No. 24-131

IN THE
Supreme Court of the United States

OCEAN STATE TACTICAL, LLC, ET AL.,
Petitioners,

v.

STATE OF RHODE ISLAND, ET AL.,
Respondents.

On Petition Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL SHOOTING SPORTS FOUNDATION, INC. IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The National Shooting Sports Foundation, Inc., certifies that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

The National Shooting Sports Foundation, Inc. (NSSF) is the firearm industry's trade association. Founded in 1961, NSSF's mission is to promote, protect, and preserve hunting and shooting sports. NSSF has approximately 10,500 members—including thousands of federally licensed manufacturers, distributors, and sellers of firearms, ammunition, and related products.

NSSF has a clear interest in this case. Its members engage in the lawful production, distribution, and sale of constitutionally protected arms. And when a state like Rhode Island tries to categorically ban such an arm, that action threatens NSSF members' businesses and infringes on their constitutional rights. Because these harmful and unlawful bans will only continue until this Court intervenes, NSSF submits this brief in support of Petitioners, and urges the Court to take this case and reverse the badly mistaken decision below.[1]

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[1] All parties were timely notified of the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward its preparation or submission. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

In *District of Columbia v. Heller* this Court established a clear constitutional rule: If an arm is in common use for lawful purposes by the American people, then an "absolute prohibition" is simply "off the table" for the government. 554 U.S. 570, 636 (2008). In the years since, Justices Thomas, Alito, and then-Judge Kavanaugh have all expressly affirmed that *Heller* meant what it said: If an arm is in lawful common use, it cannot be totally banned—*full stop*.

That should make this an easy case. What Rhode Island calls "large-capacity magazines" (LCMs)—those that hold more than ten rounds—are in reality *ordinary* magazines that are a standard component of the country's most popular firearms. They are in lawful and common use—*i.e.*, they are "typically possessed," *id.* at 625—by millions of law-abiding Americans seeking to defend themselves, their families, and their communities. Hundreds of millions of LCMs are in circulation today. Indeed, almost *ten percent* of Americans have one—making them one of the most popular products in the country.

Rhode Island's categorical ban on "LCMs"—which, again, are really standard-issue magazines—therefore amounts to a ban on one of the most common arms used by Americans for self-defense. And for that reason alone, the law is unconstitutional: The Second Amendment prohibits a government from completely banning an arm that is in common use for lawful purposes. While a government may *regulate* such arms—*e.g.*, taking them out of the hands of violent felons—it cannot *ban* them outright for all citizens;

under the Second Amendment, a state cannot make criminal what the people have made common.

Many lower courts, however, have not gotten the message. As Petitioners catalog, the pre-*Heller* bad old days are back in full force across the courts of appeals. Instead of explicit interest balancing (where the government always wins), many courts now engage in a purportedly "nuanced" historical analysis (where the government always wins).

This Court's review is needed. Without it, a steady cast of lower courts will continue to reject the notion that the Second Amendment contains any bright-line rules at all. Instead, these courts will continue to divine ever-vague principles from history, giving governments ever-more regulatory power over firearms, all to the predictable consequence of an ever-eroding individual right. The Second Amendment demands more. A law obscured by amber is no better than one trapped in it. *See United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024).

In short, applying the Second Amendment requires adherence to the country's "regulatory tradition." *Id.* And while doing so may involve some hard cases that turn on a "nuanced approach," there are also "straightforward" cases that rest on bright-line rules. *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 26-27 (2022). This case is firmly in the latter camp. Rhode Island's law bans arms that are unquestionably in common use for lawful purposes. And when an arm is part of the American tradition of firearm *ownership*, a complete ban is necessarily inconsistent with the American tradition of firearm *regulation*. The government may perhaps regulate who can carry it or

where, but a total ban is *per se* unlawful. It is imperative the Court say so (again), and reject the latest effort to hollow the Second Amendment's core.

ARGUMENT

I. THE SECOND AMENDMENT PROHIBITS TOTAL BANS ON ARMS THAT ARE IN COMMON USE FOR LAWFUL PURPOSES.

The Second Amendment states that "the right of the people to keep and bear Arms, shall not be infringed." In *Heller*, the Court held that this amendment guards "an individual right to keep and bear arms." 554 U.S. at 595. In *McDonald v. City of Chicago*, this Court affirmed that this right is "fundamental to *our* scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." 561 U.S. 742, 767 (2010). And in *Bruen*, this Court reiterated that the government cannot limit the free exercise of this right, unless that limit is consistent with "the historical tradition that delimits the outer bounds of the right." 597 U.S. at 19.

That historical tradition reveals certain "principles" that all firearm laws must follow. *Rahimi*, 144 S. Ct. at 1898. But as this Court's precedent confirms, those principles compel different analyses for *regulations* on arms, versus outright *bans*. As for the former—*e.g.*, who may possess an arm, where it may be carried—their constitutional validity turns on whether "the new law is 'relevantly similar' to laws that our tradition is understood to permit." *Rahimi*, 144 S. Ct. at 1898. But for categorical bans, our regulatory tradition establishes a more "straightforward" rule: If an arm is in common use for lawful purposes, it cannot be banned. *Bruen*, 597 U.S. at 26. A government still may regulate to a degree its purchase, possession, or

use; but it cannot draw one regulatory arrow from the quiver—a total prohibition.

1. *Heller* already adopted this bright-line rule. While this Court spilled much ink on the meaning of the Second Amendment, it needed only a few short paragraphs to explain why D.C.'s "handgun ban" was unconstitutional. 554 U.S. at 628.

It was "enough," this Court held, that D.C. had tried a "complete prohibition" on the "most popular weapon chosen by Americans [today] for self-defense in the home." 554 U.S. at 629. There was zero historical justification for a categorical ban on an arm that was in common use for lawful purposes. *Id.* at 628-29. It thus did not matter that *some* handguns are used unlawfully; or that D.C. permitted *other* firearms for self-defense (like long guns). *Id.* at 629. Americans had decided that the handgun was the "quintessential self-defense weapon"—and for that reason *alone*, a total ban on that class of arms was unconstitutional. *Id.* at 629. Although the Second Amendment left governments with "a variety of tools" for "*regulating* handguns," an "absolute *prohibition*" on such an arm was the sort of "policy choice[]" that the Constitution had taken "off the table." *Id.* at 636 (emphases added).

2. Since *Heller*, three Justices have confirmed that this Court meant what it said: If an arm is in common use for lawful purposes, it cannot be totally banned.

Start with then-Judge Kavanaugh. In the follow-on to *Heller*, Judge Kavanaugh applied the above rule in a case challenging D.C.'s total ban on semi-automatic rifles—in a dissenting opinion whose historical approach soon became the law of the land, endorsed in letter and logic by this Court in *Bruen*. 597 U.S. at 31

(quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (*Heller II*) (Kavanaugh, J.)).

Interpreting *Heller*, Judge Kavanaugh detailed how the Second Amendment's text, history, and tradition require different methods of analysis for "regulations on the sale, possession, or use of guns," as opposed to total "bans on categories of guns." 670 F.3d at 1271-72.

As to the former—regulations like *where* an arm may be used, or *who* is allowed to have a firearm—the government may "impose regulations" that track "traditional, longstanding regulations in the United States." *Id.* at 1273. This inquiry typically requires courts to "reason by analogy from history and tradition." *Id.* at 1275; *see also Bruen*, 597 U.S. at 28.

But categorical *bans* are a different animal. The "historical tradition" of American firearm regulation reveals that "bans on categories of [arms]" are allowed *only* for "[arms] that are 'dangerous and unusual.'" *Heller II*, 670 F.3d at 1271-72 (Kavanaugh, J., dissenting) (quoting *Heller*, 554 U.S. at 627). The flipside of this settled tradition is that "bans" *cannot* extend to arms that are "in common use by law-abiding citizens," which are by definition not unusual at all. *Id.* at 1272.

Applying this bright-line rule, Judge Kavanaugh had little trouble concluding that D.C.'s total ban on semi-automatic rifles was illegal. All agreed "a significant percentage of rifles [that] are semi-automatic" are "in common use today" for lawful purposes. *Id.* at 1286-87. And that *alone* was dispositive. "*Heller* protects weapons that have not traditionally been banned and are in common use by law-abiding citizens. Semi-automatic rifles have not

traditionally been banned and are in common use today, and are thus protected under *Heller*." *Id.* at 1287. That did not mean such arms are entirely immune from regulation. "But the government may not *generally ban* semi-automatic guns, whether semi-automatic rifles, shotguns, or handguns." *Id.* at 1288 (emphasis added).

Next up, in 2015, the author of *Bruen* (joined by the author of *Heller*) endorsed the exact same reasoning. Dissenting from denial in a case challenging a similar semi-automatic rifle ban (except originating out of a city in Illinois), Justice Thomas explained that the Second Amendment bars a government from enacting a "categorical ban[]" on arms "commonly own[ed] for lawful purposes." *Friedman v. City of Highland Park, Ill.*, 577 U.S. 1039, 1039 (2015) (Thomas, J., dissenting from denial). When it comes to an absolute prohibition on a category of arm, the singular question under *Heller* is "whether the law bans types of firearms commonly used for a lawful purpose—regardless of whether alternatives exist." *Id.* at 1042. And since semi-automatic rifles were obviously in common use for lawful purposes, that was "all that is needed" under this Court's cases to hold the ban unlawful. *Id.*

The next year, Justice Alito (joined by Justice Thomas) added his voice to the chorus in a case involving an absolute prohibition on stun guns: If an arm is "widely owned and accepted as a legitimate means of self-defense across the country," it cannot be subject to a "categorical ban" under *Heller*. *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring in the judgment). The "pertinent Second Amendment inquiry" is thus whether a given arm is "commonly possessed … for lawful purposes *today*." *Id.*

If so, a ban is unlawful—no further information needed.

3. Justices Thomas, Alito, and Kavanaugh have it right. And that is so not just as a matter of *Heller*, but also as a matter of history. The common-use test is the byproduct of centuries of unbroken historical practice.

As Judge Richardson exhaustively catalogued in a recent *tour de force* opinion, the American tradition of firearm regulation has drawn a consistent and marked distinction between bans on *dangerous and unusual* arms, versus arms that are in *common use for lawful purposes*—with bans allowed on the former, but not the latter. *Bianchi v. Brown*, 2024 WL 3666180, at *58 (4th Cir. 2024) (en banc) (Richardson, J., dissenting). That follows from the core of the historic right that the Second Amendment secured: a government may at times "ban dangerous and unusual weapons," but not "weapons commonly used for lawful purposes." *Id.*; *see also Rahimi*, 144 S. Ct. at 1897 (observing that historical bans on classes of arms have extended only to "dangerous and unusual weapons").

On this score, history paints with clear strokes. The right of a free people to hold "common weapons" for private and public defense had deep roots in English law and practice. *Bianchi*, 2024 WL 3666180, at *52 (Richardson, J., dissenting). That tradition carried across the Atlantic, and soon became well-established within the American colonies. *Id.* at *53. And when King George tried to strip Americans of this basic civil right—*i.e.*, when he tried to ban and confiscate common arms—it helped spark a revolution. *Id.* at *41.

After that revolution succeeded, the Founders refused to give the new government the power to strip its citizens of the very arms that had just won them their independence. Instead, they enshrined in the Constitution the right of the people to possess "common weapons." *Id.* at *52.

Indeed, the right to keep and bear arms in lawful common use was perhaps *the* central guarantee of the Second Amendment. Again, that amendment did not "lay down any novel principles of government." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). It codified a "*pre*-existing right," *Heller*, 554 U.S. at 592—the right of a free people to maintain "arms for lawful ends like self-defense" and "militia service." *Bianchi*, 2024 WL 3666180, at *58 (Richardson, J., dissenting).

And critically, the "scope" of that right—*i.e.*, what arms the people could lawfully bear in service of their civic duties—was *never* something the government determined on its own. *Friedman*, 577 U.S. at 1039 (Thomas, J., dissenting from denial). The right existed "[in]dependent" of the government. *United States v. Cruikshank*, 92 U.S. 542, 553 (1875). Its scope was instead decided "by what private citizens" *themselves* chose to "commonly possess" for their own defense. *Friedman*, 577 U.S. at 1041 (Thomas, J., dissenting from denial). In other words, the people had a direct and unalterable say in their own defense. And that is exactly what the Second Amendment protects: Its very object was to "take[] out of the hands of government" the "power" to decide for itself what the people "*really*" need for their own protection. *Heller*, 554 U.S. at 634.

That is all the more true because the Founders saw the right to keep and bear arms as an essential check upon government. Shaped by their experience under the thumb of King George, the Founders were resolute that America would not be a nation that was "afraid to trust the people with arms." *The Federalist No. 46*, at 321 (Madison) (Cooke ed., 1961). The opposite. The Founders had seen firsthand on the battlefield that having an "armed" citizenry was one of our defining "advantage[s]"—one that "Americans possess[ed] over the people of almost every other nation." *Id.* And they trusted this citizenry to "defend their own rights and those of their fellow citizens" *against* any inchoate tyranny that might arise within the new nation. *The Federalist No. 29*, at 184 (Hamilton) (Cooke ed., 1961).

By these lights, the proposition that a government could *totally ban* an arm that the people had chosen for their own lawful defense would have been anathema to the Founders. If the Second Amendment was to work as a *check* on government, it would be nonsensical that the *content* of that right could then be purely dictated by governmental grace. Put otherwise, if the people were supposed to be a counterbalance to government, the *last* thing the Framers would have wanted is for the government to have the authority to totally ban those arms commonly held by the people. A ban on weapons nobody owns does little to alter the balance of power; taking common arms from the hands of the people is a different matter entirely. As such, the Second Amendment guaranteed that the people would retain their right to keep and bear common arms—and in turn, would bar the government from stripping law-abiding Americans of the arms that they had commonly chosen for their own defense.

This is all how the Second Amendment was understood over the course of the nineteenth century. *Bianchi*, 2024 WL 3666180 at *55-57 (Richardson, J., dissenting) (collecting laws and state court decisions). During this period, there is no evidence on the other side of the ledger—examples of banning common arms are "simply nonexistent." *Id.* at *74. Instead, there is one pattern. "The line between dangerous and unusual weapons, on the one hand, and common weapons, on the other, thus has deep roots in our tradition." *Id.* at *58.

In short, the Second Amendment sought to shield by law what had already been enshrined by custom: A country where the people had the freedom to decide for themselves the arms best suited for their defense; and where the government did not have the power to deny law-abiding citizens "those arms customarily held by [them] for lawful purposes." *Bianchi*, 2024 WL 366180, at *58 (Richardson, J., dissenting). That was simply "the birth-right of an American"—a right that no American government has the "power" to extinguish. Trench Coxe, "A Pennsylvanian III" (Feb. 20, 1788).

4. The circuits, by contrast—including the one below—have allowed just that. Pet.App.21-23; *see Bianchi*, 2024 WL 3666180, at *16-17; *Bevis v. City of Naperville*, 85 F.4th 1175, 1198-99 (7th Cir. 2023). They have generally offered three unsound reasons for bucking what precedent and history demand.

First, these courts have principally rejected the common-use test as a bad idea. It "defies reason," says the First Circuit, for the lawfulness of a ban to turn on whether an arm happens to be "owned by millions of Americans." Pet.App.21; *see, e.g.*, *Bianchi*, 2024 WL

3666180, at *16 (labeling as "ill-conceived popularity test"). On this view, *Heller* could not have possibly meant what it said—and it is better read (or more aptly, edited) to say that while categorical bans may lawfully extend to "dangerous and unusual weapons," that does not mean they can "*only*" extend to such weapons. Pet.App.21.

But this is wrong at both turns. For one, *Heller* could not have been clearer. In the last part of the opinion—which, again, concerned the propriety of a *total ban* on a category of arms—this Court reasoned that it was "enough" to resolve the constitutional question to observe that the handgun is the "most popular weapon chosen by Americans for self-defense in the home." 554 U.S. at 629. And for that reason *alone*, "a complete prohibition of their use is invalid." *Id.* Whatever lower courts may think of the brightline rule adopted by *Heller*, there is no doubt it is what *Heller* said: A ban's constitutionality turns on "whether the law bans types of firearms commonly used for a lawful purpose—regardless of whether alternatives exist." *Friedman*, 577 U.S. at 1042 (Thomas, J., dissenting from denial).

And far from "defying reason," *Heller* was right. Notwithstanding the scorn of the First Circuit, for the Founding Fathers the "popularity test" was the entire point. The Second Amendment codified a preexisting right, and by tradition, the scope of that right was shaped by the people themselves—they had a civic responsibility to participate in the public and private defense, and in turn a civil right to keep and bear those arms that were "typically possessed by law-abiding citizens." *Heller*, 554 U.S. at 625. In codifying that right, the Founders thus "t[ook] out of the hands of government" the unfettered power to dictate what

categories of arms the people could lawfully bear. *Bruen*, 597 U.S. at 23. The range of arms available to Americans would not depend exclusively on the whims of the government. Instead, it would be determined by the collective wisdom of a free people in choosing which arms to commonly use for lawful purposes.

Second, the anti-common-use circuits have insisted that governments must have the capacity to ban arms when they give rise to new dangers. *See* Pet.App.25. For support, these courts read *Bruen* to hold that when faced with "unprecedented social concerns or dramatic technological changes," a government must have freer reign to regulate arms—including with bans, and even if those arms happen to be commonly used for lawful purposes. *See Bianchi*, 2024 WL 3666180, at *18 (quoting *Bruen*, 597 U.S. at 27).

But that is not what *Bruen* said. The (now oft-quoted) phrase above comes from a part of the opinion making the intuitive point that since the "regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868," there may need to be "present-day firearm regulations" that are "beyond those the Founders specifically anticipated." *Bruen*, 597 U.S. at 27-28. The Court made equally clear, however, that the presence of new conditions is not then a license for a "regulatory blank check." *Id.* at 30. Nor are novel circumstances a predicate for governments to adopt laws or regulations that the Second Amendment otherwise forbids. *See id.*

The latter point is critical—and it is what the court below (and those like it) have disregarded. Even if modern problems warrant modern regulation, the

advent of a novel issue does not suddenly put all "policy choice[s]" back on "the table." *Heller*, 554 U.S. at 636. That is, even if "unprecedented societal concerns" could potentially justify new *regulations* on an arm—*e.g.*, how it is sold, who may possess it—they cannot authorize the state to violate any of the Second Amendment's "fixed" rules. *Bruen*, 597 U.S. at 28. Just as the First Amendment prohibits banning the expression of political viewpoints no matter how "dangerous," the Second Amendment prohibits a total "ban" on arms "commonly used for lawful purposes." *Friedman*, 577 U.S. at 1039 (Thomas, J., dissenting from denial). Again, that does not mean firearm regulation is an all-or-nothing task; governments may issue narrower laws restricting the sale, use, or possession of such arms, consistent with the nation's regulatory tradition. But once the people have put an arm into common use for lawful purposes, it is beyond the reach of a categorical ban.

Third, paying lip-service to *Bruen*, these courts have claimed that total bans on common arms are actually consistent with the American history and tradition of firearm regulation. Pet.App.14-20. As support, these courts often marshal the same subset of examples (*e.g.*, regulations on sawed-off shotguns, bowie knives, or gunpowder storage). But none of them is able to withstand a moment's examination, as Petitioners explain. Pet. 23-24. All of them involve regulations about *where* arms could be used (*e.g.*, bowie knives); or *how* they could be kept (*e.g.*, gunpowder-storage rules); or bans on weapons that were never in lawful common use (*e.g.*, sawed-off shotguns). *See Bianchi*, 2024 WL 3666180, at *72-74 (Richardson, J., dissenting) (detailing all of this); *Bevis v. City of Naperville*, 85

F.4th 1175, 1217-19 (7th Cir. 2023) (Brennan, J., dissenting) (same); *Duncan v. Bonta*, 83 F.4th 803, 816-21 (9th Cir. 2023) (Bumatay, J., dissenting from grant of stay pending appeal) (same).

Neither the First Circuit nor any other federal court has identified one historic example of a ban on an arm in common use for lawful purposes. And that is because none exist. Indeed, two historians recently surveyed *every* ban on arms in this country before 1900, and found *zero*. David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGISL. 223, 383 (2024); *see* Mark W. Smith, *NYSPRA v. Bruen*, 24 HARVARD J. L. & PUB. POLICY, PER CURIAM 8 (2022) ("[T]here is zero historical support from the Founding—or even the Reconstruction era—for banning commonly possessed arms; under the *Bruen* test, that is the end of the matter."). To borrow again from Judge Richardson: The historical support in favor of such bans is "simply nonexistent." *Bianchi*, 2024 WL 3666180, at *74 (Richardson, J., dissenting).

The upshot: The government may not categorically ban an arm that is in common use for lawful purposes. That "principle" is based in a tradition "that stretched back far before and extended far after the Second Amendment's adoption." *Id.* at *59. It was faithfully applied by this Court in *Heller*, when striking down D.C's handgun ban. And it is rightly the law of the land—whether or not the lower federal courts approve.

II. "LARGE CAPACITY MAGAZINES" ARE ARMS IN COMMON USE FOR LAWFUL PURPOSES.

Rhode Island's ban thus plainly violates the Second Amendment. A ban on LCMs is doubtless a ban on

"arms," as Petitioners explain. Pet. 14-15. After all, the Second Amendment does not arbitrarily prioritize one piece of metal over another; it protects firearms including all their component parts, because the right to carry a firearm would mean nothing if the government could ban bullets or triggers or magazines. *See Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring in the judgment) ("Constitutional rights thus implicitly protect those closely related acts necessary to their exercise."); *see also, e.g.*, *Duncan*, 83 F.4th at 813-14 (Bumatay, J., dissenting) ("Without protection of the components that render a firearm operable, like magazines, the Second Amendment right would be meaningless."); *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (similar point about "bullets").

And there is no doubt that LCMs are in common use by Americans for lawful purposes. While the common-use test may well sometimes involve hard questions at the margins, this is an easy case because LCMs are one of the most popular magazines in America. They are standard components of semi-automatic handguns and rifles all across the country, and are owned for lawful purposes by nearly ten percent of the population. Moreover, LCMs are not some new phenomenon, or overnight success. They have been a standard feature of lawful American firearms since before there was a United States. Indeed, they became widespread in this country even before the telephone did. If LCMs are not in common use, nothing is.

1. The term "LCM" is pure branding: In reality, it is the standard magazine that comes as part of the most common firearms owned by everyday law-abiding Americans. Indeed, nearly *half* of American

gunowners possess at least one LCM.[2] That is close to *ten percent* of the entire population.[3] And as a result, there are hundreds of millions of LCMs in circulation across the United States today—nearing *one billion*.[4]

None of this should be remotely surprising, because LCMs are a standard part of America's most popular firearms. That is so for semi-automatic handguns (like the Glock pistol) as well as semi-automatic rifles (like the AR-15).[5] In so many words, LCMs are the most common component of America's most common guns.[6]

More important, LCMs are wildly popular among Americans, because Americans rely on them for lawful

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[2] William English, *2021 National Firearms Survey: Analysis of Magazine and Ownership and Use* 20 (May 4, 2023), https://perma.cc/DV55-QT88.

[3] Nat'l Shooting Sports Found., *Detachable Magazine Report 1990-2021*, at 4 (2024), https://perma.cc/FV8E-DDKG.

[4] *Id.* at 2; *see also, e.g.*, William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 20 (May 13, 2022), https://perma.cc/K9CR-JYZJ.

[5] *Duncan*, 83 F.4th at 813 (Bumatay, J., dissenting from grant of stay pending appeal) (handguns); *Duncan v. Bonta*, 19 F.4th 1087, 1155 & n.25 (9th Cir. 2021) (Bumatay, J., dissenting) (rifles); *see* DOJ, Guns in America: National Survey on Private Ownership and Use of Firearms, at 5 (May 1997) (growing trend is for LCMs to become standard issue).

[6] *Heller II*, 670 F.3d at 1261 ("We think it clear enough … that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use.'"); *see Staples v. United States*, 511 U.S. 603, 610-12 (1994) (semi-automatic rifles like AR-15s as "commonplace," "generally available," and "widely accepted as lawful possessions"); *Garland v. Cargill*, 602 U.S. 406, 429-30 (2024) (Sotomayor, J., dissenting) ("semiautomatic rifles" are "commonly available").

purposes. Surveys reveal that Americans have chosen LCMs for a wide-ranging set of lawful objectives, such as hunting (47%), recreational target shooting (64%), and competitive shooting sports (27%).[7] But more than anything else, the vast majority (71%) of LCM-owners bought them for "defensive purposes … making [that] the most common reason cited for [their] ownership."[8]

For good reason. It is proven that having sufficient ammunition—and not having to reload—is critical to not only repelling assailants, but also deterring those attacks in the first place.[9] Every year, there are hundreds, if not thousands, of cases where LCMs were used by law-abiding Americans to defend themselves and their families.[10] And a majority of such incidents involved multiple attackers, where semi-automatic handguns—the driving source of LCM-ownership among Americans—are the primary tool of response.[11]

These are not just statistics. Take just one example. In 2019, two masked men broke into Jeremy King's home in Florida. They grabbed his 11-year-old daughter, demanded money, and proceeded to beat King within an inch of his life. Before they could kill him (and perhaps his daughter), King's eight-month-pregnant wife burst into the room with an AR-15 and repelled the attackers. As King put it: They "came in

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[7] English, *supra* note 2, at 4.

[8] *Id.*

[9] *See, e.g.*, David B. Kopel, *The History of Firearm Magazine Prohibitions*, 78 ALB. L. REV. 849, 851-52 (2015).

[10] *See, e.g.*, Heritage Foundation, *Defensive Gun Uses in the U.S.*, https://perma.cc/UCM4-S8Y6 (Last Updated: Aug. 8, 2024)

[11] English, *supra* note 4, at 26-33.

with two normal pistols and my AR stopped it. [My wife] evened the playing field and kept them from killing me." But without an LCM firearm, there is no telling what would have occurred.[12]

In short, there is no serious doubt that LCMs are today in common use for lawful purposes—indeed, it is incontrovertible that they are among the "most popular" magazines in the country, "chosen by Americans for self-defense." *Heller*, 554 U.S. at 629.

2. That settles the constitutional question. The common-use test asks whether an arm is "commonly possessed … for lawful purposes *today*." *Caetano*, 577 U.S. at 420 (Alito, J., concurring in the judgment); *see also Heller*, 554 U.S. at 582; *Bruen*, 597 U.S. at 47. And by any criterion, the answer for LCMs is plainly yes.[13]

But that is especially so in light of LCMs' history: These magazines are not just in common use today, but they have been for generations. They are a part of the American tradition of firearm ownership, which only exacerbates how severely this ban offends the Second Amendment.

Indeed, "[t]he desire … for repeating weapons is almost as old as the history of firearms." Harold L.

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[12] Dave Jordan, *Victim of Home Invasion Speaks; Credits Wife With Saving His Life With AR-15*, SpectrumNews Florida (November 1, 2019, 4:37 PM), https://perma.cc/F4AL-L2K8.

[13] Again, the "common use" test asks what arms the people *have* put to lawful use—not what arms they *really need* or, as some courts ask here, how many bullets are *really fired*. *Compare* Pet.App.10 (citing similar cases asking just that), *with Friedman*, 577 U.S. at 1042 (Thomas, J., dissenting from denial) (Second Amendment prohibits "bans" on "firearms commonly used for a lawful purpose—regardless of whether alternatives exist.").

Peterson, *Arms and Armor in Colonial America 1526-1783*, at 215 (1956). And given this demand, firearms capable of firing more than ten rounds have been in circulation for centuries. The first such firearm able to fire over ten rounds without reloading was a sixteen-shooter invented during the *first* Queen Elizabeth. *See* David B. Kopel, *The History of Firearm Magazine Prohibitions*, 78 ALB. L. REV. 849, 852 (2015). And this sort of firearm rapidly grew in popularity across England—and soon after, its colonies. *Id.* at 852-53.

It did not take long for firearms with ten-plus-round capacities to become prevalent in America. In 1722, there was the first mention of a firearm here that "though loaded but once … was discharged eleven times following, with bullets, in the space of two minutes." Peterson, *supra*, at 215. At the Founding, the premier firearm was the Girandoni rifle—an air rifle with a twenty-two-shot magazine capacity, then known for being at the side of Merriweather Lewis on his journey west. Kopel, *supra*, at 853. And in the period between the ratifications of the Second and Fourteenth Amendments, firearms with ten-plus-round capacities proliferated. *Id.* at 853-56 (describing advances in firearms, such as the "pepperbox" pistol, which was able to fire 24-rounds without reloading); *see also* Clayton E. Cramer & Joseph Edward Olson, *Pistols, Crime, and Public Safety in Early America*, 44 WILLAMETTE L. REV. 699, 716 (2008) ("It is certainly true that firearms technology has advanced since 1791—*but not as much as some would like to think*.").

By the time of Reconstruction, "magazines of more than ten rounds [were] very commonly possessed in the United States." Kopel, *supra*, at 871. And that trend continued unabated for decades. *Id.* at 857-59 &

nn. 82, 88 ("The twentieth century saw improvements on the designs pioneered in the 1800s and expanding popularity for firearms with more than ten rounds.").

Revealingly, during this entire period, there is not a single example—not one—of any ban on any magazine (to say nothing of one in common use). "From the colonial period to the dawn of American independence on July 4, 1776, and through the ratification of the Fourteenth Amendment, there were no prohibitions on magazines. Indeed, the first magazine prohibition did not appear until the alcohol prohibition era in 1927." *Id.* at 870. (And of those prohibition-era bans, all-but-one of them has since been repealed.) Even today, Rhode Island's ban is a serious outlier: LCMs are legal in a super-majority of the states, as well as under federal law. *Duncan*, 83 F.4th at 814 (Bumatay, J., dissenting from the grant of stay pending appeal).

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This case presents an opportunity to vindicate a fundamental constitutional principle: the government may not totally ban an arm that the people have put into common use for lawful purposes.

And this case presents an ideal vehicle to do so. By any definition, LCMs are in lawful common use: They are exceedingly popular today; and have been since the Lincoln Administration. This case thus cleanly tees up the legal issue—whether a ban on an arm in common use is constitutional—without any threshold fight as to whether the at-issue arm is actually in common use.

There is also no reason for this Court to wait a Term more to address this issue. While the federal circuits are not yet split on the question here, that is a product of geography more than law; it just so happens that

states that are more willing to enact bans, sit within circuits that are more willing to uphold them. But this issue has still fiercely divided panels' worth of judges, who have aired out the competing legal positions in scholarly opinions. *Supra* at 14-15 (collecting dissents). Simply put, there is nothing left to percolate: The competing views have been presented; it now falls to this Court to say which camp is correct.

As a practical matter, the only consequence of delay will be that millions upon millions of law-abiding Americans will continue to be deprived of their Second Amendment rights—the precise sort of irreparable constitutional injury that warrants the immediate relief sought here. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (deprivation of Second Amendment rights constitutes irreparable harm). States are increasingly adopting categorical bans on arms that Americans have a right to possess. And these states have received the blessing of the federal courts, who—in the more candid parts of their opinions—have just insisted that Americans simply don't need arms like AR-15s or LCMs. *See, e.g.*, Pet.App.10. But that is *precisely* the sort of judgment call that the Second Amendment "take[s] out of the hands of government"—including its judges—and places with the people. *Heller*, 554 U.S. at 634.

CONCLUSION

This Court should grant the petition and reverse.

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