

No. 19-704

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IN THE  
**Supreme Court of the United States**

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MATTHEW D. WILSON, ET AL.,  
*Petitioners,*

v.

COOK COUNTY, ILLINOIS, ET AL.;  
*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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**BRIEF OF *AMICUS CURIAE*  
COMMONWEALTH SECOND AMENDMENT, INC.  
IN SUPPORT OF PETITIONERS**

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## STATEMENT OF INTEREST OF AMICUS CURIAE<sup>1</sup>

Commonwealth Second Amendment, Inc. (hereafter, “Amicus” or “Comm2A”) is a Massachusetts based, non-profit organization dedicated to preserving and expanding the Second Amendment rights of individuals residing in New England and beyond. Comm2A works locally and with national organizations to promote a better understanding of the rights guaranteed by the Second Amendment to the United States Constitution. The Court’s ruling in the current case affects Amicus Comm2A’s organizational interests, as well as those of its contributors and supporters, some of whom are directly affected by the law at issue in this case and who wish to enjoy the full exercise of their fundamental Second Amendment rights.

### SUMMARY OF ARGUMENT

Cook County Code §§ 54-211–215 bans the possession of firearms in common use for self-defense and other protected activities based on a set of enumerated features, including commonly deployed safety features, applied to handguns, shotguns and/or rifles. Lower Courts have applied an analysis to Second Amendment claims that differs substantially from the analysis articulated in *Heller*.

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<sup>1</sup> 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*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and they have received notice.



This has led to outcomes where statutes regulating weapons have been reviewed under rational basis, or similar levels of scrutiny, on the theory that the conduct proscribed by the statutes in question is not covered by the Second Amendment.

In addition to needing clarification that the two-step analysis currently being employed by lower courts is inaccurate, an objective test for what arms are covered under the Second Amendment would make it easier for lower courts to engage in review statutes implicating protected conduct consistently across the country. To that end, Amicus provides an example objective test that is faithful to the test laid out in *Heller*.

## STATEMENT OF THE CASE

Amicus references and incorporates the statement of the case by Petitioners, providing below a brief summary of elements relevant to this brief. Cook County Illinois bans, through Cook County Ordinance 54-211–215, the possession of arms commonly possessed by the law abiding for lawful purposes.

## INTRODUCTION

Amicus Commonwealth Second Amendment respectfully urges that the court grant certiorari in this case to clarify and resolve the definition of what arms are protected under the Second Amendment to the United States Constitution or at a minimum, clarify that the two-step analysis “test” for Second Amendment cases first articulated in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), is not faithful to the test articulated in *District of*

*Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008) for determining the constitutionality of regulations implicating the Second Amendment. The two-step analysis has been abused by courts throughout the country to hold constitutional all manner of restrictions on conduct implicating the Second Amendment, some of which having little to no direct connection to preventing violence or other legitimate government function.

## ARGUMENT

### I. Modern Improvements to Firearms are Protected

Cook County Code §§ 54-211–215 bans the possession of firearms in common use for self-defense and other protected activities based on a set of enumerated features applied to handguns, shotguns and/or rifles. Cook County is mistaken to portray firearms, such as modern sporting rifles and other arms in common use that are categorically banned by the county’s ordinance, as the “dangerous and unusual weapons” addressed in *Heller*, 554 U.S. at 627, not covered under the scope of the Second Amendment right. The types of arms covered under the Cook County Ban are in common use throughout the country and have many lawful and legitimate uses protected by the Second Amendment. The firearms covered by the Cook County ban are no more dangerous or unusual than the arms not covered by its restrictions and some of the prohibited features actually improve the safe use and operation of those firearms.

“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. This rejects the notion that simply because something is a modern arm, that it is therefore a “dangerous and unusual weapon.”

Otherwise, the Second Amendment would only protect possession of muzzle loading muskets and permit bans of modern safety ammunition and other modern technological improvements to arms, such as automatic and manual safeties. Such an analysis, in the context of the First Amendment, would permit unfettered restrictions on speech recorded onto a digital medium, such as CD, MP3, and emailed text and further prevent the press’ employment of modern printing mediums and internet-based publication. Cook County seeks to ban modern technological improvements to arms under the guise of public safety. It is for that reason that a judicial review must be undertaken to determine the constitutionality of the Cook County Ban.

## **II. The Features Banned by Cook County Ordinance**

The Cook County ban targets handguns, rifles and shotguns, all classes of arms in common use. Since the Cook County ban takes the form of a series of technological features which, when taken in combination with each other, cause the arm to be banned, one can simply look at the features themselves to ascertain if common arms possessing those features would fall under the scope of the right. The defining features of arms in common use should therefore be suitable for use by law-abiding

citizens for lawful self-defense and/or for “the common defense.”

The Cook County Ban restricts a series of features applied selectively to rifles, shotguns and/or handguns. These being generally:

- Capacity to accept a detachable magazine and has one or more of the following (applies to pistols, shotguns and rifles with exception: rifles are allowed a magazine, but not one greater than 10 rounds);
- Only a pistol grip without a stock attached (rifles and shotguns);
- A folding, telescoping or thumbhole stock (pistols, shotguns and rifles);
- 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 (pistols and rifles);
- Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand (pistols, rifles and shotguns);
- The capacity to accept a detachable magazine at some

location outside of the pistol grip (pistol);

- A muzzle brake or muzzle compensator (pistol and rifle);
- Any shotgun with a revolving cylinder (shotgun); and
- Semi-automatic operation when combined with other common features (pistols, rifles and shotguns).

*See* Cook County Code §§ 54-211.

As discussed below, each element banned by Cook County is one commonly employed by law-abiding citizens in furtherance of self-defense or other lawful purposes. These features have an original and proper purpose of promoting the safe and accurate operation of firearms. A feature's lawfulness should be considered irrespective of the class of arm it is employed on, as the lawfulness of choosing a particular class of protected firearm lies with the intent and not the choice. *See Thompson v. United States*, 155 U.S. 271, 279 (1894). The features banned by the Cook County ordinance are simply modern enhancements to the class of arms that were at the founding and are now overwhelmingly chosen by law abiding citizens for the purpose of self-defense.

### III. Detachable Magazine and/or Large Capacity Magazines

**Full Restriction: *Has the Capacity to Accept a Detachable Magazine and/or Large Capacity Magazines (Pistols, Rifles and Shotguns)***

Prior to the 1880s, the popular design choice for a repeating rifle (one where a user could reload for a second shot simply by operating a mechanism such as a lever) was to employ a lightweight storage tube under the barrel, holding rounds that were subsequently fed into the chamber of the barrel one by one. Each round would be loaded as the user pulled the lever down to eject the spent brass casing of the previously fired round. The system presented the serious and dangerous problem of premature detonation of rounds being stored in the tube, as the nose of one bullet had the real potential of striking the primer of the cartridge of a bullet in front of it, due to the recoil force of firing a separate chambered round.

James Paris Lee is widely considered the inventor of the first detachable box magazine circa 1877, where the cartridges were held safely parallel with one another, thereby removing the safety hazard of the nose to tail method of tube fed arms.<sup>2</sup> Arthur Savage, in a patent filing related to his improvements of the magazine, confirms the purpose of the design by writing, “the main objects of the invention being to facilitate the firing of the gun from the shoulder, to prevent the escape of gases to

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<sup>2</sup> Harcourt Ommundsen and Ernest H. Robinson, *Rifles and Ammunition and Rifle Shooting* 100 (New York: Funk & Wagnalls) (1915).

the rear [of the breech where the user's face is] [and] to provide for the safe storage of the cartridges..." among other benefits. U.S. Patent No. 502,018 (issued July 25, 1893). The detachable magazine has become the mainstay of most modern firearms over the last 100 years allowing users to reload quickly for practice and to maintain a ready defense posture in the face of danger.

Cook County claims that this feature, falls under the umbrella of dangerous and unusual high-capacity, rapid-fire weapons. First, what Cook County calls large capacity or high capacity are simply standard capacity magazines. When not referencing the Cook County ordinance directly, the term standard capacity will denote any capacity as seen in common use and should not be assigned to an arbitrary 10 round limit. Second, a high capacity magazine is not required for an individual to fire a large number of shots in quick succession, as demonstrated by Jerry Miculek's World Record of 12 accurately placed shots in under 3 seconds accomplished with a 6-shot revolver.<sup>3</sup> Lastly, the desire to reload quickly was acute even during the time of muskets and mini-balls, as an empty or unloaded firearm has very little utility for the purpose of self-defense. It is not the need to quickly shoot again, but the need to be *prepared to do so*, should it be required, that necessitates the use of standard capacity magazines and detachable magazines for lawful self-defense.

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<sup>3</sup> Petty, Charles E. (2004, July/August). How fast is fast? Gentleman Jerry Miculek tackles McGivern's record. *American Handgunner*, pp. 74, 111-112.

The detachable box magazine, a modern enhancement, has been the preferred choice of law-abiding citizens for over 100 years in of defense of home and hearth as well as the common defense, which makes it anything but unusual or uncommon.<sup>4</sup>

**IV. Pistol Grip Without a Stock, Folding Stock, et al.**

***Restriction: Only a Pistol Grip Without a Stock Attached (Rifles and Shotguns) and a Folding, Telescoping or Thumbhole Stock (Pistols, Shotguns and Rifles)***

Denver University law professor David Kopel sums up the purpose and lawful utility of a pistol grip as follows:

“The major purpose of a pistol grip on a long gun is to stabilize the firearm while firing from the shoulder. By holding the pistol grip, the shooter keeps the barrel from rising after the first shot, and thereby stays on target for a follow-up shot. The defensive application is obvious, as is the public safety advantage in preventing stray shots.

It is true that a pistol grip allows a rifle to be fired without resting against the shoulder. Does this provide a rational

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<sup>4</sup> See also Stephen Hunter, *Why 33 rounds makes sense in a defensive weapon*, Washington Post Editorial, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/04/AR2011020406709.html> (last visited 12/29/2019).



basis for making the rifle illegitimate? Only if one also bans handguns; for every handgun, because it has a pistol grip, can be fired without resting against the shoulder.

Unless self-defense is considered illegitimate, a pistol grip is a legitimate defensive tool. With a pistol grip, a rifle can be held with one hand while the other hand dials 911 or opens a door. The application in a home defense situation is obvious, because burglary victims will not always have time to raise their gun to their shoulder, and may not even be in a position to take a shot from the shoulder.”

David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 J. OF CONTEMP. L. 381-417, 396 (1994) (internal citations removed).

The removal of a stock or the inclusion of a telescoping or folding stock does not rob the pistol grip of any of the above stated utility and instead enhances the utility in self-defense for use in confined spaces. Confined space is an environment typically found in the common home where doors are of minimal width and hallways are typically designed for no more than one person at a time comfortably. With the stock in the closed position, the user is able to maneuver more easily in these closed off, confined spaces and more accurately engage an attacker if in the unfortunate instance they must defend themselves and their homestead.

It is legal to have a stock permanently affixed at the minimum position, at the maximum or at any

position in between, but making the stock adjustable and allowing movement between all of the above positions is deemed illegal by the Cook County ordinance. The ability to adjust the stock has very reasonable and common uses for law abiding target shooters. Telescoping stocks, including as a shock absorption mechanism to prevent discomfort and injury to shooters, have been employed since at least the 1960s for lawful and safety oriented purposes.<sup>5</sup> Additionally, during the winter months a user's clothing will be bulky and cumbersome, requiring a shorter stock than in summer to keep the preferred distance between the eye and the sights.<sup>6</sup> Another common benefit associated with telescoping stocks is the ability to adjust the length of the stock for users of varying length arms to share the same firearm.<sup>7</sup> Additionally, target practice is commonly accomplished in one of three basic shooting positions, standing, prone and seated. In each of the three positions, the optimal length of a rifle or shotgun stock is different as the head is in a different position relative to the rear sight in each of the three positions. In the standing position, the head is its furthest rearward. In bench rest and prone, the head is further forward. Coupled with the optimal eye relief of modern optical sights being within a small distance, small movements of the

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<sup>5</sup> Ken Warner, *The Shock Absorbing Shotgun*, POPULAR SCIENCE, July, 1964, at 38.

<sup>6</sup> USA International Business Publications, *US Special Operations Forces Handbook* (International Business Publications, USA 2009) (January 1, 2009).

<sup>7</sup> Anthony Mills, *Collaborative engineering and the Internet: linking product development* (Society of Manufacturing 1998) (1998).

head in relation to the optics can make the optical sights unusable without an adjustment of the stock or assuming an uncomfortable position in relation to the firearm. These features are modern enhancements to the class of arms that are overwhelmingly chosen by law-abiding citizens for sporting and self-defense purposes.

#### V. A Barrel Shroud to Prevent Burns

***Restriction: 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 (Pistols and Rifles)***

Law-abiding firearms owners complying with this ordinance, by removing the forestock or barrel shroud or other enclosure from the barrel of their rifle, would be subject to an increased and substantial risk of contact burns. When coupled with the threshold qualifier of a semi-automatic firearm, this ordinance serves as a complete ban on all semiautomatic rifles, since most rifles from the advent of firearms have included some form of covering around its barrel to prevent contact burns. These structures both protect users from severe burns and permit the users to place their non-trigger hand forward of the trigger to steady the firearm to increase recoil control and accuracy.

## VI. Protruding Forward Grip

**Restriction: *Any Feature Capable of Functioning as a Protruding Grip That Can Be Held by the Non-Trigger Hand (Pistols, Rifles and Shotguns)***

Although this requirement appears distinct from the requirement that bans shrouding the barrel, the purposes of these two features are very much similar in fact. The purpose of a vertical forward grip (foregrip) is to allow the law-abiding citizen to employ leverage to steady the barrel of a rifle during off-hand shooting to maintain better control of the firearm in recoil and increasing accuracy of any shots taken.<sup>8</sup> “I always shoot better with a vertical foregrip. I find the gun points faster, more accurately, and is steadier with one. I strongly recommend this feature for all uses.” Dan Shideler, *Gun Digest 2012*, 362 (Gun Digest Books 66th rev. ed.) (August 7, 2011). The foregrip also doubles as a monopod when prone or when shooting bench rest and makes a firearm easier and more effective to use for disabled and elderly individuals.

## VII. Detachable Magazine Outside of the Pistol Grip

**Restriction: *The Capacity to Accept a Detachable Magazine at Some Location Outside of the Pistol Grip (Pistol)***

This modern enhancement to firearms ergonomics shares some purpose with the vertical foregrip. The feature also limits pistol caliber, as

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<sup>8</sup> Patrick Sweeney, *Modern Law Enforcement: Weapons & Tactics*, (Krause Publications 3rd ed.) (2004).

complete cartridges with overall lengths of exceeding 1.5 inches would increase the size of the “magazine grip” beyond that which is comfortable to hold in the hand. Even small caliber pistols of the type used in Olympic target shooting commonly have this feature as well.

#### **VIII. A Muzzle Brake or Muzzle Compensator**

##### ***Restriction: A Muzzle Brake or Muzzle Compensator (Pistol and Rifle)***

A muzzle brake or compensator is designed to counteract the recoil of the firearm and reduce the flip of the muzzle upwards.<sup>9</sup> The purpose of this is simply to allow the law-abiding citizen to more accurately and comfortably place follow up shots in a fast-moving defensive shooting situation.

The use of compensators is a relatively modern phenomenon that has quickly become very commonplace in all manner of shooting sports.<sup>10</sup> World renowned, world record holding competitive action shooter, Jerry Miculek, designed and implemented a brake in order to improve his competitive performance.<sup>11</sup> Speed and accuracy are prized in competition as well as in the face of oncoming danger in the form of an attacker with violent and deadly intentions. These features are modern enhancements to the class of arms that are

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<sup>9</sup> Patrick Sweeney, *The Gun Digest Book of the 1911* (Gun Digest Books 1st ed.) (2001).

<sup>10</sup> Massad Ayoob, *Massad Ayoob's Greatest Handguns of the World* (Gun Digest Books 1st ed.) (2010).

<sup>11</sup> Patrick Sweeney, *Gun Digest Book of the AR-15, Volume II* (Gun Digest Books 2nd ed.) (2007).

overwhelmingly chosen by law-abiding citizens for the purpose of self-defense.

#### **IX. Any Shotgun with a Revolving Cylinder**

**Restriction:** *Any Shotgun with a Revolving Cylinder (Shotgun)*

Revolving cylinder firearms have been common since the 1830s when Samuel Colt introduced the first commercially successful revolvers. Today, revolvers still constitute between a quarter and a third of the new handgun market. Whether in a handgun or a shotgun, the revolver has an important advantage that cannot be duplicated by other ammunition storage systems: the ability to carry several types of ammunition and choose a particular type precisely when it is needed. For example, if a person, in a rural area, was threatened by a rattlesnake, he could quickly index (rotate) the revolving cylinder to use small shotgun shell, such as the .410 caliber. The dispersion of the small pellets would increase the likelihood that he would hit the snake in a means sufficient to end the threat. On the other hand, if he were threatened by a larger mammal, such as a bear, he would need to fire a single powerful bullet propelled by a large quantity of gunpowder, such as a .45 Long Colt. Versions of the ammunition recommended for self-defense from very large mammals have specific designs and shapes to ensure proper penetration. Finally, turning to human attackers, experts regularly recommend the .45 ACP caliber. This caliber is smaller and has much less gunpowder than the .45 Long Colt, and when carried for self-defense has bullets that transfer all kinetic energy to the attacker, knocking down, and ending the threat.

Modern versions of revolving cylinder shotguns are guns like the Taurus Judge<sup>12</sup> and the Smith & Wesson Governor.<sup>13</sup> They combine the size and carry capability of handguns with the ability to fire .45 ACP, .45 Long Colt and .410 shot-shells, giving law abiding citizens a variety of ammunition from which to choose.

While rattlesnakes and bears are not found in Chicago, all citizens have the right to own firearms in common use that can be employed for self-defense for travel and other non-domestic interactions. More directly, residents of Chicago also face varying threats requiring different types of ammunition. For example, the appropriate ammunition for self-defense against an attacking dog is significantly different from ammunition required for self-defense against an attacking violent criminal.

Even in the home, with a full-length standard shotgun, instant ammunition choice optimizes self-defense, while preventing bystander injury. Certain ammunition, such as a shotgun slug, is designed to penetrate building structures, including doors and walls, which can be a required element of close quarter self-defense. Other ammunition, such as a pellet-based shotgun cartridge, is designed to prevent building structure penetration, which can be a required element of self-defense when innocent bystanders are in abutting rooms, such as apartment

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<sup>12</sup> Taurus International Manufacturing, *Judge Revolver*, <https://www.taurususa.com/firearms/revolvers/taurus-judge/> (last visited July 29, 2019).

<sup>13</sup> Smith & Wesson, *Governor* <https://www.smith-wesson.com/firearms/model-governor-0> (last visited 12/29, 2019).

complexes. The public is much safer when victims can efficiently select the right kind of ammunition when required and are not forced to compromise the safety of innocent bystanders to defend themselves.

## **X. Semi-Automatic Operation When Combined with Other Common Features**

Since the introduction of the semi-automatic firearm in late 1800,<sup>14</sup> the attraction to semi-automatic firearms by law-abiding citizens for the purpose of self-defense has been unquestionable. Although there is no authoritative source for how common semi-automatic rifles and shotguns are in relation to non semi-automatic variety, the Annual Firearms Manufacturers And Export Report (AFMER) does breakout manufacturing figures for semi-automatic pistols in comparison to revolvers showing just how common and usual the semi-automatic class of firearm is in the United States.<sup>15</sup> The AFMER manufacturing data from 1998 to 2017 shows that while 10,007,303 revolvers were manufactured for sale in the US during that time, more than three times the number, or 40,515,041 semi-automatic handguns were manufactured for sale in the US.<sup>16</sup> During that same time frame, 16,345,814 shotguns and 43,698,913 rifles were

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<sup>14</sup> Glenn Jewison & Jörg C. Steiner, *Austro-Hungarian Land Forces 1848-1918*, available at <http://www.austro-hungarian-army.co.uk/biog/mannlicher.htm> (last visited December 29, 2019).

<sup>15</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives, *Annual Firearms Manufacturers And Export Report* (1998-2017) retrieved from <https://www.atf.gov/resource-center/data-statistics>.

<sup>16</sup> *Id.*



manufactured for sale in the United States.<sup>17</sup> Assuming just half of the rifles manufactured for sale in the US are semi-automatic, over 23 million people sought out a semi-automatic firearm for their self-defense and sporting needs during the 19 year period. Despite this unequivocal data showing the popularity of semi-automatic firearms, this vital modern enhancement to the firearm is specifically targeted in the Cook County ban as a feature, when combined with the other useful features in common use above, turns a common use firearm into a prohibited item.

For instance, a collapsible stock is perfectly acceptable for a bolt-action rifle or pump shotgun, but when on a semi-automatic rifle or shotgun this firearm becomes “dangerous and unusual” under the Cook County ordinance. On any gun, the collapsible stock makes the gun easier to carry to the field, in the field, and easier to store in smaller secured location in the home, promoting safety. Having this feature on a semi-automatic firearm does not then transform this firearm into something inherently more dangerous than any other typical firearm. Moreover, the collapsible stock makes the long gun much easier to maneuver in the confined spaces of an urban apartment or other dwelling, and thus considerably more useful for the “core lawful purpose” of self-defense in the home. Having a foregrip (to make the gun more accurate) is perfectly acceptable for a bolt action rifle or pump shotgun, but when on a semi-automatic rifle or shotgun this firearm now becomes “dangerous and unusual” under the Cook County ordinance. By analogy,

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<sup>17</sup> *Id.*

traction control on a Chevrolet is a useful safety feature, while that same traction control feature on a Toyota Camry turns that car into a “dangerous and unusual” vehicle. Using this approach to firearms regulation embodied in the Cook County ordinance clearly leads to unpredictable results regarding the types and nature of the firearms banned.

The potential examples are numerous, but the only logical conclusion is that Cook County seeks to ban semi-automatic firearms of all types and sizes suitable for self-defense but is unwilling to identify this class of arms specifically. Cook County accomplishes this goal by identifying features, many of which may have been chosen solely because of aesthetic characteristics.<sup>18</sup> Semi-automatic firearms are a class of arms in common use by law-abiding citizens for sporting and self-defense purposes. As such they are protected under the Second Amendment to the United States.

## **XI. An Objective Test for Constitutionally Protected Arms**

In the absence of an objective categorical test for what arms are protected under the Second Amendment, courts will continue to apply means-end testing despite Heller’s clear warning to the contrary *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008), that the “very enumeration of the right takes out of the hands of government--even the Third Branch of Government--the power to decide on

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<sup>18</sup> See also Nicholas J. Johnson *Symposium: Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique* U.C., 60 HASTINGS L.J. 1285 (2009).

a case-by-case basis whether the right is really worth insisting upon.” *Ibid.*

In recognition that this court relies on the percolation of ideas from lower courts<sup>19</sup> to exercise its Article III powers in a measured and just manner, amicus Comm2A provides the below for the courts benefit in determining how best to determine what arms are protected by the Second Amendment. The below proposes an objective test that does not rely on a subjective or relative measure for determining arms that are covered under the Second Amendment. This test could reasonably be called the Discrete Action, Discriminate Effect test (hereafter referred to as the Discrete Test). The Discrete Test simply states that any arm where the discrete action of a user results in a discriminate effect on a single target is constitutionally protected under the Second Amendment. *Heller* supports this categorical approach by both rejecting “freewheeling interest-balancing” *ibid.* while also making clear that “if weapons that are most useful in military service--M-16 rifles and the like--may be banned...” *Ibid.* at 627. In practice, this would suggest that weapons that allow a user to engage in a single action, ie; trigger pull, and have multiple effects on a single or multiple targets, or multiple rounds discharged with that single trigger pull, the arm can be subject to regulations far greater than those more suited for self-defense. If so, then the inverse must be true. Arms that will have a discriminate singular effect on the target per the discrete singular action of operating the weapon (ex; pulling the trigger), would

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<sup>19</sup> Clark, Kastellec, The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model, The Journal of Politics, Vol. 75, No. 1, January 2013, pp. 150–168.

be considered protected under the Second Amendment.

Some examples of arms that would fail this test are anything designed with explosives to radiate energy and/or material from the locus of combustion. A hand grenade would fail this test, as would an RPG, Bazooka, and similar arms. An example that is less *Reductio ad absurdum* is flash bangs, or otherwise known as a stun grenade. This type of device has an indiscriminate effect on the surroundings of its target. It is not an adequate self-defense item.

Other examples of “arms” that would not be covered<sup>20</sup> are bio and nuclear weapons, booby traps, and any sort of energy dissipating weapon that radiates energy beyond the size of a man-sized target within its effective range as none of these are discrete in their targeting nor in their impact/effect on individuals coincident of the intended target.

One example of weapons technology that can straddle the two ends of the Discrete Action test is pepper spray or oleoresin capsicum (OC). By itself, it can be an aerosol, wet or dry, and in a confined space effect large numbers of people, say if spread through the ventilation system of a building. But when combined with a gel, or other binding agent, this becomes an effective less-lethal self-defense tool that targets the agent at a specific individual.

Another example of technology that straddles both protected and unprotected classes is sonic

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<sup>20</sup> Not that the succeeding list are all arms by definition per se, but they can clearly be considered weapons in some form or another.

weaponry used by police and military<sup>21</sup> that allows for sound to be directed at groups of protestors to temporarily incapacitate them. But a smaller, directed version of such weapon employing the same technology directed into the target size of a human being may well be covered under this test.

Applied to firearms, any arm that operated by expelling a single bullet by way of a single pull of the trigger would be protected by the Second Amendment under this test. As would knives, contact weapons, and more importantly directed energy weapons such as tasers, lasers, and any future technology not yet conceived or developed that could be targeted to a reasonably small, distinct and discriminate human sized target.

The only caveat with the Discrete Test approach is what is known as “over penetration,” whereby the projectile penetrates the intended target and continues on to impact another, possibly unintended target. Over penetration has been a problem for weapons designers, those using the weapons and for those targeted by weapons since at least the founding of this nation.<sup>22</sup> In short, weapons

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<sup>21</sup> See also <https://genasys.com/products/long-range-acoustic-devices/> (Last visited 12/29/19).

<sup>22</sup> See Rule #2 of the original 28 Rogers’s Rules of Ranging, as written by Major Robert Rogers, Kings Rangers in 1757 <http://www.rogersrangers.org/rules/index.html>. (Last visited 12/22/19). These rules are still in use today by the US Army Rangers and the march rules dealing with over penetration is codified as rule #6 of the current standing orders of the US Army Rangers (<https://fas.org/irp/doddir/army/ranger.pdf>). (Last visited 12/22/19) See also <https://www.army.mil/ranger/heritage.html> (Last visited

designers want as little over penetration as possible in order to transfer the kinetic energy of the projectile to the target, but enough penetration to reach deep enough into the target to reach vital organs.<sup>23</sup> Given the history and tradition of the use of arms, that an arm can over penetrate in some cases under some circumstances, while under penetrate in other cases under other circumstances, should be seen as well within the nature of arms capable of deadly force as understood at the time of the founding of this country.

The Discrete Test approach approximates the characteristics of arms that are useful for self-defense, a principle that is embedded in the Common Use doctrine laid out in *Heller*. Those engaging in self-defense “[are] privileged to use such force as reasonably appears necessary to defend him or herself against an apparent threat of unlawful and immediate violence from another.<sup>24</sup>” Any arm that operates in a manner that focuses force on specific individuals engaging in unlawful and immediate violence are arms that are suitable for self-defense. Some jurisdictions have taken the approach that banning most, or all, variations of a class of arms, but allowing for a small number of relatively featureless handguns for example, amounts to a de minimis restriction on the right. This approach

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12/22/19) and [https://www.army.mil/article/33174/the\\_rules\\_of\\_ranging](https://www.army.mil/article/33174/the_rules_of_ranging). (Last visited 12/22/19).

<sup>23</sup> <https://www.hornady.com/team-hornady/ballistic-calculators/ballistic-resources/terminal-ballistics> (Last visited 12/22/19).

<sup>24</sup> George E. Dix, *Gilbert Law Summaries: Criminal Law* xxxiii (18th ed. 2010) (original emphasis); see generally David C. Brody & James R. Acker, *Criminal Law* 130 (2014).

amounts to a reasonableness test on restrictions to a fundamental right and ignores the reality that what works for one person will not work for another.

Categorical bans of arms that are suitable for self-defense, regardless of how they can be abused, should not be upheld. The statutes at question in Cook County Illinois extend well beyond a level of regulation comporting to a constitutionally protected right.

### CONCLUSION

Cook County joins multiple states and municipalities around the nation banning the possession of firearms in common use for self-defense and other protected activities based on a set of enumerated features. When Lower Courts have reviewed these various restrictions, they have almost universally applied an analysis to Second Amendment claims that differs substantially from the analysis articulated in *Heller*. This has led to outcomes where statutes regulating weapons have been reviewed under rational basis, or similar levels of scrutiny, on the theory that the conduct proscribed by the statutes in question is not covered by the Second Amendment.

Courts require clarification of the analysis needed for reviewing restrictions on the types of arms covered by the Second Amendment in addition to an objective test for what arms are covered under the Second Amendment would make it easier for lower courts to consistently review statutes implicating protected conduct across the country.

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