., dissenting).

May 17, 2024, marked the seventh anniversary of the date Ms. Duncan filed her complaint. On June 30, 2022, this Court instructed the Ninth Circuit to review its prior decision in light of *Bruen*. As Judge Bumatay pointed out in his dissent, not only has the circuit court so far failed to abide by this Court's GVR order, but it has also stated – with hardly any analysis – that Ms. Duncan is unlikely ultimately to prevail. Judge Bumatay is right. We deserve better.

2. *Miller*: Round Two in the Ninth Circuit

In *Miller v. Bonta*, 2023 WL 6929336 (S.D. Cal. Oct. 19, 2023), the district court found that law-abiding Americans own approximately 24.4 million semi-automatic rifles like the AR-15 and use them for lawful purposes. Accordingly, the court held that such rifles are protected by the Second Amendment and that California's law banning them is unconstitutional. Once again, however, the Ninth

Circuit immediately stayed the district court's order. *Miller v. Bonta*, Case No. 23-2979 (ECF 13) (9th Cir. 2023). This time the court gave absolutely no reason for the stay and merely pointed to the stay in a different Second Amendment case (i.e., *Duncan*) as if that were sufficient justification.

3. *Bevis*: Disfavored Arms Are Not Even "Arms"

In *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175 (7th Cir. 2023),[5] the Seventh Circuit employed the Humpty Dumpty gambit[6] to sidestep this Court's precedents. The Seventh Circuit ruled that AR-15s and "high capacity" magazines are not protected by the Second Amendment because they are not "arms" at all. 85 F.4th at 1195. Who knew that a fire*arm* is not an *arm*? Certainly not this Court. See *D.C. v. Heller*, 554 U.S. 570, 581 (2008) (citing founding-era thesaurus that stated all firearms are "arms").

But the Seventh Circuit does not have much use for the majority opinion in *Heller*. This probably explains why the court rejected the majority opinion in favor of Justice Breyer's *Heller* dissent regarding whether the common use test is circular. Compare *Heller*, 554 U.S. at 681 (common use test is circular) (Breyer, J., dissenting) with *Bevis*, 85 F.4th at 1190 (common use test is circular). This defiance of *Heller* led Judge Brennan to rebuke his colleagues as follows:

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[5] NAGR is a party in this case and has filed a petition for writ of certiorari. See Case No. 23-880.

[6] *See* Lewis Carroll, *Through the Looking-Glass* 188 (Signet Classic 2000) ("'When I use a word,' Humpty Dumpty said . . . 'it means just what I choose it to mean – neither more nor less.'").

"We are not free to ignore the [Supreme] Court's instruction as to the role of 'in common use' in the Second Amendment analysis." 85 F.4th at 1212 (Brennan, J., dissenting).

4. *Ocean State Tactical*: 39 Million is Not Enough

In *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38 (1st Cir. 2024), the plaintiffs challenged Rhode Island's ban on magazines with a capacity of more than ten rounds. Plaintiffs presented evidence that *39 million Americans* own such magazines. 95 F.4th at 45. The First Circuit nevertheless held that an absolute ban of these weapons in common use imposed "no meaningful burden" on the right to keep and bear arms. *Id.*[7] Then, the court evaluated the state's purported public safety justification for the ban and upheld the ban because it furthered that interest. 95 F.4th 46-48. But *Bruen* forbids such an analysis. 597 U.S. at 17 ("To justify its regulation, the government may not simply posit that the regulation promotes an important interest."). To be sure, the circuit court did not expressly state that it was engaging in means-end scrutiny. Instead, it purported to reach the result as part of its historical analysis. 95 F.4th at 49 ("historical tradition" supports banning weapons to further government's public safety interest). But *Bruen* warned against this very subterfuge. 597 U.S. 1, 29, n.7 (2022) ("courts may

[7] At least the court did not adopt the district court's astonishing holding that such magazines – which are an integral part of semi-automatic firearms – are not even "arms" in the first place. See *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368, 388 (D.R.I. 2022).

[not] engage in independent means-end scrutiny under the guise of an analogical inquiry").

5. *Capen*: Firearms Are Like Fentanyl

In *Capen v. Campbell*, 2023 WL 8851005 (D. Mass. Dec. 21, 2023), the court was none too pleased with the common use test and it was not shy about saying so. At the hearing on the plaintiffs'[8] motion for preliminary injunction, the court stated: "[I]t seems to me bizarre to say that all you need to show is that lots of people have these [weapons]. I mean, you know, lots of people have fentanyl, millions of people probably, you know, have illegal drugs. That's not the standard for whether or not you can ban it." See transcript at *Capen v. Campbell*, No. CV 22-11431-FDS (D. Mass.) (ECF 59), Page 8; lines 1-5.

The court's reasoning can be summed up as follows: Fentanyl is bad; AR-15s are bad. You can ban the former; it stands to reason you can ban the latter. It does not matter that tens of millions of AR-15s are possessed by law-abiding citizens for lawful purposes. After all, millions of people also possess illegal drugs, and no one questions the government's power to ban them. With this attitude, it is no surprise that the court upheld Massachusetts' ban of rifles and magazines in common use.

6. *Oregon Firearms Federation*: The Magical Bullet Theory

Oregon Firearms Fed'n v. Kotek, 682 F. Supp. 3d 874 (D. Or. 2023), is truly bizarre. The court

[8] NAGR is a party in this case.

acknowledged the commonsense conclusion that "[l]ike bullets, magazines are often necessary to render certain firearms operable." 682 F. Supp. 3d at 912. There is, therefore, a "corollary . . . right to possess the magazines necessary to render ... firearms operable." *Id.* (quoting *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015)). The court nevertheless held that because semi-automatic firearms are functional with magazines with a capacity of less than ten rounds, magazines with a greater capacity are not "bearable arms." *Id.* It is as if the court believes the eleventh round has a magical property that, once inserted into a magazine, transmogrifies it from a bearable arm into not-a-bearable arm. The obvious problem with this analysis is that it has no limiting principle. Who is to say that the *second* round does not have the same magical property? In other words, the court could just as well have held that since a semi-automatic firearm is technically functional even if it has a magazine with a capacity of only one round, magazines with a capacity of over one round are not "bearable arms." This conclusion is no more absurd than the one the court actually reached.

The court went on to botch the common use analysis, writing: "This Court finds that, while magazines that hold more than ten rounds of ammunition are owned and possessed by millions of Americans, this fact alone does not automatically entitle these magazines to Second Amendment protection." 682 F. Supp. 3d 915. This statement simply cannot be reconciled with *Heller's* plain holding. 554 U.S. at 627 ("the sorts of weapons protected were those 'in common use at the time'").

7. *Brumback*: You Have a Right to a Gun, Just Not Any of its Essential Parts

Brumback v. Ferguson, 2023 WL 6221425 (E.D. Wash. Sept. 25, 2023), involved another magazine ban. The court held the plaintiffs failed to demonstrate a likelihood of success on the merits of their Second Amendment claim because "[a] magazine is a *part of a firearm*, rather than a weapon of offence, or armour of defence . . . On its own, it cannot be used to attack or defend." *Id.* at *8 (internal citation and quotation marks omitted; emphasis added). The problem with this analysis should be obvious. The court could have said the same thing about every essential part of a firearm. For example, a trigger is a part of a firearm. On its own it cannot be used to attack or defend. But without a trigger (or a hammer, or a firing pin, or a receiver, etc.) a firearm is useless. In short, the court failed to take account of the fact that – as even the Ninth Circuit has acknowledged – "the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017).

8. *Rupp v. Bonta*: Rifles That Number in the Tens of Millions Are "Unusual"

In *Rupp v. Bonta*, 2024 WL 1142061 (C.D. Cal. Mar. 15, 2024), the court wrote: "It is undisputed that there are about 24.6 million AR- and AK-platform rifles in the United States." *Id.* at *16. Nevertheless, the rifles are, according to the court, "dangerous and

unusual" and therefore not protected by the Second Amendment. *Id.* at 19.

9. *Hartford*: Dangerous Weapons Are Unprotected

In *Hartford v. Ferguson*, 676 F. Supp. 3d 897 (W.D. Wash. 2023), the court assumed the plaintiffs would be able to show that millions of the banned weapons are owned by law-abiding citizens. *Id.*, 676 F. Supp. 3d at 904. The court nevertheless upheld the arms ban on the ground that the banned arms are "exceptionally dangerous." *Id.* at 907. But "[i]f *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous." *Caetano v. Massachusetts*, 577 U.S. 411, 418 (2016) (Alito, J., concurring).

10. *Lamont*: Millions of Arms Are Not "Arms"

The Second Circuit weighed in on the common use issue prior to *Bruen*. In *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015), the circuit court noted that "Americans own millions" of the banned rifles and magazines and therefore "[e]ven accepting the most conservative estimates . . . [the banned weapons] are 'in common use' as that term was used in *Heller*." *Id.* Since this was a pre-*Bruen* case, the circuit court nevertheless upheld the ban under an intermediate-scrutiny analysis. *Id.* at 261. Even so, *Cuomo* acknowledged the obvious point that the banned weapons are in common use.

In *Nat'l Ass'n for Gun Rts. v. Lamont*, 685 F. Supp. 3d 63 (D. Conn. 2023),[9] the district court had a seemingly insurmountable problem. After *Bruen*, intermediate scrutiny analysis is no longer available.[10] So how was the court going to uphold the ban given that the Second Circuit had already held the banned arms are in common use? The court found a way. After all, the Second Circuit had held only that the weapons were in "common use." It did not hold that they were specifically in "common use for self-defense." The district court then relied on this hair-splitting distinction to hold that the banned weapons are not covered by the plain text of the Second Amendment. *Id.*, 685 F. Supp. 3d at 98.

There are many problems with the district court's analysis, not the least of which is the linguistic contortion it employed to overrule the Second Circuit. A larger problem is shifting the common use issue to the "plain text" step. It should go without saying that a textual analysis is not an empirical analysis. As Judge Brennan observed, "common use is a sufficient condition for finding arms protected under the history and tradition test in *Bruen*, not a necessary condition to find them 'Arms' in the first place." *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175, 1209 (7th Cir. 2023) (Brennan, J., dissenting). "The nature of an object does not change based on its popularity, but the regulation of that object can." *Id.*

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[9] NAGR is a party in this case.

[10] A fair reading of *Heller* never allowed for the application of intermediate scrutiny. *Bruen* did not change that fact; it merely insisted on it. *Id.*, 597 U.S. at 19.

11. *Hanson*: Weapons in Common Use Are Not Protected

In *Heller v. D.C.*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*"), the D.C. Circuit stated: "We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use.'" As in *Cuomo*, the circuit court went on to nevertheless uphold the ban under an intermediate-scrutiny analysis. *Id.*, 670 F.3d at 1264.

In *Hanson v. D.C.*, 671 F. Supp. 3d 1 (D.D.C. 2023), the district court had the same problem the *Lamont* court had. How was it going to uphold the magazine ban at issue in the case after the D.C. Circuit had already held such magazines are in common use? *Hanson* achieved the same result as *Lamont* but with a different strategy. The court held that the magazines are not covered by the plain text "because they are *most useful in military service* and because they are not in fact commonly used for self-defense." *Id.* 671 F. Supp. 3d at 16 (emphasis added).

The district court's holding turns *Heller* on its head. *Heller* held that sophisticated military "arms that are highly unusual in society at large" are not protected. 554 U.S. at 627. But the Court specifically contrasted such arms with weapons in common use. *Id.* In other words, if a weapon is in common use, by definition it does not fit within the category of weapons "most useful for military service" that may be banned. The very paragraph of *Heller* cited by the district court undermines its holding.

12. *Delaware State Sportsmen*: Weapons in Common Use for Lawful Purposes May be Banned

Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec., 664 F. Supp. 3d 584 (D. Del. 2023), is particularly egregious, because the district court found that the banned rifles and magazines are in common use for lawful purposes but may nevertheless be banned. The court found the following fact: "Plaintiffs have sufficiently demonstrated that assault long guns are numerous and 'in common use' for a variety of lawful purposes." 664 F. Supp. 3d at 595. The court also found as follows: "I conclude that the prohibited [magazines], like the prohibited assault long guns, are in common use for self-defense." *Id*. at 597.

These findings should have automatically resulted in the court holding that the law categorically banning the weapons is unconstitutional. After all, *Heller's* central holding is that weapons in common use for lawful purposes cannot be categorically banned. 554 U.S. at 628. One would suppose, therefore, that the district court would apply that rule and hold the ban unconstitutional. It did not. Instead, it upheld the ban under the "history and tradition" step. The court wrote: "The modern regulations at issue, like the historical regulations discussed by Defendants, were enacted in response to pressing public safety concerns regarding weapons determined to be dangerous." 664 F. Supp. 3d at 603. Who knew that the Second Amendment does not protect "weapons determined to be dangerous"? Those who thought the phrase "non-dangerous weapon" is an

oxymoron are apparently wrong. Indeed, according to the Delaware court, such weapons are the only kind Americans have a constitutional right to possess. This is, of course, completely contrary to this Court's precedents. Again, "[i]f *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous." *Caetano v. Massachusetts*, 577 U.S. 411, 418 (2016) (Alito, J., concurring).

13. *Goldman*

In *Goldman v. City of Highland Park, Illinois*, 2024 WL 98429 (N.D. Ill. Jan. 9, 2024), the district court relied on *Bevis, supra*, to uphold the city's arms ban.

14. *Brown*: The Original Magic Bullet Case

Oregon Firearms Fed'n v. Brown, 644 F. Supp. 3d 782 (D. Or. 2022), is an earlier iteration of *Oregon Firearms Fed'n v. Kotek, supra.*

III. Lower Court Defiance of This Court's Second Amendment Precedents Has Reached Crisis Proportions

Heller held that handguns are protected by the Second Amendment. Sixteen years later that is the only type of firearm that has been held to be protected. Thus, to date, the lower courts have successfully cabined *Heller* to its specific facts insofar as firearms bans are concerned.

In their efforts to restrict *Heller*, the lower courts have drawn some very dubious constitutional lines. Concerning the line drawn in *Heller II*, then-

Judge Kavanaugh wrote: "Such a line might be drawn out of a bare desire to restrict *Heller* as much as possible or to limit it to its facts, but that is not a sensible or principled constitutional line for a lower court to draw or a fair reading of the *Heller* opinion, in my view." 670 F.3d at 1286, n.14 (Kavanaugh, J., dissenting). Unfortunately, as demonstrated above, *Bruen's* admonition to the lower courts to do better has fallen on deaf ears.

It is probably fair to say that lower court resistance to this Court's Second Amendment precedents has reached crisis proportions. Clearly, many lower court judges believe this Court's Second Amendment jurisprudence is misguided and have resisted it. Those courts need to be reminded of the principles set forth in *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam):

> Admittedly, the Members of this Court decide cases "by virtue of their commissions, not their competence." And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from *Rummel* [*v. Estelle*, 445 U.S. 263 (1980)]. *But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.*

Id. at 374-75 (emphasis added).

"[All judges] know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (quoting *Garnes v. Fleming Landfill, Inc.*, 413 S.E. 2d 897, 907 (1991)). Perhaps most infamously, some lower courts resisted *Brown v. Board of Education*, 347 U.S. 483 (1954), while giving lip service to its holding. For example, while mouthing platitudes about following this Court's precedent, pro-segregation judges nevertheless held that *Brown* did not apply in the areas of public transportation and public recreation facilities.[11] These segregationist judges tried to cabin *Brown* to its facts in the same way later judges have tried to cabin *Heller* to its facts. NAGR hopes the Court will use this case to send a forceful rebuke lest "anarchy" continue "to prevail within the federal judicial system."

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[11] See *Flemming v. S.C. Elec. & Gas. Co.*, 128 F. Supp. 469, 470 (E.D.S.C. 1955) (*rev'd*, 224 F.2d 752 (4th Cir. 1955)) and *Lonesome v. Maxwell*, 123 F. Supp. 193 (D. Md. 1954) (*rev'd sub nom. Dawson v. Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955)).

CONCLUSION

For the reasons set forth herein, NAGR respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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