No. _____

In The
Supreme Court of the United States

MATTHEW D. WILSON and TROY EDHLUND,

Petitioners,

v.

COOK COUNTY, a public body and corporate, TONI PRECKWINKLE, Board President, in her official capacity, and its Board of Commissioners in their official capacities, namely: JERRY BUTLER, DEBORAH SIMS, PETER N. SILVESTRI, JOHN F. DALEY, LARRY SUFFREDIN, GREGG GOSLIN, TIMOTHY O. SCHNEIDER, LUIS ARROYO JR., RICHARD R. BOYKIN, DENNIS DEER, JOHN A. FRITCHEY, BRIDGET GAINER, JESUS G. GARCIA, EDWARD M. MOODY, STANLEY MOORE, SEAN M. MORRISON, JEFFREY R. TOBOLSKI, and THOMAS DART, Sheriff of Cook County, in his official capacity,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Cook County, Illinois, prohibits its residents from possessing a class of rifles and magazines that are among the most commonplace in the United States.

The questions presented are:

1. Whether the Second Amendment to the United States Constitution allows a local government to prohibit law-abiding residents from possessing and protecting themselves and their families with a class of rifles and ammunition magazines that are "in common use at [this] time" and are not "dangerous and unusual."

2. Whether the Seventh Circuit's method of analyzing Second Amendment issues – a three-part test which asks whether (1) a regulation bans weapons that were common at the time of ratification or (2) those that have some reasonable relationship to the preservation or efficiency of a well-regulated militia and (3) whether law-abiding citizens retain adequate means of self-defense – is consistent with this Court's holding in *Heller*.

LIST OF PARTIES AND SUP. CT. RULE 14 DISCLOSURES

Petitioners Matthew D. Wilson and Troy Edhlund initiated the proceedings below by filing a complaint against Respondents Cook County, a public body and corporate, Toni Preckwinkle, Board President, in her official capacity, and its Board of Commissioners in their official capacities, namely: Jerry Butler, Deborah Sims, Peter N. Silvestri, John F. Daley, Larry Suffredin, Gregg Goslin, Timothy O. Schneider, Luis Arroyo Jr., Richard R. Boykin, Dennis Deer, John A. Fritchey, Bridget Gainer, Jesus G. Garcia, Edward M. Moody, Stanley Moore, Sean M. Morrison, Jeffrey R. Tobolski, and Thomas Dart, Sheriff of Cook County, in his official capacity.

RELATED CASES

Matthew D. Wilson, et al. v. Cook County, et al., No. 2007 CH 4848 (Cook County Circuit Court). Voluntarily dismissed on July 28, 2016, and refiled as No. 2017 CH 10345 (Cook County Circuit Court) on July 28, 2017.

Matthew D. Wilson, et al. v. Cook County, et al., 394 Ill. App. 3d 534 (Ill. App. 1st Dist., August 9, 2009); *reh. den.* 2009 Ill. App. LEXIS 1400 (Ill. App. 1st Dist., Sept. 25, 2009).

Matthew D. Wilson, et al. v. Cook County, et al., 237 Ill.2d 593 (2010) (Sept. 29, 2010).

Matthew D. Wilson, et al. v. Cook County, et al., 407 Ill. App. 3d 759 (Ill. App. 1st Dist., February 9, 2011).

Matthew D. Wilson, et al. v. Cook County, et al., 2012 IL 112026 (2012) (April 5, 2012).

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioners, Matthew D. Wilson and Troy Edhlund, respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISIONS BELOW

The decisions of the United States Court of Appeals for the Seventh Circuit are reported at 937 F.3d 1028 (7th Cir. 2019), and are reprinted in the Appendix (App.) at App. 1. The decision of the United States District Court for the Northern District of Illinois in this case is captioned *Edhlund v. Cook County* and is at 2018 U.S. Dist. LEXIS 130507 (N.D. Ill. 2018) (reprinted at App. 20).

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 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."

The relevant section of Cook County Code § 54-90, *et seq.* (the Cook County Deadly Weapons Dealer Control Ordinance), commonly known as the Blair Holt Assault Weapons Ban, and codified at Cook County Code §§ 54-211 – 215, is reprinted at App. 28.

INTRODUCTION

The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). "The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" *Id.*

This Court further explained that arms protected under the Second Amendment are "those 'in common use at the time.'" *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). The Court explained this referred to "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 627.

Despite the logical conclusion that arms cannot both be "in common use" and "unusual," the lower courts in this case, and indeed in other courts that have considered the issue, have concluded that an entire class of arms typically used by law-abiding persons

throughout America for lawful purposes such as self-defense nonetheless can be banned from possession and use, with rationales and justifications that ignore *Heller*'s clear holdings.

In this case, the Seventh Circuit has employed a three-part test unlike any in the Nation, with elements found nowhere else in Second Amendment jurisprudence, and which flatly contradict *Heller* while claiming to comport with it. *See Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015). Compounding the muddle, this test is just one of multiple methods of analyzing Second Amendment cases within the Seventh Circuit.

"Freedom resides first in the people without need of a grant from government." *Hollingsworth v. Perry*, 570 U.S. 693, 727 (2013) (Kennedy, J., dissenting). It has been the Respondents' burden to justify their restriction on fundamental rights. *See*, *e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 708-09 (7th Cir. 2011). In *City of L.A. v. Alameda Books*, 535 U.S. 425 (2002), this Court held:

> This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in

> *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39.

In addition to a test that is the opposite of *Heller*'s holding, the Seventh Circuit's *Friedman* test is justified only by the reduction of fear, which is not an actual governmental purpose, but only a smoke-and-mirrors version of one. Since the ultimate question in this case is the same as in *Friedman*, Respondents have therefore not met their burden under *Alameda Books*, as all the "evidence" Respondents have ever offered is they are worried something may happen. That is not good enough. While the State may regulate firearms in a constitutional manner, the current ban enforced against the Petitioners and the millions of law-abiding residents of Cook County, Illinois is not constitutional.

Further, this case is just one example of how the lower courts have twisted and minimized *Heller*'s holdings until, in virtually all of the lower courts, *Heller* stands for nothing except the right to have a handgun in one's home. If the Second Amendment is to mean anything else, most lower courts hold in virtually all other factual scenarios, this Court will have to explicitly say it. The lower courts have spent a decade practically daring this Court to elaborate on the scope and method of analyzing the Second Amendment right, using the silence not as an opportunity to fill the void,

but as a justification for sidestepping it. *See*, *e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1265 (D.C. Cir. 2011) (*Heller II*) ("If the Supreme Court truly intended to rule out any form of heightened scrutiny for all Second Amendment cases, then it surely would have said at least something to that effect."); *see also*, *e.g.*, *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) ("If the Supreme Court, in [*McDonald*'s] dicta, meant its holding to extend beyond home possession, it will need to say so more plainly." (Wilkinson, J., concurring); *see also Hightower v. City of Boston*, 693 F.3d 61, 74 (1st Cir. 2012) ("[W]e should not engage in answering the question of how *Heller* applies to possession of firearms outside of the home, including as to 'what sliding scales of scrutiny might apply . . . ' the whole matter is a 'vast *terra incognita* that courts should enter only upon necessity and only then by small degree.' ").

Petitioners thus ask this Court to grant their writ and set clear standards for Second Amendment review, not only for the lower court in this case, but for the other courts that must address the Second Amendment issues and challenges that inevitably come before them. This standard should follow *Heller* and the Second Amendment's original intent, to allow law-abiding persons to use arms commonly possessed for lawful purposes in order to engage in the inalienable right of self-defense. *Certiorari* should be granted and the ordinance must be enjoined.

STATEMENT OF THE CASE

1. Cook County's Ordinance.

Beginning in 1993, and amended into its current form in July, 2013, Cook County, Illinois ("the County" or "Cook County"), categorically barred its residents from possessing some of the most commonly-owned firearms and magazines in America. Cook County Ordinance ("CCO") §§ 54-211 – 215 serves to prohibit the sale, transfer, purchase, and possession of certain semi-automatic firearms, chiefly semi-automatic rifles that accept magazines containing more than ten rounds of ammunition and possess one or more of five enumerated features:

> (A) Only a pistol grip without a stock attached;
>
> (B) Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand;
>
> (C) A folding, telescoping or thumbhole stock;
>
> (D) A shroud attached to the barrel, or that partially or completely encircles the barrel, allowing the bearer to hold the firearm with the non-trigger hand without being burned, but excluding a slide that encloses the barrel; or
>
> (E) A muzzle brake or muzzle compensator.

CCO § 54-211. The Ordinance also bans many specific rifle models, including the common AR-15. *Id.* at § 54-211(7)(A)(iii).

The Ordinance also prohibits "Large Capacity Magazines," defined as "any ammunition feeding device with the capacity to accept more than ten rounds, but shall not be construed to include the following:

(1) A feeding device that has been permanently altered so that it cannot accommodate more than ten rounds.

(2) A 22-caliber tube ammunition feeding device.

(3) A tubular magazine that is contained in a lever-action firearm."

Id. at § 211, 212 (collectively referred to herein as "Banned Arms").

Defendants label its banned collection of semi-automatic firearms as "assault weapons," but this is a made-up and misleading term. "Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists." *Stenberg v. Carhart*, 530 U.S. 1001 n.16 (2000) (Thomas, J., dissenting) (quoting Bruce H. Kobayashi & Joseph E. Olson, In Re 101 California Street, 8 STAN L. & POLY REV. 41, 43 (1997)). Indeed, the Executive Director of the anti-gun rights Violence Policy Center has candidly acknowledged that the debate over "assault weapons" exploits "the public's confusion over fully automatic machine guns versus semi-automatic assault weapons." Josh Sugarmann, *Assault Weapons and Accessories in America* (1988), http://www.vpc.org/publications/assault-weapons-and-accessories-in-america/assault-weapons-and-accessories-in-america-conclusion/ (last viewed November 24, 2019).

As evidence of the Respondents' willingness to exploit this confusion, the Respondents used three pages of text just to define the "assault weapons" they are prohibiting, including a list of over 60 types of firearms that were included by mere decree. *See* CCO § 54-211(7)). This demonstrates the term "assault weapon" is not based on the actual design or functionality of the disfavored firearms, but merely how the Respondents find them aesthetically displeasing or "scary" to view.

The firearms banned by the County are not the machine guns which are heavily-regulated under federal law, and this Court has explicitly noted the difference. In *Staples v. United States*, 511 U.S. 600, 603 (1994), the Court explained:

> the terms "automatic" and "fully automatic" refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are "machineguns" within the meaning of the Act.
>
> And:
>
> We use the term "semiautomatic" to designate a weapon that fires only one shot with each pull of the trigger, and which requires no manual manipulation by the operator to place

> another round in the chamber after each round is fired.

Id. at 602, n.1.

The former category describes machine guns, which, along with sawed-off shotguns and artillery pieces, the Court called "quasi-suspect" in the same vein as hand grenades. *Id.* at 611-12.

The latter category, which the Court characterized as being "widely accepted as lawful possessions," *id.* at 612, contains what is banned under the County Ordinance.

2. The Petitioners and the Ordinance's Application.

Matthew D. Wilson is a natural person and resident of Brookfield, Cook County, Illinois. Wilson is a law-abiding citizen having never been convicted of a crime, and who possesses the said firearms for self-protection and protection of his wife in their home, and for target shooting. He has a FOID card issued by the Illinois State Police pursuant to the Illinois FOID Act, 430 ILCS 65/1, *et seq*., and is entitled to possess firearms in his residence.

Troy Edhlund is a natural person and a resident of Rolling Meadows, Cook County, Illinois. Edhlund is a law-abiding citizen who has never been convicted of a crime, and who possesses the said firearms for self-protection and protection of his wife and two children in their home, as part of a collection, and for target

shooting and hunting. He possesses a FOID card issued by the Illinois State Police pursuant to the Illinois FOID Act, 430 ILCS 65/1, *et seq.*, and is entitled to possess firearms in his residence.

The Petitioners are licensed to possess firearms generally, but are prohibited by the challenged County Ordinance from possessing certain semi-automatic rifles and pistols, labeled as "assault weapons," or any large capacity magazines ("LCMs").

The individual Petitioners would possess and use for self-defense the banned firearms and LCMs, but refrain from doing so because they fear arrest, prosecution, fine, confiscation of property, and imprisonment as it is unlawful in Cook County, Illinois, to possess such firearms and LCMs.

3. Procedural History.

Petitioners filed suit in state court in Cook County, Illinois, on February 21, 2007 (2007 CH 4848). On April 29, 2008, the Cook County Circuit Court granted a Motion to Dismiss, which was twice appealed to the Illinois Supreme Court, which eventually partially reversed the dismissal and remanded to the Circuit Court for further proceedings. 2012 IL 112026 (2012). On July 28, 2016, Petitioners voluntarily dismissed their suit.

Petitioners refiled this matter in Cook County Circuit Court on July 28, 2017, as Case No. 2017 CH 10345. On September 28, 2017, the Defendants removed the

case to the Northern District of Illinois pursuant to 28 U.S.C. § 1441 as Case No. 1:17 CV 7002.

On August 3, 2018, the District Court granted Defendants' Fed. R. Civ. P. 12(b)(6) Motion to Dismiss. On August 6, 2018, the Petitioners filed a Notice of Appeal. On August 29, 2019, the Seventh Circuit affirmed. 742 F.3d 775 (7th Cir. 2019) (App. 1).

The *per curiam* panel held that there is no legal distinction between the Village of Highland Park (pop. 29,000) and the County of Cook (pop. 5 million plus), and that with the Ordinances in *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) and this case being nearly identical, there was no need for County-specific discovery as to the *Friedman* test elements, including the *Friedman* "adequate means of self-defense" factor (App. 13-14). The lower court wrote this despite holding in *Friedman* itself that "[t]he best way to evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate. . . ." *Friedman*, 784 F.3d at 412.

The lower court also held that *Friedman* is compatible with *Heller* and "fits comfortably under the umbrella" of *Ezell*. The court reiterated its belief that it was proper to tie the category of protected arms to those which "have some reasonable relationship to the preservation or efficiency of a well-regulated militia" (App. 16), notwithstanding that *Heller* specifically stated that protected arms are those "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. The lower court further held that the

"adequate means of self defense" element was "an application and extension" of *Ezell*'s principles, notwithstanding the *Heller* Court's admonition that it is not permissible to ban one sort of protected firearm simply because a different one is allowed, *see Heller*, 554 U.S. at 629, or that the *Friedman* Court rejected a level of scrutiny analysis in favor of its own test. *Friedman*, 784 F.3d at 410.

Finally, the lower court reiterated with approval the speculative "benefits" stated in *Friedman* that the categorical ban "may reduce the overall dangerousness of crime" (*Friedman*, 784 F.3d at 412) and "may increase the public's sense of safety." *Id.* (App. 18). This is notwithstanding Justice Thomas' apt observation that "[i]f a broad ban on firearms can be upheld based on conjecture that the public might feel safer (while being no safer at all), then the Second Amendment guarantees nothing." *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of *certiorari*).

Therefore, the lower court declined to revisit *Friedman*, and refused the Petitioners the opportunity to factually distinguish this case from *Friedman*.

REASONS FOR GRANTING THE PETITION

I. Review Is Needed Because the Lower Court's Continued Reliance on Friedman Completely Contradicts and has Strayed Far From the Principles of *Heller*.

The Second Amendment 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." The Supreme Court stated in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. The enumerated right to possess a firearm for lawful purposes, most notably for self-defense, is fundamentally core to the Second Amendment. *Heller*, 554 U.S. at 629. *See also McDonald*, 561 U.S. at 778. This right "is fully applicable to the States." *McDonald*, 561 U.S. at 750.

Under *Heller*, "the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582.

The Second Amendment protects a right to possess those weapons typically possessed by law-abiding citizens for lawful purposes. *See Heller*, 554 U.S. at 625. The Court only excluded from that guarantee "those weapons not typically possessed by law-abiding citizens for lawful purposes," *id.* at 625, sometimes also

referring to those excluded as "dangerous and unusual."

Further, "[c]onstitutional 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. The Second Amendment "is fully applicable against the States." *McDonald*, 561 U.S. at 750.

St. George Tucker wrote: "Wherever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." Tucker, *View of the Constitution of the United States*, 1 Blackstone's Commentaries, ed. app. at 300 (1803). *Heller* endorsed this passage from Tucker. 554 U.S. at 606.

In *United States v. Miller*, 307 U.S. 174 (1939), the Court found that "the type of weapon at issue [a short-barreled shotgun] was not eligible for Second Amendment protection," *Heller*, 554 U.S. at 622 (emphasis omitted), because short-barreled shotguns were not commonly kept for lawful purposes by responsible, law-abiding citizens, *see Miller*, 307 U.S. 174. This last portion encapsulates the proper test for analyzing whether a firearm restriction violates the Second Amendment.

Despite the teachings in *Heller* and *McDonald*, the lower court decided in *Friedman* that a Highland Park, Illinois ordinance did not violate the Second

Amendment in banning certain arms – comparable to the Banned Arms in this case – in a manner comparable to the County Ordinance pending here.

Friedman departed from *Heller* (and diverted around *Ezell*, as discussed *infra*), by articulating a different, three-part standard for analyzing that issue, asking:

1. Whether the banned arms were in common use when the Second Amendment was ratified?

2. Whether the arms at issue are suitable for militia use?

3. Whether outlawing the banned arms preserves adequate means of self-defense for those subject to the ban?

Friedman, 784 F.3d at 410-11.

Friedman observed, correctly, that arms like the Banned Arms were not extant at ratification. *Id.* at 410. *Friedman* then deferred to the legislative and executive branches of Illinois state government to answer whether arms like the Banned Arms are suitable for militia use, answering in the affirmative. *Id*. at 410-11.

Last, *Friedman* asked whether those in Highland Park – while denied arms like the Banned Arms – still had means to adequately defend themselves, but then deferred to the legislative branch of local government in Highland Park for the answer. *Id*. at 411.

For the following reasons, this Court should review this case and declare that the lower court's use of the *Friedman* standard violates the Second Amendment and the holding in *Heller*:

A. The "Common at the Time of the Second Amendment" Test Violates *Heller*.

The first part of the *Friedman* test asks whether the Banned Arms were in common use when the Second Amendment was ratified. *Friedman*, 784 F.3d at 410. Obeying *Friedman*, the District Court asked this question and answered the same as Friedman: "no." (App. 24).

Yet, *Heller* admonished against using this as a factor when analyzing Second Amendment questions:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

Heller, 554 U.S. at 582 (internal citations omitted).

This Court reiterated that holding in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016): "The Court has

held that "the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. . . ." *Id.* (quoting *Heller*, 554 U.S. at 582).

Petitioners urge this Court to review and reject the *Friedman* standard, and they further ask this Court to re-orient toward *Heller*, discard this question from Second Amendment analysis, and remand to the lower courts with instructions to no longer consider the existence of Banned Arms in the 18th Century as a factor when analyzing whether a regulation violates the Second Amendment.

B. The "Connection to the Militia" Test Violates *Heller*.

The second part of the *Friedman* standard asks whether the "Banned Arms" are suited for militia use. *See Friedman*, 784 F.3d at 410. Friedman answered that question by deferring to the legislative and executive branches of state government, and arriving at "yes, but the state is still free to ban them." *Id*. at 410-11.

But this Court rejected the notion that the Second Amendment existed only in connection with militia service, *Heller*, 554 U.S. at 593-94, or that the arms must bear some connection to a militia, instead emphasizing whether the applicable arms are commonly possessed by private citizens, *id*. at 627-29, and "the individual right to possess and carry weapons in case of confrontation." *Id*. at 592. This Court reinforced this

holding in *Caetano*, 136 S. Ct. at 1028 ("*Heller* rejected the proposition 'that only those weapons useful in warfare are protected.' ") (quoting *Heller*, 554 U.S. at 624-25).

Additionally, Congress – not the states – retains plenary authority to organize the militia. *Heller*, 554 U.S. at 600. And "[b]ecause the Second Amendment confers rights upon individual citizens – not state governments – **it was doubly wrong for the *Friedman* court to delegate to States and localities the power to decide which firearms people may possess**." *Friedman*, 136 S. Ct. at 448-49 (Thomas, J., dissenting) (emphasis added). *Friedman's* deference to other branches of government to identify the breadth and the depth of an enumerated fundamental right, as the second prong does, defies constitutional jurisprudence launched more than eighty years ago. *See*, *e.g.*, *United States v. Carolene Products Company*, 304 U.S. 144, 152, n.4 (1938).

However, in obeying *Friedman*, the lower court here applied the second prong of the *Friedman* standard and arrived at the same answer as *Friedman*. (App. 24). Petitioners ask this Court to reinforce *Heller* – and traditional protections for guarding fundamental rights – by rejecting this element of the *Friedman* standard as improper Second Amendment analysis.

C. The "Adequate Alternative Means of Self-Defense" Test Violates *Heller*.

The third and final part of the *Friedman* test asks whether those subject to a ban or limit on their arms retain adequate alternative means of self-defense. *See Friedman*, 784 F.3d at 411. *Friedman* noted this Court has not yet provided sufficient constitutional guidance to answer that question, and without that guidance, the judiciary should defer to the legislative branch of government to answer that question. *Id.* at 412.

Petitioners likewise request this Court to review and discard this third part of the *Friedman* standard for two reasons. First, *Heller* provides sufficient guidance with a principled standard for courts to apply: whether the arms that other branches of government seek to ban or limit are in common use for lawful purposes. *Heller*, 554 U.S. at 625. If the answer is yes, under *Heller*, that is all that is needed for private citizens to have a right under the Second Amendment to keep such arms. *See McDonald*, 561 U.S. at 767-68; *Heller*, 554 U.S. at 628-29; *see also Friedman*, 136 S. Ct. at 449 (Thomas, J., dissenting).

Also, the third prong of the *Friedman* standard defies traditional fundamental rights jurisprudence by deferring to other branches of government setting the breadth and depth of the right to keep and bear arms.

Petitioners therefore urge rebuffing the entire *Friedman* standard altogether in favor of the *Heller* standard as the sole test for whether a law banning or limiting arms violates the Second Amendment.

D. In the Alternative, the Two-part *Ezell* Test Should Have Been Employed.

In *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), where this Court struck down, on Second Amendment grounds, the City's ban on firing ranges, this Court articulated a two-step standard to analyze whether a law violates the Second Amendment. In *Ezell*, this Court held that:

> if the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment – 1791 or 1868 – then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.
>
> If the government cannot establish this – if the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected – then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights. *Heller*'s reference to "any . . . standard[ ] of scrutiny" suggests as much. 554 U.S. at 628-29. *McDonald* emphasized that the Second Amendment "limits[,] but by no means eliminates," governmental discretion to regulate activity falling within the scope of the right. 130 S. Ct. at 3046 (emphasis and parentheses omitted).

Ezell, 651 F.3d at 702-03.

The rigor of that means-ends scrutiny depends on how close the law comes to the core of the Second Amendment guaranteed rights, and how severely the law imposes on those rights. The closer to the core – and the greater the imposition – the greater the scrutiny. *See Ezell*, 651 F.3d at 702-03. Under *Ezell*, self-defense lies within the core of rights the Second Amendment guarantees; laws encroaching on that core must satisfy a level of scrutiny approaching strict scrutiny. *See Ezell*, 651 F.3d at 708; *see also Friedman*, 784 F.3d at 414-15 (Manion, J., dissenting)

But while not only departing from *Heller* while analyzing the class of arms ban as exists here, *Friedman* also shunned *Ezell's* analysis (though the *Friedman* dissent urged its use, 784 F.3d at 414-15), and multiple Courts of Appeal have applied the same standards. *See*, *e.g.*, *Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017) (*Ezell II*); *see also*, *e.g.*, *Tyler v. Hillsdale Cnty. Sheriff's Dept.*, 837 F.3d 678, 685-86 (6th Cir. 2016); *Jackson v. City and County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

Instead of applying either the analysis discussed in *Heller* or in *Ezell*, *Friedman* diverts on a third route, adopting the above-discussed three-prong standard that both defies precedent and fosters intra-Circuit confusion about which analysis courts should use to examine laws affecting the rights to keep and bear arms.

Citing *Friedman*, the lower court did not apply the *Ezell* two-part analysis, either, because it incorrectly determined that *Friedman* took the matter outside of the scope of the Second Amendment in the first instance (App. 26). This is even though the *Friedman* Court did not hold such a thing, and even acknowledged that the banned firearms are commonly used ("The record shows that perhaps 9% of the nation's firearms owners have assault weapons, but what line separates 'common' from 'uncommon' ownership is something the Court did not say."), *Friedman*, 784 F.3d at 409, and are beneficial for self-defense. *Id.* at 411.

Nevertheless, the *Friedman* decision did not credit these facts in its holding, and the lower court in this case followed that erroneous reasoning.

II. Review Is Needed to Provide Direction to the Lower Courts as to Proper Second Amendment Analysis and Jurisprudence.

It has become abundantly clear in the years since *Heller* was decided that without this Court's attention and review, the lower courts will continue to shrink and limit the holdings in *Heller* to its specific fact pattern, as if that were all the Court was saying. Further, the muddle left in the wake of the Seventh Circuit's decisions in this case and in *Friedman*, when compared and contrasted with the various balancing tests employed by the other Circuit Courts, cries out for clear direction from the Supreme Court to return the Second Amendment to its rightful place – establishing a

fundamental right to keep and bear arms for the purpose of self-defense by means of a test based upon text, history, and tradition.

Since the decisions in *Heller* and *McDonald*, the lower courts have strayed far from the principles laid down by this Court by employing various forms of balancing tests rejected in those seminal cases. In *Heller* this Court stated quite clearly:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. 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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 554 U.S. at 635; *see also Friedman*, 136 S. Ct. at 448 (Thomas, J., dissenting from denial of *certiorari*).

"Without clear or complete guidance from the Supreme Court, lower court judges have proposed an array of different approaches and formulations, producing a 'morass of conflicting lower court opinions' regarding the proper analysis to apply" in Second Amendment cases. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706 (2012) (footnote omitted).

"[N]oncompliance with our Second Amendment precedents warrants this Court's attention as much as any of our precedents. . . ." *Friedman*, 136 S. Ct. at 447 (Thomas, J., dissenting from denial of *certiorari*). "[A] considerable degree of uncertainty remains as to the scope of [the Second Amendment] right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation." *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011).

In dissenting from the denial of *certiorari* in *Friedman*, Justice Thomas wrote: "I would grant *certiorari* to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right." *Friedman*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from denial of *certiorari*). *See also Jackson v. City and Cnty. of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., dissenting from denial of *certiorari*) (listing cases wherein this Court has shown a "repeated willingness to review splitless decisions involving alleged violations of other constitutional rights").

The lower courts have come up with various ways to write certain types of firearms out of the purview of the Second Amendment. The Seventh Circuit, perhaps in some way the worst offender among the Circuit Courts, has created a variety of tests with the outcomes apparently dependent on the make-up of the panel hearing the case rather than the text and history of the Amendment (*see Heller*, 554 U.S. at 636-37) and the tradition of firearms laws in this country. *Id*. at 625-27. In *Ezell*, the court applied "not quite strict

scrutiny." 651 F.3d at 708-10. In *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) it applied intermediate scrutiny. In *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) the court followed *Heller* and recognized it was not permitted to repudiate this Court's historical analysis, reasoning that such an approach was central to this Court's holding in *Heller*. *Id*. at 935.

In contrast, *Friedman*'s third prong requires interest balancing – of a sort different than in other circuits – but interest balancing nonetheless. In this case, the Seventh Circuit doubled down on *Friedman*, refusing to revisit it, thus perpetuating the checkerboard of varying tests within the Circuit.

Most puzzling is the lower court's interpretation and application of *Friedman*'s third prong which requires courts to weigh whether a challenged law banning the possession of a certain class of firearms leaves the residents of the political subdivision at issue with "ample" or "adequate" means to exercise their "inherent right of self defense." *Friedman*, *supra* at 411. After reiterating this requirement, the lower court then refused to allow Petitioners to address the question, despite the logical differences between the relatively tranquil town of Highland Park with 29,000 residents and Cook County with more than 5 million inhabitants.

The lower court therefore applied a test which, by its terms would require balancing of the type and frequency of crimes in the County against the adequacy of the firearms they are allowed to possess

while simultaneously ignoring the actual threats to which they will likely be exposed. The lower court purports to apply the same test for constitutionality to different circumstances, while actually engaging only in a result oriented, sham analysis.

While the Seventh Circuit's balancing test in *Friedman* may be especially egregious in its refusal to follow *Heller*, other circuits have come no closer to proper adherence to this Court's holdings. They have also engaged in result oriented balancing tests of the type explicitly rejected by this Court rather than properly looking to the text of the Second Amendment and to the history and tradition of firearm regulation. *See Worman v. Healey*, 922 F.3d 26, 40 (1st Cir. 2019) ("fit" between ban on possession of certain semi-automatic firearms and large capacity magazines and a valid governmental objective "close enough to pass intermediate scrutiny"); *see also Kolbe v. Hogan*, 849 F.3d 114, 143 (4th Cir. 2017) (under intermediate scrutiny, weapons most useful in military service may be banned, and (incorrectly) holding that semi-automatic rifles were "like M-16 rifles" and were "beyond the reach of the Second Amendment").

Similarly, other Circuit Courts of Appeals have discounted *Heller* and used judicial interest balancing approaches to determine whether a prohibition on the possession of certain semi-automatic firearms and ammunition magazines holding more than ten rounds are constitutional. Those courts look to whether: the challenged law burdened the "core" protection of the Second Amendment, there is a "reasonable" fit between an

important governmental interest and the challenged law, and whether the law burdens more conduct than is "reasonably" necessary. *See*, *e.g.*, *Association of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106, 117, 119 (3d Cir. 2018). Such an "intermediate scrutiny" approach can be manipulated to reach any desired result.

In *New York State Rifle and Pistol Association, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2018), the court upheld the constitutionality of statutes prohibiting possession of semi-automatic "assault" weapons and "large-capacity" magazines. The court recognized that *Heller* rejected "mere rational basis review" but then stated that "heightened scrutiny is not always appropriate" and would only apply if the law implicates the "core" protections of the amendment and the burden on their exercise is "substantial." *Id.* at 258.

The terms used by the lower courts in constructing these balancing tests – "substantial" burden, "reasonable" fit, burdens more conduct than "reasonably necessary" – are tailor-made to achieving a desired result regardless of the facts. The inferior federal courts have run amok in their defiance of *Heller* devising one form of interest balancing test after another allowing cities, states, and counties to infringe on the rights of the law-abiding to exercise their inherent rights of self-defense guaranteed by the Second Amendment. Here, the lower court has approved a procedure making it impossible for those raising Second Amendment challenges to introduce any evidence to attempt to meet the very balancing test it has created.

That State and local governments do not have *carte blanche* to experiment with fundamental rights is apparent when it comes to establishing religion *via* school prayer (*Engel v. Vitale*, 370 U.S. 421 (1962)), using libel and nuisance laws to suppress freedom of the press (*Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931)), "separate but equal" educational facilities (*Brown v. Board of Education*, 347 U.S. 483 (1954)), prohibitions on interracial marriage (*Loving v. Virginia*, 388 U.S. 1 (1967)), interference with family planning (*Griswold v. Connecticut*, 381 U.S. 479 (1965)), or prohibitions on same-sex marriages (*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)). Though many lower courts are apparently content to treat the Second Amendment as a second class right, *Heller* demands more.

This case is but one example of the lower courts restricting Second Amendment rights in the face of *Heller* because that case did not address the specific factual situation in front of the lower court at that moment. Absent instruction from this Court, the Second Amendment will continue to be diluted.

III. Review Is Needed Because the Seventh Circuit Wrongfully and Categorically Banned a Class of Arms That Are Commonly Used By Law-Abiding Persons for Lawful Purposes.

A straight application of *Heller* must result in finding that the Banned Arms are in common use for lawful purposes and are, *a fortiori*, not "unusual." Yet

courts, including the lower court, evade this test in two ways: by questioning whether the Banned Arms are "in common use"; and by equating the Banned Arms alleged similarities to the M-16 "weapon of war" this Court identified in *Heller* as being a firearm beyond the Second Amendment's protection. Neither evasive technique withstands scrutiny.

A. The Banned Arms Are "In Common Use."

Friedman took issue with the *Heller* "in common use for lawful purposes" standard in several ways, one of which was the lack of method for determining what constituted "common use," stating: "The record shows that perhaps 9% of the nation's firearms owners have assault weapons, but what line separates 'common' from 'uncommon' ownership is something the Court did not say." 784 F.3d at 409.

This Court gave significant guidance on the line that constitutes "common use" in *Caetano* when it found that 200,000 stun guns owned across 45 states constituted "common use." *Caetano*, 136 S. Ct. at 1032-33. The Banned Arms sold in the United States over the last several decades are 10 to 20 times as numerous than stun guns for "assault weapons" and perhaps as much as 50 times more numerous than stun guns considering LCMs.

1. Millions of United States Residents Lawfully Use the Banned Firearms.

The *Friedman* dissent, in addressing "common use," noted that an estimated 5 million firearm owners own AR-type rifles, and that over 8,000,000 AR-type rifles were produced or imported. 784 F.3d at 421, n.2.

As pertains to evaluating the Banned Arms in this case:

> *Heller* draws a distinction between such firearms and weapons specially adapted to unlawful uses and not in common use, such as sawed-off shotguns. *Id*., at 624-25, 128 S. Ct. 2783, 2815-16, 171 L. Ed. 2d 637, 676-77. The [County's] ban is thus highly suspect because it broadly prohibits common semiautomatic firearms used for lawful purposes. Roughly five million Americans own AR-style semiautomatic rifles. *See* 784 F.3d, at 415, n. 3. The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. *See ibid*. Under our precedents, that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons. *See McDonald*, 561 U.S., at 767-68, 130 S. Ct. 3020, 3036-37, 177 L. Ed. 2d 894, 914-15; *Heller*, supra, at 628-29, 128 S. Ct. 2783, 2817-18, 171 L. Ed. 2d 637, 679-80.

Friedman, 136 S. Ct. at 449 (Thomas, J., dissenting from denial of *certiorari*).

In addressing the same "in common use" issue, the *Heller II* court conceded:

> "We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use,' as the plaintiffs contend. Approximately 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." 670 F.3d at 1261.

The *Heller II* dissent cited further evidentiary support:

> According to one source, about 40 percent of rifles sold in 2010 were semi-automatic. *See* Nicholas J. Johnson et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* ch. 1 (forthcoming 2012). The AR–15 is the most popular semi-automatic rifle; since 1986, about two million semi-automatic AR–15 rifles have been manufactured. J.A. 84 (Declaration of Firearms Researcher Mark Overstreet) . . . Semi-automatic rifles are commonly used for self-defense in the home, hunting, target shooting, and competitions. J.A. 137 (Declaration of Firearms Expert Harold E. Johnson). Also, many hunting guns are semi-automatic. *Id.*

Heller II, 670 F.3d at 1287-88 (Kavanaugh, J., dissenting).

The Court in *NYSRPA v. Cuomo* noted the same thing when it stated "Americans own millions of the firearms that the challenged legislation prohibits. The same is true of large-capacity magazines." 804 F.3d at 255.

Referencing this Court's decision in *Staples v. United States*, 511 U.S. 600, 603 (1994), which should have closed the door on the "common use" issue, the *Heller II* dissent observed:

> [I]n its 1994 decision in *Staples*, the Supreme Court already stated that semi-automatic weapons "traditionally have been widely accepted as lawful possessions." 511 U.S. at 612. Indeed, the precise weapon at issue in *Staples* was the AR–15. The AR–15 is the quintessential semi-automatic rifle that D.C. seeks to ban here. Yet as the Supreme Court noted in *Staples*, the AR–15 is in common use by law-abiding citizens and has traditionally been lawful to possess.

Heller II, 670 F.3d at 1288 (Kavanaugh, J., dissenting).

The *Friedman* Court noted that Highland Park had conceded uncertainty as to "whether the banned weapons are commonly owned" and reasoned that if the banned weapons "are (or were [commonly owned] before [the City] enacted the ordinance), then they are not unusual." 784 F.3d at 409. The court then considered whether the firearms were "dangerous":

> And the record does not show whether the banned weapons are "dangerous" compared

> with handguns, which are responsible for the vast majority of gun violence in the United States: nearly as many people are killed annually with handguns in Chicago alone as have been killed in mass shootings (where use of a banned weapon might make a difference) nationwide in more than a decade. *See* Research and Development Division, *2011 Chicago Murder Analysis*, Chicago Police Department 23 (2012); J. Pete Blair & Katherine W. Schweit, *A Study of Active Shooter Incidents in the United States Between 2000 and 2013*, Federal Bureau of Investigation, United States Department of Justice 9 (2014).

Friedman, 784 F.3d at 409.

However, the lower courts, which followed *Friedman*'s erroneous holding, never considered this issue. Plaintiffs should have been allowed to show that the Banned Arms meet this standard. That the lower courts did not allow this was reversible error.

The Banned Arms are not otherwise disproportionately dangerous. Indeed, the same features singled out by the County in defining "assault weapons" actually enhance the safe and accurate use of those firearms and do not affect their basic function of firing one shot with each trigger pull.

The millions of Americans who own so-called "assault weapons" use them for the same lawful purposes as any other type of firearm: hunting, target practice, recreational shooting, and self-defense. By contrast, these firearms are almost never used for crime.

According to most studies, less than 2% of firearms used in the commission of crime are so-called "assault weapons." And even that 2% principally is composed of handguns classified as "assault weapons," not the semi-automatic rifles that are at issue in this case. *See*, *e.g.*, Christopher S. Koper, *Updated Assessment of the Federal Assault Weapons Ban* at 2, 16 (July 2004), https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf (last visited November 24, 2019). "Well under 1%" of firearms used in crime are "assault rifles." Gary Kleck, *Targeting Guns: Firearms and Their Control*, 112 (1997). Criminals by far prefer ordinary handguns, which are both cheaper and easier to carry and conceal. Indeed, even in mass shootings – which were the primary motivation behind the County's ban – "semiautomatic handguns are far more prevalent . . . than firearms that would typically be classified as assault weapons." James Alan Fox & Monica J. DeLateur, *Mass Shootings in America: Moving Beyond Newtown*, 18 Homicide Stud. 125, 136 (2014) (https://www.researchgate.net/publication/270480045_Mass_Shootings_in_America_Moving_Beyond_Newtown) (last visited November 24, 2019).

Given that millions of "assault weapons" are lawfully owned and used for lawful purposes, a level that far exceeds that which this Court determined to satisfy "in common use" in *Caetano*, and that this Court has already acknowledged the wide acceptance of the lawful possession of "assault weapons," the Court should put to rest once and for all both the issue of 1) the proper test – whether a firearm is in common use for

lawful purposes; and 2) that "assault weapons" satisfy this test.

2. Even More LCMs Are in Use for Lawful Purposes.

The magazines that the County has separately banned are, if anything, even more ubiquitous; indeed, so common are magazines capable of holding more than ten rounds that they are best thought of as standard-capacity magazines. The *Kolbe* court likewise acknowledged "evidence that in the United States between 1990 and 2012, magazines capable of holding more than ten rounds numbered around 75 million." *Kolbe*, 849 F.3d at 136.

The D.C. Circuit in *Heller II* likewise conceded that magazines capable of holding more than ten rounds are in common use, stating: "As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000." *Heller II*, 670 F.3d at 1261.

In March, 2019, the District Court for the Southern District of California enjoined enforcement of a ban on LCMs. *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019). In explaining its reasoning, the Court summarized expert submissions in that case relating to the "commonality" of LCMs and found:

> Magazines holding more than 10 rounds are used for self-defense by law-abiding citizens. And they are common. Lawful in at least 41 states and under federal law, these magazines number in the millions. Plaintiff's Exh. 1 (James Curcuruto Report), at 3 ("There are at least *one hundred million* magazines of a capacity of more than ten rounds in possession of American citizens, commonly used for various lawful purposes including, but not limited to, recreational and competitive target shooting, home defense, collecting and hunting.") (emphasis added); Plaintiff's Exh. 2 (Stephen Helsley Report) at 5 ("The result of almost four decades of sales to law enforcement and civilian clients is millions of semiautomatic pistols with a magazine capacity of more than ten rounds and likely *multiple millions* of magazines for them.").

Id. at 1143 (emphasis added).

Even courts that have upheld bans on LCMs have recognized that these magazines are in common use for useful purposes; and, these findings are amply supported. Accordingly, with respect to LCMs this Court should also put to rest the issues of 1) the proper test – whether a firearm (which includes essential component parts like its magazine) is in common use for lawful purposes; and 2) that LCMs satisfy this test.

B. The Banned Arms Are Not "Unusual."

Several Circuit Courts, particularly *Heller II* and *Kolbe*, collapsed the "dangerous and unusual"

consideration into one test focused on the Banned Arms' supposedly "dangerous" nature. Likening a civilian semi-automatic rifle to the fully automatic M-16 rifle used by the United States Military, both courts ignored that the Banned Arms were in common use for lawful purposes and upheld restrictions on the Banned Arms because they were too "dangerous," the *Kolbe* court even finding them beyond Second Amendment protection. *Heller II*, 670 F.3d at 1263-64; *Kolbe*, 849 F.3d at 125-30, 142 (rejecting the dissent's "popularity test"), 163, n.10.

Beyond a patent rejection of this Court's *Heller* test, the Seventh Circuit in this case, and its sister circuits in addressing this issue, ignore this Court's admonitions made most recently in *Caetano*:

> As to "dangerous," the court below held that a weapon is "dangerous *per se*" if it is " 'designed and constructed to produce death or great bodily harm' and 'for the purpose of bodily assault or defense.' " 470 Mass., at 779, 26 N.E.3d, at 692 (quoting *Commonwealth v. Appleby*, 380 Mass. 296, 303, 402 N.E.2d 1051, 1056 (1980)). That test may be appropriate for applying statutes criminalizing assault with a dangerous weapon. *See ibid.*, 402 N.E.2d, at 1056. But it cannot be used to identify arms that fall outside the Second Amendment. First, the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes. *See Heller*, *supra*, at 627, 128 S. Ct. 2783 (contrasting " 'dangerous and unusual

> weapons' that may be banned with protected 'weapons . . . in common use at the time'").

Caetano, 136 S. Ct. at 1031.

And: "If *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous. 554 U.S., at 636, 128 S. Ct. 2783." *Id*. at 1032. However, even accepting "dangerousness" is a relevant consideration, the various circuit court decisions base this finding on data that is suspect. Indeed, a thorough analysis of the factors these circuits relied on to find the Banned Arms "too dangerous" revealed the arguments have more bark than bite. *See* David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, Journal of Contemporary Law, Vol. 20, 381, 386-401 (1994). And similarly with LCMs. *See Duncan*, 366 F. Supp. 3d at 1163-71.

C. The Ordinance Works a Categorical Ban on Semi-automatic Rifles.

The Ordinance does not facially ban all semi-automatic rifles. But under its definition of "assault weapon," with a nominal exemption for rifles chambered for the .22 Long Rifle cartridge, the Ordinance imposes a practically categorical ban. The Ordinance does this by classifying as a banned "assault rifle" any semi-automatic rifle that can accept a detachable magazine with a capacity greater than ten rounds, or capable of being modified to accept such a magazine.

Any rifle capable of accepting a detachable magazine is capable of accepting a greater than ten-round magazine. One need only: (a) insert an already extant magazine with greater than ten-round capacity, (b) modify a magazine with an original ten-round maximum capacity to hold more rounds, or (c) fabricate a custom magazine whose neck and feed lips fits the applicable rifle's magazine well, and whose body carries and feeds more than ten rounds.

Rifles not originally capable of accepting detachable magazines can be modified – using varying degrees to tools and skill – to accept detachable magazines. Even curios and relics like the revered M1 Garand rifle of WWII and Korea vintage – originally produced with an internal eight-round capacity – can be modified to accept detachable magazines with greater than ten rounds and so is banned under the Ordinance. *See Winchester Experimental Mag-Fed Garands, Forgotten Weapons*, December 12, 2016, available at https://youtu.be/_Y01YMVJrJI (last visited November 24, 2019).

The Ordinance's effect is therefore a categorical ban on practically all semi-automatic rifles. Under *Heller*, a categorical ban like that violates the Second Amendment. 554 U.S. at 629; *see also Wrenn v. District of Columbia*, 864 F.3d 650, 665-67 (D.C. Cir. 2017) (near total categorical ban violates Second Amendment).

CONCLUSION

For all the reasons stated above, Petitioners respectfully pray that the Court issue a writ of *certiorari* in this matter and reverse the judgment below.

Respectfully submitted,

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