No. _____

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

PETITION FOR WRIT OF CERTIORARI

JAMES MICHAEL CAMPBELL
RICHARD PAUL CAMPBELL
CAMPBELL CONROY & O'NEIL, P.C.
1 Constitution Wharf
Suite 310
Boston, MA 02129

JOHN PARKER SWEENEY
Counsel of Record
JAMES W. PORTER, III
MARC A. NARDONE
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street NW
Suite 1350
Washington, DC 20036
(202) 393-7150
jsweeney@bradley.com

Counsel for Petitioners

September 23, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

This Court exhaustively analyzed the text, history, and tradition of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), concluding that the Second Amendment enshrines an individual right of self-defense, *id.* at 595, and protects common firearms that are "typically possessed by law-abiding citizens for lawful purposes," *id.* at 625. The Court struck down the District of Columbia's ban on possession of handguns and operable rifles and shotguns, holding a ban on arms typically possessed for lawful purposes is inconsistent with the Second Amendment's text, history, and tradition. *Id.* at 627–29. This Court confirmed *Heller*'s standard and applied it to the states in *McDonald v. City of Chicago*, 561 U.S. 742, 790–91 (2010). Six years later, the Court made clear the *Heller* standard was to be applied in reviewing the constitutionality of a state ban on possession of stun guns. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027–28 (2016) (per curiam).

Massachusetts prohibits the possession of firearms and ammunition magazines that are typically possessed by law-abiding, responsible citizens for lawful purposes, including self-defense. The court of appeals rejected *Heller*'s text, history, and tradition standard, instead applying a two-part approach to uphold the ban under intermediate scrutiny. App. 11–28.

The question presented is:

> Does Massachusetts' ban unconstitutionally infringe the individual right to keep and bear arms under the Second Amendment?

PARTIES TO THE PROCEEDING

Petitioners David Seth Worman; Anthony Linden; Jason William Sawyer; Paul Nelson Chamberlain; Gun Owners' Action League, Inc.; On Target Training, Inc.; and Overwatch Outpost were plaintiffs-appellants below.

Respondents Maura T. Healey, in her official capacity as Attorney General of the Commonwealth of Massachusetts; Daniel John Bennett, in his official capacity as the Secretary of the Executive Office of Public Safety and Security; and Kerry Gilpin, in her official capacity as the Superintendent of the Massachusetts State Police, were defendants-appellees below.

RELATED CASES

Worman v. Healey, No. 1:17-cv-10107, United States District Court for the District of Massachusetts. Judgment entered April 6, 2018.

Worman v. Healey, No. 18-1545, United States Court of Appeals for the First Circuit. Judgment entered April 26, 2019.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 26.6, petitioners state as follows:

Gun Owners' Action League, Inc.; On Target Training, Inc.; and Overwatch Outpost are not publicly held entities. None of these entities has a parent corporation, and no publicly held company owns 10% or more of their stock. The remaining petitioners are individuals.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

PETITION FOR WRIT OF CERTIORARI

This Court last addressed its *Heller* decision three years ago in *Caetano*, when it granted the petition, vacated the lower court's decision, and remanded with instructions that *Heller*'s standard must be faithfully applied. Again this Court is presented with a Massachusetts ban on possession of protected arms. And again the courts below rejected *Heller*'s text, history, and tradition analysis, departing from this Court's Second Amendment jurisprudence. At best, the lower courts have misinterpreted this Court's Second Amendment jurisprudence and, at worst, they have deliberately refused to protect a fundamental constitutional right. It is inarguable that the Second Amendment to the United States Constitution protects the right of law-abiding, responsible citizens to keep and bear arms that are typically possessed for lawful purposes. This Court has analyzed and confirmed the scope of this fundamental, individual right on three separate occasions. *Heller*, 554 U.S. at 625, 627; *McDonald*, 561 U.S. at 790–91; *Caetano*, 136 S. Ct. at 1027–28. Yet the lower courts do not follow *Heller* and its progeny in reviewing firearm bans.

The courts below—like many courts nationwide—declined to follow *Heller*'s clear instruction, and instead created multiple, inconsistent "tests" for evaluating the constitutionality of firearm bans, apparently for the purpose of avoiding the result this Court's jurisprudence plainly requires. Even while rejecting *Heller*'s clear and easily applied standard, the lower courts cannot agree on the scope of the Second Amendment

protection for arms "typically possessed by law-abiding citizens for lawful purposes" and whether, and what level of, constitutional scrutiny should be applied to review a ban on such protected arms. *See infra* at 19–25. Instead of following *Heller*, the lower courts most often apply some version of a two-part approach to uphold a ban under intermediate scrutiny. The only consistent threads in this emerging trend are that *Heller* is ignored and the infringing ban is upheld.

This case is the most recent example of that trend. The courts below upheld Massachusetts' ban on possession of popular semiautomatic firearms and standard ammunition magazines by law-abiding, responsible citizens, infringing their right to keep and bear arms for lawful purposes, including self-defense. *Heller*, 554 U.S. at 635. The district court held the banned firearms and magazines were outside the Second Amendment's protections because it believed they are useful for military service. App. 53–61. The court of appeals applied a two-part approach, first assuming that the banned firearms and magazines are protected but then upholding the ban under intermediate scrutiny as a permissible exercise of legislative power. App. 11–28. Neither court's approach, nor their holdings, can be reconciled with *Heller*.

The Court's per curiam "grant, vacate and remand" of the *Caetano* petition should have been enough to reinforce *Heller*'s mandate. But the courts below in this case—and the lower courts in a number of cases since *Caetano*—do not heed that message. More is required to protect the individual right to

self-defense that this Court recognized in *Heller* and has since reaffirmed. This Court should grant this petition to reinforce *Heller*'s core holding that the Second Amendment forbids a ban on protected arms and to repair the fractured Second Amendment jurisprudence.

OPINIONS BELOW

The district court's opinion is reported at 293 F. Supp. 3d 251 (D. Mass. 2018). App. 30–72. The court of appeals' opinion is reported at 922 F.3d 26 (1st Cir. 2019). App. 1–29.

JURISDICTION

The court of appeals entered its judgment on April 26, 2019. Justice Breyer granted an extension of time to file this petition to and including September 23, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Massachusetts General Laws, Chapter 140, Sections 121 and 131M ("the Challenged Laws") are reprinted at App. 74–83.

STATEMENT OF THE CASE

I. Factual Background

Massachusetts bans the possession of the class of arms it categorizes as "assault weapon[s]," a term it defines to include many of the most popular firearms in the country. G.L. c. 140 §§ 121, 131M; App. 74–75, 82–83. The banned firearms are semiautomatic, meaning that they fire only once with each pull of the trigger. App. 99. Massachusetts also bans the possession of "large-capacity feeding device[s]," which it defines as "fixed or detachable magazine[s] . . . capable of accepting, or that can be readily converted to accept, more than ten rounds of ammunition." G.L. c. 140 §§ 121, 131M; App. 77, 83–83. Half of the magazines kept across the country would fall within this ban. App. 101, 176. The banned firearms and magazines are typically possessed for lawful purposes. App. 99, 173–77.

Firearms with a capacity of more than ten rounds have been owned by civilians for centuries. App. 99. The Founders were familiar with multiple-shot repeating firearms at the time the Second Amendment was drafted. App. 99. Semiautomatic firearms with detachable magazines have been used by the civilian population for over a century, and there has been no historic prohibition on their ownership. App. 99.

The banned firearms include some of the most popular and commonly owned firearms today: AR- and AK-platform rifles. App. 100, 174. Between 1990 and 2015, approximately 13.7 million rifles based on these platforms were manufactured or imported into the United States. App. 100, 174. Because AR- and AK-platform rifles have been sold to civilians in the U.S. since the late 1950s, even more of these rifles were manufactured in or imported to the U.S. before 1990. App. 100, 174–76.

Already ubiquitous, the banned firearms are growing in popularity. App. 100, 174–75. As of 2013, more than 4.8 million people, most of whom are married with some college education and a household income greater than $75,000, own at least one modern sporting rifle. App. 100, 175. Even more people use these firearms: according to a 2016 report published by the National Shooting Sports Foundation about Sport Shooting Participation in the United States, approximately 14 million people participated in shooting with a banned firearm in 2016, a 57% increase from 2009. App. 100, 176. In 2015 alone, more than 1.5 million of the banned firearms were manufactured in or imported into the United States. App. 101, 174–75. According to a 2017 survey of 324 firearm retailers across the United States, these firearms accounted for 17.9% of all firearm sales, whereas shotguns and traditionally styled rifles accounted for only 11.5% and 11.3% of all firearm sales, respectively. App. 101, 175.

Magazines capable of holding more than ten rounds of ammunition are likewise typically possessed

for lawful purposes. App. 101, 176. Tens of millions of people across the country possess magazines capable of holding more than ten rounds of ammunition. App. 101, 176. Between 1990 and 2015, Americans owned approximately 115 million of these magazines, accounting for approximately 50% of all magazines owned during this time (approximately 230 million). App. 101, 176. It is reasonable to assume that many more such magazines were purchased in the United States prior to 1990 and that even more people possess a magazine capable of holding more than ten rounds of ammunition. App. 101–02, 176. This is particularly likely given the fact that these banned magazines are provided as standard equipment for many semiautomatic rifles and pistols sold in the United States. App. 102, 177.

The banned firearms and magazines are typically possessed for a variety of lawful purposes, including home defense, target shooting, and hunting. App. 102, 174. Purchasers of the banned firearms report that one of the three most important reasons for their purchase of such firearms is self-defense. App. 102, 175. There are several reasons why an individual would choose a banned firearm for self-defense. App. 102, 159–64. Banned firearms based on the AR-15 platform are the most ergonomic, safe, readily available, and effective firearms for civilian defensive shooting. App. 103, 159. Effective defensive shooting requires stopping the human aggressor as quickly as possible, and semiautomatic rifles like the banned firearms offer superior accuracy, less recoil, greater effective range, faster

reloading, potentially reduced downrange hazard, better ergonomics, and a larger ammunition capacity than other types of firearms, such as handguns and shotguns. App. 103, 159. These firearms are also relatively lightweight, are available with a telescoping/adjustable stock, have a vertical pistol grip, can be fired with one hand, are chambered for cartridges that can be effective while having relatively mild recoil, and utilize magazines with a standard capacity of more than ten rounds. App. 103, 145. These characteristics make banned firearms such as the AR-15 and its copies appropriate for close-quarter encounters, and are among the easiest to shoot accurately. App. 103, 145.

In contrast, handguns are much more difficult to fire accurately than semiautomatic rifles because they are more difficult to steady, absorb less recoil, and are more sensitive to shooter technique. App. 104–05, 146. These factors combine to make handguns substantially more difficult to fire accurately, especially under stress. App. 105, 170–71. Shotguns also have significantly more recoil than semiautomatic rifles, and it is more difficult to fire repeat shots accurately with a shotgun. App. 105, 147.

The banned magazines are effective for self-defense. Reloading a semiautomatic firearm with a detachable magazine is time-consuming even under ideal circumstances. App. 108, 169. When considering factors such as distractions, noise, multiple assailants, lighting conditions, nervousness, and fatigue, the time to reload increases. App. 108, 169. Reloading a firearm is also physically and mentally demanding, limiting a

victim's ability to escape, fend off an attacker, call 911, or give physical aid or direction to others. App. 108, 170. Reloading a firearm requires focus and therefore distracts the victim from the assailant and her surroundings. App. 108, 170. This distraction increases the likelihood of a missed shot. App. 108, 170. Greater magazine capacity reduces the need to reload in situations requiring more than ten rounds of ammunition to stop an attacker. App. 108, 168. As a result, higher capacity magazines allow individuals to better protect themselves. App. 108, 168.

The availability of the banned magazines can be the difference in surviving or not surviving a self-defense situation. App. 109, 154. Civilians, unlike police officers, likely have no body armor, no radio, no partner, no cover units, and no duty belt with extra magazines. App. 109, 163. Yet, civilians are confronted by the same violent felons as are the police. App. 109, 163. Because studies show highly trained and experienced police officers require the use of more than ten rounds to subdue an aggressive assailant in 17% of their close range encounters, it follows that an untrained civilian gun owner would need at least that many rounds. App. 109, 168.

The desire to have more rounds of ammunition available without reloading is not new; it has driven firearm design and development for centuries. App. 109. An early firearm with a capacity of more than ten rounds was available around 1580, and throughout the 17th and 18th centuries, many commercially available firearms had a capacity of more than ten rounds. App.

109. Commercially available firearms with a capacity of more than ten rounds became even more widespread after the Second Amendment was ratified. App. 109. Likewise, semiautomatic firearms with detachable magazines have been available and in wide use for well over a century. App. 110. The magazines most typically possessed by civilians hold more than ten rounds of ammunition. App. 110, 164. By limiting magazine capacity to ten rounds or fewer, petitioners are denied the benefits of modern technology and forced to use defensive tools from a bygone era. App. 110, 164.

The individual petitioners are law-abiding, responsible citizens and residents of Massachusetts who would keep the banned firearms and magazines for lawful purposes, including self-defense, if not for the ban. App. 124–32. The remaining petitioners are licensed firearm dealers who would keep and sell the banned firearms and magazines for lawful purposes, as well as an advocacy organization that would acquire and keep the banned firearms and magazines to aid in accomplishing its mission of firearm education and training, and that represents the Second Amendment interests of its membership. App. 133–40.

Respondents are the individuals responsible for enforcing Massachusetts' firearm and magazine bans and have been sued in their official capacities. *See* App. 8.

II. Procedural History

Petitioners produced undisputed material facts demonstrating that the firearms and magazines at issue are typically possessed for lawful purposes by law-abiding, responsible citizens. App. 84–123. The district court, however, rejected *Heller*'s standard, denied petitioners' motion for summary judgment, and granted respondents' motion for summary judgment to uphold the ban. App. 53–61, 71, 73. The district court drew upon *Kolbe v. Hogan*, 849 F.3d 114, 136 (4th Cir. 2017) (en banc), to conclude that the banned firearms and magazines "are not within the scope of the personal right to 'bear Arms' under the Second Amendment" because they are "weapons that are most useful in military service." App. 53–54.

The court of appeals affirmed the judgment, also declining to follow *Heller* but using a different analysis to uphold the ban than the one applied by the district court. App. 11–28. The panel chose a two-part approach that it had recently adopted from other circuits and applied to evaluate and uphold a Second Amendment challenge to a municipal handgun carry permitting scheme. App. 11–12. First, the panel assumed without deciding that the ban burdened conduct falling within the scope of the Second Amendment. App. 12–18. Second, the panel chose a form of intermediate scrutiny and upheld the ban as "a 'reasonable fit' between the restrictions imposed by the law[s] and the government's valid objectives." App. 18–28.

REASONS FOR GRANTING THE PETITION

I. Massachusetts impermissibly bans possession of common firearms and magazines typically possessed for lawful purposes by law-abiding, responsible citizens.

This Court has reviewed three Second Amendment challenges since 2008, and on each occasion the Court applied the same standard to invalidate laws that prohibit law-abiding, responsible citizens from possessing arms that are typically possessed for lawful purposes. *Heller*, 554 U.S. at 636; *McDonald*, 561 U.S. at 790–91; *Caetano*, 136 S. Ct. at 1027. The Court's analysis in this trio of cases is "crystal clear," providing "a test that anyone can understand." *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019).

In *Heller*, the Court struck down a ban on the possession of operable firearms in the home as well as a handgun possession ban that included within its sweep many popular semiautomatic firearms. 554 U.S. at 574, 629–36. The Court extensively analyzed the Second Amendment's text, history, and tradition to establish the process for determining the constitutionality of laws burdening the exercise of the right. *Id*. at 576–605. The Court concluded, "on the basis of both text and history, that the Second Amendment confer[s] an individual right to keep and bear arms," *id.* at 595, "extends, prima facie, to all instruments that constitute bearable arms," *id*. at 582, and categorically protects the possession of firearms that are "typically possessed by law-abiding citizens for lawful purposes." *Id*. at 625, 627. Under this standard, any ban on

protected arms is a policy choice that is "off the table." *Id*. at 636.

Despite this clear instruction, Massachusetts bans firearms and ammunition magazines that law-abiding, responsible citizens typically possess for lawful purposes like self-defense. Under *Heller*, Massachusetts' ban cannot survive any measure of constitutional scrutiny.

The banned firearms are typically possessed for lawful purposes. As of 2013, almost five million Americans owned these firearms, which are the most frequently sold long guns in America. App. 100, 175. Just two of the most popular models of these banned firearms (the AR- and AK-platform rifles) account for approximately 13.7 million firearms manufactured or imported into the United States between 1990 and 2015. App. 100, 174.

Law-abiding citizens typically choose the banned firearms for self-defense because they are the most ergonomic, safe, and effective firearms for civilian defensive shooting. App. 103, 159. The banned firearms can be equipped with certain features (such as telescoping stocks) that enable the user to operate the firearm more easily for accurate defensive use. App. 103, 145. The banned firearms are also kept for other lawful purposes, including hunting and target shooting. App. 102, 174.

Magazines capable of holding more than ten rounds of ammunition are even more prevalent and are also typically possessed by law-abiding, responsible

citizens for lawful purposes. App. 101, 176. By 2015, Americans owned approximately 115 million of these magazines, accounting for approximately 50% of all ammunition magazines owned during this time period. App. 101, 176. These ubiquitous magazines are provided as standard equipment for many semiautomatic rifles and pistols sold in the United States. App. 102, 177.

Law-abiding citizens choose the banned magazines because they provide an adequate supply of readily available ammunition in case of confrontation. App. 106–07, 168. Magazines capable of holding more than ten rounds of ammunition are also necessary for effective self-defense because more than ten shots are often needed to neutralize human and non-human aggressors. App. 106–07, 168. Even if additional ammunition is available and accessible under a surprise attack, very few defensive situations afford the victim the time necessary to reload a firearm because the process of reloading is both physically and mentally demanding in light of the stress and fear attendant to a violent physical attack. App. 104–05, 108, 170. Greater magazine capacity allows individuals to better protect themselves by reducing the need to reload in situations requiring more than ten rounds of ammunition. App. 108, 168. Criminals who plan an attack and choose the time for their assault can simply utilize multiple magazines, or ignore the restriction altogether, giving them a pronounced advantage over a law-abiding, responsible citizen limited to ten rounds. App. 108–09, 168.

The undisputed facts demonstrate that the banned firearms and magazines are protected arms under the Second Amendment because they are "typically possessed for lawful purposes." Under *Heller*'s standard, that is the end of the inquiry and the challenged laws should be held unconstitutional.

II. The courts below declined to follow *Heller*, instead upholding the ban under different standards borrowed from other lower courts.

The lower courts (including the district court and court of appeals here) are failing to follow *Heller*'s standard for reviewing the constitutionality of a ban on arms. The lower courts cannot agree on what alternative standard to apply instead of *Heller*'s, creating a fractured landscape of authority on the interpretation and application of a fundamental right.

A. *Heller* provides the standard for determining whether a ban on possession of bearable arms infringes the Second Amendment right.

This Court mandates a clear and simple standard to guide review of a ban on bearable arms: The Second Amendment protects, and the government may not ban, arms that are "typically possessed for lawful purposes like self-defense." *Heller*, 554 U.S. at 624 (internal quotation marks omitted).

As clearly as it established the proper analytical framework, *Heller* rejected interest balancing as a

method to resolve Second Amendment challenges. *Id*. at 634–35. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or . . . future judges think that scope [is] too broad." *Id*. at 635. Put differently, *Heller* forbids any form of interest balancing to determine the scope of the Second Amendment right because "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id*. at 634 (emphasis in original). Because the Second Amendment "is the very product of an interest balancing by the people" at the time of its enactment, *id*. at 635 (emphasis omitted), it "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *id*.

The District of Columbia's handgun ban could not stand under this framework because it prohibited handguns—an "entire class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense. *Id*. at 628. The handgun ban could not be saved simply because long guns might be available. *Id*. at 629. Nor did it matter that a "prohibition of handgun ownership" might have positively affected the country's "problem of handgun violence." *See id*. at 636. *Heller* makes clear that a ban on protected arms is not a constitutionally permissible solution to address the problem of firearm violence, even if

such a ban might be effective.[1] *Id*. This Court made clear that state and local governments may regulate—within Constitutional limitations—the possession and ownership of firearms, but a ban on protected firearms is per se unconstitutional because it conflicts with the text, history, and tradition of the Second Amendment. *Id*. at 629.

Two years later, the Court held "that the Due Process Clause of the Fourteenth Amendment incorporates [and applies to the states] the Second Amendment right recognized in *Heller*," *McDonald*, 561 U.S. at 791, because "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty," *id*. at 778. *McDonald* affirmed that *Heller*'s text, history, and tradition analysis is the only proper framework for evaluating the constitutionality of firearm bans. *Id*. at 767–68. The Court yet again "rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." *Id.* at 785 (citing *Heller*, 554 U.S. at 633–35). In striking down two municipal handgun bans, the Court reiterated that any ban on bearable arms that are typically possessed for lawful

---

[1] "The right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications." *McDonald*, 561 U.S. at 783; *see also Hudson v. Mich.*, 547 U.S. 586, 591 (2006) ("The exclusionary rule generates substantial social costs, which sometimes include setting the guilty free and the dangerous at large." (internal citation and quotation marks omitted)).

purposes like self-defense is per se unconstitutional. *See id*. at 791.

Long after *Heller* established (and *McDonald* affirmed) the appropriate analytical framework, the Court admonished the Massachusetts Supreme Judicial Court for rejecting *Heller*'s standard. *Caetano*, 136 S. Ct. at 1027–28. In *Caetano*, the lower court had upheld Massachusetts' ban on the possession of stun guns. *Id*. at 1027. For the third time in as many cases, this Court affirmed the Second Amendment text, history, and tradition analysis, reiterating that *Heller* controls the determination of firearm ban cases and may not be disregarded by the lower courts. *Id*. at 1028. Again, this Court did not apply or approve any form of interest balancing.

The Massachusetts Supreme Judicial Court subsequently followed *Caetano* and faithfully applied *Heller* to conclude that Massachusetts' "absolute prohibition . . . against the civilian possession of stun guns is in violation of the Second Amendment." *Ramirez v. Commonwealth*, 479 Mass. 331, 343, 94 N.E.3d 809, 819 (2018). The court recognized that "the possession of stun guns may be regulated, but not absolutely banned" because any such ban "is inconsistent with the Second Amendment and is therefore unconstitutional." *Id*. at 338, 815. But, the lower federal courts generally have ignored *Caetano*'s clarion call. *E.g.*, *Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen.*, 910 F.3d 106, 123–24 (3d Cir. 2018) (upholding New Jersey's ban on "large-capacity magazines"); *Kolbe*, 849 F.3d at 146 (upholding Maryland's ban on "assault weapons" and

"large-capacity magazines"); *Rupp v. Becerra*, No. 8:17-cv-00746-JLS-JDE (C.D. Cal. July 22, 2019) (upholding California's ban on "assault weapons").

Nothing in *Heller* or *McDonald* supports the lower courts' departure from this Court's straightforward instructions. Rather, this Court's decisions expressly disavow the interest balancing pursued by the lower courts that results in upholding government bans on arms that are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 634–35; *McDonald*, 561 U.S. at 767–68. The only framework for analyzing a ban on bearable arms is *Heller*'s text, history, and tradition analysis, which demonstrates that any ban of arms that are typically possessed by law-abiding, responsible citizens for lawful purposes is unconstitutional. *Heller*, 554 U.S. at 634–35.

B. The decisions below are only the most recent examples of a decade-long trend among lower courts rejecting *Heller*'s standard and fashioning other standards to uphold bans on possession of protected arms.

Despite its clarity, the courts below did not turn to *Heller*'s standard to guide their decisions in this case. Rather, they shunned the text, history, and tradition analysis in favor of an interest-balancing approach expressly forbidden by *Heller*. App. 11–28, 53–61. And, by applying an improper analysis, they produced the

wrong result—upholding a ban on firearms and magazines that are typically possessed by law-abiding, responsible citizens for lawful purposes like self-defense. App. 11–28, 53–61. It is undisputed that the banned firearms and magazines are typically possessed for many lawful purposes, including self-defense, hunting, and target shooting, App. 99–114, 174. The banned firearms and magazines have not historically been banned. *See Kolbe v. Hogan*, 813 F.3d 160, 176–77 (4th Cir. 2016), *vacated on other grounds by Kolbe*, 849 F.3d at 136; *see also Friedman v. City of Highland Park*, 784 F.3d 406, 418 (7th Cir. 2015) (Manion, J., dissenting) ("[O]utside of weapons deemed dangerous or unusual, there is no historical tradition supporting wholesale prohibitions of entire classes of weapons."). Massachusetts' bans are inconsistent with the Second Amendment's text, history, and tradition and must be overturned.

The court of appeals' departure from *Heller* here is evident in its contrast to *Ramirez*. The Massachusetts Supreme Judicial Court invalidated Massachusetts' ban on stun guns because they are in common use for the lawful purpose of self-defense. *Ramirez*, 479 Mass. at 343, 94 N.E.3d at 819. As in *Ramirez*, this case involves a Massachusetts ban on bearable arms that are similarly protected by the Second Amendment. *See Heller*, 554 U.S. at 582. Had the correct standard been applied here, the court of appeals would have reached the same conclusion as in *Ramirez*, invalidating Massachusetts' ban on protected firearms and magazines.

Instead, the court of appeals adopted a two-part interest-balancing approach that it had applied in an earlier decision in *Gould v. Morgan*, 907 F.3d 659, 668–69 (1st Cir. 2018). *Gould* took its cue from a line of decisions dating back to 2010—all of which chose interest-balancing approaches, rather than applying *Heller*'s text, history, and tradition analysis. *Id*. at 668 (citing *Young v. Haw.*, 896 F.3d 1044, 1051 (9th Cir. 2018); *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 874–75 (4th Cir. 2013); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 701–04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010)).

The court of appeals applied its two-part approach by asking first "whether the challenged law burdens conduct that falls within the scope of the Second Amendment's guarantee." *Gould*, 907 F.3d at 669. If so, "the court must then determine what level of scrutiny is appropriate and must proceed to decide whether the challenged law survives that level of scrutiny." *Id*. This approach is wholly inconsistent with *Heller*'s explicit instruction—reiterated in *McDonald*—to avoid "judicial interest balancing." *McDonald*, 561 U.S. at 785 (citing *Heller*, 554 U.S. at 633–35). *Heller* is clear that any such approach may not be used to analyze a law

banning protected arms from the homes of law-abiding, responsible citizens.

Applying this two-part approach, the court of appeals reviewed the government's justifications and upheld the ban as "a 'reasonable fit' between the restrictions imposed by the law[s] and the government's valid objectives." App. 23–28. In so doing, the court of appeals (and the other lower courts before it applying a similar two-part approach) elevated the legislative majority's preference above the individual's fundamental right of self-defense. The district court's error was even more flagrant, excluding these same popular arms from the Second Amendment, simply by declaring them "most useful in military service." App. 53–54. The ipse dixit rationalizations of individual jurists cannot substitute for this Court's considered Second Amendment jurisprudence. The law-abiding, responsible citizens of Massachusetts deserve better.

III. This Court should grant review to mend the lower courts' fractured Second Amendment jurisprudence and reinforce *Heller*.

Lower courts nationwide have had considerable difficulty understanding and applying *Heller*'s mandate, contributing to the development of many different standards for analyzing firearm bans. As we have seen, the courts below each chose a different analysis to reach the same conclusion in this case. *Compare* App. 53–61 (concluding that the banned firearms and magazines fall outside the scope of the

Second Amendment right because they are "weapons that are most useful in military service"), *with* App. 11–28 (applying the "two-step approach for analyzing Second Amendment challenges" and assuming that the banned firearms and magazines fall within the scope of the Second Amendment right). The variety of approaches circulating among the lower courts has created "an overly complex analysis that people of ordinary intelligence cannot be expected to understand." *Duncan*, 366 F. Supp. 3d at 1155. This far-reaching misunderstanding of *Heller*'s instruction compels the grant of certiorari. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (having granted certiorari to resolve a disagreement among the lower courts on the proper interpretation of Federal Rule of Civil Procedure 56).

Several lower courts analyzing a firearm ban have adopted some form of a two-part approach. *See, e.g.*, *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116; *Duncan v. Becerra*, 742 F. App'x 218 (9th Cir. 2018); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *Heller II*, 670 F.3d at 1252; *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). But most lower courts cannot agree on how either part of the two-part approach should be applied, giving rise to a dizzying array of differing opinions instead of what should be a simple analysis under *Heller*. *Duncan*, 366 F. Supp. 3d at 1155 (referring to the confused and confusing two-part approach as a "tripartite binary test with a sliding scale and a reasonable fit").

For example, lower courts cannot agree on how to define the scope of the Second Amendment at part one of the two-part approach. To resolve this question, some lower courts ask whether the firearms and magazines at issue are "typically possessed by law-abiding citizens for lawful purposes." *See Cuomo*, 804 F.3d at 255 (concerning firearms and magazines); *Fyock*, 779 F.3d at 997 (concerning magazines); *Heller II*, 670 F.3d at 1260–61 (concerning firearms and magazines). If so, the banned firearms and magazines fall within the scope of the Second Amendment. *See id*. Other lower courts have expressly rejected *Heller*'s test to resolve the same question. *See Friedman*, 784 F.3d at 408–10 (concerning firearms and magazines).[2]

---

[2] The United States Court of Appeals for the Seventh Circuit is a microcosm of the disarray among the lower courts, primarily because the outcome of any given Second Amendment challenge depends entirely on the makeup of the three-judge panel that is randomly chosen to decide the case. *Compare Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (conducting an historical analysis to hold that a law prohibiting the carrying of firearms in public violated the Second Amendment), *and Ezell v. City of Chicago*, 651 F.3d 684, 708–10 (7th Cir. 2011) (applying the two-part approach, selecting "not quite strict scrutiny," and holding that shooting ranges fall within the scope of the Second Amendment and cannot be banned from a city), *with Friedman*, 784 F.3d at 410–12 (applying a test that looked at whether the banned items were in common use at the time of the Founding to hold a statute banning "assault weapons" and "large-capacity magazines" did not violate the Second Amendment) *and United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (applying intermediate scrutiny and holding a statute prohibiting misdemeanants from the possession of firearms did not violate the Second Amendment). The court has so far been unable to select a uniform standard of review, leaving

Regardless of the standard they adopt, most courts analyzing a firearm ban fail to conduct a robust analysis of the Second Amendment's relevant text, history, and tradition, and instead either assume or summarily conclude that banned firearms and magazines fall within the scope of the Second Amendment right. *E.g.*, App. 12–18; *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116–17; *Duncan*, 742 F. App'x at 221; *Cuomo*, 804 F.3d at 257; *Fyock*, 779 F.3d at 998. But some courts have strayed even further from *Heller*'s clear path. The Fourth Circuit in *Kolbe* harshly criticized this Court's test, 849 F.3d at 141–42, and held that banned firearms and magazines did not fall within the scope of the Second Amendment right because they are "like" "M-16 rifles" and, therefore, are "weapons that are most useful in military service." *Kolbe*, 849 F.3d at 135 (citation omitted). No other court of appeals—before or since—has adopted this "military service" test. Without an accord among the lower courts on how to apply the first step, outcomes vary on a case-by-case basis—as illustrated by the lower court's choice here to follow *Kolbe* rather than *Heller*.

Analysis of the second step is no more uniform. The second step of the two-part approach asks what level of constitutional scrutiny should be applied to analyze laws that burden the Second Amendment right. Putting aside *Heller*'s direction to avoid interest balancing, this Court made clear that rational-basis review cannot be used to analyze Second Amendment

---

the scope of the Second Amendment (and the outcome of any given lawsuit) uncertain.

challenges. "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment . . . would have no effect." *Heller*, 554 U.S. at 628 n.27.

The lower courts also continually grapple with what level of heightened constitutional scrutiny to apply at the second step. Many lower courts have adopted a form of intermediate scrutiny. *E.g.*, App. 18–28. Others have suggested that strict scrutiny may be appropriate for a firearm ban. According to the United States Court of Appeals for the Fifth Circuit, for example, "[a] regulation that threatens . . . the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family . . . triggers strict scrutiny." *Nat'l Rifle Ass'n*, 700 F.3d at 195; *accord Duncan*, 366 F. Supp. 3d at 1158 (applying strict scrutiny to analyze a magazine ban). *See also Kolbe*, 813 F.3d at 183–84 (selecting and applying strict scrutiny because the challenged laws prohibited possession of protected arms in the home), *vacated en banc in Kolbe*, 849 F.3d at 137–38 (holding that the same firearms are not protected, and, even if they were, upholding the ban under intermediate scrutiny).

Even if the lower courts uniformly selected intermediate scrutiny at the second step, the application of intermediate scrutiny is nothing more than a rubber stamp approving firearm bans that are categorically unconstitutional under *Heller*. Many lower courts—ostensibly applying intermediate scrutiny—evaluate firearm bans by asking only whether the ban is reasonably related to a valid or important government

interest. *E.g.*, App. 23–28 (requiring a "reasonable fit" between the challenged law and a valid government objective); *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 207 (same); *Duncan*, 742 F. App'x at 221 (same). This version of intermediate scrutiny shields firearm bans as effectively as would rational-basis review, which *Heller* flatly rejected. 554 U.S. at 628 n.27. By contrast, the proper iteration of intermediate scrutiny requires that laws burdening fundamental rights be "narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley*, 573 U.S. 464, 485–86 (2014). An absolute ban on the possession of bearable arms could never satisfy this standard because a ban is not tailored at all—much less "narrowly tailored." *See id*.

Intermediate scrutiny allows lower courts to uphold laws burdening the Second Amendment right simply by citing discrete incidents of firearm violence. But *Heller* rejected the problem of firearm violence to justify a ban on popular firearms. 554 U.S. at 636. This Court has been clear that the government may not regulate the secondary effects of constitutionally protected conduct by forbidding the conduct itself. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) (government cannot ban child pornography on the ground that it might lead to child abuse because "[t]he prospect of crime" "does not justify laws suppressing protected speech"); *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (state cannot impose a ban on solicitations by public accountants on the ground that

solicitations "create[] the dangers of fraud, overreaching, or compromised independence").

Intervention by this Court is necessary to preserve the Second Amendment right, which the lower courts are relegating to the bottom shelf in the "hierarchy among . . . constitutional rights." *See Grace v. District of Columbia*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016) (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 (1989) (noting that there is no distinction between the protection that should be provided to the various constitutional rights)). Only this Court can ensure that the lower courts' rejection of *Heller* will not make "the Second Amendment extinct." *See Heller*, 554 U.S. at 636.

More than a decade ago in *Heller*, this Court established that the government cannot ban law-abiding, responsible citizens from possessing arms that are typically possessed for lawful purposes. Rather than follow this principle, the courts below each drew upon a different lower court approach to uphold Massachusetts' ban on these protected firearms and magazines. This Court should grant the petition to reinforce *Heller* as the standard for determining whether a ban on bearable arms infringes the Second Amendment right and mend the lower courts' fractured jurisprudence.

CONCLUSION

For the foregoing reasons, petitioners respectfully request this Court grant the petition for certiorari.

Respectfully submitted,

JAMES MICHAEL CAMPBELL
RICHARD PAUL CAMPBELL
CAMPBELL CONROY & O'NEIL, P.C.
1 Constitution Wharf
Suite 310
Boston, MA 02129

JOHN PARKER SWEENEY
Counsel of Record
JAMES W. PORTER, III
MARC A. NARDONE
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street NW
Suite 1350
Washington, DC 20036
(202) 393-7150
jsweeney@bradley.com

Counsel for Petitioners

September 23, 2019