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 Ninety-Four Members of the United States House of Representatives as Amici Curiae in Support of Petitioners

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INTEREST OF *AMICI CURIAE*

Amici curiae are members of the United States House of Representatives. A complete list of *amici* is set forth in the Appendix.[1]

Members of Congress swear an oath (or affirm) to support and defend the Constitution of the United States, and they have an obligation to defend the principles of liberty enshrined in that social contract. They therefore have a strong interest in ensuring that the principles established in the Constitution are preserved and that governments at all levels of our federal system do not infringe on constitutional rights. As duly elected representatives of the people of the United States and members of a co-equal branch of government, members of Congress have an obligation to urge the Court to protect the rights found in the Constitution.

Amici curiae submit this brief to show how constitutional principles and rights are currently being trampled in Second Amendment cases. First, as to principles, lower courts are disregarding this Court's holdings in *Heller* and *McDonald* and failing to yield to this Court as the ultimate interpreter of the Constitution. Second, as to rights, the lower courts are refusing to apply *Heller* and *McDonald* faithfully,

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[1] *Amici* provided written notice to the parties ten days before this brief was filed, and the parties have consented to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, no counsel for a party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amici curiae* and their counsel made any such monetary contribution.

denying law-abiding citizens their constitutional right to keep and bear arms.

SUMMARY OF THE ARGUMENT

In *District of Columbia v. Heller* and *McDonald v. City of Chicago*, this Court held that the right to keep and bear arms—to have and carry them—is an individual, natural, and fundamental right. The right predates the Second Amendment, and its central concept is the right of self-defense.

A troubling trend has developed since this Court decided those two cases a decade ago. The lower courts are eschewing this Court's instruction to look to the text, history, and tradition of the Second Amendment to analyze whether a gun restriction is constitutional. Instead, they are employing the type of interest-balancing approach that the Court has explicitly rejected.

This case is the latest in that trend. Instead of faithfully following *Heller*, the First Circuit followed the interest-balancing approach that other circuits have applied. Specifically, the First Circuit purportedly applied intermediate scrutiny to uphold a Massachusetts ban on so-called "assault weapons" and large-capacity magazines.

The repeated failure of lower courts to follow this Court's precedent requires this Court to say (once again) that the Second Amendment right is not a second-class right. The Court has the opportunity to do so in a case in which it has already granted certiorari. *See N.Y. State Rifle & Pistol Ass'n v. City of New York,* 883 F.3d 45 (2d Cir. 2018), *cert. granted,*

139 S. Ct. 939 (2019). Reversing the Second Circuit's decision will remind lower courts that this Court is the ultimate interpreter of the Constitution and protect law-abiding citizens' right to keep and bear arms.

Deciding *New York State Rifle & Pistol Ass'n*, however, is unlikely to be enough. It certainly would not undo the First Circuit's error here. Further, legislatures around the country are considering myriad new gun restrictions (if they have not adopted them already). Responsible, law-abiding gun owners, thus, face new and greater infringement on their fundamental rights. Ensuring the lower courts apply the appropriate framework to analyze new restrictions and properly protect the fundamental right to keep and bear arms requires a clear command from this Court.

ARGUMENT

I. The Second Amendment protects citizens' rights to keep and bear arms for self-defense.

A. This right is fundamental.

Eleven years ago, this Court unequivocally held that "the Second Amendment conferred an individual right to keep and bear arms." *Dist. of Columbia v. Heller*, 554 U.S. 570, 595 (2008). Two years later, the Court held that this "right is fully applicable to the States." *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

Reaching the conclusion that the Second Amendment protected an individual right of self-defense involved a detailed analysis of the amendment's text, in light of the historical use of its words. The Court traced the right enshrined in the Second Amendment to 1689 and the English Bill of Rights that followed the Glorious Revolution. *See Heller*, 554 U.S. at 592–93. Through Blackstone and other commentators, the Court examined the understanding of the founding generation that their fundamental rights as Englishmen included "the natural right of resistance and self-preservation" and "the right of having and using arms for self-preservation and defence." *Id.* at 593–94 (quoting 1 William Blackstone *Commentaries on the Laws of England*, 139–40 (1765)). The Court explored state constitutions from the founding era, concluding that their analogous protections support that the Second Amendment codified an individual right to keep and bear arms in defense of self and of the state. *Heller*, 554 U.S. at 600–03. The Court went on to consider commentary from legal scholars from the founding era to after the Civil War, as well as case law and legislation from before and after the Civil War. *See id.* at 603–26.

Considering the language of the Second Amendment and given its historical underpinning, the Court endorsed the common understanding "that the Second Amendment, like the First and the Fourth Amendments, codified a *pre-existing* right." *Id.* at 592. In other words, as the Court recognized in *United States v. Cruikshank*, the right to keep and bear arms exists as a natural right independent of the Second Amendment. *See* 92 U.S. 542, 553 (1875). And the natural right the Second Amendment codi-

fied includes the right to keep and bear arms both to defend against tyranny and in self-defense. *See Heller,* 554 U.S. at 598 (discussing the militia of those "trained in arms and organized" as a check on tyranny); *id.* at 599 (calling self-defense "the *central component*" of the Second Amendment right).

When the Court incorporated this right against the states in *McDonald*, the Court also looked to history as a guide to determine "whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty," or, as the Court has also framed the inquiry, "whether this right is 'deeply rooted in this Nation's history and tradition.'" 561 U.S. at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

The Court reasoned that recognition of the natural right of self-defense is "ancient" and stands as the "*central component*" of the Second Amendment. *McDonald*, 561 U.S. at 767. Relying on *Heller*, the Court again reviewed the right to keep and bear arms through history—from the English Bill of Rights, to Blackstone, to the debates between the Federalists and Anti-Federalists, to the debates on ratification of the Bill of Rights, to state constitutions just before and after ratification of the Bill of Rights, to the Civil War era. *See id.* at 767–80; *see also id.* at 815–19 (Thomas, J., concurring). The Court held that the right to keep and bear arms codified in the Second Amendment is a fundamental right and necessary to our system of ordered liberty and thus applies to the States. *See id.* at 778.

Together, *Heller* and *McDonald* confirm that the right to keep and bear arms is a natural right. It

is fundamental to the American concept of liberty. And the core of the right is the right to self-defense, against both tyranny and the everyday evils of this world.

B. This right is not subject to an interest-balancing test.

In *Heller*, this Court rejected an interest-balancing approach to the "core" right of self-defense. 554 U.S. at 634. The Court observed that "no other enumerated constitutional right" (such as the First Amendment) was subject to such a test. *Id.* Like other fundamental rights, neither courts nor legislatures are free to limit a right protected by the Constitution.

And lest there be any doubt that the Court meant what it said in *Heller*, the Court observed in *McDonald* that it had "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 561 U.S. at 785; *accord Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 702–03 (6th Cir. 2016) (Batchelder, J., concurring in most of the judgment) ("The Supreme Court has at every turn rejected the use of interest balancing in adjudicating Second Amendment cases.").

Rather than an interest-balancing approach, *Heller* mandates that courts "assess gun bans and regulations based on text, history, and tradition." *Heller v. Dist. of Columbia* (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *see also Silvester v. Becerra*, 138 S. Ct. 945, 947–48 (2018) (Thomas, J., dissenting from denial of certiorari) (collecting cases in agreement). Under this ap-

proach, courts should analyze the Second Amendment's text and our nation's history and traditions to determine whether the Second Amendment protects the people seeking protection, the activity they seek to protect, and the arm they seek to use. *See, e.g.*, *Heller*, 554 U.S. at 624–27. Courts must apply the test with rigor, begin with a presumption that restrictions are invalid, and must force the government to meet a heavy burden to rebut that presumption. In other words, they must do what this Court did in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam), when it analyzed a Massachusetts law banning stun guns under the Second Amendment.

II. Lower courts are not faithfully applying *Heller* and *McDonald*.

Text, history, and tradition is not, however, the test that lower courts have applied in Second Amendment cases. Their failure to do so flies in the face of our Constitution.

The Constitution vests the "judicial Power" in this Court and "in such *inferior* Courts" as Congress may establish. U.S. Const. art. III, § 1 (emphasis added). As the highest court in the land, this Court is the "ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Lower courts are thus bound to follow this Court's interpretation of the Constitution. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

Yet lower courts have not treated *Heller* and *McDonald* with such respect. Generally speaking, their refusal to apply these two decisions faithfully falls into one of two categories.

The first category of cases applies the interest-balancing test this Court has rejected. Cases taking this approach often define the "core" Second Amendment right narrowly, limiting it to "self-defense *in the home*." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of N.J.*, 910 F.3d 106, 117 (3d Cir. 2018) (emphasis added). Then, these courts subject any law that does not severely burden self-defense in the home to less than strict scrutiny, typically applying intermediate scrutiny (or something they call intermediate scrutiny) instead.[2] *See, e.g.*, *id.* at 118.[3] And

[2] A rare exception in the courts of appeals not to choose intermediate scrutiny is *Ezell v. City of Chicago*, in which the Seventh Circuit applied something close to but "not quite 'strict scrutiny'" to strike down Chicago ordinances that required range training to own a handgun yet prohibited any firing ranges from being located in the City. 651 F.3d 684, 708 (7th Cir. 2011). Although that court at least applied something more than intermediate scrutiny, it still did not apply the text, history, and tradition test *Heller* established.

[3] *See also United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019); *Gould v. Morgan*, 907 F.3d 659, 674 (1st Cir. 2018), *petition for cert. filed,* (U.S. Apr. 4, 2019) (No. 18-1212); *Pena v. Lindley*, 898 F.3d 969, 977 (9th Cir. 2018), *petition for cert. filed,* (U.S. Jan. 3, 2019) (No. 18-843); *Stimmel v. Sessions*, 879 F.3d 198, 207 (6th Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 207 (5th Cir. 2012); *Heller II*, 670 F.3d at 1261.

when they define the core right narrowly and purport to apply intermediate scrutiny, courts virtually always uphold the gun restriction.

That was what the First Circuit did here. First, it asked whether the restriction burdens a right protected by the Second Amendment, which the court "assume[d]" the restriction did. (App. 12, 18.) Then, it asked how much of a burden the restriction is to determine the level of scrutiny. (App. 12.) The First Circuit reasoned the restriction on semiautomatic firearms and large-capacity magazine "does not heavily burdened the core right of self-defense in the home," so intermediate scrutiny was appropriate. (App. 19.)

But this narrow definition of the core right ignores what this Court said in *Heller*: "self-defense" (not just self-defense in the home) is "the *central component* of the right." 554 U.S. at 559. By narrowly defining the core right, lower courts are finding a way to apply a lower level of scrutiny to gun restrictions.

The use of interest-balancing tests has another problem: Lower courts are not applying these tests rigorously. Consider, for example, the Second Circuit's decision in *New York State Rifle & Pistol Ass'n* that is now pending in this Court. That case involves a New York City ordinance prohibiting gun owners from taking their handguns outside of the city limits, even if the gun is unloaded and locked in a separate container from the ammunition or is being taken to the owner's second home. There, the court said it was applying intermediate scrutiny. *See N.Y. State Rifle & Pistol Ass'n,* 883 F.3d at 62. The Second Circuit

held that intermediate scrutiny (still a meaningful bar for a government restriction to clear) was met simply because the former head of the office that issued licenses to possess handguns said that "license holders 'are just as susceptible as anyone else to stressful situations,' including driving situations that can lead to road rage, 'crowd situations, demonstrations, family disputes,' and other situations 'where it would be better to not have the presence of a firearm'" and because enforcing restrictions on carrying handguns is harder if licensees can "create an explanation about traveling for target practice or shooting competition." *Id.* at 63. This is hardly a rigorous application of intermediate scrutiny.

The second way courts avoid following *Heller* is by cherry picking language from that decision. The district court's decision in this case is an example of that approach. In *Heller*, this Court observed that "dangerous and unusual weapons" that were not "in common use at the time" were not protected by the Second Amendment. 554 U.S. at 627. Immediately following this statement was a reference to "M-16 rifles and the like" as examples that could be banned without offending the Second Amendment. *Id.*

The district court here latched onto this language and framed the question as whether "the banned assault weapons and large capacity magazines [are] 'like' 'M-16 rifles.'" (App. 55.) The court quickly concluded that the banned firearms were like M-16s and are "most useful in military service," so they are "outside the scope of the Second Amendment." (App. 55); *see also, e.g.*, *Kolbe*, 849 F.3d at 137; *Friedman v. City of Highland Park*, 784 F.3d

406, 408 (7th Cir. 2015); *Rupp v. Becerra*, — F. Supp. 3d —, No. 817CV00746JLSJDE, 2019 WL 4742298, at *6 (C.D. Cal. July 22, 2019).

This conclusion, however, disregards critical distinctions between the M-16 and the banned firearms. Importantly, the M-16 used by the military is a machine gun. Every variant of the M-16 employed by our nation's military is capable of fully automatic fire or can fire in three-round bursts with a single pull of the trigger.[4] The rifles Massachusetts bans (like the AR-15) are purely semiautomatic, firing a single time with each pull of the trigger. The M-16 and AR-15 may be similar in appearance but the AR-15's "scary" appearance is no justification for banning it. However it looks, the AR-15 is not a fully automatic machine gun. So, it is not a type of firearm this Court described as a "dangerous and unusual weapon[]" traditionally subject to being banned. This drive to conflate the AR-15 with the M-16 has led lower courts to uphold gun restrictions without actually applying the test that this Court adopted in *Heller* and analyzing whether the rifle at issue was "in common use at the time" for self-defense.

The comparisons of semiautomatic rifles to other types of banned (or bannable) weapons do not stop

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[4] *See* Dep't of the Army, *U.S. Army Field Manual 3-22.9* § 2-1 (Feb. 2011) (providing the "Characteristics of the M16/M4 Series Weapons" and identifying all variants as having either fully automatic or three round burst capability); Dep't of the Navy, *U.S. Marine Corp Technical Manual 05538/10012-IN* Ch. 3, p. 1 (Dec. 2008) (identifying each variant of the M-16/M-4 series of weapons used by the U.S. Marine Corp as having either fully automatic or three round burst capability).

with the look of guns like the AR-15. The Seventh Circuit compared such a semiautomatic rifle to the fully automatic "Tommy gun" that "was all too common in Chicago" during Prohibition but was later banned by federal law. *Friedman*, 784 F.3d at 408. The Seventh Circuit's focus on the commonality of the firearm (if in fact the Tommy gun was ever common) caused it to overlook another requirement: that the common use be "lawful." *Heller*, 554 U.S. at 625. The Seventh Circuit never discussed whether the Tommy gun was commonly used for lawful purposes before it was banned. The Seventh Circuit's reference to Prohibition-era Chicago suggests it was not describing widespread "lawful" use of the Tommy gun by American civilians.

To be fair, not all lower courts have missed the mark on *Heller*. The Southern District of California correctly called this Court's *Heller* holding "a simple Second Amendment test in crystal clear language" and struck down a California ban on magazines holding more than ten rounds. *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019), *appeal filed*, (9th Cir. Apr. 4, 2019) (No. 19-55376).[5] Aptly condensing the test, the court reasoned:

> It is a hardware test. Is the firearm hardware commonly owned? Is the hardware commonly owned by law-abiding citizens? Is the hardware owned

[5] *See also Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.").

> by those citizens for lawful purposes? If the answers are "yes," the test is over. The hardware is protected.

Id. Application of this test here shows why the Massachusetts ban and the First Circuit's decisions are wrong. Both types of weapons and the large-capacity magazines banned are: (1) commonly owned; (2) by law-abiding citizens; (3) for the lawful purpose of self-defense. Therefore, the test is over, and the Massachusetts ban is invalid.

But sadly, courts applying the correct test are the exception. And neither of the common approaches to Second Amendment cases are faithful to the Constitution or this Court's precedent. Instead of continuing to allow the lower courts to misapply *Heller* and *McDonald* to the detriment of fundamental rights of law-abiding citizens, the Court should act to immediately correct those courts and require them to follow this Court's test for protecting the right to keep and bear arms. At minimum, the disagreement among the lower courts on how to apply *Heller* is reason enough to grant certiorari. *See* Sup. Ct. R. 10(a).

III. New, extreme gun restrictions are coming.

In addition to the failure of lower courts to follow this Court's precedent, another consideration supports granting a writ of certiorari here. There is a wave of new gun restrictions being proposed around the country. Numerous legislatures are considering gun restrictions similar to the one at issue here. For example, legislatures have proposed banning large-capacity magazines. *See, e.g.*, S. Bill 70, 150th Gen. Assemb. (Del. 2019) (more than fifteen rounds); HB

3265, 80th Legis. Assemb. (Or. 2019) (more than ten rounds). Some states are looking to ban or restrict semiautomatic firearms. *See, e.g.*, S. Bill 68, 150th Gen. Assemb. (Del. 2019); HB 456, 153d Gen. Assemb. (N.C. 2019).

State legislatures are not alone. According to the *New York Times*, (virtually) every Democratic candidate for President supports at least a ban on so-called assault weapons. *See* Maggie Astor, *Where the 2020 Democrats Stand on Gun Control Proposals*, N.Y. Times, Oct. 14, 2019, at A20 ("All 19 candidates support an assault weapons ban."). Some go even further, supporting bans on large-capacity magazines and mandatory "buybacks." *See id.* Among them, former Texas Congressman Beto O'Rourke stated at a primary debate: "Hell yes, we're going to take your AR-15, your AK-47."[6]

Before a new wave of infringing regulations becomes law, the Court should make clear that those restrictions violate fundamental Second Amendment rights. Granting certiorari in this case and reversing the First Circuit's decision to uphold Massachusetts' invalid ban would send that message.

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[6] *See* Benjy Sarlin, *"Hell Yes": Beto O'Rourke Explains How He Intends to Get Your AR-15s*, NBC News (Sept. 13, 2019 12:18 PM), https://www.nbcnews.com/politics/2020-election/beto-o-rourke-explains-how-he-intends-get-your-ar-n1054191.

IV. The Court should consider summary reversal, depending on the decision in *New York State Rifle & Pistol Ass'n*.

Later this Term, the Court will hear argument in *New York State Rifle & Pistol Ass'n*. If the Court reaches the merits of that case (the Court has asked the parties to be prepared to discuss mootness) and holds that narrowly defining the core right and lackadaisically applying intermediate scrutiny is not sufficient, the Court should consider summary reversal here.

The Court has summarily reversed lower court decisions that apply this Court's "standard in name only," *Maryland v. Kulbicki*, 136 S. Ct. 2, 3 (2015) (per curiam), or that "disregard[] the precedents of this Court," *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam). That is what the First Circuit did here.

In light of *Heller* and *McDonald*, summary reversal would be appropriate even if *New York State Rifle & Pistol Ass'n* were moot. The Court has done so before when lower courts have disregarded *Heller* and the fundamental rights the Second Amendment protects. See *Caetano*, 136 S. Ct. at 1028 (reversing a Massachusetts Supreme Judicial Court decision that "contradict[ed] this Court's precedent" in *Heller*). But given lower courts' repeated failures to abide by *Heller* and *McDonald*, this case warrants briefing, oral argument, and an opinion to protect the constitutional principles and rights that lower courts have flouted in Second Amendment cases.

CONCLUSION

For these reasons, *amici* request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Appendix

APPENDIX

THOSE JOINING IN AMICI CURIAE BRIEF

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Representative Rick Allen (GA-12)
Representative Kelly Armstrong (ND-AL)
Representative Brian Babin (TX-36)
Representative Troy Balderson (OH-12)
Representative Jim Banks (IN-03)
Representative Jack Bergman (MI-01)
Representative Andy Biggs (AZ-05)
Representative Dan Bishop (NC-09)
Representative Rob Bishop (UT-01)
Representative Kevin Brady (TX-08)
Representative Mo Brooks (AL-05)
Representative Ted Budd (NC-13)
Representative Tim Burchett (TN-02)
Representative Michael C. Burgess, M.D. (TX-26)
Representative Bradley Byrne (AL-01)
Representative Ken Calvert (CA-42)
Representative Buddy Carter (GA-01)
Representative John R. Carter (TX-31)
Representative Steve Chabot (OH-01)
Representative Liz Cheney (WY-AL)
Representative Ben Cline (VA-06)
Representative Doug Collins (GA-09)
Representative James Comer (KY-01)
Representative K. Michael Conaway (TX-11)
Representative Warren Davidson (OH-08)
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Representative Jeff Duncan (SC-03)
Representative Neal Dunn (FL-02)

Representative Tom Emmer (MN-06)
Representative Chuck Fleischmann (TN-03)
Representative Bill Flores (TX-17)
Representative Matt Gaetz (FL-01)
Representative Greg Gianforte (MT-AL)
Representative Bob Gibbs (OH-07)
Representative Louie Gohmert (TX-01)
Representative Lance Gooden (TX-05)
Representative Paul A. Gosar, D.D.S. (AZ-04)
Representative Tom Graves (GA-14)
Representative H. Morgan Griffith (VA-09)
Representative Michael Guest (MS-03)
Representative Jim Hagedorn (MN-01)
Representative Andy Harris, M.D. (MD-01)
Representative Kevin Hern (OK-01)
Representative Jody Hice (GA-10)
Representative Clay Higgins (LA-03)
Representative George Holding (NC-02)
Representative Richard Hudson (NC-08)
Representative Bill Johnson (OH-06)
Representative Mike Johnson (LA-04)
Representative Jim Jordan (OH-04)
Representative John Joyce, M.D. (PA-13)
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Representative Mike Kelly (PA-16)
Representative Steve King (IA-04)
Representative Doug LaMalfa (CA-01)
Representative Doug Lamborn (CO-05)
Representative Robert E. Latta (OH-05)
Representative Debbie Lesko (AZ-08)
Representative Billy Long (MO-07)
Representative Barry Loudermilk (GA-11)
Representative Roger Marshall, M.D. (KS-01)
Representative Tom McClintock (CA-04)
Representative Mark Meadows (NC-11)

Representative Carol D. Miller (WV-03)
Representative Dan Newhouse (WA-04)
Representative Ralph Norman (SC-05)
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Representative David P. Roe, M.D. (TN-01)
Representative Mike Rogers (AL-03)
Representative David Rouzer (NC-07)
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