No. 21-902

In The
Supreme Court of the United States

DOMINIC BIANCHI, et al.,

Petitioners,

v.

BRIAN FROSH, in his official capacity as Attorney General of the State of Maryland, et al.,

Respondents.

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

AMICUS BRIEF OF *AMICI CURIAE* PROFESSORS OF SECOND AMENDMENT LAW, CATO INSTITUTE, JOHN LOCKE FOUNDATION, CENTER TO KEEP AND BEAR ARMS, AND INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI CURIAE*[1]

***Amici* professors** are law professors who teach and write on the Second Amendment: Randy Barnett (Georgetown), Royce Bardondes (Missouri), Robert Cottrol (George Washington), Nicholas Johnson (Fordham), Donald Kilmer (Lincoln), David Kopel (Denver), Joyce Malcolm (George Mason), George Mocsary (Wyoming), Joseph Muha (Akron), Joseph Olson (Mitchell Hamline, emeritus), Michael O'Shea (Oklahoma City), and Glenn Reynolds (Tennessee). Many of them were cited by this Court in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. Their amicus brief in *New York State Rifle & Pistol Association v. City of New York* was cited by Justice Alito's dissent. Oft-cited by lower courts as well, these professors include authors of the first law school textbook on the Second Amendment, as well as many other books and law review articles on the subject. They are further described at https://davekopel.org/Briefs/Bianchi/professorbios.pdf.

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[1] No counsel for a party in this case authored this brief in whole or part. No party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amici* and their members contributed money intended to fund the preparation or submission of this brief. Professor Mocsary provides consultation and research services to Plaintiff Firearms Policy Coalition pursuant to a fixed-fee quarterly retainer. Under that agreement, he is expected to provide approximately 20 hours of time to said Plaintiff. The instant matter does not fall under that agreement. No time spent on this brief by Professor Mocsary has been, or will be, reported to said Plaintiff under that retainer. All parties were given 10 day notice and have consented to the filing of this brief.

Cato Institute is a nonpartisan public policy research foundation that advances the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was founded in 1989 to restore the principles of constitutional government that are the foundation of liberty.

John Locke Foundation was founded in 1990 as an independent, nonprofit think tank. It employs research, journalism, and outreach to promote Locke's vision: responsible citizens, strong families, successful communities, individual liberty, and limited constitutional government.

Center to Keep and Bear Arms is a project of the Mountain States Legal Foundation (MSLF), a Colorado-based nonprofit, public interest legal foundation. MSLF was founded in 1977 to defend the Constitution, protect private property rights, and advance economic liberty. The Center was established in 2020 to advance litigation in protection of all Americans' natural right to self-defense.

Independence Institute was founded in 1985, dedicated to the eternal truths of the Declaration of Independence. It is a nonprofit, nonpartisan 501(c)(3) educational organization. The Institute has long been a nationally recognized research center on firearms law and policy.

SUMMARY OF ARGUMENT

Circuit court decisions upholding rifle bans like those in this case rely on untenable reasoning. The Fourth Circuit's rule, at issue here, would authorize prohibiting the most common arms of the colonial and Founding periods: the all-in-one American long gun that was made for hunting, personal defense, and militia use.

The Seventh Circuit purported to favor arms like those of the Founding Era. Yet the court upheld a ban on self-loading firearms, a type that preceded the Second Amendment by a century-and-a-half.

The Second Circuit employed an especially unfavorable version of intermediate scrutiny that considers only the government's evidence, and that does not consider less restrictive alternatives. The First Circuit second-guessed law-abiding citizens' personal choices of common defensive arms.

All four of this Court's Second Amendment precedents on arms bans—*Caetano*, *Heller*, *McDonald*, and *Miller*—eschewed means-ends balancing. This Court's approach has always been categorial.

The rifles at issue here are "in common use," as lower courts have acknowledged. "Common use" is not determined by how often a gun is fired in self-defense. "Common use" encompasses all lawful uses, including hunting and self-defense. Arms bans do not become constitutional if they slice protected classes of arms into smaller subclasses. Dick Heller's 9-shot .22 caliber

revolver was not particularly common, but handguns are very common.

ARGUMENT

I. The Circuit Court majorities upholding rifle bans are self-contradictory and contrary to this Court's precedents.

A. The Fourth Circuit's test contravenes this Court's *Staples* precedent, and would have allowed prohibition of most long guns used in colonial and Founding-era America.

The Fourth Circuit allows the prohibition of firearms that are "like" those that are "most useful in military service." *Kolbe v. Hogan*, 849 F.3d 114, 126 (4th Cir. 2017). By the Fourth Circuit's interpretation, this upholds a ban on semiautomatic rifles, *id*. at 156, which are not used by any military in the world, and which fire much more slowly than automatic rifles (which modern militaries do use).

The Fourth Circuit's test is inconsistent with *Staples v. United States*, 511 U.S. 600 (1994). That case noted the "long tradition of widespread lawful gun ownership by private individuals in this country," and explicitly distinguished common AR-15 rifles from the military's M-16 rifles. *Id.* at 602. *Staples* held that AR-15 rifles, which "traditionally have been widely accepted as lawful possessions," do not share the "quasi-suspect character" of hand grenades, as M-16 rifles

might. *Id.* at 601 (requiring prosecution to prove that defendant knew that his defective rifle discharged two rounds per trigger pull).

Even if semiautomatic rifles could be considered "like" automatic military machine guns, the Fourth Circuit's test would uphold banning the firearms most plainly protected by the Second Amendment.

As described in the petition, the rifles at issue are widely owned for hunting *and* self-defense. Pet.Br. 22. The same was true of most long guns that Americans brought to militia service during the colonial and founding periods.

"Perhaps the first identifiable style of American firearm" was the bird-hunting long gun used by Dutch and German settlers. BILL AHEARN, MUSKETS OF THE REVOLUTION AND THE FRENCH & INDIAN WARS 101 (2005). These arms evolved, influenced by the English and by immigrant French Huguenot gunsmiths:

> The result was the development of a unique variety of American long fowler. These American long guns served as an all-purpose firearm. When loaded with shot, they were suited to hunt birds and small game, and when loaded with a ball, they could provide venison for the table. In times of emergency, they were needed for militia, and more than a few saw service in the early colonial wars as well as the Revolution.

Id.

Unlike muskets, fowling pieces had lighter barrels and stocks, and their muzzles were slightly flared to increase birdshot's velocity. J.N. GEORGE, ENGLISH GUNS AND RIFLES 85 (1999) (1947); TOM GRINSLADE, FLINTLOCK FOWLERS: THE FIRST GUNS MADE IN AMERICA 5 (2005). They lacked the musket's swivels for sling attachment. JIM MULLINS, OF SORTS FOR PROVINCIALS: AMERICAN WEAPONS OF THE FRENCH AND INDIAN WAR 49 (2008). Fowlers and muskets nevertheless served similar purposes. Muskets were used for bird hunting, and fowling pieces for infantry. M.L. BROWN, FIREARMS IN COLONIAL AMERICA: THE IMPACT OF HISTORY AND TECHNOLOGY, 1492-1792, at 85 (1980).

During the Revolution, fowling pieces were often employed in militia service. Some were retrofitted with bayonet mounts. GRINSLADE at 54, 63. "In times of Indian raids or war, the family fowling-piece served the need for a fighting gun." *Id*. at 5.

Because many people needed firearms that met both militia requirements and hunting needs, in America, "civil and military uses of firearms dovetailed as they had not generally done in Europe." LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA 41 (1975). "Thus the distinction between military and sporting arms is almost lost." HAROLD PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA 1526-1783, at 179 (Dover 2000) (1956). Americans had developed what collectors call the "semi-military" firearm. *Id*.

Since colonial times, Americans have chosen versatile firearms well-suited for hunting, personal protection, and community protection. Yet under the Fourth Circuit's test, all such firearms, from the Dutch fowler onward, could be prohibited. They are very "like" military firearms in that they were the most-used guns for militia service.

B. The Seventh Circuit's test contradicts this Court's *Caetano* precedent, and itself.

Each part of the Seventh Circuit's idiosyncratic three-part test contradicts *Heller*. Pet.Br. 19. Moreover, the court misapplied its test. One item of the test asks, "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." *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015).

When the Massachusetts Supreme Judicial Court later adopted a similar rule in *Caetano* for stun guns and Tasers, this Court unanimously stated that such a rule contradicted *Heller*:

> [T]he [Massachusetts] court explained that stun guns are not protected because they "were not in common use at the time of the Second Amendment's enactment." *Id*., at 781, 26 N.E.3d, at 693. This 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." 554 U.S., at 582. . . .

Caetano v. Massachusetts, 577 U.S. 411, 411-12 (2016).

Moreover, the Seventh Circuit did not follow its own rule. The rifles banned by Highland Park (and Maryland) are the modern equivalent of the versatile long guns that were common in 1791. As hybrids well-suited for hunting, self-defense, and community defense, these modern self-loading rifles are more analogous than other modern firearms to the most common 1791 militia arms.

A semiautomatic firearm is called a "self-loader" because it reloads itself. That is, after the user presses the trigger to fire one shot, the gun loads the next round into the firing chamber, ready for the user to press the trigger again. As of 1791, the self-loader was a century-and-a-half old. The first commercially successfully self-loader was the Lorenzoni pistol, introduced in the first half of the seventeenth century, and copied by gunsmiths in Europe and America. NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY online ch. 23, at 2198-99 (3d ed. 2021).[2]

Of course, the rifles at issue here are more advanced than Lorenzonis. Technology improves continuously, as the Founders knew; the hybrid long guns of the American Revolution were better than their Dutch

[2] http://firearmsregulation.org/www/FRRP3d_CH23.pdf.

fowler ancestors. When the Second Amendment was ratified, the state-of-the-art repeating firearm was the Girandoni air rifle, which could shoot 21 or 22 rounds in .46 or .49 caliber. Manufactured in Pennsylvania, and famously carried on the Lewis & Clark Expedition, the Girandoni was powerful enough to take an elk—which is to say, it is more powerful than many of the rifles banned by Maryland. *Id.* at 2206.

Self-loading, invented by Lorenzoni, was perfected in the 1880s, starting with the Mannlicher Model 85 rifle, introduced in 1885. *Id.* at 2227.

Over the twentieth century and the first decades of the twenty-first, firearm mechanics, self-loaders included, have changed little; materials and manufacturing have improved, such as with lightweight synthetic stocks instead of wooden ones. *Id.* at 2231. In 1957, British firearms historian Robert Held declared: "Although the *age* of firearms today thrives with ten thousand species in the fullest heat of summer, the *history* of firearms ended between seventy and eighty years ago. There has been nothing new since, and almost certainly nothing will come hereafter." ROBERT HELD, THE AGE OF FIREARMS: A PICTORIAL HISTORY 186 (1957). All semiautomatics "descend from" the models of the 1880s. *Id.* at 185.

Even if *Friedman*'s preference for Founding Era arms types was valid under this Court's precedents, self-loading firearms should be protected under its test.

C. The feeble version of intermediate scrutiny employed by the Second Circuit would have made *Heller* come out the other way.

The Second Circuit upheld rifle bans under intermediate scrutiny by applying an especially rights-unfavorable version to the Second Amendment. Even if *Heller* allowed intermediate scrutiny for bans on common arms, interest-balancing requires a court to weigh both parties' evidence. Yet the Second Circuit considered only the state's evidence. The same methodology would have upheld the handgun ban in *Heller*.

City of Los Angeles v. Alameda Books, 535 U.S. 425, 438 (2002) (plurality opinion), establishes that the *first* step of intermediate scrutiny analysis is determining whether the state's evidence "fairly support[s]" its rationale. If the state meets its initial burden, the plaintiffs have an opportunity to "cast direct doubt on this rationale, either by demonstrating that the [government's] evidence does not support its rationale or by furnishing evidence that disputes the [government's] factual findings." *Id.* at 438-39. "If plaintiffs succeed in casting doubt on a [government] rationale in either manner, the burden shifts back to the [government] to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439.

But in *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015) ("*NYSRPA*"), the Second Circuit considered only the government's evidence: "So long as the defendants produce evidence

that fairly supports their rationale, the laws will pass constitutional muster." *Id.* Under *Alameda Books*, the Second Circuit should have examined the plaintiffs' evidence, which supported plaintiffs' claims that the prohibitions did not advance public safety and did endanger law-abiding citizens.

Under *NYSRPA*'s version of intermediate scrutiny, the government will always win when it litigates competently. Gun-rights cases often involve contested statistics and social science. Plaintiffs, like the government, are entitled to have their evidence—experts, studies, affidavits, etc.—considered. *NYSRPA* deprives Second Amendment plaintiffs of a basic feature of our adversarial system of justice.

Indeed, under *NYSRPA*'s methodology, the handgun ban struck in *Heller* would have been upheld. According to *NYSRPA*, there are only two questions in evaluating an arms ban:

> (1) Is there an important government interest?—Obviously yes, preventing criminals from shooting people. *Id*. at 261.
>
> (2) Is there evidence to "fairly support" the inference that a ban could advance the government interest?—Yes. *Id.*

As detailed in Justice Breyer's *Heller* dissent, there is extensive social science evidence about handgun misuse, which is disproportionate to the misuse of other firearm types. Further, there is (disputed) social science evidence that handgun bans reduce handgun crime. *Heller*, 554 U.S. at 693-704 (Breyer, J.,

dissenting). Under *NYSRPA*, that ends the case. Plaintiffs' evidence to the contrary is not considered.

Justice Kennedy's concurring opinion in *Alameda Books*, provides the controlling rule of the case: the government "may not regulate the secondary effects of [protected conduct] by suppressing the [protected conduct] itself." *Alameda Books*, 535 U.S. at 445 (controlling opinion of Kennedy, J.); *Marks v. United States*, 430 U.S. 188, 193 (1977) (in fragmented decisions, the narrowest opinion controls).

Here, Maryland's statute is aimed at the secondary effects of criminal misuse of firearms. But the law's effect is suppressing the exercise of a constitutional right. "A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)). *Heller* rejected the notion that controlling the secondary effects of handguns (criminal misuse) could be accomplished by banning handguns in general.

The Second Circuit also ignored intermediate scrutiny's requirement that the government show that substantially less burdensome alternatives—such as a thorough background-check system rather than prohibition—were not available to achieve the government's ends. According to this Court's rules of intermediate scrutiny, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not

simply that the chosen route is easier." *McCullen v. Coakley*, 574 U.S. 464, 495 (2014). But *NYSRPA* did not consider relevant and available alternatives. *NYSRPA*, 804 F.3d at 259.

II. Means-ends scrutiny is inapplicable to the prohibition of constitutionally protected arms.

Although the Eighth Circuit adheres to a *Heller*-like standard of review based on text, history, and tradition, the other circuits have a adopted a two-part test incorporating tiers of scrutiny.[3] But *Heller* made clear that banning arms typically possessed by law-abiding citizens for lawful purposes is categorically unconstitutional.

The distinction was recognized in a foundational case for the Two-Part Test:

> Both *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. . . . For all *other* cases, however, we are left to choose an appropriate standard of review from among the heightened standards of scrutiny the Court

[3] *See United States v. Hughley*, 691 F. Appx. 278, 279 (8th Cir. 2017) (unpublished) ("Other courts seem to favor a so-called 'two-step approach.' . . . We have not adopted this approach and decline to do so here.").

> applies to governmental actions alleged to infringe enumerated constitutional rights.

Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011) (emphasis added).

This Court has addressed arms bans four times: in *Caetano*, *McDonald*, *Heller*, and *Miller*. None of these cases indicates that interest-balancing—such as a heightened scrutiny analysis—is appropriate. For arms prohibitions, the Court has twice expressly rejected such an approach. *Heller*, 554 U.S. at 628-35; *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010).

In addition, Justice Scalia joined Justice Thomas's dissent from denial of certiorari for *Friedman*:

> Despite these holdings [in *Heller* and *McDonald*], several Courts of Appeals—including the Court of Appeals for the Seventh Circuit in the decision below—have upheld categorical bans on firearms that millions of Americans commonly own for lawful purposes. See 784 F.3d 406, 410-12 (2015). Because noncompliance with our Second Amendment precedents warrants this Court's attention as much as any of our precedents, I would grant certiorari in this case.
>
> . . . .
>
> The question under *Heller* is not whether citizens have adequate alternatives available for self-defense. Rather, *Heller* asks whether the law bans types of firearms commonly used for a lawful purpose—regardless of whether

> alternatives exist. 554 U.S. at 627-29. And *Heller* draws a distinction between such firearms and weapons specially adapted to unlawful uses and not in common use, such as sawed-off shotguns. *Id*. at 624-25. The City's ban is thus highly suspect because it broadly prohibits common semiautomatic firearms used for lawful purposes. Roughly five million Americans own AR-style semiautomatic rifles. See 784 F.3d at 415 n.3. The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. See *id*. Under our precedents, that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons. See *McDonald*, 561 U.S., at 767-68; *Heller*, *supra*, at 628-29.

Friedman v. City of Highland Park, 577 U.S. 1039, 1042 (2015) (Thomas, J., dissenting from denial of certiorari).

Bright-line rules declaring extreme government actions categorically unconstitutional, without means-ends scrutiny, are common. This is true even for rights where many other questions involving less extreme government actions *are* resolved by tiers of scrutiny or other forms of balancing.

Under the First Amendment, for example, governmental interference with "ecclesiastical decisions",[4] governmental regulation, prohibition, or rewarding of

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[4] *Hosanna-Tabor Evang. Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-89 (2012).

religious beliefs as such,[5] and government's "excessive entanglement" with religion are categorically unconstitutional.[6] None of these actions can be upheld even if the government proves that its action could pass interest-balancing.

Likewise, under the Fifth Amendment, a "permanent physical occupation" is always a taking.[7] The Sixth Amendment "protection against double jeopardy unequivocally prohibits a second trial following an acquittal."[8] The Eighth Amendment embodies the categorical rules that sentences may never exceed the maximum allowed by facts proven beyond a reasonable doubt to the jury or admitted by the defendant,[9] and that capital punishment may never be imposed for crimes against individuals not causing death.[10] The Tenth Amendment categorically forbids Congress from commandeering state legislatures.[11]

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[5] *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion).

[6] *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338-39 (1987).

[7] *Loretto v. Telep. Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

[8] *Arizona v. Washington*, 434 U.S. 497, 503 (1978).

[9] *United States v. Booker*, 543 U.S. 220, 226, 244 (2005).

[10] *Kennedy v. Louisiana*, 554 U.S. 407, 412, 447 (2008).

[11] *New York v. United States*, 505 U.S. 144, 154, 161 (1992).

III. The correct understanding of arms "in common use."

A. All bearable arms are presumptively protected.

"The Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Heller*, 554 U.S. at 582. "In other words, it identifies a presumption in favor of Second Amendment protection, which the State bears the initial burden of rebutting." *NYSRPA*, 804 F.3d at 257 n.73; *cf. Virginia v. Black*, 538 U.S. 343, 369 (2003) (Scalia, J., concurring in part and dissenting in part) (defining "prima facie evidence" as "sufficient to establish a given fact" and "if unexplained or uncontradicted . . . sufficient to sustain a judgment in favor of the issue which it supports.") (quoting BLACK'S LAW DICTIONARY 1190 (6th ed. 1990)).

B. The presumption is rebutted by proof that an arm is "dangerous and unusual."

Heller noted that the Second Amendment's protection of arms in common use "is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " 554 U.S. at 627. Indeed, "unusual" is the antithesis of "common"—so an arm "in common use" cannot also be "dangerous and unusual."

"[T]his is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual." *Caetano*, 577 U.S. 411, 417 (Alito, J., concurring). Thus, "[b]ecause the Court rejects the lower court's

conclusion that stun guns are 'unusual,' it does not need to consider the lower court's conclusion that they are also 'dangerous.'" *Id.*

C. By every lower court measure of "common," the rifles banned by Maryland are common.

This Court has not precisely defined "common use." In *Heller* and *McDonald*, the Court struck bans on handguns, "the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 629. A detailed examination of their commonality was unnecessary.

The *Caetano* concurrence 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." 577 U.S. at 420 (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 were common enough for protection under the Second Amendment. *Id.*

1. Total number.

"Some courts have taken the view that the total number of a particular weapon is the relevant inquiry." *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016). The Second Circuit determined that semiautomatic rifles

are "in common use" because "Americans own millions of the firearms." *NYSRPA*, 804 F.3d at 255. The D.C. Circuit came to the same conclusion, because, at the time of consideration, "Approximately 1.6 million AR-15s alone [had] been manufactured since 1986." *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*"). The First Circuit assumed common use, "albeit without deciding," because "the plaintiffs have shown that, as of 2013, nearly 5,000,000 people owned at least one" such firearm. *Worman v. Healey*, 922 F.3d 26, 35-36 (1st Cir. 2019). The Fourth Circuit decided that it "need not answer" the "common use" question, but acknowledged evidence that "there were at least 8 million" such firearms "in circulation in the United States by 2013." *Kolbe*, 849 F.3d at 128, 136.[12]

2. Number of jurisdictions.

When the Supreme Judicial Court of Massachusetts upheld a ban on stun guns because the "number of Tasers and stun guns is dwarfed by the number of firearms," the *Caetano* concurrence explained that such a test is untenable because "[o]therwise, a State would be free to ban *all* weapons *except* handguns, because 'handguns are the most popular weapon chosen by Americans for self-defense in the home.'" *Caetano*, 577 U.S. at 420 (Alito, J., concurring) (quoting *Heller*, 554 U.S. at 629). The *Caetano* concurrence identified

[12] Some numbers were based on counting a single platform—such as the ArmaLite Rifle (AR), while others are based on multiple platforms.

"the more relevant statistic" as the absolute number of arms and the number of jurisdictions in which they are lawful. *Id.* The rifles banned in Maryland are legal in 44 states. Pet.Br. 9.

3. Percentage of total.

Some courts consider whether weapons of the type under consideration constitute a significant percentage of the total national arms stock. The Second Circuit found semiautomatic rifles to be "in common use" when they "represent about two percent of the nation's firearms." *NYSRPA*, 804 F.3d at 255. The First Circuit assumed common use for "three percent of guns in the United States," owned by "one percent of Americans." *Worman*, 922 F.3d at 35. The Fourth Circuit noted that the banned guns comprised nearly three percent of firearms owned nationwide. *Kolbe*, 849 F.3d at 126. Additionally, two of the banned types "accounted for approximately 20% of firearm sales in the United States in 2012." The guns "comprised between 18% and 30% of all regulated firearm transfers in Maryland in 2013." *Id.* at 128. The D.C. Circuit found "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." *Heller II*, 670 F.3d at 1261.[13] These firearms are even more common today. Pet.Br. 21-22.

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[13] The numbers cited vary because of differences in what was counted—*e.g.*, percent of modern sales versus percent of total firearms owned.

D. The level of generality for assessing "common."

This Court has demonstrated that commonality is not to be determined by slicing arms types into subcategories. Rather, a protected arm must be among "sorts" or "kinds" of weapons that are "in common use at the time." *Heller*, 554 U.S. at 624, 627.

When assessing handgun bans, neither *Heller* nor *McDonald* made any distinction between the two primary subcategories of handguns: revolvers and semiautomatic pistols. Nor did the Court concern itself with the unusual nature of the 9-shot, .22 caliber revolver—far from the most popular type of handgun—that Mr. Heller sought to possess.[14]

Revolvers are significantly less popular for self-defense than semiautomatic pistols. JOHNSON ET AL., at 1985-88 (in 2019 American manufacturers produced 3,046,013 pistols and 580,601 revolvers).[15] Moreover, the large majority of revolvers hold 5 or 6 rounds. For self-defense with a revolver, people relying on the diminutive .22 caliber are well in the minority.

But as *Heller* implicitly recognized, for any number of reasons some law-abiding citizens choose a .22

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[14] *Heller* was based on Dick Heller's 2002 attempt to register in the District of Columbia his 9-shot, .22 caliber High Standard Buntline single action revolver. Plaintiffs' Motion for Summary Judgment, Exhibit A, *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004), https://web.archive.org/web/20111117110734/http://www.gurapossessky.com/news/parker/documents/SJExhibitA.pdf.

[15] http://firearmsregulation.org/www/FRRP3d_CH20.pdf.

revolver for self-defense and other lawful purposes, even though over 99 percent of other law-abiding citizens choose something else.[16]

Just as *Heller* did not divide handguns into subclasses, *Caetano* did not subdivide or make distinctions among handheld electroshock arms. The concurrence described them as a "*class* of arms." 577 U.S. at 418 (Alito, J., concurring) (emphasis added). The "class" included "Tasers" (which eject electric prongs to a distance of several feet) and "stun guns" (which require the user to touch the device to the attacker's body). *Id*. at 415 n.2, 419-20.

Because the Supreme Court performs the commonality analysis at the "sort," "kind," or "class" level, lower courts should not have upheld prohibitions of a subclass (or subsort or subkind) of rifles. This Court should not allow its "common use" test to be employed to ban a thin or thick slice of an otherwise-protected class of arms.

Biathlon rifles are relatively rare. They are used by serious competitors in the sport of winter biathlon, which combines fast-paced cross-country skiing with precision target shooting. A biathlon rifle is exquisitely

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[16] *See* Nelson Lund, *Second Amendment Standards of Review in a Heller World*, 39 FORDHAM URBAN L.J. 1617, 1627-28 n.57 (2012) ("Whether or not any of the Justices examined the record, the Court had to be referring to this specific revolver when it said: 'Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register *his handgun* and must issue him a license to carry it in the home.' ") (citing *Heller*, 554 U.S. at 635) (emphasis added).

balanced, rugged, ultra-reliable in adverse weather, and expensive.[17]

Rifles, as a class, are the type of firearm least likely to be involved in crime. Pet.Br. 10. Biathlon rifles, far less. If "common use" can be drilled down into subtypes, then almost anything can be banned. The government can win a case at part one of the two-part test by showing that a particular subclass of arms is not common: Biathlon rifles are not "common" compared to many other types of guns. So the two-part test ends at part one. Biathlon rifles not being "common," there is no Second Amendment issue, and the case is over.

The same analysis applies to a subclass of low-powered pistols from Beretta and Taurus: the "tip-up barrel design." In Beretta's words, "Thanks to this design, you never need to rack the slide and you can load that first round directly into the chamber. This is especially convenient in cold weather, or for people with weaker hands."[18] So, too, for a person with only one functional hand or arm. In more common semiautomatic pistols, the user must rack the slide backwards to make the gun ready to fire. This requires either

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[17] Casual biathlon participants might use multi-purpose rifles, such as a lightweight bolt-action .22 rifle.

[18] Beretta, *3032 Tomcat*, https://www.beretta.com/en/3032-tomcat/.

significant strength or well-developed technique.[19] Although tip-up pistols use relatively weak ammunition (.22, .25, or .32 caliber), they are the right choice for some individuals.

Neither .22 revolvers, biathlon rifles, nor tip-up pistols are the most common arms. The total handgun stock far outnumbers all of them combined. Dick Heller's odd handgun is protected, despite its rarity as a defensive arm. For the biathlon rifle, all other rifles, and all other arms, the *Heller* rule is the same: classes, not subclasses.

The Fourth Circuit's "like" standard would allow biathlon rifle confiscation under a different theory. Like many modern sports (e.g., javelin, archery, fencing), biathlon deliberately mimics martial skills. The first Winter Olympic biathlon-type competition, in 1924 at Chamonix, was called "military patrol." When Josef Stalin's Soviet army attempted to annex Finland in 1939-40, Finns, who could shoot precisely and ski quickly, repelled the attackers in the Winter War and saved Finland's democracy. Combining skiing and shooting was also the objective of the famed American 10th Mountain Division in the Italian Alps during World War II. Biathlon rifles are "like" military arms, as they are for an activity that emulates warfare. The same is true for bows, arrows, swords, and javelins, which are deadly weapons; their modern versions are

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[19] The Well-Armed Woman, *Racking the Slide on Your Gun*, https://thewellarmedwoman.com/training-handling/racking-the-slide-of-your-gun/ .

"like" the weapons that were used for centuries for warfare, hunting, or defense.

E. Law-abiding citizens, not the courts, decide which common arms are appropriate for their personal circumstances.

Below, Respondents argued that the rifles in question are unprotected because they are rarely fired in self-defense. *See* Respondent's Br. 10, *Bianchi v. Frosh*, 858 Fed. Appx. 645 (4th Cir. 2021). Similarly, the D.C. Circuit upheld a rifle ban by pointing out that handguns are used most often for self-defense and by stating that plaintiffs had not shown sufficient evidence that the rifles "are well-suited to or preferred for the purpose of self-defense or sport." *Heller II*, 670 F.3d at 1262. In another case, the plaintiffs did detail why the rifles were especially well-suited for lawful defense. The First Circuit retorted that the same characteristics also made the rifles more useful for criminals. *Worman v. Healey*, 922 F.3d 26, 40 (1st Cir. 2019).

The First Circuit's rationale is the same as *Heller*'s dissent: "the very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous." *Heller*, 554 U.S. at 711 (Breyer, J., dissenting).

The *Heller* majority did not believe that criminal use of common arms was a constitutionally sufficient reason to prohibit possession by the law-abiding. Nor did *Heller* attempt to quantify defensive handgun incidents. The Court, instead, simply observed that many

Americans "keep" and have "chosen" handguns for self-defense. *Heller*, 554 U.S. at 629-30.

Similarly, millions of Americans keep the Maryland-banned firearms for self-defense and other lawful purposes. Some defenders prefer rifles because rifles have longer barrels than handguns, so they are generally more accurate. The most common caliber for the rifles banned by Maryland is the .223, an intermediate-power cartridge that is easier to handle, especially by persons with limited upper body strength.

F. "Common use" is not limited to self-defense; it includes all lawful purposes.

As detailed in Petitioners' Brief, the banned rifles are purchased for hunting, self-defense, target shooting, and other lawful purposes. Pet.Br. 22. Even if the rifles were purchased solely for hunting, they would be no less protected.

Self-defense is not the only Second Amendment activity. The right encompasses arms "typically possessed by law-abiding citizens for *lawful purposes*," *Heller*, 545 U.S. at 625 (emphasis added). "The traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes *like* self-defense." *Id.* at 624 (emphasis added).

Heller approvingly quoted the Supreme Court of Tennessee: "the right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes." *Id.* at 614 (quoting *Andrews v. State*, 50 Tenn.

165, 178 (1871)). And *Heller* acknowledged that "most [Americans in the Founding Era] undoubtedly thought [the right] even more important for self-defense and hunting" than for militia service. *Id.* at 599. The dissent similarly recognized that "[w]hether [the Second Amendment] also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case." *Id.* at 636-37 (Stevens, J., dissenting).

McDonald summarized the "central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald*, 561 U.S. at 780; *see also Friedman*, 577 U.S. at 1042 (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. Under our precedents, that is all that is needed . . . under the Second Amendment.") (citation omitted); *Luis v. United States*, 578 U.S. 5, 26-27 (2016) (Thomas, J., concurring) ("The right to keep and bear arms . . . implies a corresponding right to . . . acquire and maintain proficiency in their use") (quotations and citations omitted).

Every federal court of appeals to address the issue found that the Second Amendment right protects other lawful purposes. *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 204-07 (2017). Notably, the Seventh Circuit twice struck restrictions

on firing ranges for violating the Second Amendment. *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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