

Nos. 25-238, 25-566

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, 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 Second and Seventh Circuits

**BRIEF OF AMICUS CURIAE PROFESSOR JOSEPH
BLOCHER IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*¹

Joseph Blocher is the Lanty L. Smith '67 Distinguished Professor of Law at Duke University School of Law. His scholarship on gun rights and regulation has been published in the *Yale Law Journal*, the *Stanford Law Review*, the *Harvard Law Review Forum*, and other leading academic journals. See, e.g., *Bans*, 129 *Yale L.J.* 308 (2019); *Good Cause Requirements for Carrying Guns in Public*, 127 *Harv. L. Rev. F.* 218 (2014); *Firearm Localism*, 123 *Yale L.J.* 82 (2013); *The Right Not to Keep or Bear Arms*, 64 *Stan. L. Rev.* 1 (2012). His publications include a forthcoming article on the Second Amendment and “common use,” *The Common Use Test and the Question of Constitutional Coverage*, 125 *Mich. L. Rev.* (forthcoming 2027). His work has also been cited by many federal courts of appeals. E.g., *Bianchi v. Brown*, 111 F.4th 438, 464 (4th Cir. 2024) (en banc). His book *The Positive Second Amendment: Rights, Regulation, and the Future of Heller* (2018) (with Darrell A.H. Miller) includes a comprehensive account of the history, theory, and law of the right to keep and bear arms. His expertise in the history of firearms regulations and familiarity with lower-court class-of-arms cases render him well suited to assist the Court in evaluating whether to extend a novel categorical protection to AR-15s and similar weapons simply because they are purportedly widely owned.

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no entity or person other than *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In petitioners’ telling, there is “an absolute right to possess arms in common use for lawful purposes.” Br. of Pet’rs at 29. The bare fact that many such weapons are now in circulation in the States that have not made them unlawful is, in petitioners’ view, dispositive of the question whether the Second Amendment bars any government from prohibiting or materially restricting their ownership or use, regardless of any harm they inflict on the public.

That is incorrect. The Second Amendment has never provided an “absolute” right to possess and use any weapon without restriction, simply because such weapons are already in general circulation. See *Wolford v. Lopez*, 609 U.S. 185, 193 (2026); *District of Columbia v. Heller*, 554 U.S. 570, 624-625 (2008) (describing some weapons, *e.g.*, “short-barreled shotguns,” as constitutionally unprotected). And indeed courts have overwhelmingly concluded that restrictions on AR-15s and similar weapons are constitutional because they fit comfortably within this Nation’s regulatory traditions. In that regard, *amicus* will focus on two overarching points.

First, this Court’s decision in *United States v. Miller*, 307 U.S. 174 (1939), from which petitioners’ purported “common use” test derives, does not remotely support petitioners’ arguments for an absolute Second Amendment right to possess assault weapons. The *Miller* Court’s analysis proceeded from the premise that the *only* weapons the Second Amendment could conceivably shield from state regulation were the weapons citizens would need if called to serve in colonial-era militias—that is, weapons suitable for *mili-*

tary use. *Id.* at 178-179. This Court’s decision in *Heller* repudiated every aspect of that approach. It both protected the right to bear arms for self-defense irrespective of whether those arms would have had any use in military service, and emphatically rejected the proposition that dangerous military weapons could not be subject to state regulation because such weapons would be of the type that *were* suitable for use in military service. See *Heller*, 554 U.S. at 582, 624-625. Accordingly, *Miller*’s uncritical assertion that the arms in common use at the Founding were the sorts of arms suitable for the militia represented the very mode of Second Amendment analysis that *Heller* rejected. It was also wrong. Historical analysis has shown that weapons in common use at the time of the Founding were typically unsuitable for militia service. That is why Founding-era laws encouraged, and sometimes even required, citizens to obtain weapons suitable for militia service. See *infra*, pp. 8-10. It thus makes little sense to look to *Miller*—let alone history or tradition—as authority for petitioners’ proposed “common use” test. See Joseph Blocher, *The Common Use Test and the Question of Constitutional Coverage*, 125 Mich. L. Rev. (forthcoming 2027)² (manuscript at 21-31).

Second, making a numbers-based “common use” analysis the sole determinant of Second Amendment protection would not establish an administrable rule for future class-of-arms cases. There is no neutral principle that determines when a weapon is “common.” Even if such a line could be drawn, it would be resistant to evidentiary proof; formulations such as “in common use for self-defense” are particularly susceptible to variation in measurement, and the set of firearms in “common use” is subject to rapid technological

² <https://perma.cc/8VSB-YLVG>.

and commercial change. The test is also circular: it protects weapons because they have not been banned, but it permits bans because they already exist. That logic is incompatible with this Court’s precedents overruling handgun bans but allowing restrictions on military-grade weapons.

For these reasons, the Court should firmly reject petitioners’ efforts to create a novel categorical protection for any class of weapons that happens already to be in circulation. Although the traditional understanding of “Arms” or practice of regulating “dangerous or unusual” weapons may involve some consideration of common use or associated factors, that is no basis to make Second Amendment protection turn entirely on a counting exercise. This Nation’s history is replete with examples of legislation targeting particularly dangerous weapons that confer minimal defensive benefit but wreak widespread harm—even when, and often precisely because, they are commonplace. Regulation of AR-15-style weapons fits well within that tradition.

ARGUMENT

I. The number of weapons in circulation at a given time has never conclusively defined the Second Amendment right.

The Second Amendment is not a right to possess “any weapon whatsoever.” *Heller*, 554 U.S. at 626. To the contrary, this Court has recognized that military-grade weapons and certain other unusual weapons are beyond the right’s scope altogether. *Id.* at 624-625, 627. By the same token, this Court has never applied a numerical test that categorically protects any weapon in general circulation, no matter how novel or dangerous its characteristics. See generally *Bianchi v. Brown*, 111 F.4th 438, 460 (4th Cir. 2024) (en banc).

(Wilkinson, J.) (“[W]eapons that are *not* in common use can safely be said to be *outside* the ambit of the Second Amendment. But the logic does not work in reverse. Just because a weapon happens to be in common use does not guarantee that it falls within the scope of the right to keep and bear arms.”).

This Court has thus recognized that the application of the Second Amendment is *not* conclusively determined by the fact that a weapon has already been banned, or, conversely, by the fact that it has already entered private circulation. For instance, new weapons like stun guns can enable the use of nonlethal force in self-defense, regardless of whether they were widely available in previous eras. *Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016) (per curiam). And it would be “startling” to infer blanket Second Amendment protection for military weapons like machine guns, *Heller*, 554 U.S. at 624—even though there may be hundreds of thousands of them in private hands, Bureau of Alcohol, Tobacco, Firearms & Explosives, *Data & Statistics*³ (accessed Oct. 9, 2026) (“ATF Statistics”).

It would be equally “startling” to apply a numerical “common use” test (which omits consideration of whether a weapon is unusually dangerous) to resolve this case, given that AR-15s are such close cousins of M16s—the very military firearms that this Court in *Heller* identified as obviously subject to regulatory prohibition because of how unusually dangerous they are. 554 U.S. at 624, 627. The weapons are in most respects identical. The principal difference between the two is that the military M16 version is a fully automatic weapon capable of firing several hundred bul-

³ <https://perma.cc/R84G-GGV9>.

lets per minute, while the AR-15 version that is available for civilian purchase and use in States where it is legal is a semi-automatic weapon capable of firing up to about 100 bullets per minute—though it can also be easily modified to mimic fully automatic fire. The differences between the two weapons “pale[] in significance” compared to the similarities. *Bianchi*, 111 F.4th at 454-456.

In nonetheless advocating for a “common use” test that would conclusively forbid restrictions on possessing or using AR-15-style assault weapons, petitioners place considerable weight on *Heller*’s discussion of *United States v. Miller*, 307 U.S. 174, 179 (1939), a decision that included a passing reference to “common use.” Br. of Pet’rs at 28-29 (citing *Heller*, 554 U.S. at 624-627). But—as petitioners’ conspicuous failure to cite *Miller* itself reflects—that decision cannot possibly bear the weight of petitioners’ argument or justify adoption of the test they propose.

Miller upheld a ban on sawed-off shotguns by applying the principle that the Second Amendment must be “interpreted and applied” with the purpose of supporting the States’ ability to call forth the militia. *Id.* at 178-179. It noted the “absence of any evidence tending to show that possession or use” of such weapons had “some reasonable relationship to the preservation or efficiency of a well regulated militia” and withheld “judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” *Id.* at 178. Then *Miller* surmised that the colonists would have reported to service in the militia with “arms supplied by themselves and of the kind in common use at the time.” *Id.* at 178-179. The “common use” phrase thus was more

literary detour than historical analysis; it had no supporting citation. And certainly nothing in *Miller* turned on whether the weapons at issue were indeed in common use; the opinion provided no further exposition or analysis on that point.⁴

Even more to the point, this Court’s decision in *Heller* repudiated virtually every element of the *Miller* Court’s analysis. See *Heller*, 554 U.S. at 627-628. *Heller* went so far as to describe *Miller* as “an uncontested and virtually unreasoned case” “that discusses *none* of the history of the Second Amendment.” *Id.* at 624 & n.24.

As particularly relevant here, *Heller* dismissed any interpretation of the Second Amendment that would restrict its protections to “only those weapons useful in warfare”—rejecting as “startling” the notion that it could be unconstitutional to impose “restrictions on machineguns” while allowing regulation of handguns and other arms typically possessed for self-defense. *Id.* at 624. On the contrary, “weapons that are most useful in military service * * * may be banned” because

⁴ The federal government points to a small number of nineteenth-century decisions purportedly protecting commonly kept arms. Br. of United States at 13; see also Br. of Pet’rs at 48. But these decisions also typically identified the protected arms as “the usual equipment of the soldier.” *Andrews v. State*, 50 Tenn. 165, 186 (1871); *Aymette v. State*, 21 Tenn. 154, 158 (1840) (“ordinary military equipment”); *Fife v. State*, 31 Ark. 455, 459-461 (1876) (“such arms as are used for purposes of war” (citation omitted)); *State v. Workman*, 35 W. Va. 367, 373 (1891) (“weapons of warfare”), *abrogated by N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022). That does not show that *all* common weapons were beyond regulation—if anything, it shows the opposite. See, e.g., *Andrews*, 50 Tenn. at 186 (authorizing effectively comprehensive restrictions on dirks, sword canes, pocket pistols, and other weapons).

they are not the “sorts of weapons” that the framers of the Second Amendment intended to protect. *Id.* at 627. Numerous courts have concluded that AR-15s and similar weapons may be regulated for this exact reason. See, e.g., *Bevis v. City of Naperville*, 85 F.4th 1175, 1201-1202 (7th Cir. 2023) (“History and tradition leave no doubt that certain weaponry is for the state only,” such as “grenades,” “machineguns,” and “artillery pieces” (collecting authorities)); *Bianchi*, 111 F.4th at 452, 459 (“The Second Amendment, with its ‘central component’ of ‘individual self-defense,’ is not concerned with ensuring citizens have access to military-grade or gangster-style weapons.” (quoting *Bruen*, 597 U.S. at 29)).

Heller noted *Miller*’s dicta about militiamen bringing arms “in common use at the time,” amending it to add that the arms brought for service would have needed to be in common use “for lawful purposes like self-defense” to qualify as arms presumptively protected by the Second Amendment. 554 U.S. at 624 (quoting *Miller*, 307 U.S. at 179); see also *Bruen*, 597 U.S. at 21, 47. But *Heller* was not primarily concerned with defining the scope of “Arms,” it did not conduct an “exhaustive historical analysis,” *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 626), and it did not purport to draw from *Miller* any rule that weapons in common use at the Founding (or at any other time) would automatically be protected from regulation by the Second Amendment.

In fact, the historical record appears to show precisely the opposite of what *Miller* surmised. Firearms in common use at the Founding had minimal utility for militia service—militiamen could even be “penalized” if they “turn[ed] up at muster with guns in common use.” Saul Cornell, *The Early American Tradition*

of Arms Regulation: Common Law, Common Weapons, and Common Use, 75 Duke L.J. Online 109, 110 (2026). “The differences between civilian arms and military arms were well understood by the revolutionary generation.” *Id.* at 121. Firearms commonly used for hunting were not capable of a sufficient volume of fire for battle, and they generally could not be modified to add a bayonet, which would have been critical for hand-to-hand combat. Jack Thorlin, *Just to Be Safe, Let’s Keep Ignoring What “Arms” Meant in 1791*, 129 Dick. L. Rev. 1075, 1095-1097 (2025).

Accordingly, Founding-era laws “sought to force reluctant militia members to purchase military quality muskets equipped with bayonets.” Cornell, *supra*, 75 Duke L.J. Online at 120. *Miller* itself cited state laws requiring militiamen to procure specific weapons, confirming that arms were required that were not in common use. 307 U.S. at 180-182. The Militia Act of 1792 likewise required each militia member to purchase “a good musket or firelock, a sufficient bayonet and belt,” and other equipment; the Act also aimed to standardize bores to be “sufficient for balls of the eighteenth part of a pound.” Act of May 8, 1792, ch. 33, 1 Stat. 271, 271-272. And the Act afforded these military-quality arms legal protections from distraint or execution. *Id.* at 272; Cornell, *supra*, 75 Duke L.J. Online at 126 & n.87. “Weapons in common use,” on the other hand, “were not elevated to any special legal status.” Cornell, *supra*, 75 Duke L.J. Online at 124.

The historical evidence thus refutes the premise petitioners seek to extract from *Miller* (by way of *Heller*) that all common weapons would have been protected as “part of the ordinary military equipment” or to “contribute to the common defense.” See *Miller*, 307 U.S. at 178. There would have been minimal benefit

from having men report to service with firearms in common use for private purposes such as hunting that could not take a bayonet; the militia laws in fact aimed to secure the opposite result. In short, *Miller*'s historically inaccurate observation about "common use" is inconsistent with its own reasoning and played no load-bearing role in either *Miller* itself or in *Heller*. There is thus no reason to elevate it into a rule of categorical protection now. Nothing about *Miller*'s reasoning supports petitioners' demand for a determinative "common use" test for Second Amendment protection.

II. Making "common use" dispositive of constitutional protection would be unhelpful for resolving other class-of-arms cases.

Establishing a principle of categorical protection for weapons in "common use" would also present significant problems as a rule for future class-of-arms cases. See Blocher, *The Common Use Test*, *supra* (manuscript at 32-40).

A "common use" test would be inadministrable. One glaring problem with making Second Amendment protection turn on a "popularity test," *Bianchi*, 111 F.4th at 460, is the lack of any principled way to determine when a weapon becomes sufficiently "common" to qualify for constitutional protection.

The difficulty begins with identifying the question courts would have to answer. Is federal constitutional protection determined, as petitioners seem to suggest, by the percentage of States currently regulating a weapon? Br. of Pet'rs at 10, 35 ("legal in the vast majority of states"). By the percentage of people who supposedly own the weapon—perhaps according to the answers of a minority of respondents to an unrepresentative survey? *Id.* at 11, 34 (extrapolating from a

survey restricted to gun owners that around 4-5% of Americans own “AR-15-style” weapons). By the sheer numbers that manufacturers are able to flood into the market before state and local authorities are able to assess and respond to the risks posed by the weapon? *Id.* at 12-13, 35. And does it matter if a large number of the weapons are owned by a small number of people? Kim Parker et al., *America’s Complex Relationship with Guns*, Pew Rsch. Ctr. 22 (June 22, 2017)⁵ (29% of gun owners own five or more guns). There is no indication which of these a “common use” test would or could enshrine as constitutional criteria, or where the cutoff would be—making the line “impossible to draw with precision.” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 921 (2018); cf. *Rucho v. Common Cause*, 588 U.S. 684, 707 (2019) (lack of “clear, manageable, and politically neutral” standard establishing how much partisan gerrymandering is too much).

Even if the right metrics could be discerned, the threshold for what is “common” cannot be determined in a principled manner. Is a weapon in common use if it is lawful in 15 States but unlawful in 35, if hundreds of thousands or millions of such weapons are lawfully possessed in that minority of States? And if so, why should the Second Amendment bind the people in a substantial majority of States to the public-safety regulatory choices of the people in a minority of States? What if the States are equally divided on the question? And if the Second Amendment would not bar regulation in those circumstances, why should the answer here be different, given that the people of eleven

⁵ <https://www.pewresearch.org/wp-content/uploads/sites/20/2017/06/Guns-Report-FOR-WEBSITE-PDF-6-21.pdf>.

States—a third of the Nation’s population—have chosen to ban AR-15 sale or possession? See Br. of Pet’rs at 10 n.3. Alternatively, assuming that the proportion of Americans who own AR-15s is indeed around 4 or 5%, or even 8%, is that really “common”? See Br. of Pet’rs at 11. How about 2%? 1%? Cf. *Bruen*, 597 U.S. at 67-68 (giving minimal weight to territorial laws applicable to “less than 1% of the American population”). These questions are fundamental, but petitioners have no answer to them.

It should be obvious that petitioners’ approach will invite litigation that cannot be resolved on a principled basis. For example, this Court allowed a constitutional challenge against a stun gun ban with circulation figures in the hundreds of thousands—*i.e.*, less than .1% of Americans. See *Caetano*, 577 U.S. at 420 (Alito, J., concurring in the judgment). But if that degree of possession amounts to common use, then fully automatic weapons would be protected as well, with hundreds of thousands in potential private circulation. ATF Statistics, *supra*. There are even more high-capacity magazines and bump stocks, owing to manufacturers’ efforts to flood the market. Mike Spies, *Newly Obtained Documents Show How Gun Manufacturers Swamped the Market With Large-Capacity Magazines*, The Trace (Dec. 22, 2025)⁶ (over 700 million high-capacity magazines produced between 1990 and 2021, despite federal ban from 1994 to 2004); *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,547 (Dec. 26, 2018) (as many as 520,000 bump stocks held by the public). And this is all assuming that the pertinent class of weapons can be easily defined in the first place—which it very likely will not be. See *Snope v.*

⁶ <https://www.thetrace.org/2025/12/large-capacity-magazine-nssf-gun-study/>.

Brown, 145 S. Ct. 1534, 1539 (2025) (Thomas, J., dissenting from denial of certiorari) (“every single AR-15 can be converted to a machinegun using cheap, flimsy pieces of metal” (citation omitted)); *Garland v. Cargill*, 602 U.S. 406, 429 (2024) (Alito, J., concurring) (“a semiautomatic rifle with a bump stock can have the same lethal effect as a machinegun”).

“Common use” would depend on untested evidence. Even if a principled “common use” line could be drawn in theory, applying it in practice will prove unmanageable. “[T]he data on firearm ownership necessary to evaluate whether the test is satisfied in any given case simply does not exist.” Cody J. Jacobs, *End the Popularity Contest*, 83 Tenn. L. Rev. 231, 272-275 (2015). Making constitutional protection dependent on how many firearms are in circulation, or why they are owned, could allow Second Amendment class-of-weapons cases to turn on unreliable surveys rather than reasoned legal principles. Estimates of gun ownership and defensive gun use vary widely, with Professor (and *amicus*) William English’s 2021 study proposing an incidence of defensive gun use “more than twenty times higher than estimates based on data from the National Crime Victimization Survey.” Deborah Azrael et al., *A Critique of Findings on Gun Ownership, Use, and Imagined Use from the 2021 National Firearms Survey*, 78 SMU L. Rev. 239, 251-255 (2025); see also, e.g., David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. Crim. L. & Criminology 1430, 1431 (1997). But that unpublished study has been repeatedly cited as evidence of “common use.” See, e.g., *Duncan v. Bonta*, 133 F.4th 852, 902 (9th Cir. 2025) (Bumatay, J., dissenting); *Bianchi*, 111 F.4th at 518 n.58 (Richardson, J., dissenting); *Hanson v. District of*

Columbia, 120 F.4th 223, 269 & nn.172, 174 (D.C. Cir. 2024) (Walker, J., dissenting).

Untested surveys about “common use” are a particularly unreliable foundation for constitutional protection. Evidentiary testing is crucial for statistics—yet amici often make statistical claims supported by studies that have, for example, never been published. Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757, 1784-1787 (2014) (noting that much “extra-record evidence” in amicus briefs would not “hold up on cross-examination”). And there is little reason to think the courts of appeals have substantial institutional competence in evaluating untested statistical claims.

These problems will be particularly vexing insofar as “common use” is understood to incorporate abstract questions like whether a gun is owned “for self-defense.” It is difficult enough to sift out the multiple individual motives for owning weapons, but it may be impossible to determine why the public owns them in any legally coherent sense. The Court has described it as “hazardous” to invalidate legislation as unconstitutional based on “guesswork” about “congressional motives or purposes.” *United States v. O’Brien*, 391 U.S. 367, 383-384 (1968); see also Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent As Oxymoron*, 12 Int’l Rev. L. & Econ. 239, 249 (1992) (“Individual intents, even if they are unambiguous, do not add up like vectors.”). That reasoning applies *a fortiori* to “guesswork” about the aggregate purposes of the hundreds of millions of members of the American public. For instance, petitioners (at 11) cite a survey where only a minority of 399 AR-15-style rifle owners cited self-defense as one of their main two reasons for owning them; the total number was higher for the set

of answers including “recreation/fun/sport,” “because I can,” “because I want to,” and “angers liberals/people want to ban them/they make other people afraid.” Emily Guskin et al., *Why do Americans own AR-15s?*, Wash. Post (Mar. 27, 2023)⁷ (capitalization modified). And though a higher number (around 65%) agreed that self-defense was one major reason they owned an AR-15, about the same number (63%) registered the same agreement with the statement that they owned one because “[i]t is fun to shoot.” *Ibid.*

Some courts have limited protection to instruments *actually* used for self-defense in the home, as opposed to weapons with speculative defensive utility. *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 45 (1st Cir. 2024) (“True, one could imagine Hollywood-inspired scenarios in which a homeowner would need to fend off a platoon of well-armed assailants without having to swap out magazines. But we read *Bruen* as requiring us to ascertain how a regulation actually burdens the right of armed self-defense, not how it might be imagined to impose such a burden.”). That is more concrete, but it, too, is difficult to measure—and as courts have recognized, there is no chance it would cover AR-15s and similar weapons, which are seldom used in actual self-defense. See, e.g., *ibid.*; *Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017) (“Neither the plaintiffs nor Maryland law enforcement officials could identify a single incident in which a Marylander has used a military-style rifle or shotgun, or needed to fire more than ten rounds, to protect herself.”), *abrogated on other grounds by Bruen*, 597 U.S. 1; *Barnett v. Raoul*, 180 F.4th 1035, 1051 (7th Cir. 2026) (rare to

⁷ <https://www.washingtonpost.com/nation/interactive/2023/american-ar-15-gun-owners/>.

use large numbers of rounds or even rifles generally for self-defense in the home).

“Common use” varies over time. Any benchmark that could be established for the “common use” test would also be subject to unpredictable change. As this Court has recognized, neither firearms nor their role in society is static. That is why handguns receive constitutional protection without regard to whether they were “considered ‘dangerous and unusual weapons’ in the 1690s,” given that “they are indisputably in ‘common use’ for self-defense today.” *Bruen*, 597 U.S. at 47 (citations omitted). However, making isolated “common use” dispositive would expose constitutional protection to rapid changes over cycles of technological advance and commercial popularity.

Which firearms are “in common use” is a question with an answer that constantly varies as new technology displaces previous technology. The lethality of today’s semiautomatic weapons, particularly in today’s urban environments, has no meaningful antecedents before the twentieth century. Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 Cal. L. Rev. 1, 35 (2025) (“repeating firearms and high-capacity weapons were much too rare and too irrelevant to public safety to attract regulatory attention in 1791”).

The weapons commonly used for self-defense at the Founding—to the extent weapons were used at all—were not even firearms. Firearms at the Founding “were notoriously inaccurate at range, liable to misfire, and had to be muzzle-loaded with gunpowder and ball before every shot.” *Id.* at 15. They generally could not be “kept loaded and at the ready for any extended period.” *Ibid.* Firearms could be used *offensively* in settings where their lack of accuracy was a lesser concern, such as hunting or group combat. But they were

rarely used in self-defense or even as instruments of crime. Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. 99, 153-154 (2023). Hand-to-hand weapons were much more useful for such purposes. *Bianchi*, 111 F.4th at 464. And certainly, Founding-era firearms are no longer widely used today—which, remarkably, would suggest that under a “common use” test, the colonists’ own firearms are now unprotected.

Technological changes continued after the Founding, and the nineteenth century saw especially rapid change. At that point, mass production introduced single-shot and repeating pistols to a broad market (leading to a wave of armed crime and ensuing gun control laws). DeLay, *supra*, 113 Cal. L. Rev. at 37. But these weapons had long reload times and typically “held between three and seven rounds”—a long way off from the AR-15’s capabilities. *Id.* at 38-39. The later nineteenth century brought improvements such as effective breech-loading and metallic cartridges, enabling weapons with more capacity, though they still could not match the power or accuracy of single-shot rifles. *Id.* at 39-43. And reloading these weapons was cumbersome, with magazines that needed to be reloaded one by one. *Ibid.*

Further innovations with self-loading mechanisms and detachable magazines changed the landscape again in the twentieth century, enabling automatic weapons—which were promptly regulated by the National Firearms Act in 1934. *Id.* at 44-47.

As with automatic weapons, the relatively recent availability of AR-15s was met with regulation. Perhaps most notably, the manufacture, transfer, and possession of AR-15s and other “semiautomatic assault weapon[s]” was federally banned from 1994 to

2004 under the Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-332, § 110102, 108 Stat. 1796, 1996-1998 (1994). Only after the ban expired in 2004 did firearm companies begin to flood the market with AR-15s, employing the Nation’s military conflicts in the Middle East as an “accidental advertising campaign.” Todd C. Frankel et al., *The Gun That Divides a Nation*, Wash. Post (Mar. 27, 2023);⁸ see also *Annual Share of AR-15 Assault Rifles in the Total Number of Firearms Manufactured in the United States from 1990 to 2020*, Statista (June 2, 2023).⁹

Were this case to have come before the Court a mere 25 years ago, it would have been startling to contend that the illegal-to-possess AR-15 was “popular,” Br. of Pet’rs at 8—and even more dubious to assert that it was in common public use “for lawful purposes,” *Heller*, 554 U.S. at 624—for the same reason that longstanding federal restrictions on machine guns have made it unthinkable to describe those weapons as “in common use.” See *ibid.*; *Bevis*, 85 F.4th at 1199 (“Indeed, most of the AR-15s now in use were manufactured in the past two decades. Thus, if we looked to numbers alone, the federal ban would have been constitutional before 2004, but unconstitutional thereafter.” (footnote omitted)). The same is true for large-capacity magazines, which some have described as “the *most common* magazines in the country,” *Duncan*, 133 F.4th at 892 (Bumatay, J., dissenting); like AR-15s, such magazines were federally banned until 2004.

⁸ <https://www.washingtonpost.com/nation/interactive/2023/ar-15-america-gun-culture-politics/>.

⁹ <https://www.statista.com/statistics/1388010/sharear-15-united-states-firearm-production-historical/>.

A “common use” test would be circular. The “common use” test ultimately makes Second Amendment protection circular. It protects weapons because they have not yet been banned, but permits bans because they already exist. As the Seventh Circuit has recognized, “it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn’t commonly owned.” *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015). That decision correctly observed that “[a] law’s existence can’t be the source of its own constitutional validity.” *Ibid.*

Such circularity would leave society without any recourse in situations (perhaps including this one) when unusually dangerous weapons have proliferated in advance of regulation. It is obvious from *Heller*’s discussion of machine guns that “certain bearable arms—such as the M16, the short-barreled shotgun, the ricin pellet-firing umbrella gun, and the W54 nuclear warhead—are not protected by the Second Amendment.” *Bianchi*, 111 F.4th at 460. It therefore cannot be the case that “any one of these or similarly dangerous weapons could gain constitutional protection merely because it becomes popular before the government can sufficiently regulate it.” *Ibid.* Because a “common use” test would produce precisely these results rejected by *Heller*, it cannot be the law.

The advent of modern technologies like AI and 3D printing makes these questions even more urgent. New forms of weaponry could achieve wide public circulation at speeds unimaginable even a generation ago, and well before the people have an opportunity to assess whether such weapons should be regulated because they are unusually dangerous. Under petitioners’ view of the Second Amendment, however, State

and local governments would be denied the authority to restrict such weapons if they flood the market before the democratic process has a chance to reach an informed judgment about what is in the public interest. See Krystal LoPilato et al., *Artificially Assisted Gun Violence*, Everytown for Gun Safety (Sept. 28, 2026).¹⁰

“Common use” would be susceptible to manipulation. Such circularity is reason enough to reject the test, but it also would encourage the government and interested parties to manipulate the relevant factual predicates for the test—by preventing a weapon from becoming common or ensuring that a weapon becomes so.

First, the test could spur the government to ban firearms before they can be widely acquired. “Machine guns aren’t commonly owned for lawful purposes today because they are illegal.” *Friedman*, 784 F.3d at 409. Attributing the lack of protection for machine guns to their purported rarity, rather than their lethal characteristics, effectively makes the 1934 National Firearms Act the source of its own constitutionality. Craig S. Lerner & Nelson Lund, *Heller and Nonlethal Weapons*, 60 *Hastings L.J.* 1387, 1393 (2009) (the test “empowers Congress to create its own exceptions to the Second Amendment so long as the Supreme Court waits awhile before it checks to see whether particular weapons are in common civilian use”). A commonality-based test thus establishes an incentive to keep weapons off the market so that they do not become common.

¹⁰ <https://everytownresearch.org/report/artificially-assisted-gun-violence-chatbot-risks-and-preventative-steps-for-responsible-ai-companies/>.

Second, the test would encourage manufacturers to inundate the market with weapons before the legislative process can evaluate whether they are dangerous. As explained previously, *supra*, p. 18, the firearms industry has proven with AR-15s that it can “flood the market with new, deadlier weapons in a very short time frame.” Jacobs, *supra*, 83 Tenn. L. Rev. at 268. Such manufacturing figures can then be used as purported proof of “common use,” given how difficult it is to track actual private usage. *Ibid.*

Third, the test could shield weapons that are especially favored by criminals. After all, one reason to regulate weapons is that their common use presents a broad threat to public safety and law enforcement. The “Tommy gun,” for instance, was “all too common in Chicago” during Prohibition, “but that popularity didn’t give it a constitutional immunity from the federal prohibition enacted in 1934.” *Friedman*, 784 F.3d at 408; *Bianchi*, 111 F.4th at 469 (“As a criminal’s weapon, the Tommygun was an unqualified success.” (citation omitted)). Similarly, the long-range power and precision of the Barrett .50 caliber semiautomatic sniper rifle has “very limited ability to serve the defensive needs of the average citizen” but “extraordinary capability to advance the offensive purposes of criminals, terrorists, and soldiers”—which is exactly why it is in common use by Mexican drug cartels. *Bianchi*, 111 F.4th at 453. And the instant case frames the issue squarely, given that “the AR-15 and similar assault rifles” are “the most popular arms for terrorist attacks in the United States.” *Id.* at 456-457. Surely this is not the kind of common usage that the framers of the Second Amendment could have intended to safeguard.

Limiting the test by requiring common use for “lawful purposes” is not a feasible solution. *Heller*, 554 U.S. at 625. Asking whether a weapon is sufficiently “lawful” to be constitutionally protected verges on question-begging and raises significant concerns of judicial policymaking. In a Second Amendment class-of-arms challenge, the entire premise of the suit is that the legislature has found that a weapon should *not* be legal. Judges should not need to displace that legislative decision by reasoning that a weapon is or is not “lawful” in some abstract sense that disregards the decisions of the people’s representatives, without the guidance of substantive constitutional principles. See *McDonald v. City of Chicago*, 561 U.S. 742, 803 (2010) (Scalia, J., concurring) (rejecting “an assumption that judges can distinguish between a *proper* democratic decision to leave things alone (which we should honor), and a case of democratic market failure (which we should step in to correct)”).

Protection of AR-15s as weapons “in common use” could have wider consequences. The Court should also bear in mind the wider impacts of class-of-arms decisions under its Second Amendment jurisprudence—in particular, the fact that protection for AR-15s is likely to extend a presumptive right to carry them around this Nation’s densest cities. *Bruen*, 597 U.S. at 24. If a State wants to protect its citizens from the terrifying sight of mass-shooting weapons near schools or train stations or places of worship, it will have to litigate that choice—and may lose. *Bruen*, 597 U.S. at 31 (stating that “there is no historical basis” to “declare the island of Manhattan a ‘sensitive place’ simply because it is crowded”). A State may not even be able to protect owners and patrons of convenience stores or nightclubs by establishing a *default* rule pre-

venting such weapons from being taken inside. *Wolford*, 609 U.S. at 190-191. The Second Amendment should not be understood to command that kind of “a terror to the people.” *State v. Langford*, 10 N.C. 381, 383-384 (1824) (citation omitted).

III. The Court should not recast traditional restrictions on “dangerous or unusual” weapons into a categorical protection for weapons in common circulation.

Heller connected “common use” to the tradition of regulating unusually dangerous weapons, 554 U.S. at 627—but extending categorical protection to any and all weapons in general circulation at an arbitrary point in time would not be a faithful interpretation of that association.

Petitioners claim “an absolute right to possess arms in common use for lawful purposes.” Br. of Pet’rs at 29. But “while the founding generation cherished the Second Amendment right, they did not think it was absolute.” *Wolford*, 609 U.S. at 193. Even assuming, as petitioners propose (at 26), that AR-15s are “Arms” according to the Second Amendment’s text because they are firearms—reasoning that would apply equally to fully automatic or ricin-firing weapons—such arms are subject to traditions of regulation. See *Wolford*, 609 U.S. at 213-214 (Barrett, J., concurring) (“While history is relevant to both steps” of *Bruen*, “it plays a different ‘rol[e]’ at each one.” (citation omitted)). Such regulatory traditions, including restrictions on unusually dangerous weapons, may be relevant to “help delineate the contours” of the Second Amendment right and determine “if a challenged regulation fits within that tradition”—even if there is no “historical twin.” *United States v. Rahimi*, 602 U.S. 680, 691-692 (2024). The key question is whether a

regulation “comport[s] with the principles underlying the Second Amendment.” *Id.* at 692.

Framing the inquiry as described in *Rahimi*, it becomes apparent that the tradition of restricting “dangerous or unusual” arms cannot be collapsed into a tradition of restricting only weapons that are not widely owned. See Br. of Pet’rs at 49 (“because the banned rifles are in *common* use, they are not *unusually* dangerous”). The relevant principle—preventing the out-size harms caused by unusually dangerous weapons—does not hinge on bare numbers.

Limitations on carry of “dangerous or unusual weapons” were part of the common law, reflected in such offenses as going armed. 4 William Blackstone, *Commentaries* 148-149 (1769); see also *Bruen*, 597 U.S. at 43-44. Before the nineteenth century, technological limits on firearms meant fewer occasions of armed interpersonal violence. See *supra*, pp. 16-17. But it is clear that communities could and did restrict unusually dangerous arms for the protection of the public, and the fact that a weapon might be ordinary in a rural setting did not make it appropriate in town. Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82, 112-114 (2013). Urban regulation of gunpowder—i.e., explosives—was similarly considered a core exercise of the police power, even though gunpowder was also generally used and important for the community’s defense. *Id.* at 115-116; see, e.g., *People v. Sands*, 1 Johns. 78, 79-80 (N.Y. Sup. Ct. 1806).

Once more dangerous weapons entered circulation in the nineteenth century, there are abundant examples of those weapons being regulated—and the fact that a weapon was in “common use” often *motivated* such regulation rather than precluding it. See generally *Repository of Historical Gun Laws*, Duke Ctr. for

Firearms L.¹¹ (accessed Oct. 24, 2026) (352 results for nineteenth-century “categorical bans”). Bowie knives, with their large blades and sharp edges, provide a ready illustration. The knives were “both widespread and used for lawful purposes” starting in the 1830s. *Barnett*, 180 F.4th at 1047. Accounts from the mid-nineteenth century attest to “[t]he popularity of these weapons as tools of self-defense.” Cornell, *supra*, 75 Duke L.J. Online at 130; see, e.g., *Cockrum v. State*, 24 Tex. 394, 403 (1859) (heightened punishment for use of “a bowie-knife, the most deadly of all weapons in common use”). Yet their dangerousness prompted “ubiquitous” regulation. Pet. App. (25-566) 52a-57a; see, e.g., *Haynes v. State*, 24 Tenn. 120, 122 (1844) (“The design of the statute was to prohibit the wearing of bowie-knives * * * which the experience of the country had proven to be extremely dangerous and destructive to human life.”). Such regulations were sustained on the power of the State legislatures to “protect our citizens from the terror which a wanton and unusual exhibition of arms might produce.” *Aymette*, 21 Tenn. at 159.

This Court should avoid reducing this longstanding practice of regulating unusually dangerous weapons into a “dangerous and unusual” formulation that requires a regulated weapon to be both “dangerous” and, separately, “unusual.” *Heller*’s reference to “dangerous and unusual” weapons, 554 U.S. at 627, was apparently a misquotation of Blackstone. Although some authorities used that phrasing, Blackstone described restrictions relating to “dangerous *or* unusual” weapons. 4 William Blackstone, *Commentaries* 148-149 (1769) (emphasis added). This formulation was also

¹¹ <https://firearmslaw.duke.edu/repository-of-historical-gun-laws/advanced-search>.

employed in judicial decisions. See, e.g., *O'Neill v. State*, 16 Ala. 65, 67 (1849); *State v. Lanier*, 71 N.C. 288, 289 (1874).

Rather, “dangerous or unusual” and “dangerous and unusual” appear to reflect a single principle—along the lines of “uncommonly dangerous.” *Hanson*, 120 F.4th at 238 n.7; see also *Barnett*, 180 F.4th at 1047 (widely accepted “set of historical regulations imposing targeted restrictions on weapons whose danger and lethality stand out”); Pet. App. (25-566) 30a-33a (“*Unusually dangerous* is the obvious fit to describe weapons that are so lethal that legislators have presumed that they are not used or intended to be used for lawful purposes, principally individual self-defense.”); Samuel L. Bray, “*Necessary and Proper*” and “*Cruel and Unusual*”: *Hendiadys in the Constitution*, 102 Va. L. Rev. 687, 695 (2016) (“Hendiadys is a figure of speech in which two terms, separated by a conjunction, are melded together to form a single complex expression.”). Indeed, a widely used law dictionary employed both the “dangerous or unusual” and “dangerous and unusual” formulations. Cornell, *supra*, 75 Duke L.J. Online at 115-116. This confirms it is inapt to parse the common-law concept of “dangerous or unusual” as though the phrase were in a statute. The formulation can instead be understood as capturing the idea that unusually dangerous weapons can be regulated consistent with a recognition of the right to keep and bear arms.

A historical tradition of regulating unusually dangerous common weapons is consistent with the 1700s’ regulation of gunpower by each major American city, the 1800s’ regulation of Bowie knives and similar weapons by the vast majority of States, the National Firearms Act of 1934, the 1994 federal assault weapon

ban—and regulation of AR-15s today. The AR-15 lies “far outside the animating purposes of the Second Amendment.” *Bianchi*, 111 F.4th at 458. The weapon has minimal utility for self-defense in urbanized areas. Instead, its heightened range and power creates significant dangers to the public, enabling shooters to unleash fusillades on unknowing crowds, penetrating nearby buildings, and reaching neighbors and bystanders—without providing any recognizable advantage over the arms that are already protected under the Second Amendment. *Ibid.* The burden on the Second Amendment right from restricting such weapons fits easily within this Nation’s regulatory traditions, regardless of whether they are in “common use.”

CONCLUSION

The Court should affirm each of the judgments below.

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