

In the Supreme Court of the United States

CUTBERTO VIRAMONTES, ET AL.,

Petitioners,

v.

COOK COUNTY, ILLINOIS, ET AL.,

Respondents.

EDDIE GRANT, JR., ET AL.,

Petitioners,

v.

RONNELL HIGGINS, ET AL.,

Respondents.

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

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

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

COMMONWEALTH SECOND AMENDMENT, INC. (“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 particularly those residing in the Commonwealth of Massachusetts.¹ 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 this case affects Amicus Comm2A’s organizational interests, as well as those of its contributors and supporters, because Massachusetts law embodies a prohibition on “assault-style firearms” that has terms that are highly similar to the Cook County and Connecticut “assault weapon” bans that are now before the Court.

But Comm2A also has a particularized interest in the Court’s resolution of this case, and a unique perspective to offer, because of the manner in which Massachusetts has implemented its “assault” firearm prohibitions. That is, while the terms of the respective laws are similar, Massachusetts has implemented its prohibitions in a manner that stands as a logical extension of the prohibitions before the Court, as well

¹ Pursuant to this Court’s Rule 37.6, counsel for amicus curiae certifies that no counsel for any party authored this brief in whole or in part 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.

as their underlying rationales. This lies in the Commonwealth’s expansion of the prohibition on “copies or duplicates” of designated “assault”-type firearms to cover raw technological development—severed from any attachment to “military” or “combat” features. The Court’s consideration of this expansion provides significant insight into the ramifications that attach to the Court’s resolution of the cases at bar—and particularly, to any standard the Court might adopt to parse between weapons that are “dangerous and unusual,” and those that are not.



SUMMARY OF ARGUMENT

Courts upholding bans on purportedly “assault”-type firearms often reason that features like pistol grips, adjustable or folding stocks and muzzle attachments bestow “military” or “combat” attributes on arms that make them dangerous and unusual— notwithstanding their ordinary and common use for lawful purposes. Massachusetts has banned such arms since 1998, but when this ban proved ineffective, the Commonwealth moved to expand it to go beyond these essentially cosmetic features. More precisely, Massachusetts expanded its ban on “copies or duplicates” of designated guns to sweep up arms that merely use the same underlying technology. In doing so, it has shown that the focus on putatively “assault” characteristics is ultimately an attempt to prohibit technical innovation and development. Thus, the actual import of a ruling that upheld the challenged “assault weapon” prohibitions would be to freeze the

field of legal firearms at a point in time that existed many decades ago. Or otherwise stated, a Second Amendment exception for purported “assault weapons” would be an exception that swallowed the rule 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.” *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008); *accord Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016).

Amicus agrees with Petitioners that the widespread and common use of AR-15 and similar semiautomatic rifles for lawful purposes ought to be the end of this matter. However, acknowledging that the Court may want to provide additional factors that courts can use in respect of closer questions in the future, Amicus goes on to discuss additional factors that could be used to address the dangerous and unusual issue. Those factors are the extent to which a bearable arm is likely to have a discrete impact on a single target that is predictable, not indiscriminate. Amicus couples these factors with consideration of the “core” interest of self-protection and assessment of how a ban on the arm would burden the right of self-defense. This approach addresses much of the Court’s caselaw, as well as many of the concerns that lower courts have raised in the “assault weapon” context.



ARGUMENT

I. The Expansion of “Assault” Firearm Prohibitions in Massachusetts Shows That the Ultimate Issue Is Development and Innovation.

A. Lower Courts Have Relied on Supposedly Grave and Unique Dangers Associated with Modern Design Features.

To reach the conclusion the governments are free to ban modern semiautomatic rifles like the AR-15 as (so-called) “assault weapons” or “assault”-type firearms, lower courts have often attached misplaced reliance on the presence of modern design features. The Fourth Circuit, for example, relied substantially on the notion that AR-15 rifles have “combat-functional features” such as flash suppressors, pistol grips, threaded barrels and rails for attaching accessories. *See Bianchi v. Brown*, 111 F.4th 438, 455 (4th Cir. 2024). This made them “outside the ambit of protection” on the rationale that they were “military-style weapons designed for sustained combat operations that are ill-suited and disproportionate to the need for self-defense.” *Id.* at 461.

The Second Circuit departed from the Fourth Circuit in finding that AR-15 rifles are indeed protected “arms.” *See N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015). But again, the Second Circuit found that the Connecticut and New York bans’ reliance on “enumerated military-style features” operated to single out firearms with “a capability for

lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns.” *Id.* at 262 (quotation omitted). Moreover, the court reasoned that the bans had only a limited import because “citizens may continue to arm themselves with . . . any semiautomatic gun that does not contain any of the enumerated military-style features.” *Id.* at 260. Both the Second Circuit and the Fourth Circuit reasoned that “the banned assault weapons are just *some* of the semiautomatic rifles and shotguns in existence.” *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017) (citing *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d at 260) (emphasis added).

B. Massachusetts’ Expansion of the Prohibition on “Copies or Duplicates” Shows That the Issue Is Ultimately Technological Development.

Like both of the challenged “assault weapon” bans, Massachusetts prohibits a subset of semiautomatic firearms that are purported to be particularly dangerous. And, also like both of the challenged laws, Massachusetts defines a prohibited firearm using a bimodal definition that has two alternative prongs. One of the prongs identifies specific makes and models of semiautomatic firearms (like the “Colt AR-15”) and then also includes their “copies or duplicates” as prohibited. *See* Mass. Gen. L. ch. 140, § 121, *Assault-style firearm* (e); *see also* Conn. Gen. Stat. § 53-202b(1)(B)-(D); Code of Ordinances of Cook County, Ill., § 54-211, *Assault weapon* (7)(A)-(C) (“C.C. Ord.”). The other prong defines a prohibited “assault” firearm as, pertinently, a semiautomatic rifle with the ability to “accept” a

detachable magazine² and one, two or more additional features—most notably, a pistol grip, a folding or adjustable stock, or a muzzle attachment. *See* Mass. Gen. L. ch. 140, § 121, *Assault-style firearm* (a); *see also* Conn. Gen. Stat. § 53-202b(1)(E)(i); C.C. Ord. § 54-211, *Assault weapon* (1). Massachusetts first enacted its law in 1998. *See* 1998 Mass. Acts ch. 180, sec. 47, § 131M.

This two-prong framework—naming specific guns and their “copies or duplicates,” as well as any detachable magazine rifle that has additional features, is the same essential framework that several other states have used to adopt “assault weapon” restrictions. *See* 720 Ill. Comp. Stat. 5/24-1.9(a)(1)(A), (J); N.Y. Penal L. § 265.00(22)(a), (e);³ *see also* Cal. Penal L. §§ 12276(a), (e), 12276.1(a)(1) (prohibiting firearms in same “series”). It was also a key part of the federal law that was in place from 1994 through 2004. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XI, subtit. A § 110102(b), 108 Stat. 1796, 1997. And, as noted previously, lower courts upholding these prohibitions have often reasoned that they have limited sweep because “citizens may continue to

² The Cook County law requires that the semiautomatic rifle have “the capacity to accept a *large capacity* magazine detachable or otherwise,” not just a detachable one. *See* C.C. Code § 54-211, *Assault weapon* (1) (emphasis added). This distinction is largely immaterial in application because, regardless of a weapon’s originally intended capacity, larger-capacity aftermarket magazines are often available. *See, e.g., United States v. McIntosh*, 124 F.4th 199, 215-16 (3d Cir. 2024) (Matey, J., concurring) (citations omitted).

³ This subpart covers a list of specified makes and models and their “copies or duplicates.” *See* 2000 N.Y. Laws ch. 189, sec. 8, § 265.00(22)(e)(v).

arm themselves with . . . any semiautomatic gun that does not contain any of the enumerated military-style features.” *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d at 260.

However, in Massachusetts this rationale came largely to an end in July 2016, when the Massachusetts Attorney General issued an “Enforcement Notice” that evinced a much broader application of the prohibition on “copies and duplicates.” *See Enforcement Notice: Prohibited Assault Weapons* (Jul. 20, 2016), <https://www.mass.gov/doc/enforcement-notice/download>.

Under the Enforcement Notice, a firearm is within the prohibition on “copies or duplicates” of listed “assault weapons” if it meets either a “Similarity Test” or an “Interchangeability Test.” *See id.* These criteria prohibit any firearm “if its internal functional components are substantially similar in construction and configuration to those of an Enumerated Weapon,” or alternatively, “if it has a receiver that is the same as or interchangeable with the receiver of an Enumerated Weapon.” *Id.*; *see also Pullman Arms Inc. v. Healey*, 301 F.Supp.3d 227, 229 (D. Mass. 2018) (explaining terms); *Worman v. Healey*, 293 F.Supp. 3d 251, 258 (D. Mass. 2018) (same). Eight years later, the General Court codified this new standard into law. *See* 2024 Mass. Acts ch. 135, sec. 16, *codified at* Mass. Gen. L. ch. 140, § 121, *Assault-style firearm* (f).⁴

⁴ The legislative enactment omitted language from the Enforcement Notice that had also included any firearm that “includes or accepts two or more operating components that are the same as or interchangeable with those of an Enumerated Weapon,” and it is unclear whether this aspect of the Enforcement Notice remains in effect. *Compare* Mass. Gen. L. ch. 140, § 121, *Assault-style firearm* (f), *with* ENFORCEMENT NOTICE: PROHIBITED ASSAULT

What is particularly significant is that, after this expansion of the scope “copies and duplicates,” the prohibition on “assault”-type firearms no longer applies only to firearms that have features that are purportedly “combat-functional” or “military-style,” like pistol grips, folding stocks and muzzle brakes. Rather, the prohibition applies to *all* firearms that use the same internal technology, even if they do not have the features that, by lower courts’ reasoning, give “assault” firearms “a capability for lethality . . . far beyond that of other firearms in general, including other semiautomatic guns.” *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d at 262 (quotation omitted).

Consider the firearm in the Question Presented, the AR-15. The essential novelty that this gun’s original 1956 Armalite patent identified was an operating system that did not use a “conventional gas cylinder, piston and actuating rod assembly,” but instead directed gas to an expansion chamber in the bolt carrier. *See Gas Operated Bolt and Carrier System*, U.S. Patent No. 2,951,424 (filed Aug. 14, 1956) (issued Sep. 6, 1960). This new design was an improvement because it: (1) “provide[d] a gas system which is lighter and less expensive to produce” than conventional piston-based systems; (2) was “less sensitive to different firing pressures caused by variations in the propelling charge”; and (3) “provide[d] smoother operation and longer life of the working parts” because “the actuating force is transmitted directly down the center line of

WEAPONS (Jul. 20, 2016), <https://www.mass.gov/doc/enforcement-notice/download>. Notably, the same legislation supplanted the term “Assault-style firearm” for “Assault weapon.” *See* 2024 Mass. Acts ch. 135, sec. 16.

the barrel and the bolt mechanism to the shoulder of the shooter.” *Id.*

None of these benefits relate to the ostensibly “combat” or “military” characteristics that courts have relied on to uphold bans on AR-15’s and similar rifles. Yet, under an expanded concept of “copies and duplicates” the result is that a firearm using this “new” (70 year old) technology is prohibited, even if it sports traditional stocks and accessories and looks nothing like a “modern” rifle. This flies directly in the face of *Heller*’s mandate 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.” *Heller*, 554 U.S. at 582; *accord Caetano*, 577 U.S. at 411.

Consider again that courts such as the Second Circuit have reasoned that “citizens may continue to arm themselves with . . . any semiautomatic gun that does not contain any of the enumerated military-style features.” *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d at 260. Under Massachusetts’ expanded “copies and duplicates” approach, this is no longer true. For example, the FlightLite SCR, a rifle that uses the same direct gas impingement technology as the AR-15, but has *no* designated “military” or “combat” features, is unlawful. *See* SCR [product page], <https://fightlite.com/rifles/scr>.

II. “Dangerous and Unusual” Considerations That Are Consistent with Historical Precedent and the Core Interest of Self-Defense.

As Petitioners have aptly shown, the design features that the challenged laws target—protruding pistol grips, adjustable stocks, muzzle attachments,

and the like—have little connection to actual functionality, and instead relate largely to aesthetic characteristics. *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*, 60 U.C. HASTINGS L.J. 1285, 1299 (2009) (“The better explanation for these distinctions is symbolism.”). These features do nothing to show that a particular weapon, like the AR-15, is so “dangerous *and* unusual,” *Caetano*, 577 U.S. at 417 (Alito, J., concurring), that historical tradition can support a ban on it. And, as the above discussion shows, the use of superficial criterion can easily lead to bans that are much broader and more severe than their original justification—and ones that can be difficult or impossible to accurately predict. Who, after all, can reliably say that any semiautomatic firearm’s internal operating components won’t be deemed sufficiently analogous to that of a banned “assault weapon”?⁵

⁵ Courts themselves have had difficulty keeping this straight. In *Bianchi v. Brown*, 111 F.4th 438 (4th Cir. 2024), the court remarked that “[t]he AR-15 continues to use the same internal piston firing system and the same ammunition as the M16,” *id.* at 454 (citations omitted), although as shown *supra*, the essential design novelty of the AR-15 platform was that it did not use a “conventional gas cylinder, piston and actuating rod assembly,” but instead directed gas to an expansion chamber in the bolt carrier. *See* Gas Operated Bolt and Carrier System, U.S. Patent No. 2,951,424 (filed Aug. 14, 1956) (issued Sep. 6, 1960).

A. The Proposed Criteria Look to a Weapon’s Anticipated Operation and This Court’s Precedents.

Millions of Americans own AR-15s and other similar semiautomatic rifles for lawful purposes and, as Petitioners have shown, this ought to be the end of the matter. Yet, we understand that the Court may want to provide more concrete guidance regarding the contours that distinguish weapons that are truly “dangerous and unusual” from those that are likely to be commonly used for lawful purposes, whatever their external appearance might be. To that end, we offer two criteria that could be considered alongside what the Court has already pronounced. These criteria relate to the physical attributes of a weapon’s anticipated operation, and as such, they provide a review standard that is more objective than one grounded in superficial appearance. Certainly, they would better serve the Court’s edict 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 a case-by-case basis whether the right is really worth insisting upon.” *Heller*, 554 U.S. at 634.

The considerations are: first, whether a weapon is likely to have a *discrete* effect, meaning that any single operation of the weapon is likely to effect only one individual target; and second, whether the weapon’s effect is likely to be *discriminate*, meaning that that this individual target is likely to be predictable. Along with them, a particular consideration is the principle that the Second Amendment’s “core lawful purpose is self-defense.” *Heller*, 554 U.S. at 630; *accord McDonald v. City of Chicago*, 561 U.S. 767, 768 (2010). And to that end, “whether modern and historical regulations

impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are ‘*central*’ considerations when engaging in an analogical inquiry.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 20 (2022) (quoting *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599)). To show how these considerations would operate, we consider the precedent on “dangerous and unusual” weapons, as well as the concerns that some courts have raised about potential repercussions.

B. Applying the Criteria to Precedent.

We begin with *United States v. Miller*, 307 U.S. 174 (1939), which concerned the unlawful possession of a “sawed-off” shotgun, *id.* at 178.⁶ The Court, in rejecting the claim that the Second Amendment invalidated the prohibition, explained that “it is not within judicial notice that this weapon is any part of the ordinary military equipment.” *Id.* Rather, the Court reasoned that “the Militia comprised all males physically capable of acting in concert for the common defense” and “that ordinarily, when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” *Id.* at 179.

The Court in *Heller* explained that *Miller* stands for the proposition that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.” *Heller*, 554

⁶ Justice McReynolds, when announcing the Court’s opinion from the bench, made it clear that the firearm was a “sawed-off” shotgun, vis-à-vis one originally manufactured with a short barrel. See *Supreme Court Bars Sawed-Off Shotgun*, N.Y. TIMES (Mar. 31, 1939).

U.S. at 625. And further, the Court found “that limitation [was] fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” *Id.* at 627 (citing 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 148-49 (1769); other citations omitted).

Viewed through the lens of determinate and discriminate impact, and coupled with usefulness for self-defense and burden on the right, this result is easy to justify. A shotgun that has been sawed down and lacks a choke is determinate, in that it fires a single time in a predictable direction, but is comparatively indiscriminate. That is, its blast spreads out much more than a normal shotgun’s would, making it likely to injure bystanders and only effective at very close range. In terms of its usefulness for self-defense, then, as now, a person seeking to exercise this core right would have much better options available, and the burden on an individual’s self-defense right from a ban on sawed-off shotguns would accordingly be relatively small.

But there is more to be gleaned from *Miller*. In explicating on the types of arms that militiamen were likely to bring to muster at the time of the founding, the Court observed that those “arms” were generally “muskets” of suitable bore (caliber) and sufficient overall length, along with ammunition and necessary accessories. *See Miller*, 307 U.S. at 180-81 (citations and quotations omitted). But notably, the Court observed, the Virginia General Assembly had also provided that, in counties lying west of the Blue Ridge, men summoned for service “shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements, in lieu thereof.” *Id.* at 182

(*quoting* 1785 Va. Acts ch. 1, sec. 3, reprinted in 10 Hening’s Statutes at Large 12 (1823)).

One pertinent takeaway is that rifling was (as Petitioners observe in their brief) a relatively new technology at the time the founding—and one that increased firearms’ lethality by substantially extending their power and effective range. *See* Pet. Br. at 5-6. At the time, a far more common weapon was the smoothbore musket, a comparatively “simple weapon” that “was not particularly accurate” and had a limited “aimed effective range.” Martin Pegler, *FIREARMS IN THE AMERICAN WEST 1700-1900* 7 (2002). This was because of “the poor fit between ball and bullet,” which resulted in “a large proportion of the propellant gas escap[ing] past the ill-fitting bullet and simply vanish[ing] into thin air.” *Id.* at 9. Moreover, “[t]he poor fit . . . also meant that the bullet bounced down the barrel like a golfball being fired down a large drainpipe.” *Id.* Notwithstanding these limitations, the smoothbore musket had the advantage of being “adaptable, [as it was] capable of being loaded with solid ball, shot or a popular combination of both that was to become known as ‘buck and ball.’” *Id.* at 7.

Thus, and put simply, at the time of the founding, the smoothbore musket stood as the older and more commonly used technology, while the rifle stood as new technology that, while comparatively obscure, and less adaptable to some common conditions of the time, had significantly increased lethality. Yet, this increased lethality did not result in rifles being outside the scope of protection. Rather, all indications are that the framers adopted and embraced this new technology—and precisely because it was more effective, *i.e.* more lethal. *See* Pet. Br. at 5-6.

This makes sense through the lens of determinate and discriminate effects. Rifles are determinate (firing a single projectile in a predictable direction) and discriminate (likely to impact an intended target alone). This was particularly the case given that rifled arms stood as a more accurate—and more powerful—improvement over smoothbore ones. Given that weapons are inherently harmful, restricting them on that basis—increased lethality—would make as much sense as restricting new forms of communication on the rationale that they are a more effective form of speech. *But see Saia v. New York*, 334 U.S. 558, 561 (1948) (“Loudspeakers are today indispensable instruments of effective public speech.”). And finally, because rifled arms were more accurate and more effective, they also better served the purpose of self-defense. Conversely, restricting access to these more effective arms would have been a significant burden on the right of self-defense. Of course, all of these considerations are also true of AR-15 rifles. Massachusetts police trainers cite the “patrol rifle” as the “superior tool,” relative to handguns, for protecting against armed attackers. *See* Mass. Municipal Police Training Committee, BASIC FIREARMS INSTRUCTOR COURSE: PATROL RIFLE 3 (2010), http://www.mlefiaa.org/files/MPTC_NEWS/Patrol_Rifle_Student_Manual_2010.pdf.

Aside from sawed-off shotguns, *Heller* also referenced two other types of arms as being likely outside the scope of protection as “dangerous and unusual.” First, the Court referenced “machineguns,” and more specifically, “M-16 rifles and the like.” *See Heller*, 554 U.S. at 624, 627. Beyond that, the Court made a somewhat vaguer reference to “sophisticated arms that are highly unusual in society at large,” remarking

that “it may be true that no amount of small arms could be useful against modern-day bombers and tanks.” *Id.* at 627.

The determinate/discriminate framework handles these well. In the normal (*i.e.* foreseeable) course, machineguns like M-16 rifles are neither determinate nor discriminate. Rather, machineguns release a stream of bullets that strike multiple targets and, except in the hands of highly trained operators, those targets are largely indiscriminate. Indeed, this is what makes machineguns well-suited for warfare situations, where targets are likely to be multiple homogenous troops. But people seeking to protect themselves and their families within the confines of civil society would have many better options, and a preclusion on machineguns would do relatively little to burden the right of armed self-defense.

Beyond that, the “arms” that “could be useful against modern-day bombers and tanks” would likely not be “small arms” at all—as the Court appeared to acknowledge. And of course, the Court has recognized that the “arms” the Second Amendment protects are those that are “bearable,” *i.e.* those “that ‘a man wears for his defence, or takes into his hands,’” and that are “carr[ied] . . . for the purpose of offensive or defensive action.” *Caetano*, 577 U.S. at 416 n.3 (Alito, J., concurring) (quoting *Heller*, 554 U. S. at 581, 584) (alteration in source)); *see also Bruen*, 597 U.S. at 19. We return to this momentarily, but for now observe that artillery and missiles are plainly not “bearable” arms.

Next and finally, there is the Court’s decision in *Caetano*, where it vacated a Massachusetts judgment that had found that stun guns were not protected

“arms.” *See* 577 U.S. at 412. While the Court’s *per curiam* resolution suggests that the question was not a close one, it is notable that it also would not be a close one through the lens of determinate and discriminate effects. A stun gun is determinate, in that it impacts a single target selected by its user, and it is discriminate, in that its likely effect is only that intended target. A stun gun is useful for self-defense in that it can incapacitate an attacker, and a person facing a prohibition on stun guns would have few comparable alternatives to choose from.

C. Applying the Criteria to Lower Courts’ Concerns.

We next move to some of the hypotheticals that lower courts have raised—beginning with the most extreme, a “bearable” nuclear weapon such as the W54 warhead. *See Bianchi v. Brown*, 111 F.4th 438, 451 (4th Cir. 2024) (citing *Bevis v. City of Naperville*, 85 F.4th 1175, 1198 (7th Cir. 2023)).⁷ Plainly, a bomb is neither determinate nor discriminate, as it kills or destroys all within its blast (and things well beyond its blast, in the case of a nuclear weapon). And, a bomb has virtually no utility for personal self-defense because it would kill its user if deployed to stop an imminent threat—and if the user were able to arm it and *leave*, then the targeted threat would by definition no longer be imminent. Conversely, bombs, whether they are hand grenades or nuclear weapons, would do little to serve the right of personal self-defense, and a ban on them would do little to curtail it. “Even if some nuclear warheads are small enough for an individual

⁷ We agree with Petitioners that the example is somewhat absurd. *See* Pet. Br. at 39.

to carry, no reasonable person would think to use one to defend himself.” *Snope v. Brown*, 145 S.Ct. 1534, 1538 (2025) (Thomas, J., dissenting from denial of certiorari). All of this would also be true of bazookas and rocket and grenade launchers like the Panzerfaust and RPG-7. *See Bianchi*, 111 F.4th at 460.

Finally, there is the issue of biological weapons, including the hypothetical “umbrella gun that fires a ricin-laced pellet.” *See id.* at 451, 460. A biological weapon, on its own, is neither discrete nor discriminate because it impacts an unknown number of victims, and its user has almost no control over who those victims are. A ricin pellet might be discrete, and also somewhat discriminate. But as to the parallel question—usefulness for the core purpose of personal self-defense—the Fourth Circuit decision raising the issue answers that question on its own: Such an arm would be “utterly ineffective at countering imminent threats for which the right to self-defense exists because it takes hours for ricin to have a debilitating effect.” *Id.* at 451 (citation omitted).

A common use analysis that considers the physical characteristics of arms and their usefulness for personal self-defense, as we have outlined, mirrors a principle that is embedded in *Heller*. From the beginning, “Americans understood the ‘right of self-preservation’ as permitting a citizen to ‘repe[l] force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’” *Heller*, 554 U.S. at 595 (quoting 1 St. George Tucker, BLACKSTONE’S COMMENTARIES 145-46 n.42 (1803)); *see also* 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 3 (1769) (“if the party himself, or any of these his relations”—“husband and wife, parent and child, master and

servant”—“be forcibly attacked in his person or property, it is lawful for him to repel force by force.”). 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. While some jurisdictions have taken the approach of banning most or all variations of a class of arms, but allowing for a small number of relatively “featureless” ones to remain, that approach is anything but a de minimus restriction on the right—particularly when one considers its ultimate ramifications. Rather, this approach amounts to a “reasonableness” test for substantial burdens on the fundamental right of self-defense, and one that ignores the reality that what works for one person will not necessarily work for another.



CONCLUSION

The challenged laws are categorical bans on broad swaths of arms that are suitable for self-defense. They lack historical precedent or justification and extend well beyond the level of regulation that can comport with a constitutionally protected right. To the extent the Court is inclined to rely on characteristics or attributes of bearable arms to answer the question of whether they are “dangerous and unusual,” the standards that the challenged laws embody are untenable. Rather, a standard that considers the actual nature of the weapons at issue—both their intended and foreseeable effect, coupled with consideration of their usefulness for self-defense—would achieve results far more in line with the Second Amendment that the people adopted in 1791.

Respectfully submitted,

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