

No. 24-10633

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMAION WILSON,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

**BRIEF *AMICI CURIAE* OF GUN OWNERS OF AMERICA,
GUN OWNERS FOUNDATION, GUN OWNERS OF CALIFORNIA,
TENNESSEE FIREARMS ASSOCIATION, TENNESSEE
FIREARMS FOUNDATION, VIRGINIA CITIZENS DEFENSE
LEAGUE, VIRGINIA CITIZENS DEFENSE FOUNDATION,
AMERICA'S FUTURE, U.S. CONSTITUTIONAL RIGHTS LEGAL
DEFENSE FUND, HELLER FOUNDATION, AND
CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND
IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR
REHEARING EN BANC**

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JAMAION WILSON,

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

United States of America, Plaintiff-Appellee.

Jamaion Wilson, Defendant-Appellant.

Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Tennessee Firearms

Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, America's Future, U.S. Constitutional Rights Legal Defense Fund, Heller Foundation, and Conservative Legal Defense and Education Fund, *Amici Curiae*.

Robert J. Olson, Jeremiah L. Morgan, William J. Olson, Oliver M. Krawczyk, John I. Harris III, and J. Mark Brewer are counsel for *Amici Curiae*.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and Fifth Circuit Rule 28.2.1, it is hereby certified that *Amici Curiae* are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them.

/s/ Robert J. Olson

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INTEREST OF THE *AMICI CURIAE*¹

The interest of the *amici curiae* is set forth in the accompanying motion for leave.

STATEMENT OF THE CASE

In 2023, Defendant-Appellant Jamaion Wilson shot and killed a man during a transaction for a firearm, claiming self-defense. *See United States v. Wilson*, 2026 U.S. App. LEXIS 756, at *2-3 (5th Cir. Jan. 12, 2026) (“*Wilson*”). The weapon Wilson used – a handgun outfitted with a “Glock switch” – was capable of fully automatic fire, and therefore constituted a “machinegun” under federal law. *Id.* Since 1986, federal law has prohibited ordinary Americans from even possessing machineguns manufactured after 1986, imposing an artificial cap on the number available for private ownership. *See* 18 U.S.C. § 922(o). Wilson was charged under this 1986 law and challenged it on Second Amendment grounds. *See Wilson* at *3. After the district court rejected Wilson’s challenge, he pleaded guilty and later appealed. *Id.*

¹ It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Last month, a panel of this Court affirmed, declining to disturb a prior panel decision in *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016), which “held that machineguns ‘do not receive Second Amendment protection’” because they are supposedly “‘dangerous and unusual.’” *Wilson* at *4, *5. Under *Hollis*, judges may declare firearms unprotected based on perceived dangerousness or uncommonality.

SUMMARY OF ARGUMENT

This appeal does not concern Wilson’s use of deadly force or whether it was justified self-defense. Rather, at issue is whether the Government has the constitutional authority to criminalize the mere possession of a machinegun. The Second Amendment’s text deprives the Government of that power, and history confirms what the text plainly states.

This Court should rehear this case for three reasons in addition to those discussed in the Petition. First, a methodological reset is overdue in this Circuit. Since *District of Columbia v. Heller*, 554 U.S. 570 (2008), and now even more so after *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), panels of this Court have failed to faithfully apply the Second Amendment’s analytical framework, relying instead on vague passages of dicta to uphold gun control. These varying approaches

contravene governing precedent, and this case presents an ideal vehicle to begin correcting those errors.

Second, the *Hollis* and *Wilson* panels misapplied the Supreme Court's precedents on what items constitute "Arms" under the Second Amendment. Consistent with *Heller* and *Bruen*'s guidance, this Court should clarify that, if a weapon is "bearable," then it is presumptively protected by the Second Amendment. Proof of a weapon's "common use" – whatever that means – is *sufficient* to demonstrate constitutional protection, but it is not *necessary*.

Third, historical regulations of the *carrying* of "dangerous and unusual weapons" never reached the mere *possession* of firearms – of any kind. Rather than criminalizing the possession of lethal and rare weapons, these historical regulations simply proscribed the public brandishing of arms in a manner that disturbed the peace. Accordingly, these regulations cannot justify the challenged statute under *Bruen*, and this Court should correct that historical misunderstanding here.

ARGUMENT

I. DISCORDANT PANEL DECISIONS HAVE TRANSFORMED THIS CIRCUIT FROM SECOND AMENDMENT STALWART INTO A REALM OF UNCERTAINTY.

The Second Amendment guarantees the individual “right of the people to keep and bear Arms.” But in the recent past, not all courts recognized this principle. In fact, it was *this Court* that led the individual-rights charge in Second Amendment jurisprudence, long before any other federal circuit. See *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). Thus, *Emerson* established this Circuit as a Second Amendment stalwart – one that litigants could trust would respect original meaning and individual rights.

Eventually, of course, the Supreme Court caught up. And, consistent with this Amendment’s “unqualified command,” the Supreme Court has since instructed that challenges to every firearm regulation be analyzed using a one-step test: constitutional “text, as informed by history.” *Bruen* at 17, 19. To that end, “[o]nly if” the Government “demonstrate[s] that [its] regulation is consistent with this Nation’s historical tradition of firearm regulation ... may a court conclude that [an] individual’s conduct falls outside” the Second Amendment’s protections. *Id.* at 17. Thus, *Bruen*’s methodological “hold[ing]” (*id.*)

could not be clearer: *all* “firearm regulations” are subject to historical analysis, even – and perhaps especially – those the Court previously assumed might survive historical review, “if and when” challenged. *Heller* at 635; *see id.* at 626-27, 627 n.26.

Unfortunately, this Court’s Second Amendment decisions following *Heller* and *Bruen* have failed to carry *Emerson’s* torch. Contrary to the Supreme Court’s “unequivocal” approach, several panels of this Court have declined to hold the Government to its historical burden, thereby upholding various infringements. In place of *Heller* and *Bruen’s* originalist test, these panels have contrived new and shifting approaches to analyzing the Second Amendment, employing vague and untested dicta.

Hollis v. Lynch declared that machineguns “do not receive Second Amendment protection” at all, on the theory that they are “dangerous and unusual” weapons in the literal sense. *Id.* at 451, 447. But the panel’s “dangerous and unusual” test came not from any rigorous historical understanding of the Second Amendment right, but rather from *Heller’s* passing dicta on “the sorts of weapons protected.” *Heller* at 627. Under this approach, the *Hollis* panel came to the head-scratching

conclusion that “[t]he Second Amendment does not create a right to possess a weapon solely because ... [it] is useful for militia or military service” (*Hollis* at 445), even though the Framers believed precisely the opposite.²

Also consider another panel’s approach in *McRorey v. Garland*, 99 F.4th 831 (5th Cir. 2024), which blessed indefinite waiting periods when purchasing firearms. Rather than examining whether the Framers would have allowed the acquisition of a firearm to be delayed for days or weeks on end, the panel reframed the statute as a “presumptively constitutional” “‘shall-issue’ licensing regime[]” under *Bruen*’s footnote nine (*id.* at 836, 837), essentially reverting to a “judge-empowering ‘interest-balancing inquiry.’” *Bruen* at 22 (internal quotations omitted); see *McRorey* at 840 (opining that a waiting “period of 10 days” to purchase a firearm “does not qualify” as “‘abusive’”). But although *Bruen* discussed

² See, e.g., Tench Coxe, *A Pennsylvanian*, No. 3, Pa. Gazette, at 2 (Feb. 20, 1788) (“Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American.”); Henry Campbell Black, Handbook of American Constitutional Law § 203 (2d ed. 1897) (“The ‘arms’ here meant are those of a soldier. ... The citizen has at all times the right to keep arms of modern warfare.”).

various optional³ shall-issue regimes in a footnote, *Bruen* never purported to wholesale exempt any firearm regimes from its analytical framework. To the contrary, “consisten[cy] with this Nation’s historical tradition” is the “[o]nly” way a court may uphold a firearm regulation. *Bruen* at 17. Perhaps unsurprisingly, subsequent panels have sought to minimize *McRorey*’s damage, evincing a disagreement among the judges of this Court regarding *Bruen*’s basic methodology. See *Reese v. BATFE*, 127 F.4th 583, 590 n.2 (5th Cir. 2025).

But what *McRorey* started, another panel continued in *United States v. Peterson*, 161 F.4th 331 (5th Cir. 2025). There, the panel described the National Firearms Act’s onerous registration requirements for silencers as another “shall-issue regime,” thereby entirely avoiding historical analysis of a modern firearm regulation dating only to the 20th century. *Id.* at 339; cf. *Bruen* at 66 n.28 (declining to “address any of the 20th-century historical evidence”).

³ Indeed, in the public-carry context, a majority of the 43 states *Bruen* discussed either do not require licensure to carry at all, or require licensure only to carry concealed. See *Bruen* at 38 n.9. In other words, *Bruen* declined “to suggest the unconstitutionality” of regimes that largely impose no restrictions on the Second Amendment in the first place. *Id.*

And now in this case, a panel once again has absolved the Government of its historical burden, claiming *Hollis*'s "unmistakable holding" that machineguns are "dangerous and unusual" obviates the need for a *Bruen* analysis. *Wilson* at *7.

All of these panel opinions analyzed "firearm regulations," yet not one properly applied *Bruen*'s historical framework. And they stand in stark contrast to *other* opinions of this Court that have encountered no difficulty applying *Heller* and *Bruen* as written. *See, e.g., Reese* at 600 (striking the "federal handgun purchase ban" for young adults); *United States v. Connelly*, 117 F.4th 269, 272 (5th Cir. 2024) (striking a federal ban on firearm possession as applied to a "non-violent, marijuana smoking gunowner"). This growing inter-panel rift has created a patchwork of Second Amendment approaches in this Circuit, warranting en banc review to "secure ... uniformity of the court's decisions." Fed. R. App. P. 40(b)(2)(A). This Court should grant the Petition and rehear the case, applying only "the Second Amendment's text, as informed by history." *Bruen* at 19.

II. THE SECOND AMENDMENT PRESUMPTIVELY PROTECTS ALL “BEARABLE ARMS,” AND NOTHING MORE IS NEEDED TO PROCEED TO HISTORICAL ANALYSIS.

Explaining the original meaning of the Second Amendment in *Heller*, the Court observed that to “bear Arms” means to “wear, bear, or carry” weapons “upon the person or in the clothing or in a pocket...” *Heller* at 584. And, with respect to the term “Arms,” the Court instructed that “Arms” include “[w]eapons of offence, or armour of defence,” and “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another,” including “*all firearms*,” as originally understood. *Id.* at 581 (emphasis added). Thus, “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. In other words, if a weapon may be worn on the person or carried in the hand (*i.e.*, “bearable”) – and *certainly* if it is a firearm – then the Constitution presumptively protects the right to both keep and bear that weapon.

Lest there be any doubt, *Bruen* expanded upon *Heller*’s understanding of “Arms.” Indeed, the Second Amendment’s “general definition” of “Arms” “covers ... instruments that facilitate armed self-

defense” at the plain text, and “we use history to determine which modern ‘arms’ are protected by the Second Amendment....” *Bruen* at 28. Thus, if the Government seeks to ban a weapon, then it bears the burden of demonstrating a relevant historical tradition. *Id.* at 17; accord *Snope v. Brown*, 145 S. Ct. 1534, 1535 (2025) (Thomas, J., dissenting from denial of certiorari).

Contrast the Supreme Court’s straightforward approach with the convoluted method employed here. Rather than conclude the obvious – that Wilson’s “Glock switch”-equipped handgun is a presumptively protected bearable “Arm” – the panel posited that machineguns enjoy *no* protection because they “are dangerous and unusual and therefore not in common use’....” *Wilson* at *7. But “common use” is no prerequisite to constitutional protection, and this Court should clarify as much.

To be sure, *Heller* “recognize[d] an[] important limitation on the right to keep and carry arms” – that the Second Amendment “protected” only those weapons “in common use,” and that the Second Amendment accordingly “does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes....” *Heller* at 627, 625. *Heller* assumed that “limitation” to be “fairly supported by the historical

tradition of prohibiting the carrying of ‘dangerous and unusual weapons,’” but never explained why. *Id.* at 627. Indeed, the Court acknowledged that *Heller* was only its “first in-depth examination of the Second Amendment....” *Id.* at 635.

Bruen later clarified what *Heller* meant. Revisiting its prior reference to “dangerous and unusual weapons,” the Court concluded 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.” *Bruen* at 47 (emphasis added). This would make sense – historical regulations of *public carry* inform the scope of *public carry*. Any broader of a prohibition that applied to mere possession would not “impose a *comparable* burden on the right of armed self-defense,” and therefore would fail *Bruen*’s “how.” *Id.* at 29 (emphasis added).

Properly understood, then, “common use” is no prerequisite to constitutional protection, but rather a means of rendering historical analysis superfluous. Indeed, “the traditions of the American people ... demand[] our unqualified deference” (*Bruen* at 26), and so “a complete prohibition” of a firearm in common use is simply “invalid.” *Heller* at 629.

In other words, the *people's preferences prevail*, and judges cannot override those preferences, “especially given their ‘lack [of] expertise’ in the field.” *Bruen* at 25. Thus, if machineguns’ entry into “common use” is unclear, then all that means is this Court must engage in a historical analysis of Section 922(o) – not avoid it entirely, as the panel did. This Court should grant the Petition to clarify this basic precept.

III. HISTORICAL REGULATIONS OF “DANGEROUS AND/OR UNUSUAL WEAPONS” WERE LIMITED IN SCOPE AND NEVER BANNED THE SIMPLE POSSESSION OF ARMS.

Contrary to the panel’s hyper-literal interpretation, “dangerous and unusual” is a historical term of art with a specific meaning. As Sir William Blackstone explained, the “dangerous and unusual” offense was an “Offence[] Against the *Public Peace*.”⁴ Accordingly, it shared a common theme with the dozen other common-law offenses with which it was codified. All were “either ... an actual breach of the peace; or constructively so, by tending to make others break it.” *Id.* The relevant text of this historical regulation reads:

The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by

⁴ 4 William Blackstone, Commentaries on the Laws of England at 142 (John Taylor Coleridge ed., 1825) (emphasis added).

terrifying the good people of the land; and is particularly prohibited by the statute of Northampton.... [*Id.* at 148-49.]

In other words, this description was of the “common-law offense of affray....” *Bruen* at 51. Affray laws “regulated a niche subset of Second Amendment-protected activity” – the *public* carry of weapons “*in a particular manner*” – not banning all possession. *United States v. Rahimi*, 602 U.S. 680, 770 (2024) (Thomas, J., dissenting) (emphasis added). Indeed, Blackstone made clear that the common-law offense required something more than simple possession of a “dangerous or unusual weapon” in order for criminal liability to attach. The law required that the weapon not only be possessed, and not even just that it be present in public (“riding or going armed”), but also that its presence breach “the public peace” and cause “terr[or].” *See also Heller* at 623 (noting the “prohibition on terrorizing people with dangerous or unusual weapons”). Of course, for this to happen, such a weapon must have been carried openly and visibly.

Curiously, the *Hollis* panel acknowledged historical scholarship demonstrating “that dangerous and unusual refers only to the manner in which weapons are used,” and not actual dangerousness or rarity. *Hollis* at 448. Even so, the panel left *Heller*’s admittedly “inaccurate definition

of “dangerous and unusual weapons” to the Supreme Court to modify. *Id.* (internal quotations omitted). Of course, that modification has since arrived with *Bruen*’s limitation to public carry. *See* Section II, *supra*.

Accordingly, this Court should grant the Petition to correct its approach to the historical record. Ever since *Heller* was decided, far too many courts have misread the Supreme Court’s dicta on “dangerous and unusual weapons” to justify atextual and ahistorical arms bans on firearm possession, making en banc review necessary here.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, *et al.* in Support of Defendant-Appellant's Petition for Rehearing en banc was made this 17th day of February, 2026, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Gun Owners of America, *et al.* in Support of Defendant-Appellant's Petition for Rehearing en banc complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,599 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), as well as Fifth Circuit Rule 32.1, because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2021 in 14-point Century Schoolbook.

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Dated: February 17, 2026