No. 19-404

In The Supreme Court of the United States

DAVID SETH WORMAN, et al.,

Petitioners,

v.

MAURA T. HEALEY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, CALIFORNIA GUN RIGHTS FOUNDATION, SECOND AMENDMENT FOUNDATION, CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS, JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP, MADISON SOCIETY FOUNDATION, AND INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Cato Institute is a nonpartisan public policy research foundation that advances the principles of individual liberty, free markets, and limited government.

Firearms Policy Coalition is a nonprofit membership organization that defends constitutional rights and promotes individual liberty through advocacy, research, legal efforts, outreach, and education.

Firearms Policy Foundation is a nonprofit organization that serves its members and the public through charitable programs including research, education, and legal efforts.

California Gun Rights Foundation is a nonprofit organization that focuses on educational, cultural, and judicial efforts to advance civil rights.

Second Amendment Foundation ("SAF") is a nonprofit foundation dedicated to protecting the right to arms through educational and legal action programs. SAF has over 650,000 members, in every State of the Union. SAF organized and prevailed in *McDonald v. City of Chicago*.

Citizens Committee for the Right to Keep and Bear Arms is a nonprofit organization dedicated to protecting firearms rights by educating grassroot activists, the public, legislatures, and the media.

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[1] All parties received timely notice and consented to the filing of this brief. No counsel for any party authored the brief in whole or part. Only *amici* funded its preparation and submission.

Jews for the Preservation of Firearms Ownership is a nonprofit educational civil rights corporation focused on firearms ownership and responsibility. Its work centers on the history of gun control.

Madison Society Foundation is a nonprofit corporation that supports the right to arms by offering education and training to the public.

Independence Institute is a nonpartisan public policy research organization. The Institute's *amicus* briefs in *Heller* and *McDonald* (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*). The Institute's Research Director, David B. Kopel, is co-author of the first law school textbook on the Second Amendment, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY (Aspen Pub. 2d ed. 2017). His scholarship has been cited in 21 state appellate opinions and 18 U.S. Circuit Courts of Appeals opinions, including by then-Judge Kavanaugh in *Heller II*. The Seventh Circuit commended his scholarship as an example of the proper "originalist interpretive method as applied to the Second Amendment." *Ezell v. City of Chicago*, 651 F.3d 684, 702 n.11 (7th Cir. 2011) (Sykes, J.)

SUMMARY OF ARGUMENT

This Court has addressed arms prohibitions more than any other Second Amendment issue—a total of four times. Yet lower courts remain deeply divided over the proper approach to such prohibitions, even when, as here, the prohibition applies to some of the most popular arms in existence.

Under this Court's precedents, if arms are "in common use," they are constitutionally protected and cannot be banned.

But this Court has not defined "common use," and lower courts have struggled to define it themselves. Some courts look at the total number of the banned arms. Some courts look at the percentage the banned arms constitute of the total nationwide arms stock. And other courts have followed Justice Alito in considering the number of jurisdictions in which the banned arms are lawful.

While this Court has demonstrated that prohibitions on constitutionally protected arms are categorically invalid, lower courts have developed various tests to weigh the constitutionality of such prohibitions.

Many courts apply heightened scrutiny, despite this Court expressly rejecting interest-balancing tests for arms prohibitions on two different occasions.

The Fourth Circuit applies a test that allows firearms to be banned if they are most useful in military service. This test disregards this Court's statements acknowledging that founding-era militiamen used the

same arms for militia service and home defense. Under the Fourth Circuit's test, virtually none of the arms owned in the Founding Era would have been protected by the Second Amendment.

The Seventh Circuit asks whether the arms were common at the time of ratification, whether the arms are useful in militia service, and whether alternative arms exist. This Court has expressly rejected each element of the Circuit's test.

Despite this Court's clear precedents, the lower courts continue to struggle with bans on arms in common use—including what constitutes "common use," and how to evaluate prohibitions on common arms. The petition for a writ of certiorari should be granted to resolve the conflicting approaches among the lower courts, and to hold unconstitutional Massachusetts's ban on common arms.

ARGUMENT

I. Lower courts have struggled to determine what constitutes "common use."

A. This Court held that the Second Amendment protects arms "in common use."

This Court specifically addressed "*what* types of weapons" the right to keep and bear arms protects in *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008) (emphasis in original). This Court concluded that the right protects arms that are "typically possessed by

law-abiding citizens for lawful purposes." *Id.* at 625. In other words, as "[*United States v. Miller*] said . . . the sorts of weapons protected were those 'in common use at the time.'" *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

In the Founding Era, "when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 624 (quoting *Miller*, 307 U.S. at 179) (brackets omitted). Thus, "[t]he 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. Because "weapons used by militiamen and weapons used in defense of person and home were one and the same," protecting arms in common use is "precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface." *Id.* at 625 (citations omitted).

Therefore, "the pertinent Second Amendment inquiry is whether [the arms in question] are commonly possessed by law-abiding citizens for lawful purposes today." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1032 (2016) (Alito, J., concurring) (emphasis omitted).[2]

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[2] To be sure, the specific make and model of a particular arm need not be popular in the market to be protected. 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. So it is the function of the arm rather than the exact type of arm that matters. Thus, in *Heller*, this Court paid no attention to the Colt

This Court, however, has not precisely defined "common use." *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) involved challenges to handgun bans. And because handguns are "the most popular weapon chosen by Americans for self-defense in the home," a detailed examination of their commonality was unnecessary. *Heller*, 554 U.S. at 629.

In *Miller*, the district court had quashed the indictment, so neither party had an opportunity to present evidence regarding the commonality of short-barreled shotguns. Because the commonality of these arms was not within judicial notice, this Court remanded. 307 U.S. at 178 ("Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment").

Concurring in *Caetano*, Justice Alito declared that "[t]he more relevant statistic is that hundreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States." 136 S. Ct. at 1032 (Alito, J., concurring) (quotations and brackets omitted). Because "stun guns are widely owned and accepted as a legitimate means of self-defense across the country," they are protected by the Second Amendment. *Id.* at 1033. But lower courts have largely ignored this approach, instead continuing to explore various other methods.

Buntline nine-shot revolver that Dick Heller sought to possess, and instead focused on the commonality of handguns in general.

B. Lower courts are divided over what test applies to determine "common use."

In the federal circuits, "[e]very post-*Heller* case to grapple with whether a weapon is 'popular' enough to be considered 'in common use' has relied on statistical data of some form, creating a consensus that common use is an objective and largely statistical inquiry." *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (quotations omitted). Nevertheless, "[t]here is considerable variety across the circuits as to what the relevant statistic is." *Id.*[3]

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[3] The Fourth Circuit found the common use test especially perplexing, posing a series of rhetorical questions that it was "[t]hankfully" able to avoid:

> On the issue of whether the banned assault weapons and large-capacity magazines are protected by the Second Amendment, the *Heller* decision raises various questions. Those include: How many assault weapons and large-capacity magazines must there be to consider them "in common use at the time"? In resolving that issue, should we focus on how many assault weapons and large-capacity magazines are owned; or on how many owners there are; or on how many of the weapons and magazines are merely in circulation? Do we count the weapons and magazines in Maryland only, or in all of the United States? Is being "in common use at the time" coextensive with being "typically possessed by law-abiding citizens for lawful purposes"? Must the assault weapons and large-capacity magazines be possessed for any "lawful purpose[ ]" or, more particularly and importantly, the "protection of one's home and family"? Is not being "in common use at the time" the same as being "dangerous and unusual"? Is the standard "dangerous *and* unusual," or is it actually "dangerous *or* unusual"?

1. Total number test.

"Some courts have taken the view that the total number of a particular weapon is the relevant inquiry." *Id.*

The Second Circuit found that banned semi-automatic firearms and standard magazines "are 'in common use' as that term was used in *Heller*" because "Americans own millions of the firearms that the challenged legislation prohibits. The same is true of large-capacity magazines." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015) ("*NYSRPA I*").[4]

The D.C. Circuit found that banned semi-automatic firearms and standard magazines are "indeed in 'common use'" because "[a]pproximately 1.6 million AR-15s alone have been manufactured since 1986."[5] *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*"). And "approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000." *Id.* "There may well be some capacity above which magazines are

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Kolbe v. Hogan, 849 F.3d 114, 135–36 (4th Cir. 2017) (en banc).

[4] For simplicity, this brief sometimes uses the statutory term "large-capacity magazine." However, the term is a misnomer. The vast majority of banned magazines—by Massachusetts and states with similar bans—are the standard magazines supplied by the manufacturer of the firearm.

[5] "AR" is short for "ArmaLite," the original manufacturer of the rifle.

not in common use but . . . that capacity surely is not ten." *Id.*

The Fourth Circuit decided it "need not answer" whether standard magazines are "in common use," but acknowledged "evidence that in the United States between 1990 and 2012, magazines capable of holding more than ten rounds numbered around 75 million." *Kolbe*, 849 F.3d at 129, 136.

The Ninth Circuit determined that a district court did not abuse its discretion by finding that "at a minimum, [magazines over 10 rounds] are in common use." *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015). The plaintiffs "presented sales statistics indicating that millions of magazines, some of which [] were magazines fitting Sunnyvale's definition of large-capacity magazines, have been sold over the last two decades in the United States." *Id.*

2. Percentage test.

Some courts consider what percentage the banned arms constitute of the total nationwide arms stock. The Second Circuit found banned semi-automatics "in common use" even when they "only represent about two percent of the nation's firearms." *NYSRPA I*, 804 F.3d at 255.

The D.C. Circuit found banned semi-automatic rifles and standard magazines "in common use" because "in 2007 this one popular model [AR-15] accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles,

produced in the U.S. for the domestic market. As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds." *Heller II*, 670 F.3d at 1261.

3. Jurisdictions test.

Justice Alito's *Caetano* concurrence identified "the more relevant statistic" as the raw number of arms and the number of jurisdictions in which they are lawful. Whereas the concurrence in *Caetano* determined stun guns were "in common use" because hundreds of thousands had been sold nationwide and they were lawful in 45 states, the Fifth Circuit determined machine guns were unprotected: only 175,977 were owned by civilians and "34 states and the District of Columbia prohibit possessing machineguns." *Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring); *Hollis*, 827 F.3d at 450.[6]

A California district court applied the jurisdictions test and determined that standard magazines over 10 rounds "are common" because they were "[l]awful in at least 43 states and under federal law." *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1118 (S.D. Cal. 2017), *aff'd*, 742 F. App'x 218 (9th Cir. 2018).

[6] *Hollis*'s state law count was incorrect, but it demonstrates the use of state laws in assessing "common use."

C. By any metric, the banned semi-automatic firearms and standard-capacity magazines are "in common use."

Here, the record shows that "[b]etween 1990 and 2015, Americans owned approximately 114,700,000" of the banned magazines, which is "approximately 50% of all magazines owned." App. 101. "In 2016, modern sporting rifles [i.e., some semi-automatic rifles] accounted for approximately 40% of all long gun sales" and "17.9% of all firearm sales." App. 175–76. And "approximately 13,739,000 AR- and AK-platform rifles [were] manufactured in or imported to the U.S. between 1990 and 2015." App. 174. Additionally, the rifles that Massachusetts bans are lawful in at least 44 states. The magazines are lawful in 41. And both are legal under federal law.[7] Whatever the methodology, the numbers in this case exceed the numbers circuit circuits have deemed "common."

But the fact remains that "[t]here is considerable variety across the circuits as to what the relevant statistic is and what threshold is sufficient for a showing of common use." *Hollis*, 827 F.3d at 449. "[W]hat line separates 'common' from 'uncommon' ownership is

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[7] Only five other states ban some semi-automatic rifles: California (Cal. Penal Code §§ 30510, 30605), Connecticut (Conn. Gen. Stat. Ann. § 53-202c), Maryland (Md. Code Ann., Crim. Law § 4-303; Md. Public Safety § 5-101(r)(2)), New Jersey (N.J. Stat. Ann. §§ 2C:39-1, 5), and New York (N.Y. Penal Law §§ 265.00, .02(7)). And a California district court determined earlier this year that "[m]agazines holding more than 10 rounds are . . . [l]awful in at least 41 states." *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1143 (S.D. Cal. 2019).

something the Court did not say." *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 409 (7th Cir. 2015).

D. Lower courts have contradicted this Court's precedents by analyzing the utility rather than popularity of banned arms.

The court below improperly focused on the utility of the banned arms, noting that "the record shows that semiautomatic assault weapons do not share the features that make handguns well-suited to self-defense in the home" and "the record . . . offers no indication that the proscribed weapons have commonly been used for home self-defense purposes." *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019).[8] Other circuit courts have found similar considerations persuasive. *See Heller II*, 670 F.3d at 1261 ("[W]e cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or hunting"); *Ass'n of New Jersey*

[8] The statute's exemption for all law enforcement (including retired law enforcement officers) concedes that the banned arms promote the Second Amendment's "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630; Mass. Gen. Laws ch. 140, § 131M. The arms of typical law enforcement officers are selected solely for defensive purposes, and are especially suitable for defense of self and others in civil society.

Moreover, self-defense is not the only purpose for which arms possession is protected. The right includes hunting, target practice, and other lawful activities, according to every federal circuit court that has addressed the issue. *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 204–07 (2017).

Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey, 910 F.3d 106, 122 (3d Cir. 2018) ("the record does not show that LCMs are well-suited or safe for self-defense"). Conversely, the Seventh Circuit considered that "assault weapons can be beneficial for self-defense because they are lighter than many rifles and less dangerous per shot than large-caliber pistols or revolvers." *Friedman*, 784 F.3d at 411.

Whether particular arms are appropriate or necessary for self-defense and other lawful purposes is a decision that the Second Amendment reserves to the people, not to the government. If legislatures could decide what is appropriate or necessary, the handgun bans struck down in *Heller* and *McDonald* would have been upheld.

Heller demonstrated that what matters is whether arms are commonly chosen by the people for lawful purposes: "*Whatever the reason*, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." 554 U.S. at 629 (emphasis added). As Justice Stevens explained, "The Court struck down the District of Columbia's handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their *popularity* for that purpose." *McDonald*, 561 U.S. at 890 n.33 (Stevens J., dissenting) (emphasis in original).

Whether courts agree with the choice made by the people is immaterial. Indeed, "[t]he very enumeration of the right takes out of the hands of government—

even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634 (emphasis in original). "To limit self-defense to only those methods acceptable to the government is to effect an enormous transfer of authority from the citizens of this country to the government—a result directly contrary to our constitution and to our political tradition." *Friedman*, 784 F.3d at 413 (Manion, J., dissenting).

The right cannot depend on how frequently arms are fired in self-defense. The bizarre result would be that the safer the country became, the less rights the people would have, because fewer arms would be fired defensively.

This Court explained in *McDonald* why it struck down the handgun ban in *Heller*: "we found that this right applies to handguns because they are the most preferred firearm in the nation to 'keep' and use for protection of one's home and family. Thus, we concluded, citizens must be permitted to use handguns for the core lawful purpose of self-defense." *McDonald*, 561 U.S. at 767–68 (quotations, citations, and brackets omitted). Because handguns are "preferred," they "must be permitted."

II. Lower courts have struggled to determine how to evaluate bans on arms in common use.

A. This Court's precedents require that bans on constitutionally protected arms be held categorically unconstitutional.

This Court's precedents mandate that Massachusetts's ban be held categorically invalid. Bans on arms "in common use" are not to be reviewed under heightened scrutiny interest-balancing or analyses of military utility. The bans are flatly unconstitutional. This is certain, because it is the precise approach taken by this Court when confronted with such bans.

Heller held a handgun ban categorically invalid. Because handguns are constitutionally protected arms, "a complete prohibition of their use is invalid." 554 U.S. at 629. This Court did not conduct a tiered scrutiny analysis; it considered no data on handgun crime or defensive handgun use, nor any other pro/con social science evidence. Nor did this Court consider whether handguns are useful in military service.

In contrast, social science and analysis of military uses pervaded Justice Breyer's dissent. *Id.* at 693–713 (Breyer, J., dissenting). The *Heller* majority opinion, not the dissent, provides the controlling rules of judicial review.

In *McDonald*, this Court again held a handgun ban categorically invalid when applying the Second Amendment right to the states. And this Court again

refused to adopt an interest-balancing approach in a challenge to a ban on constitutionally protected arms:

> Municipal respondents assert that, although most state constitutions protect firearms rights, state courts have held that these rights are subject to "interest-balancing" and have sustained a variety of restrictions. . . . In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.

Id. at 785. Also conspicuously absent from *McDonald* was any examination of the usefulness of handguns in military service.

The Seventh Circuit recognized that "[b]oth *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are *categorically unconstitutional*." *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) ("*Ezell I*") (emphasis added).

Justice Alito's *Caetano* concurrence confirmed the categorial approach. In *Caetano*, this Court issued a *per curiam* opinion summarily reversing and remanding an opinion of the Massachusetts Supreme Judicial Court that upheld a ban on stun guns. Justice Alito's concurring opinion, joined by Justice Thomas, conveyed the correct approach to a ban on arms in common use: "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." 136 S. Ct. at 1033 (Alito, J., concurring). Dismissing as irrelevant the utility of the arms in military service, the concurrence added that "the Second Amendment . . . protects such weapons as a class, *regardless of any particular weapon's suitability for military use.*" *Id.* at 1032 (Alito, J., concurring).

B. The circuit courts are split over the proper test for arms bans.

1. Heightened scrutiny interest-balancing tests.

Several circuit courts, despite determining that banned arms are in common use, have proceeded to apply heightened scrutiny to prohibitions on those arms. *See Heller II*, 670 F.3d 1244; *NYSRPA I*, 804 F.3d 242; *Fyock*, 779 F.3d 991; *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*, 910 F.3d 106; *Kolbe*, 849 F.3d 114 (alternative holding).

This Court has addressed arms prohibitions on four separate occasions, and it has never indicated that interest-balancing is appropriate. Instead, this Court has twice expressly rejected such an approach. *Heller*, 554 U.S. at 628–35; *McDonald*, 561 U.S. at 785.

In contrast to the roughly 50 pages of the *Heller* opinion that analyzed the Second Amendment's text and history to conclude that it protects the private

possession of arms in common use, the circuit courts' means-end scrutiny is conceived from a single sentence. Over 55 pages into the opinion, this Court declared: "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to 'keep' and use for protection of one's home and family, would fail constitutional muster." *Heller*, 554 U.S. at 628–29 (quotation and citation omitted). Of all the means-end scrutiny conducted in Second Amendment cases, *Heller*'s lone sentence is easily the shortest—indicating that it was not intended as means-end scrutiny at all.

> To be sure, the Court noted in passing that D.C.'s handgun ban would fail under any level of heightened scrutiny or review the Court applied. But that was more of a gilding-the-lily observation about the extreme nature of D.C.'s law—and appears to have been a pointed comment that the dissenters should have found D.C.'s law unconstitutional even under their own suggested balancing approach—than a statement that courts may or should apply strict or intermediate scrutiny in Second Amendment cases. We know as much because the Court expressly dismissed Justice Breyer's *Turner Broadcasting* intermediate scrutiny approach and went on to demonstrate how courts should consider Second Amendment bans and regulations—by analysis of text, history, and tradition.

Heller II, 670 F.3d at 1277–78 (Kavanaugh, J., dissenting) (citations omitted).

When declining to apply "Justice Breyer's *Turner Broadcasting* intermediate scrutiny approach," this Court also rejected strict scrutiny—as Justice Breyer acknowledged:

> Respondent proposes that the Court adopt a "strict scrutiny" test . . . But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws . . . whose constitutionality under a strict-scrutiny standard would be far from clear.
>
> Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. . . . [A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

Heller, 554 U.S. at 688–89 (Breyer, J., dissenting).

> *McDonald* too rejected interest-balancing:
>
> Justice BREYER is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller*

> recommended an interest-balancing test, the Court specifically rejected that suggestion. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."

561 U.S. at 790–91 (quoting *Heller*, 554 U.S. at 634) (citations omitted).

This Court has never indicated approval of heightened scrutiny for arms bans. In addition to *Heller* and *McDonald* expressly rejecting such a test, it was absent from Justice Alito's concurrence in *Caetano*. The concurrence simply stated 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." 136 S. Ct. at 1033 (Alito, J., concurring).

"The Supreme Court has at every turn rejected the use of interest balancing in adjudicating Second Amendment cases." *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 702–03 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment). Yet lower courts continue to disregard this Court's precedents and apply means-end scrutiny to bans on constitutionally protected arms—making difficult empirical judgments in an area in which they lack expertise.

2. Weapons most useful in military service.

The Fourth Circuit has adopted a test that allows firearms to be banned if they "are most useful in military service." *Kolbe*, 849 F.3d at 135. These include "M-16 rifles and the like." *Id.* at 135 (quoting *Heller*, 554 U.S. at 627). In *Kolbe*, the Fourth Circuit held that "[b]ecause the banned assault weapons and large-capacity magazines are 'like' 'M-16 rifles'—'weapons that are most useful in military service'—they are among those arms that the Second Amendment does not shield." 849 F.3d at 135.

Similarly, the D.C. Circuit upheld a ban on "assault weapons" under heightened scrutiny because "*Heller* suggests 'M–16 rifles and the like' may be banned because they are 'dangerous and unusual,'" and "it is difficult to draw meaningful distinctions between the AR–15 and the M–16." *Heller II*, 670 F.3d at 1263 (citing *Heller*, 554 U.S. at 627).

By contrast, other courts have rejected a military test. The Second Circuit found that "this analysis is difficult to manage in practice. Because the AR–15 is 'the civilian version of the military's M–16 rifle,' defendants urge that it should be treated identically for Second Amendment purposes. But the Supreme Court's very choice of descriptor for the AR–15—the 'civilian version'—could instead imply that such guns 'traditionally have been widely accepted as lawful.'" *NYSRPA I*, 804 F.3d at 256 (quoting *Staples v. United States*, 511 U.S. 600, 603 (1994)). *See also Worman*, 922 F.3d at 36

("we are reluctant to plunge into this factbound morass."); *Duncan*, 366 F. Supp. 3d at 1174 ("*Kolbe*'s decision that large capacity magazines are outside the ambit of the Second Amendment is an outlier and unpersuasive.").

Kolbe's test contradicts several of this Court's precedents.

As this Court recognized, "In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same." *Heller*, 554 U.S. at 624–25 (quoting *State v. Kessler*, 289 Or. 359, 368 (1980)). Law-abiding citizens possessing weapons most useful for military service was "precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface." *Heller*, 554 U.S. at 625.

In *Miller*, the lack of evidence showing that the banned "weapon is any part of the ordinary military equipment" precluded this Court from "say[ing] that the Second Amendment guarantees the right to keep and bear such an instrument." 307 U.S. at 178. *Heller* clarified that this did not "mean that *only* those weapons useful in warfare are protected." 554 U.S. at 624 (emphasis added).

Justice Alito later explained that "*Miller* and *Heller* recognized that . . . the Second Amendment . . . protects . . . weapons . . . regardless of any particular weapon's suitability for military use." *Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring).

Kolbe's test leaves unprotected virtually every arm founding-era militiamen were required to keep for militia service, effectively severing the Second Amendment's operative clause from the purpose announced in its preface even at the time of ratification.

Additionally, *Kolbe*'s holding was based on the Fourth Circuit's determination that "the banned assault weapons and large-capacity magazines possess an amalgam of features that render those weapons and magazines like M16s." 849 F.3d at 144. Yet the court acknowledged that "[s]everal . . . banned assault weapons are—like the AR-15 and semiautomatic AK-47—semiautomatic versions of machineguns." *Id.* at 125. And this Court—specifically describing the AR-15—explained that such weapons that fire "only one shot with each pull of the trigger" "traditionally have been widely accepted as lawful possessions." In contrast, machine guns have the "quasi-suspect character we attributed to owning hand grenades." *Staples*, 511 U.S. at 603 n.1, 611–12.

3. The *Friedman* test.

In a case upholding a ban on common arms, the Seventh Circuit declined to apply the circuit's previously adopted heightened scrutiny test; instead, heightened scrutiny analyses were brushed off as "inquiries that do not resolve any concrete dispute." *Friedman*, 784 F.3d at 410. So "instead of trying to decide what 'level' of scrutiny applies," the court invented its own three-element test: "whether a regulation bans

weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and whether law-abiding citizens retain adequate means of self-defense." *Id.* (quotation and citations omitted).

The *Friedman* test is similar to the test this Court later reversed in *Caetano*. This Court explained in *Caetano* that questioning whether arms were "in common use at the time of the Second Amendment's enactment . . . is inconsistent with *Heller*'s clear statement that the Second Amendment 'extends . . . to . . . arms . . . that were not in existence at the time of the founding.'" 136 S. Ct. at 1027–28 (quoting *Heller*, 554 U.S. at 582). And questioning whether the arms "are readily adaptable to use in the military" was inappropriate because "*Heller* rejected the proposition "that only those weapons useful in warfare are protected." *Id.* at 1028 (quoting *Heller*, 554 U.S. at 624–25).

Friedman's discursion on the availability of alternate arms also contradicted this Court: "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." *Heller*, 554 U.S. at 629. Nevertheless, *Friedman* remains binding precedent in the Seventh Circuit.

Indeed, the Seventh Circuit recently upheld a similar ban on common arms, denying that "*any* authority or developments that postdate our *Friedman* decision [] require us to reconsider that decision." *Wilson v.*

Cook Cty., 937 F.3d 1028, 1035 (7th Cir. 2019) (emphasis in original).

CONCLUSION

Despite this Court's clear precedents, the lower courts continue to struggle with bans on arms in common use. The petition for a writ of certiorari should be granted to resolve the conflicting approaches among the lower courts.

Respectfully submitted,

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