

No. _____

In the
Supreme Court of the United States

Guy Mena,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 26 U.S.C. §5861(e) comports with the Second Amendment?

Subsidiary question: whether this Court should hold the instant Petition pending the resolution of multiple relevant divisions of authority arising from the “dangerous and unusual weapon” exclusion from the Second Amendment?

PARTIES TO THE PROCEEDING

Petitioner is Guy Mena, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Guy Mena seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Mena*, No. 23-10144, 2023 WL 7314349 (5th Cir. November 6, 2023)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The unpublished panel opinion and judgment of the Fifth Circuit were entered on November 6, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Section 5861(e) of Title 26 reads:

It shall be unlawful for any person— ... (e) to transfer a firearm in violation of the provisions of this chapter.

Section 5845 of Title 26 reads in relevant part:

(a) Firearm

The term “firearm” means ... (6) a machinegun...

(b) Machinegun

The term “machinegun” means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of

parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

The Second Amendment of 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.

STATEMENT OF THE CASE

A. Trial Proceedings

Petitioner Guy Mena was arrested after the government arranged a controlled buy of a gun that could be modified to fire fully automatically. *See* (ROA-9-12). It ultimately charged him violations of 26 U.S.C. §§5861(e), 5871. *See* (ROA-9-12). Together with 26 U.S.C. §§5811, 5812, and 5845(a), these statutes forbid the transfer of a machinegun without first registering the machinegun with ATF and paying a tax. This case ultimately merged with a drug case for the purpose of sentencing, producing a term of 175 months imprisonment for the drug offense and a concurrent term of 120 months for the gun offense. *See* (ROA.74). The defendant also received two concurrent terms of supervised release, *see* (ROA.74), which may become consecutive terms of imprisonment in the event of revocation, *see United States v. Gonzalez*, 250 F.3d 923, 926 (5th Cir.2001).

B. Court of Appeals

Petitioner appealed, contending that the statutes of conviction violate the Second Amendment because they compel citizens to volunteer a weapon now in common use for confiscation prior to transfer. He acknowledged the Fifth Circuit's holding that machineguns fall outside the Second Amendment and raised the claim for further review. *See Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016). The court of appeals applied *Hollis* and rejected the claim as foreclosed. *See* [Appendix A]; *United States v. Mena*, No. 23-10144, 2023 WL 7314349, at *1 (5th Cir. November 6,

2023)(unpublished). In doing so, it applied plain error review, the claim not having been raised in district court. *See Mena*, 2023 WL 7314349, at *1

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to address conflict in the lower courts regarding the Constitutionality of bans on assault rifles such as the AR-15 and high-capacity magazines; it should hold the instant Petition pending resolution of the issue.

The Second Amendment protects from infringement “the right of the people to keep and bear Arms.” U.S. Const. Amend. II. This encompasses an individual right to bear arms for self-defense, unconnected to military service. *District of Columbia v. Heller*, 554 U.S. 570 (2008). This Court has held, however, that the Second Amendment does not protect the right to possess “dangerous and unusual” arms. *Heller*, 554 U.S. at 627; accord *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1, 21 (2022).

The bulk of lower court authority concludes that this exclusion applies to laws that prohibit weapons such as the AR-15 and/or high-capacity magazines. *See Duncan v. Bonta*, 83 F.4th 803, 805–06 (9th Cir. 2023)(collecting cases); *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175, 1195–96 (7th Cir. 2023); *Oregon Firearms Fed'n v. Kotek Oregon All. for Gun Safety*, 2023 WL 4541027, at *32-33 (D. Or. July 14, 2023). These courts reason that devices allowing rapid discharge of a large number

of bullets are of primary value in military contexts, *see Bevis v. City of Naperville, Illinois*, 85 F.4th at 1197, that they are not necessary for self-defense, *see Oregon Firearms Fed'n*, 2023 WL 4541027, at *32-33, that the features of these devices render them unusually dangerous, *see id.* at *34, that they implicate dramatic technological changes and emergent societal concerns, *see id.* at *36-39, and that bans on them are analogous to valid historical regulations, *see id.* at *39-45.

By contrast, the Southern District of California in *Miller v. Bonta*, --- F.Supp.3d ---2023 WL 6929336 (S.D. Cal. 2023), recently held that California's ban on weapons like the AR-15 and on high-capacity magazines violates the Second Amendment. Notably, it considered and rejected each of the arguments canvassed above. *See Miller*, 2023 WL 6929336, at *11-39. The District of Colorado, moreover, has granted a preliminary injunction against a ban on high-capacity magazines, demonstrating that the position of the court in *Miller*, while a minority one, is not idiosyncratic. *See Rocky Mountain Gun Owners v. Bd. of Cnty. Comm'rs*, No. 1:22-cv-02113-CNS-MEH, 2022 WL 4098998, at *2 (D. Colo. Aug. 30, 2022).

This Court should resolve that division of authority. It pertains to a fundamental constitutional right – that of self-defense -- and to primary conduct at its most raw – whether conduct undertaken by hundreds of thousands of American citizens is constitutionally protected, or may instead subject them to felony liability. Institutional actors -- billion-dollar industries and state and local governments -- currently act in the shade of legal uncertainty, deciding where to invest capital, and what laws to enact to protect their citizens from gun violence, without knowing the

basic scope of their rights. What the split lacks in circuit-level development, it makes up for in sharpness, significance, and urgency.

The resolution of this issue is likely to be of immense importance to the instant case. As the Seventh Circuit held, there is little constitutional difference between a ban on devices that permit a large number of bullets to be fired in a short space of time, on the one hand, and a ban on machineguns, on the other hand. The Seventh Circuit observed:

When we compare the AR-15s and other semiautomatic weapons covered by the Act and its counterparts, we come to the same conclusion. Indeed, we asked the plaintiffs at oral argument to explain what distinguishes AR-15s from M16s, the military's counterpart that is capable of both fully automatic operation and semiautomatic operation. The question is important precisely because *Heller* itself stated that M16s are not among the Arms covered by the Second Amendment; they are instead a military weapon.

Bevis v. City of Naperville, Illinois, 85 F.4th 1175, 1195 (7th Cir. 2023); *see also Kolbe v. Hogan*, 849 F.3d 114, 134 (4th Cir. 2017), *abrogated by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022)(recounting statement of district court that “[g]iven that assault rifles like the AR-15 are essentially the functional equivalent of M-16s—and arguably more effective—the [reasoning of *Heller* that M-16s could be banned as dangerous and unusual] would seem to apply here.”)(brackets added by Fourth Circuit). As such, there is a reasonable probability that a ruling extending the Second Amendment to AR-15’s and/or high-capacity magazines would also reach the machinegun forming the basis of Petitioner’s conviction and sentence.

As such, resolution of the division of authority referenced above may have significant consequence for the instant case. This Court should grant certiorari to

resolve the constitutionality of bans on AR-15's and/or high-capacity magazines, and hold the instant petition pending its resolution. *See Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163 (1998).

II. This Court should grant certiorari to address conflicts in the methodology used to determine whether a weapon is in common use, and accordingly due Second Amendment protection; it should hold the instant Petition pending resolution of the issue.

As noted, this Court has held that the Second Amendment does not protect the right to possess “dangerous and unusual” arms. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008); *accord New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1, 21 (2022). The court below affirmed Petitioner’s conviction on the basis of this proposition, applying its precedent that excludes machineguns from Second Amendment protection.

The courts applying the “dangerous and unusual” exclusion from the Second Amendment have applied conflicting mechanisms to determine whether a weapon is unusual. As the court below observed in a previous case, *see Hollis v. Lynch*, 827 F.3d 436, 448-451 (5th Cir. 2016), some courts consider the absolute numbers in use of the prohibited weapon. *See New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015) (“Though fewer statistics are available for magazines, those statistics suggest that about 25 million large-capacity magazines were available in 1995, shortly after the federal assault weapons ban was enacted, and nearly 50 million such magazines—or nearly two large-capacity magazines for each gun

capable of accepting one—were approved for import by 2000. Even accepting the most conservative estimates cited by the parties and by amici, the assault weapons and large-capacity magazines at issue are ‘in common use’ as that term was used in *Heller*.”). Others, by contrast, consider the percentage of arms in circulation within the prohibited class. See *United States v. Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015)(holding that AR-15 are not in common used because only “9% of the nation's firearms owners have assault weapons.”); *United States v. Lane*, No. 3:23CR62 (RCY), 2023 WL 5663084, at *15 (E.D. Va. Aug. 31, 2023)(“...the Court finds that the question of whether machineguns are ‘unusual’ can be answered by simply comparing the number of the machineguns in this country to the total number of guns overall.”). And two Justices of this Court concurred that stun-guns fall within the Second Amendment because of the numbers sold and the small number of jurisdictions that prohibit them. See *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring).

In short, the lower courts have identified “a wide variety in methodological approaches” to adjudicate whether a weapon is in common use. *Hollis*, 827 F.3d at 449; see also *Friedman*, 784 F.3d at 409 (“what line separates ‘common’ from ‘uncommon’ ownership is something the Court did not say.”); *Oregon Firearms Fed'n v. Kotek Oregon All. for Gun Safety*, No. 2:22-CV-01815-IM, 2023 WL 4541027, at *26 (D. Or. July 14, 2023)(noting that “[p]re-*Bruen*, courts struggled to reach a consensus framework for deciding what renders a firearm ‘in common use’ as stated in *Heller*,”

and “[t]his lack of a unifying framework often led courts to apply divergent approaches.”).

This Court should take certiorari to resolve this difference in the adjudication of this issue. The methodology pertains to a critical step in the adjudication of a basic constitutional right of armed defense. Further, as noted above, it has been expressly acknowledged by more than one court, *see Hollis*, 827 F.3d at 449; *Oregon Firearms Fed’n*, 2023 WL 4541027, at *26; *Friedman*, 784 F.3d at 409, reflecting its potential importance to the determination of legal rights. It pertains mostly to primary conduct, not process. And it is unlikely to resolve spontaneously, given the current state of this Court’s guidance, which is limited. *See Heller*, 554 U.S. at 627; *Bruen*, 597 U.S. at 21.

Finally, the issue may be important to the resolution of the instant appeal. At least one of the relevant mechanisms clearly supports the notion that machineguns are now within “common use.” There are now three-quarters of a million machineguns owned throughout the United States. *See* Bureau of Alcohol, Tobacco, and Firearms, *Firearms Commerce in the United States, 2021 Annual Statistical Update*, p. 17 (2021)(reflecting 741,146 registered machineguns throughout the United States), *available at* <https://www.atf.gov/firearms/docs/report/2021-firearms-commerce-report/download>, *last visited February 1, 2024*. Notably, these are only the registered machineguns, the bulk of which are probably legally owned remnants of the pre-1986 regime. By comparison, two Justices of this Court thought

that stun guns were in common use for lawful purposes, even though only about 200,000 people possessed them. *See Caetano*, 577 U.S. at 420.

This Court should grant certiorari to resolve the methodological question, and hold the instant case pending the resolution of that case. *See Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163 (1998).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 5th day of February, 2023.

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