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 Writ of Certiorari to the United States Court of Appeals for the First Circuit**

# REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI


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## REPLY BRIEF

Respondents' Brief in Opposition confirms that the decision below conflicts directly with this Court's decision in *District of Columbia v. Heller*, which held that a ban on bearable arms typically possessed for lawful purposes is unconstitutional under the Second Amendment's text, history, and tradition. There is no dispute that Massachusetts bans semiautomatic firearms and standard capacity magazines typically possessed for lawful purposes. Respondents do not even attempt to reconcile the lower court's approval of this ban with *Heller*. Rather, Respondents confirm that the lower courts have rejected *Heller*'s text, history, and tradition standard to uphold bans on protected arms under a variety of approaches.

Respondents' primary argument is that certiorari should not be granted because the court below and other lower courts consistently uphold bans on protected arms, notwithstanding the absence of consensus on a doctrinal approach. Opp. at 11. But none of these approaches applied by the lower courts comport with *Heller*'s standard.

The lower court assumed that the banned arms are protected but went on to uphold the ban under a two-part approach. Because protected arms cannot constitutionally be banned under *Heller*, Respondents urge another test that would exclude the banned arms from the Second Amendment entirely. *See* Opp. at 16 (arguing that the court below should have determined the scope of the Second Amendment by using the "most useful in military service" test fashioned by the Fourth Circuit rather than the lower court's two-part approach or this Court's text, history, and tradition standard).

This Court's review is necessary to stem the continuing erosion of citizens' fundamental Second Amendment rights. Millions of law-abiding, responsible citizens are being denied their right to keep protected arms in their homes. This Court should grant the writ to confirm that Massachusetts' ban is inconsistent with the Second Amendment's text, history, and tradition because the arms at issue are typically possessed for lawful purposes.

## I. Respondents confirm that the First Circuit rejected *Heller* to uphold an unconstitutional ban of protected arms.

The First Circuit held that Massachusetts may ban entire classes of arms that are typically possessed for lawful purposes. App. 28–29. In so doing, the court rejected the text, history, and tradition standard set forth in *Heller* and "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). Review is needed to guide the lower courts, which are united only in their rejection of *Heller* to uphold bans on the possession of common firearms. *See Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) ("The lower court's ill treatment of *Heller* cannot stand.") (Alito, J., concurring).

The First Circuit's rejection of *Heller* is self-evident. *Heller* held that the Second Amendment protects all bearable arms that are "typically possessed . . . for lawful purposes" and that a law banning a protected arm is unconstitutional. 554 U.S. 570, 625 (2008). If a review of the text, history, and tradition demonstrates that the arm historically would not have been banned because it is typically possessed by law-abiding citizens for lawful purposes,

then the government may not ban it. That is the end of the analysis when it comes to review of a ban on bearable arms. *Id*. at 634–35.

The First Circuit refused to apply *Heller*'s standard. Instead, it drew upon prior decisions within that circuit and other circuits to apply a two-part approach that is inconsistent with *Heller*'s standard, which does not allow for interest balancing. *Id*. at 634–36. The critical flaw in the First Circuit's reasoning is evident. The court "assumed, albeit without deciding" that the Second Amendment protects the banned arms. App. 18. This assumption should have ended the question: Massachusetts' ban is unconstitutional. *Heller*, 554 U.S. at 636.

Instead, the First Circuit did precisely what *Heller* forbids: it went on to apply an interest balancing test that asked whether the Second Amendment right at issue was "really worth insisting upon." *Heller*, 554 U.S. at 634. The First Circuit's disregard of *Heller*'s core holding reflects the lower courts' disregard for Second Amendment rights and demonstrates the extent to which those rights have already been eroded. *Caetano*, 136 S. Ct. at 1033 (Alito, J., concurring).

Because Respondents cannot plausibly argue that *Heller* endorsed interest balancing, they argue that an interest balancing test—intermediate scrutiny—is appropriate because *Heller* did not reject intermediate scrutiny by name. Opp. at 20 (arguing that *Heller* rejected only the interest balancing test proposed by Justice Breyer's dissent in *Heller*). This argument ignores that the interest balancing test rejected by *Heller* was premised upon a case applying intermediate scrutiny. *See Heller*, 554 U.S. at 690

(Breyer, J., dissenting) (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195–96 (1997)). When *Heller* rejected the interest balancing test advanced by the dissent, it rejected intermediate scrutiny as a standard for reviewing a ban of protected arms.

Were there any doubt after *Heller* that the Second Amendment forbids interest balancing, this Court dispelled it in *McDonald*, a case virtually ignored by the lower courts. *See McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010). *McDonald* declared there would be no need for "judges to assess the costs and benefits of firearms restrictions and thus [] make difficult empirical judgments in an area in which they lack expertise" because, "while [Justice Breyer's dissenting] opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion." *Id.* at 790–91. Respondents' argument that many lower courts have adopted intermediate scrutiny only underscores the urgent need for this Court's review.

Analyzing a constitutional challenge using only text, history, and tradition is not unique to the Second Amendment. The Seventh Amendment is anolgous in this regard. Both the Second and Seventh Amendments protect pre-existing rights. *Compare Heller*, 554 U.S. at 603 (Second Amendment protects pre-existing right to keep and bear arms), *with City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999) (Seventh Amendment protects common law right to jury trial) (plurality opinion). This Court analyzes challenges under both Amendments using only an historical analysis. *Compare Heller*, 554 U.S. at 603 (requiring text, history, and tradition standard to analyze Second

Amendment challenges), *with Monte Dunes*, 526 U.S. at 708 (explaining the historical inquiry in the Seventh Amendment context as whether an issue was "tried at law at the time of the founding or is at least analogous to one that was" and if so, "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.") (internal citations omitted). Neither the Second Amendment nor Seventh Amendment is analyzed under an interest balancing test.

The First Circuit's rejection of *Heller*'s central holdings caused it to reach the wrong result. It is undisputed that the banned arms are typically possessed for many lawful purposes, App. 99–114, 174. And it is indisputable that a ban on these arms is inconsistent with the Second Amendment's text, history, and tradition because there is no historical tradition for banning arms that are typically possessed for lawful purposes. This Court should grant review to correct the lower court's fundamental error in rejecting *Heller*.

## II. Respondents confirm that the lower courts have rejected *Heller*, creating doctrinal splits among the courts.

The First Circuit's interest balancing cannot be reconciled with *Heller* and *McDonald*. But because the lower court assumed the banned arms are protected, Respondents argue as an alternative basis for affirmance that the banned arms fall outside the Second Amendment under the Fourth Circuit's opinion in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc). *See* Opp. at 16. In *Kolbe*, the Fourth Circuit created a test to determine whether an arm is

protected by the Second Amendment: if the arm is "most useful in military service," then it may be banned. *Kolbe*, 849 F.3d at 136. This test derives from the Fourth Circuit's misinterpretation of *Heller*'s dicta—that "sophisticated arms that are highly unusual in society at large" and "most useful in military service," like "M-16 rifles[,] . . . bombers and tanks," fall outside the Second Amendment's protection. *Heller*, 554 U.S. at 627. *Kolbe* transposed this dicta with *Heller*'s actual holding. "[O]biter dicta . . . may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." *Williams v. United States*, 289 U.S. 553, 568 (1933) (internal quotation omitted). This is all the more true where, like in *Kolbe* and the district court's opinion in this case, the dicta reverses *Heller*'s core holding—that the government may not ban arms typically possessed for lawful purposes. Tellingly, the "most useful in military service" test has never been adopted or applied by any other court. Semiautomatic rifles are not "most useful in military service;" instead they are historically understood to be lawful civilian firearms. *Staples v. United States*, 511 U.S. 600, 612 (1994).

Despite the fact that Respondents argue for a test other than what the First Circuit applied, and despite the fact that the district court and circuit court in this case applied different tests, Respondents yet maintain that there is no split among the lower courts in Second Amendment cases. Opp. at 11. Respondents' facile view ignores the reality that there are separate, divergent, and conflicting tests being applied in various jurisdictions. *See* Pet. at 18–27.

Respondents have confirmed that there are multiple, distinct methodologies being applied to Second Amendment challenges, including the *Kolbe* standard, the two-part approach with intermediate scrutiny used by the First Circuit, and this Court's controlling *Heller* standard that Respondents dismiss. But even these disparate methodologies do not exhaust all the doctrinal splits that have arisen.

The Seventh Circuit, for instance, has adopted three different frameworks. *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 v. City of Highland Park, Ill.*, 784 F.3d 406, 410–12 (applying a standard 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). In the Seventh Circuit, whether an arm is protected by the Second Amendment depends entirely on the makeup of the three-judge panel that decides the case. None of these frameworks comports with *Heller* because none examines whether the banned arms are typically possessed for lawful

purposes, and all of these frameworks differ from each other.

These ongoing doctrinal splits have produced a muddled and unpredictable area of law, divorced from the teachings of *Heller* and *McDonald*. *See, e.g.*, *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1155 (S.D. Cal. 2019) (noting 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"). The various iterations of the two-part approach are even more perplexing, leading the Southern District of California to label this morass: "The Tripartite Binary Test with a Sliding Scale and a Reasonable Fit." *Id.* at 1154. In practice, how a given firearm regulation is reviewed depends upon the circuit in which it is challenged. For example, in the Fourth Circuit, only arms not useful in military service are protected by the Second Amendment. This bizarre standard protects arms like sawed-off shotguns, the very arm this Court deemed unprotected in *United States v. Miller*, 307 U.S. 174 (1939). And, this standard is diametrically opposed to the one used in *Friedman*, where that panel held that arms useful in military service are protected. 784 F.3d at 410–12.

The lower courts' fractured Second Amendment jurisprudence fails to protect the fundamental right and produces inconsistent and unconstitutional results. Only this Court can ensure that the Second Amendment is not relegated to second class status as a politically disfavored right.

## CONCLUSION

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

Respectfully submitted,

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