No. 25-238, 25-566

In The
Supreme Court of the United States

CUTBERTO VIRAMONTES, *et al.*,
Petitioners,

-v-

COOK COUNTY, *et al.*,
Respondents.

EDDIE GRANT, JR., *et al.*,
Petitioners,

-v-

RONNELL HIGGINS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC TRANSPORTATION, *et al.,*
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Seventh and Second Circuits

BRIEF OF KNIFE RIGHTS, INC. AND THE KNIFE RIGHTS FOUNDATION, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Knife Rights, Inc. is a non-profit member organization incorporated under the laws of the State of Arizona. Knife Rights, Inc., through direct and grassroots advocacy, promotes legislative and legal action in support of people's ability to keep and carry knives and edged tools for all lawful purposes including self-defense.

The Knife Rights Foundation, Inc. is a non-profit organization incorporated under the laws of the State of Arizona. The Knife Rights Foundation, Inc. serves knife owners and the public with a focus on protecting the rights of knife owners to keep and carry knives and edged tools for all lawful purposes including self-defense. The purposes of The Knife Rights Foundation include the promotion of education regarding local, state and federal knife laws, and the defense and protection of the civil rights of knife owners nationwide.

This case concerns amici because it will ultimately impact their members' and the public's ability to acquire, possess, keep and carry various knives in common use and to exercise their right to keep and bear arms.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Knife Rights, Inc. and The Knife Rights Foundation, Inc. are not publicly traded and have no parent corporations.

SUMMARY OF THE ARGUMENT

The government may not ban arms that are typically possessed by law-abiding citizens for lawful purposes, that is, arms that are "in common use." Because common use governs *all* arms that fall within the plain text of the Second Amendment, the concept should be understood and applied in a sufficiently broad manner as to fully capture the notion that the Second Amendment protects arms that are *chosen* by the people to keep and bear "whatever the reason . . . ." *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008). The choices of the people control.

Thus, common use entails two critical concepts. **First**, because common use is an historical inquiry which takes place at step two of *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022) (see Pet.Br. at 27-28), the burden of proof lies with the government. That is, the government must prove that the subject arm is *not* in common use. **Second**, courts can conclude that an arm is in common use even without a record on numerosity.

As Justice Alito explained in his concurrence in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), "[a] weapon may not be banned unless it is *both* dangerous *and* unusual," *Id.* at 417 (Alito, J, concurring) (emphasis in original). As such, as part of its burden under *Heller* and *Bruen*, the government must prove that an arm is "unusual" that is, *not* in common use.

Though not their burden, Petitioners have filled the record with unrefuted evidence that the AR-15 and similar rifles are possessed by law-abiding Americans in vast numbers. That alone is sufficient for a finding of common use.

However, raw numerosity cannot be—and indeed is not—a necessary component for common use. Otherwise, government defendants will surely attempt to argue that many arms that are plainly in common use are actually unprotected merely due to lack of available data. The right to keep and bear arms does not live or die upon the availability of survey or sales data. A record, such as this, replete with this type of data may certainly make a court's job easier, but a government defendant may not point to the lack of numerical data as evidence that an arm is not in common use.

To be sure, a constitutional principle that is rigidly wedded to one specific type of data would fall short of protecting the right to keep and bears *arms* but rather may end up protecting the right to keep and bear only one or two types of arms—an approach that would vindicate a principle exactly the opposite of that embodied in the Nation's historical tradition.

We know from *Heller* that "handguns are the most popular weapon chosen by Americans for self-defense in the home . . . ." 554 U.S. at 629. We know from *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 297 (2025) that the AR-15 "is the most popular rifle in the country." And yet, only one type of weapon can be "the most popular weapon" and only one type of rifle can be "the most popular rifle."

Thus, the ultimate question is how should courts identify which arms are "typically possessed by law abiding citizens for lawful purposes." The approach to common use should be sufficiently flexible as to bring into the analysis a broad variety of factors reasonably calculated to glean *what Americans, themselves, choose to keep and bear*.

The Second Amendment, like the other Bill of Rights guarantees, protects *a nationwide* right. Accordingly, commonality across jurisdictions should weigh heavily in favor of a common use finding.

Further, when conducting the common use analysis, the focus should not be too granular. An arm is "common" if it is of a common "type" and not somehow distinct from that type in a constitutionally significant way. *Heller*, for instance, asked whether "handguns" are common, not whether the specific make and model Dick Heller wanted to own was common.

Because the government has the burden to show an arm is "dangerous and unusual," if the government cannot somehow distinguish a banned arm from others of its type, then as long as the *type* is common, the specific arm is common too. Thus, in evaluating such an attempt, a court must avoid assessing the level of generality too low. In order to justify distinguishing a type of arms for the purpose of a common use analysis, the government must identify a difference that is constitutionally relevant.

Understanding common use in this way has the additional benefit of addressing the so-called "circularity problem." Arms newly introduced to market which do not yet have significant sales may nevertheless be in common use because even though they have no sales record of their own, their commonality should be evaluated based upon the category or type of arm to which they belong. The so-called "circularity problem" is an analytical myth.

Finally, even if the government carries its burden to prove an arm is "unusual," that is, not in common use, it must also prove that the arm is "dangerous" for that arm to be unprotected. Since all arms are dangerous in the trivial, literal sense, "dangerous" in the historically relevant sense can only mean "more dangerous than arms in common use." This is because an unusual arm that is no more dangerous than an arm in common use is not distinguishable from that common arm in a categorically relevant way. Thus, in the same way the government must distinguish an arm categorically to disprove common use, the government must also distinguish an "unusual" arm categorically from common arms to prove dangerousness. Level of generality comes into play in exactly the same way for both commonality and dangerousness.

Adhering to the foregoing principles ensures a rigorous approach to the application of common use that faithfully applies this Court's recognition that the Constitution protects the keeping and bearing of those arms *chosen by the people*. Accordingly, in deciding these cases the Court should apply a broad understanding of common use consistent with these principles.

ARGUMENT

Because the Common Use Test Applies Equally to All Arms Falling Within the Plain Text of the Second Amendment, "Common Use" Should be Understood and Applied Broadly to Fully Encompass the Historical Tradition that the Second Amendment Protects Those Arms that are the Choice of the *People* to Keep and Bear.

Petitioners have fully briefed the historical and doctrinal basis for the common use test as governing arms ban challenges under the Second Amendment. Pet.Br. 28-34. Amici need not repeat that analysis here. Instead, Amici write to emphasize that because common use governs *all* arms that fall within the plain text of the Second Amendment, the concept should be understood and applied in a sufficiently broad manner as to fully capture the notion that the Second Amendment protects arms that are *chosen* by the people to keep and bear "whatever the reason . . . ." *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008). The choices of the people control.

Thus, common use entails two critical concepts. **First**, because common use is an historical inquiry which takes place at step two of *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022) (see Pet.Br. at 27-28), the burden of proof lies with the government. That is, the government must prove that the subject arm is *not* in common use. **Second**, courts can conclude that an arm is in common use even without a record on numerosity.

A. The burden as to common use is on the government.

As Petitioners have already more fully explained at Pet.Br. 27-28, as a *Bruen* step two historical tradition issue, the burden of proof as to common use is on the government. Thus, as Justice Alito explained in his concurrence in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), "[a] weapon may not be banned unless it is *both* dangerous *and* unusual," *Id*. at 417 (Alito, J, concurring) (emphasis in original). As such, as part of its burden under *Heller* and *Bruen*, the government must prove that an arm is "unusual" that is, *not* in common use.

B. To determine whether a type of arm is "in common use," a court should look to nationwide evidence of the arm's commonality, which may or may not reflect raw numerosity.

The record in this matter reflects as follows:

> Surveys indicate that tens of millions of Americans own [the rifles at issue], with the most recent data suggesting approximately 26 million individual Americans own at least

> one such rifle, with approximately 22 million choosing an AR-15 platform rifle specifically. *See,* English*, supra* at 37; *see also, e.g.*, WASH. POST-IPSOS, *supra* at 1 (concluding that 20% of gun owners, or 16 million Americans, owned AR-15s in 2022). Dealers report that AR-15 platform and similar semiautomatic rifles are second only to semiautomatic handguns in popularity and account for approximately twenty percent of firearm sales in the country. NSSF, *2023 Retailer Survey*, *supra* at 9. Production data shows that over the last two decades, on average, well over a million such firearms have been produced for the American market annually. NSSF, *Firearm Production*, *supra* at 7.

Pet.Br. at 34-35. *See also* Pet.Br. at 8-14.

Though not their burden, Petitioners have filled the record with unrefuted evidence that the AR-15 and similar rifles are possessed by law-abiding Americans in vast numbers. That alone is sufficient for a finding of common use.

However, raw numerosity cannot be—and indeed is not—a necessary component for common use. Otherwise, government defendants will surely attempt to argue that many arms that are plainly in common use are actually unprotected merely due to lack of available data. The right to keep and bear arms does not live or die upon the availability of survey or sales data. A record, such as this, replete with this type of data may certainly make a court's job easier, but a government defendant may not point to the lack of numerical data as evidence that an arm is not in common use.

As advocates of the rights of American knife owners, Amici are especially sensitive to this concern. If numerosity were the sole means of understanding common use, a court examining the constitutional right to keep and bear, say, a knife such as a stiletto (unequivocally an arm within the plain text of the Second Amendment), might be expected to make its determination looking for national data on stiletto possession and sales even if no such data are available.

Indeed, the voluminous record in *this* case highlights this important issue. Petitioners present an overwhelming record on the subject of semi-automatic rifles, so much so that it may be tempting to enshrine the type of record presented in *this* case as the archetype of common use analysis.

To be sure, a constitutional principle that is rigidly wedded to one specific type of data would fall short of protecting the right to keep and bears *arms* but rather may end up protecting the right to keep and bear only one or two types of arms—an approach that would vindicate a principle exactly the opposite of that embodied in the Nation's historical tradition.

We know from *Heller* that "handguns are the most popular weapon chosen by Americans for self-defense in the home . . . ." 554 U.S. at 629. We know from *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 297 (2025) that the AR-15 "is the most popular rifle in the country." And yet, only one type of weapon can be "the most popular weapon" and only one type of rifle can be "the most popular rifle."

Then what? It is not the case that only the *most* popular arms are protected. We know this because arms are protected under the Second Amendment if they are "in common use" not merely if they are the *most* commonly used. The Second Amendment protects all arms "typically possessed by law abiding citizens for lawful purposes", 554 U.S. at 625—that is, arms *chosen* by the people to be kept and borne (*see* Pet.Br. at 8-14, 31-34).

Thus, the ultimate question is how should courts identify which arms are "typically possessed by law abiding citizens for lawful purposes." The approach to common use should be sufficiently flexible as to bring into the analysis a broad variety of factors reasonably calculated to glean *what Americans, themselves, choose to keep and bear*.

This Court repeatedly refers to common use as a nationwide test. It concludes that handguns are in common use because "the *American people* have considered the handgun to be the quintessential self-defense weapon" and handguns "are the most popular weapon chosen *by Americans* for self-defense in the home." *Heller,* 554 U.S. at 629 (emphases added). Moreover, the Court refers to the line between "dangerous and unusual weapons" and those "in common use" as identifying "arms that are highly unusual *in society at large*." *Id.* at 627 (emphasis added); *see also id.* at 628 (handguns are "overwhelmingly chosen by *American society*" for self-defense (emphasis added)); *Caetano*, 577 U.S. at 420 (Alito, J., concurring) ("stun guns are widely owned and accepted as a legitimate means of self-defense *across the country*" (emphasis added)).

This conclusion is the only theoretically sound one. The Second Amendment, like the other Bill of Rights guarantees, protects *a nationwide* right. "[T]he people" whose firearm rights it guarantees, U.S. CONST. amend. II, are "the People of the United States" who "ordain[ed] and establish[ed] th[e] Constitution" in order "to form a more perfect Union," *id.* at pmbl.—not the people of each state or local jurisdiction in isolation. Thus, the Amendment protects those who live in states or localities with a less robust tradition of protecting the right to keep and bear arms from outlier legislation that falls short of national standards. *Cf.* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16 (1996); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 370 (1992).

Thus, in *Caetano*, Justice Alito considered it relevant that stun guns "may lawfully [be] possess[ed] . . . in 45 States." 577 U.S. at 420. In *Smith & Wesson*, the Court noted that AR-15s and similar rifles are "widely legal," 605 U.S. at 297, as well as recognizing in *Staples v. United States,* 511 U.S. 600, 612-14 (1994) that semiautomatic firearms, including AR-15 platform rifles, are "commonplace and generally available" weapons that "traditionally have been widely accepted as lawful possessions." Accordingly, commonality across jurisdictions should weigh heavily in favor of a common use finding.

Further, when conducting the common use analysis, the focus should not be too granular. An arm is "common" if it is of a common "type" and not somehow distinct from that type in a constitutionally significant way. *Heller*, for instance, asked whether "handguns" are common, not whether the specific make and model Dick Heller wanted to own was common. Nor did the Court ask whether Dick Heller's handgun was a revolver, a semiautomatic, a single shot, what caliber, or any other more granular question. So too in *Caetano*, Justice Alito asked whether "stun guns" were common *as a category*.

Because the government has the burden to show an arm is "dangerous and unusual," if the government cannot somehow distinguish a banned arm from others of its type, then as long as the *type* is common, the specific arm is common too. Thus, in evaluating such an attempt, a court must avoid assessing the level of generality too low. Justice Barrett observed that when evaluating historical analogs a court may fail to apply the principles of *Heller* and *Bruen* by analogizing at too *high* a level of generality and thereby justify too many laws ("[t]o be sure, a court must be careful not to read a principle at such a high level of generality that it waters down the right." *United States v. Rahimi* , 602 U.S. 680, 740 (Barrett, J. concurring)). Similarly, in applying the common use principle, a court must be careful not to read a category of arms at too *low* a level of generality.

In either instance, getting the level of generality wrong waters down the right. In order to justify distinguishing a type of arms for the purpose of a common use analysis, the government must identify a difference that is constitutionally relevant. Just as Cook County and Connecticut cannot identify any constitutionally significant difference among the arms at issue in these cases, so too are future government defendants required to disprove common use based on constitutionally relevant categories of arms.

A future model of a popular semiautomatic handgun, for example, a Glock Model 17, will not be numerically common based on sales alone when first released because it has not been sold in great numbers yet. But it will nonetheless be constitutionally protected because it is categorically a common, bearable arm possessed and used for lawful purposes. The same goes for the firearms prohibited under Cook County's and Connecticut's laws based on semiautomatic function and characteristics, and their evolutionary and technological successors. And while some AR-15 rifle models, like those used for competition, are not sold in large numbers by themselves, those too are protected for the same reasons that all semi-automatic firearms are, just as brand-new models of e.g. Glock and Sig Sauer handguns will be once they are available for sale. Similarly, a new model of knife produced by Gerber, Kabar, or Benchmade may not have sales history, but its commonality would be based on its similarity to a class and/or type of common arm.

Understanding common use in this way has the additional benefit of addressing the so-called "circularity problem." Arms newly introduced to market which do not yet have significant sales may nevertheless be in common use because even though they have no sales record of their own, their commonality should be evaluated based upon the category or type of arm to which they belong. The so-called "circularity problem" is an analytical myth.

Adhering to the foregoing principles ensures a rigorous approach to the application of common use that faithfully applies this Court's recognition that the Constitution protects the keeping and bearing of those arms *chosen by the people*. Accordingly, in deciding these cases the Court should apply a broad understanding of common use consistent with these principles.

C. Because the government must prove an arm is both "dangerous" *and* "unusual," arms *not* in common use cannot be banned unless the government also proves they are "dangerous."

Another, related, issue bears discussion. Even if the government carries its burden to prove an arm is "unusual," that is, not in common use, it must also prove that the arm is "dangerous" for that arm to be unprotected. Since all arms are dangerous in the trivial, literal sense, "dangerous" in the historically relevant sense can only mean "more dangerous than arms in common use." This is because an unusual arm that is no more dangerous than an arm in common use is not distinguishable from that common arm in a categorically relevant way. Thus, in the same way the government must distinguish an arm categorically to disprove common use, the government must also distinguish an "unusual" arm categorically from common arms to prove dangerousness. Level of generality comes into play in exactly the same way for both commonality and dangerousness.[2]

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[2] This understanding helps explain why courts, such as the Second Circuit below, that hold an arm unprotected if

Accordingly, an "unusual" arm that is nevertheless no more dangerous than a commonly possessed arm is not distinguishable from the common arm in any constitutionally relevant way and therefore remains protected under the Second Amendment.

Thus, to sustain an arms ban the government must prove both: (1) that the arm is not in common use and is therefore "unusual" and (2) that the arm is more dangerous than arms that *are* in common use. That is the only way the government can show that a ban is consistent with the historical tradition of banning "dangerous and unusual" weapons.

described as "unusually dangerous" are plainly wrong. *See National Association for Gun Right v. Lamont*, 153 F. 4th 213, 232-34 (2d Cir. 2025). The way in which these courts use the phrase "unusually dangerous" collapses "dangerous" and "unusual" into a single concept and obliterates the notion of common use. "Unusually dangerous," if it means anything, could only mean "more dangerous than arms in common use." Common use comes first. If an arm is in common use the analysis ends there. Only if the government proves that an arm is *not* in common use should a court go on determine if the arm is, in fact, dangerous in the historically relevant sense.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgments below in a manner consistent with the principles discussed herein.

Respectfully submitted,

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