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 THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Rifle Association of America, Inc. ("NRA") is the oldest civil rights organization in America and the Nation's foremost defender of Second Amendment rights. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians. The NRA has a strong interest in this case because its outcome will affect the ability of the many NRA members who reside within the First Circuit and—if this Court grants review—throughout the Nation to exercise their fundamental right to keep and bear firearms in common use for lawful purposes.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the First Circuit upheld Massachusetts' ban on popular semi-automatic firearms and standard-capacity magazines. In doing so, it—like several other courts across the country—ignored this Court's clear test for determining whether the government may ban certain types of arms consistent with the Second Amendment: Is the arm "typically possessed by law-abiding citizens for lawful purposes"? *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). If it is, then any prohibition must fail. The First Circuit acknowledged this test, but then upheld Massachusetts'

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution for the preparation or submission of this brief. All parties received timely notice of this *amicus* brief and have consented to its filing.

law under a watered-down form of scrutiny that is irreconcilable with *Heller*. This Court should grant the petition for certiorari and reverse the First Circuit's deeply flawed decision, which gives states carte blanche to ban commonly used firearms in direct contravention of the Second Amendment.

* * *

In *Heller*, this Court held that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. This right "extends, prima facie, to all instruments that constitute bearable arms," and this presumption of protection may be rebutted only if the weapon in question is "not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 582, 625. The Court later clarified in *McDonald v. City of Chicago* that because it "found that [the Second Amendment] right applies to handguns," it followed that "citizens must be permitted to use handguns for the core lawful purpose of self-defense." 561 U.S. 742, 767-68 (2010) (cleaned up).

Massachusetts disregarded the Second Amendment in enacting its prohibition on numerous commonly owned firearms—arms it inaccurately calls "assault weapons"—along with ammunition magazines capable of holding more than ten rounds—which it incorrectly deems to be "large capacity." Mass. Gen. Laws ch. 140, § 131M. The First Circuit similarly disregarded the Second Amendment in upholding that ban. In doing so, the court chided plaintiffs for "assert[ing] that they have an unfettered Second Amendment right to possess the proscribed assault weapons and [large-capacity magazines] in their

homes for self-defense." Pet. App. 5. But plaintiffs seek only to vindicate the rights enshrined in the Constitution and further elucidated in *Heller*. Because the Second Amendment right applies to the popular and commonly held firearms and magazines at issue here, plaintiffs—like all law-abiding citizens—must at the very least be permitted to use them for the core lawful purpose of self-defense.

The First Circuit's decision and reasoning in this case directly conflict with this Court's decision in *Heller*. The fact that these firearms are "overwhelmingly chosen by American society for th[e] lawful purpose [of self-defense]," *Heller*, 554 U.S. at 628, is dispositive. *Heller* leaves no room for confusion on this point. Indeed, in 2016, this Court summarily reversed the Massachusetts Supreme Judicial Court when it departed from *Heller* and failed to employ the common-use test. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

Despite acknowledging *Heller's* common-use test, the First Circuit proceeded to distort it beyond all recognition, stripping the citizens of Massachusetts of their constitutional right to keep and bear protected arms. But this Court's precedent is clear that a state may not prohibit "an entire class of 'arms' that is overwhelmingly chosen by American society for [self-defense.]" *Heller*, 554 U.S. at 628. Massachusetts enacted just such a prohibition, and the First Circuit erred by upholding it.

This Court's intervention is imperative, as laws similar to the statutes challenged here have proliferated in recent years. Since 2008, at least six other states have attempted to ban standard-size magazines, and five states

have attempted to ban certain semi-automatic firearms. A number of cities and municipalities (including Los Angeles, San Francisco, and Pittsburgh) have also adopted similar measures. In short, the legal issues presented by this case are of significant national importance and will continue to recur until this Court reaffirms what it previously said in *Heller*: The Second Amendment protects the commonly used firearms and magazines at issue here. The petition for certiorari should be granted.

ARGUMENT

I. The Court Should Grant Certiorari To Reaffirm That The Second Amendment Protects Firearms And Magazines In Common Use For Lawful Purposes.

The First Circuit acknowledged in the decision below that "*Heller* is the beacon by which we must steer." Pet. App. 13. It recognized that "[r]efined to bare essence, [*Heller*'s] message is that the Second Amendment 'elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Id.* at 11 (quoting *Heller*, 554 U.S. at 635). The court further acknowledged that "the relevant question is . . . whether the proscribed weapons are in common use for lawful purposes like self-defense." *Id.* at 16. Yet the First Circuit lamented that "*Heller* provides only meager guidance" in helping to "plot the dividing line between common and uncommon use[.]" *Id.* Then, instead of analyzing text, history, and tradition as *Heller* requires, the court abandoned *Heller*'s common-use test altogether in favor of an interest-balancing analysis. *See id.* at 28-29 (stating that "the interests of state and local

governments in regulating the possession and use of such weapons . . . must be balanced against the time-honored right of individuals to bear arms in self-defense"). That approach to the Second Amendment is deeply flawed and irreconcilable with this Court's precedent.

Far from offering "meager guidance," *id.* at 16, *Heller*'s common-use test is straightforward and grounded in the text, structure, and history of the Second Amendment. Based on an extensive analysis of contemporary dictionaries and other historical sources, this Court held that the term "Arms" in the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms." *Heller*, 554 U.S. at 582. By announcing the purpose for which the pre-existing right to keep and bear arms was codified, *id.* at 599 ("to prevent elimination of the militia"), the prefatory clause clarifies but "does not limit or expand the scope" of the right so codified, *id.* at 578. Because "[t]he traditional militia was formed from a pool of men bringing arms in common use at the time for lawful purposes like self-defense," *id.* at 624 (cleaned up), it follows that arms "in common use at the time" for lawful purposes lie at the core of the Second Amendment, *see id.* at 627.

At the same time, those same historical sources indicate that "arms that are highly unusual in society at large" fall outside the Second Amendment's protective sphere. *Id.* That limitation follows from the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.*; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *148-49 (going armed "with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land"); 1 WILLIAM

HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135 (1716) (against the law for a man to "arm[ ] himself with dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People"); 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 79 (1804) (crime may be committed where "a man arms himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people"). This exception is entirely consistent with the "common use" test, since firearms in common use, by definition, cannot be considered dangerous and unusual.

In short, *Heller*'s teachings are clear: courts must employ the common use test—"a test based wholly on text, history, and tradition"—and may not engage in interest balancing. *See Heller v. District of Columbia*, 670 F.3d 1244, 1276 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*Heller II*"). As this Court explained in *Heller* itself, "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." 554 U.S. at 634. The Court later reiterated in *McDonald* that *Heller* "specifically rejected th[e] suggestion" of an "interest balancing test." 561 U.S. at 791. It also rejected the notion that judges would be required to "assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments . . . ." *Id.* at 790-91. In light of the Second Amendment, the government may prohibit only "those weapons not typically possessed by law-abiding citizens for lawful purposes[.]" *Heller,* 554 U.S. at 625. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634. In the decision

below, however, the First Circuit did exactly what this Court said lower courts should *not* be doing in adjudicating alleged violations of the Second Amendment: the court applied intermediate scrutiny and balanced the interest of the State against the burdens imposed on its citizens.

In "conclud[ing] that the Act does not heavily burden the core Second Amendment right of self-defense within the home," the First Circuit boldly proclaimed that "wielding the proscribed weapons for self-defense within the home is tantamount to using a sledgehammer to crack open the shell of a peanut." Pet. App. 20. The court further maintained that its "conclusion is reinforced by the fact that—unlike the use of handguns—the use of semiautomatic assault weapons, even in the home, does not 'implicate[ ] the safety only of those who live or visit there.'" *Id.* (citing *Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir. 2018)). "Rather," the court continued, "the use of semiautomatic assault weapons implicates the safety of the public at large. After all, such weapons can fire through walls, risking the lives of those in nearby apartments or on the street." *Id.*[2] But those concerns are inapposite to

2. In fact, the First Circuit's concern is unfounded. These firearms do not shoot through walls. *See* Pet. App. 104 (explaining that "ammunition typically used by the [b]anned [f]irearms . . . penetrate human tissue at the depth in which the FBI determined to be most desirable" while "effective shotgun ammunition's penetration range is unnecessarily deep, practically guaranteeing pass-thru shots that pose considerable danger to others in the area."). Semi-automatic rifles are actually *safer* for home defense than many handguns, which "offer far less terminal effectiveness" and "are much more difficult to fire accurately than a semiautomatic rifle," and shotguns, the most effective ammunition for which "has significantly more recoil than a []

the *threshold* inquiry under the Second Amendment. Only the choices of law-abiding, responsible citizens matter in determining whether certain weapons are "typically possessed by law-abiding citizens for lawful purposes"—not those of elected representatives, state attorneys general, or judges. *Heller,* 554 U.S. at 625.

This Court's intervention is needed to reaffirm that *Heller* means what it says, and to correct the lower court decisions that have deviated from *Heller*'s clear teachings. As then-Judge Kavanaugh has explained, "it is a severe stretch to read *Heller* . . . as consistent with an intermediate scrutiny balancing test." *Heller II,* 670 F.3d at 1284 (Kavanaugh, J., dissenting). He noted that this Court "struck down D.C.'s handgun ban because handguns have not traditionally been banned and are in common use by law-abiding citizens." *Id.* It was "not because the ban failed to serve an important government interest and thus failed the intermediate scrutiny test." *Id.* Rather, "the Court endorsed certain gun laws because they were rooted in history and tradition, not because they passed the intermediate scrutiny test." *Id.*

Judge Kavanaugh further emphasized that "[w]e need not squint to divine some hidden meaning from *Heller* about what tests to apply" because "*Heller* was up-front about the role of text, history, and tradition in Second Amendment analysis—and about the absence of a role for judicial interest balancing or assessment of costs and benefits of gun regulations." *Id.* at 1285. "Gun bans and gun regulations that are longstanding—or, put another

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semiautomatic rifle and is therefore more difficult to fire repeat shots accurately." *See* Pet. App. 144-47.

way, sufficiently rooted in text, history, and tradition—are consistent with the Second Amendment individual right," while "[g]un bans and gun regulations that are not longstanding or sufficiently rooted in text, history, and tradition are not consistent with the Second Amendment individual right." *Id.*; *see also id.* at 1276 ("I read *Heller* and *McDonald* as setting forth a test based wholly on text, history, and tradition."). Certiorari is warranted to correct the clear errors in the First Circuit's analysis and reaffirm *Heller*'s common-use standard for the other lower courts going forward.

II. The Popular Semi-Automatic Firearms And Standard-Capacity Magazines Massachusetts Has Banned Are In Common Use For Lawful Purposes.

A. Popular semi-automatic firearms like those Massachusetts has banned are commonly and lawfully used by responsible citizens across the country.

Under the proper Second Amendment standard, this case should not be close. Semi-automatic firearms like those Massachusetts has banned are commonly and lawfully used by citizens across the country, including for self-defense. As of 2013, nearly five million Americans owned semi-automatic weapons. Pet. App. 100, 175. These firearms are so popular that, between 1990 and 2015, more than 13 million rifles like those subject to Massachusetts' ban were manufactured or imported for domestic sale in the United States. Pet. App. 100; *see also* Pet. App. 16-17. ("[T]he plaintiffs have shown that, as of 2013, nearly 5,000,000 people owned at least one semiautomatic assault weapon. They also have shown that

between 1990 and 2015, Americans owned approximately 115,000,000 LCMs."). In 2017, rifles of this kind made up 18% of all retail firearm sales. *Id.* at 101. Indeed, one type of firearm Massachusetts has banned—the AR-15—is not only popular, but is "the best-selling rifle type in the United States." Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue*, 60 HASTINGS L.J. 1285, 1296 (2009).

Because semi-automatic firearms are "in common use," they are not "dangerous and unusual" and therefore are protected by the Second Amendment. *Heller*, 554 U.S. at 627. In fact, this Court has held that semi-automatic rifles of the type that fall under Massachusetts' ban are "civilian" firearms that "traditionally have been widely accepted as lawful possessions[.]" *Staples v. United States*, 511 U.S. 600, 603, 612 (1994). Additionally, these firearms are currently legal throughout the vast majority of the country, and only in recent years have some states and municipalities sought to ban them. *See infra* Section IV.

This Court's recent decision in *Caetano v. Massachusetts* further confirms that these firearms are in common use. In a per curiam opinion, this Court unanimously vacated and remanded a decision of the Massachusetts Supreme Judicial Court that refused to apply *Heller*'s common-use test in upholding Massachusetts' ban on the possession of stun guns. Justice Alito concurred in that decision, emphasizing that stun guns "are widely owned and accepted as a legitimate means of self-defense across the country," based on evidence that "hundreds of thousands of Tasers and stun guns have been sold to private citizens." *Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring) (cleaned up). On remand, the Supreme Judicial Court corrected course, "conclud[ing] that stun guns are 'arms' within

the protection of the Second Amendment" and therefore "the possession of stun guns may be regulated, but not absolutely banned." *Ramirez v. Commonwealth*, 94 N.E.3d 809, 815 (Mass. 2018). It follows *a fortiori* that the semi-automatic arms banned here—over a million and a half of which were produced or imported for sale on the domestic market in 2015 alone, Pet. App. 101—are in common use.

Federal courts around the country have similarly concluded that the banned semi-automatic firearms are in common use. As the D.C. Circuit explained, "[a]pproximately 1.6 million AR–15s alone have been manufactured since 1986, and in 2007 this one popular model 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. The Second Circuit put it even more succinctly: "This much is clear: Americans own millions of the firearms that the challenged legislation prohibits." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015); *see also Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2016), on reh'g en banc, 849 F.3d 114 (4th Cir. 2017) ("[W]e have little difficulty in concluding that the banned semi-automatic rifles are in common use by law-abiding citizens.").

Law-abiding citizens across the country use semi-automatic firearms for a variety of lawful purposes. *See* Pet. App. 84-123. Self-defense is a primary purpose, given that semi-automatic firearms are safe, accurate, ergonomic, and effective for repelling criminal attacks. Pet. App. 103, 159. According to retired FBI supervisory special agent Buford Boone, "[s]emiautomatic rifles . . . are well suited for defensive shooting—shooting use in defense of self, others, and home. Pet. App. 144. Since

"[e]ffective defensive shooting requires stopping the human aggressor as quickly as possible, [] certain attributes of semiautomatic rifles make them the ideal firearm for defensive shooting." *Id.* Attributes that makes these firearms "particularly suitable for defensive purposes" include the fact that they are relatively lightweight; can be fired with one hand; and have relatively mild recoil. *Id.* at 145. A vertical pistol grip makes it easier for a user to hold the rifle in one hand while "hold[ing] a flashlight or call[ing] 911" with the other. *Id.* at 146.

The First Circuit made much ado about "assault weapons," misleadingly referring to the banned firearms as such 38 times. But that misleading and unhelpful terminology (which Massachusetts uses as well) conflates semi-automatic firearms with fully automatic machine guns even though these are two very different types of arms. This has become a familiar tactic. The anti-gun Violence Policy Center has candidly acknowledged that the term "assault weapon" was designed to exploit "the public's confusion over fully automatic machine guns versus semi-automatic assault weapons." Josh Sugarman, Assault Weapons and Accessories in America 5-6 (1988), http://goo.gl/i9r8Nn; *see also* Dep't of the Treasury, Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles (July 6, 1989), https://goo.gl/CDLu29 (acknowledging that "it is somewhat of a misnomer to refer to [semi-automatic] weapons as 'assault rifles' " because "[t]rue assault rifles are selective fire weapons that will fire in a fully automatic mode"). Semi-automatic firearms, like those covered by the ban, "fire[] only one shot with each pull of the trigger." *Staples*, 511 U.S. at 602 n.1.

Millions of Americans use these semi-automatic firearms just as they would other firearms—for lawful purposes. A 2013 survey showed that the top two uses of the AR-15 (or other similar rifles) by ordinary citizens were self-defense and recreational hunting. Pet. App. 175. "Modern sporting rifles, particularly AR- and AK-platform rifles . . . are owned or used by tens of millions of persons in the U.S. each year for a variety of lawful purposes, including recreational and competitive target shooting, home defense, hunting, and collecting." Pet. App. 174 (testimony of James Curcuruto). Indeed, 2016 saw a 57% increase in target shooting with modern sporting rifles from 2009, with nearly 14 million Americans participating. *Id.* at 100.

Finally, semi-automatic firearms are not typically used in the commission of crimes. *See, e.g.*, FBI Study, https://bit.ly/2p0bw4D; *see also Heller II*, 670 F.3d at 1269-70 (Kavanaugh, J., dissenting) ("Moreover, semi-automatic *handguns* are used in connection with violent crimes far more than semi-automatic *rifles* are."). As Christopher Koper (one of the State's experts in the district court) noted in a much-cited 2004 study, so-called "assault weapons" "are used in a small fraction of gun crimes," largely because they "are more expensive and more difficult to conceal than the types of handguns that are used most frequently in crime." JA2117-118[3] (citation omitted); *see also* GARY KLECK, TARGETING GUNS 112 (1997) (evidence indicates that "well under 1% [of crime guns] are 'assault rifles.'").

But extensive criminal use of common firearms does not affect their constitutionality. This Court has

3. "JA" refers to the Joint Appendix filed in the First Circuit.

already struck down a ban on semi-automatic handguns in *Heller*, which are statistically used more often for criminal purposes than other types of firearms. *See, e.g.*, FBI Study, https://bit.ly/2p0bw4D. Since "[t]here is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles[,]" *Heller II*, 670 F.3d at 1269 (Kavanaugh, J., dissenting), the Massachusetts ban must fail.

B. Standard-capacity magazines like those Massachusetts has banned are commonly and lawfully used by responsible citizens across the country.

The semi-automatic firearms and standard-capacity magazines Massachusetts has banned are "in common use"—by tens of millions of Americans—"for lawful purposes like self-defense," *Heller*, 554 U.S. at 624, and are equipped with features that make them particularly effective for that purpose. But because this fact was unhelpful, the court below disregarded it in favor of an analogy. *See* Pet. App. 20. (stating that "wielding the proscribed weapons for self-defense within the home is tantamount to using a sledgehammer to crack open the shell of a peanut").

The vast majority of semi-automatic firearm owners use magazines capable of holding more than ten rounds of ammunition. In fact, these magazines are standard issue for many popular semi-automatic rifles sold in the United States. *See* Pet. App. 102, 176-77. And between 1990 and 2015, Americans owned nearly 115 million magazines capable of holding more than 10 rounds of ammunition. Pet. App. 101. This number "account[ed] for approximately 50%

of all magazines owned during this time (approximately 230,000,000)." *Id.* Their popularity is unsurprising given that nearly two-thirds of the distinct models of semi-automatic centerfire rifles listed in the 2018 edition of Gun Digest are normally sold with standard magazines that hold more than ten rounds of ammunition. Gun Digest 2018 at 441-49, 497-99 (Jerry Lee ed., 72d ed. 2017).

Lower courts across the country have recognized this fact and have identified these magazines as standard. *See, e.g.*, *New York State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 255 ("Even accepting the most conservative estimates cited by the parties and by amici, the . . . magazines at issue are 'in common use' as that term was used in *Heller*."); *Kolbe*, 813 F.3d at 174 ("[T]he record in this case shows unequivocally that [magazines holding more than 10 rounds] are commonly kept by American citizens . . . . [T]hese magazines are so common that they are standard."); *Heller II*, 670 F.3d at 1261 ("There may well be some capacity above which magazines are not in common use but . . . that capacity surely is not ten.").

Importantly, this recognition demonstrates that standard-capacity magazines are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. The sheer number of standard-capacity magazines in the United States can be explained only by their overwhelmingly lawful use, since "[c]ommon sense tells us that the small percentage of the population who are violent gun criminals is not remotely large enough to explain the massive market for magazines of more than ten rounds . . . ." David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 871 (2015); *see also Friedman v. City of Highland Park*, 784

F.3d 406, 416 (7th Cir. 2015) (Manion, J., dissenting) ("The fact that a statistically significant number of Americans use . . . large-size magazines demonstrates ipso facto that they are used for lawful purposes."). Even here, the First Circuit acknowledged that "[i]t is undisputed that the individual plaintiffs are . . . law-abiding, responsible citizens." Pet. App. 11.

Many Americans keep and use standard-capacity magazines for self-defense. This makes sense. "[S]tandard capacity magazines (those for which the firearm was designed) are appropriate and potentially necessary for successful defense of oneself or home." Pet. App. 144. A law-abiding citizen increases her opportunity to repel an attacker by increasing her capacity of attacker-stopping ammunition. When a citizen faces multiple attackers—a common occurrence in violent crime—this is particularly important. The leading survey of defensive gun use found that more often than not the defenders were being attacked by more than one person. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150, 186 (1995). In 2008 alone, 797,139 violent crime incidents occurred in the U.S. in which the victims faced multiple offenders—17.4% of all violent crimes. Bureau of Justice Statistics, Criminal Victimization in the United States, 2008 Statistical Tables tbl.37 (2010). And in 247,388 of these violent crimes the victim faced four or more offenders. *Id.* Given these statistics, it is no surprise that citizens commonly use guns to defend themselves and opt to carry more ammunition. As retired Agent Boone testified below, "[a] limit on a magazine's capacity may hinder defensive shooting." Pet. App. 147-48. This is "evidenced by the fact that nearly all

law enforcement agencies, including the FBI, issue their officers magazines capable of holding more than 10 rounds of ammunition." *Id.*

In sum, there is no serious question that popular, standard-capacity magazines like the ones Massachusetts has banned here are "in common use for lawful purposes like self-defense." *Heller*, 554 U.S. at 624.

III. Because It Bans An Entire Class Of Protected Arms, Massachusetts' Law Is Categorically Unconstitutional.

Under *Heller*'s common-use standard, the Second Amendment undoubtably protects the firearms and magazines Massachusetts has banned. *Heller* also specifies the subsequent analytical steps in the constitutional analysis once that threshold finding has been made. Because the Second Amendment "elevates" the rights it protects "above all other interests," a law that effectively destroys its "core protection" must be held categorically unconstitutional, not "subjected to a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634. This is just such a law. Massachusetts does not merely regulate or marginally restrict the use of protected firearms and magazines; it instead bans outright the very possession of a whole class of arms commonly possessed for lawful purposes such as self-defense. Astonishingly, that ban applies even in "the home, where the need for defense of self, family, and property is most acute." *Id.* at 628. Accordingly, Massachusetts' ban is per se unconstitutional.

"Under [this Court's] precedents, that [a firearm is in common use] is all that is needed for citizens to have a right under the Second Amendment to keep such weapons." *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of cert.). Specifically, *Heller* instructs that a court need only determine whether prohibited firearms are "arms" protected by the Second Amendment. This Court has emphasized that, once that threshold finding has been made, any other considerations are off-limits, including a balancing of allegedly competing public policy considerations: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35.

As discussed above, *see supra* Section II.A, courts have no discretion to "balance" these fundamental rights against even the most pressing public policy concerns. Indeed, even extensive criminal use of common firearms would not affect their constitutionality. This Court previously found the District of Columbia's ban on the possession of handguns to be unconstitutional notwithstanding social science research indicating that such arms are much more commonly used in violent crime than the semi-automatic weapons Massachusetts has banned here. As Justice Breyer noted in dissent in *Heller*, it is indisputable that handguns "are the overwhelmingly favorite weapon of armed criminals." *Id.* at 682 (Breyer, J., dissenting). "From 1993 to 1997," for example, "81% of firearm-homicide victims were killed by handgun," and

"[i]n a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates and 86.7% of federal inmates said that they were armed with a handgun." *Id.* at 697-98.

Massachusetts' invocation of public safety interests to justify its ban on these semi-automatic rifles (which, again, are responsible for "well under 1%" of gun crimes, KLECK, TARGETING GUNS, *supra*, at 112) mirrors the same, failed rationale that was rejected in *Heller*. The majority in *Heller*, was unswayed by the District's professed interest in preventing violent crime, except to note that while "[t]he Constitution leaves the District of Columbia a variety of tools for combating that problem . . . the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 636.

In *Heller*, this Court rejected any attempt to balance citizens' rights under the Second Amendment against the government's alleged public-safety interest. Indeed, the majority expressly rejected Justice Breyer's proposed "interest-balancing" approach to the Second Amendment, which would have drawn on "First Amendment cases applying intermediate scrutiny." *Id.* at 704 (Breyer, J., dissenting). Such a "judge-empowering 'interest-balancing inquiry'" that could overcome a constitutional right "is no constitutional guarantee at all." *Id.* at 634 (majority opinion). The majority's reasoned conclusion forecloses any intermediate-scrutiny analysis. As even a former Brady Center attorney has recognized, those courts that have adopted such an analysis in the Second Amendment context have "effectively embraced the sort

of interest-balancing approach" that the Supreme Court "condemned" in *Heller*. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 706-07 (2012).

This Court was adamant that state restrictions that cut to the core of the Second Amendment right must be struck down categorically, not weighed under a judge-empowering "tiers-of-scrutiny" approach. In *McDonald*, this Court held that the Second Amendment is incorporated through the Fourteenth Amendment, and thus applies to the states as well as the federal government. Writing again in dissent, Justice Breyer argued against this incorporation of the right to keep and bear arms, asserting that "determining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions." 561 U.S. at 922 (Breyer, J., dissenting). But the controlling plurality opinion squarely rejected this argument, asserting that "Justice Breyer is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions . . . . [W]hile his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion." *Id.* at 790-91 (plurality opinion). Instead, as the majority in *McDonald* explained, *Heller* "found that [the Second Amendment] right applies to handguns," and thus concluded that "citizens must be permitted to use" them. *Id*. at 767-68 (cleaned up).

This Court's decision in *Caetano* further confirms that *Heller*'s categorical test as the governing one. *Caetano* vacated a state court opinion upholding Massachusetts' ban on the possession of stun guns. Although this Court remanded the case to the state court rather than striking

down Massachusetts' law outright, Justice Alito filed a concurring opinion emphasizing that under the correct Second-Amendment analysis—*Heller*'s categorical approach—the law is plainly unconstitutional. As Justice Alito explained, "[w]hile less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment." *Caetano,* 136 S. Ct. at 1033 (Alito, J., concurring)). On remand, the Massachusetts Supreme Judicial Court agreed: "the absolute prohibition . . . that bars all civilians from possessing or carrying stun guns, even in their home, is inconsistent with the Second Amendment and is therefore unconstitutional." *Ramirez,* 94 N.E.3d at 815.

Several lower federal courts have since agreed that "'complete prohibition[s]' of Second Amendment rights are always invalid," and must be found unconstitutional "without bothering to apply tiers of scrutiny because no such analysis could ever sanction obliterations of an enumerated constitutional right." *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) (quoting *Heller*, 554 U.S. at 629); *see also Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (striking down categorical ban on carrying arms); *Young v. Hawaii*, 896 F.3d 1044, 1070-71 (9th Cir. 2018) (Hawaii law that "amounts to a destruction of the core Second Amendment right to carry a firearm openly for self-defense . . . is unconstitutional under any level of scrutiny") (cleaned up). The *Heller* analysis thus suffers no problems attributable to legitimacy, clarity or logic.

Like the bans at issue in *Caetano*, *McDonald*, and *Heller* itself, Massachusetts' law "amounts to a prohibition of an entire class of 'arms,'" *Heller*, 554 U.S. at 628, that "are widely owned and accepted as a legitimate means of self-defense across the country," *Caetano*, 136 S. Ct. at 1033 (Alito, J., concurring). Under all three of those opinions, that must be the end of the constitutional analysis, not the beginning. No matter how compelling a state's interest in public safety may be—and no matter how narrowly it tailors its means to that end—a flat ban on the possession of arms that are in common use for lawful purposes is simply "off the table." *Heller*, 554 U.S. at 636.

IV. The Issues Presented Here Are Of Significant National Importance In Light Of The Proliferation Of Similar Measures By States And Municipalities.

Certiorari is also warranted because the questions presented here are of significant and increasing national importance and are certain to recur absent this Court's intervention. Perhaps spurred by some lower courts' unwillingness to faithfully apply *Heller*, a number of states and municipalities have adopted laws similar to the Massachusetts statutes at issue here that ban certain types of commonly used magazines or firearms.

Since 2008, California, Colorado, Connecticut, the District of Columbia, New Jersey, New York, and Vermont have all banned certain types of standard-capacity magazines. *See* Cal. Penal Code § 32310; Colo. Rev. Stat. §§ 18-12-301, 18-12-303; Conn. Gen. Stat. Ann. § 53-202w; N.J. Stat. Ann. 2C:39-1, 2C:39-3; N.Y. Penal Law §§ 265.36, 265.37; 13 Vt. Stat. Ann. § 4021. Several states have also banned certain types of commonly used

semi-automatic firearms. *See*, *e.g.*, Conn. Gen. Stat. Ann. § 53-202c; D.C. Code Ann. §§ 7-2501.01, 7-2502.02; Md. Code Ann., Crim. Law §§ 4-301—4.306; N.Y. Penal Law §§ 265.00, 265.02, 265.10, 400.00. A number of cities or municipalities have also enacted bans on certain types of firearms or magazines, including San Francisco, Los Angeles, Boulder, and Pittsburg. *See* Los Angeles Mun. Code Ch. IV, Art. 6.7, § 46.30; S.F. Police Code Art. 9 Sec. 619; Boulder Mun. Code 5-8-28; Pittsburgh Bill Nos. 2018-1218, 2018-1219.

In sum, this case implicates questions of considerable national importance that warrant immediate resolution by this Court. Given the proliferation of state and local ordinances that seek to ban certain types of commonly used firearms or accessories, it is imperative for this Court to grant certiorari to provide much-needed guidance to the lower courts about the proper application of the common-use test and the proper level of scrutiny in Second Amendment cases.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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