No. 15-133

In The Supreme Court of the United States

ARIE S. FRIEDMAN and the
ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

v.

CITY OF HIGHLAND PARK, ILLINOIS,

Respondent.

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

BRIEF OF NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS FOR WRIT OF CERTIORARI

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AMICUS CURIAE STATEMENT OF INTEREST[1]

The National Rifle Association of America, Inc. ("NRA") is a nonprofit, voluntary membership corporation qualified as tax-exempt under 26 U.S.C. § 501(c)(4) with its headquarters in Fairfax, Virginia. Founded in 1871, the NRA is America's foremost and oldest civil rights organization and defender of Second Amendment rights. Its approximately five million members are individual Americans bound together by a common desire to ensure the preservation of the Second Amendment right to keep and bear arms.

The NRA has a particular interest in this case, as the courts below improperly upheld a prohibition on common, constitutionally protected arms.

SUMMARY OF ARGUMENT

This case should have turned on a simple premise. Firearms that are commonly chosen by law-abiding citizens for lawful purposes cannot be banned. While some contours of the Second Amendment have been left to future evaluation, at least this much is clear from recent decisions by this Court.

[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than Amicus Curiae, its members, or counsel made a monetary contribution to its preparation or submission. Council of record for all parties received timely notice of Amicus Curiae's intent to file and have consented to this filing.

A divided panel boldly ignored these precedents, upholding an outright ban on firearms and magazines that are hugely popular for self-defense and other lawful purposes. In doing so, the majority substituted its judgment in place of this Court's – as well as the constitutional choices of the American public – by fabricating a series of tests that ultimately authorize the government to ban common firearms if it might make the public "*feel* safer."

Left standing, the majority's opinion would threaten not only the sustainability of the Second Amendment, but also a vibrant Bill of Rights meant to safeguard individual rights against government overreach and public sentiment. Intervention by the Court is critical to reverse this error that ultimately led the majority to uphold a complete ban on firearms that are widely preferred because they are extremely accurate, reliable, and versatile – and among the safest on the civilian market.

ARGUMENT

I. Firearms Commonly Kept for Lawful Purposes by Responsible, Law-Abiding Citizens Cannot Be Banned

Highland Park has second-guessed the judgment of millions of law-abiding citizens across the United States by deeming popular semi-automatic firearms and magazines to be unfit for civilian use. But the Second Amendment forbids the City from making this

policy choice. The firearms and magazines it prohibits are "arms protected by the Second Amendment." *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008). Thus, they cannot be banned. When the Second Amendment "right *applies* to" certain types of firearms, "citizens *must* be permitted to use [them] for the core lawful purpose of self-defense." *McDonald v. City of Chicago*, 561 U.S. 742, 767-68 (2010) (emphases added) (quotation marks omitted).

A. The City's Ban on Firearms Protected by the Second Amendment Is Necessarily Invalid Under Any Level of Judicial Scrutiny

This Court recently confirmed that the Second Amendment protects a fundamental, individual right to keep and bear arms that, by virtue of the Fourteenth Amendment, state and local governments are bound to respect. *Heller*, 554 U.S. at 581; *McDonald*, 561 U.S. at 750, 766. It follows that there are certain "instruments that constitute bearable arms," *Heller*, 554 U.S. at 582, that law-abiding citizens have an inviolable right to possess and use. Indeed, the constitution protects firearms "of the kind in common use . . . for lawful purposes like self-defense." *Id*. at 624. Conversely, it "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id*. at 625. Put another way, the Second Amendment does not protect arms "that are highly unusual in society at large," *id*. at 627, but it definitively protects those in common use for lawful

purposes, *id*. at 624. This distinction is fairly supported by the historical prohibition on carrying "dangerous and unusual weapons." *Id*. at 627.

As Petitioners correctly explain, the banned semi-automatic firearms and magazines are far from unusual. Pet. Writ Cert. at 9-11, 19-20, 29. Millions of Americans possess them for lawful purposes, including the core lawful purpose of self-defense. *Id*. Constitutional protection for these arms is thus secure, and the City's complete prohibition on their use is necessarily incompatible with the Second Amendment.

Heller confirms this implication of the constitutional text. There, the Court held that the Second Amendment "*elevates above all other interests* the right of law-abiding, responsible citizens to use *arms* in defense of hearth and home." *Heller*, 554 U.S. at 635 (emphases added). After finding that handguns are protected "arms" within the meaning of the Second Amendment, the Court concluded without pause that D.C.'s ban was irreconcilable with the Second Amendment. While the Court noted that the handgun ban would fail "any of the standards of scrutiny that we have applied to enumerated constitutional rights," *id.* at 628, it made a point of not applying any of those standards. That the Court did so is unsurprising – for the Second Amendment would mean little if the application of a particular test might permit the government to ban the very firearms the Second Amendment protects.

Under *Heller*, the only thing to be done to resolve a challenge to a flat ban on certain firearms is to determine whether they are protected by the Second Amendment. Any further evaluation of allegedly competing public policy considerations is foreclosed by the constitutional text. That text is the "very *product* of an interest-balancing by the people," *id*. at 635, and "[t]he very enumeration of the right [to keep and bear arms] takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon," *id*. at 634.

In line with *Heller*, the Court's analysis of restrictions on certain types of firearms in other cases have similarly turned on whether they enjoyed constitutional protection. In *McDonald*, the Court struck down another handgun ban, explaining that, "in *Heller*, . . . we found that [the Second Amendment] right *applies* to handguns. . . . Thus, we concluded, citizens *must* be permitted to use handguns for the core lawful purpose of self-defense." *McDonald*, 561 U.S. at 767-68 (brackets and quotation marks omitted) (emphasis added). Conversely, in *United States v. Miller*, 307 U.S. 174 (1939), the Court found that "the type of weapon at issue was not eligible for Second Amendment protection," *Heller*, 554 U.S. at 622 (emphasis omitted), because short-barreled shotguns were not commonly kept for lawful purposes by responsible, law-abiding citizens, *see Miller*, 307 U.S. 174. This test is what harmonizes the Second Amendment cases decided by the Court.

The Court's treatment of restrictions on certain firearms is also consistent with its approach to evaluating bans in other constitutional rights contexts. Even where there might be potential for future harm to the public, the Court has long found it appropriate to strike heavy restrictions on protected conduct without resort to a particular level of scrutiny.

For example, in *Stanley v. Georgia* the Court simply concluded that "the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." 394 U.S. 557, 567 (1969). The Court similarly invalidated as a violation of the First Amendment a restriction on access to materials deemed "communist political propaganda." *Lamont v. Postmaster General*, 381 U.S. 301 (1965). And even absent any specific enumerated right, this Court has found flat bans on certain contraceptives are necessarily unconstitutional. *Griswold v. Connecticut*, 381 U.S. 479 (1965). These restrictions, like Highland Park's blanket prohibition, are *per se* unconstitutional.

But even if the majority in this case declined to categorically invalidate the ban, it should have found the law unconstitutional under either strict or intermediate scrutiny. Indeed, recent authority from the Court affirms that under either standard the government bears the distinct burden of establishing that its chosen means are narrowly drawn to further its objectives without unnecessarily infringing upon

constitutional rights. *McCutcheon v. Fed. Election Comm'n*, ___ U.S. ___, 134 S. Ct. 1434, 1456-57 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)); *see McCullen v. Coakley*, ___ U.S. ___, 134 S. Ct. 2518, 2530 (2014) (confirming that even under intermediate scrutiny, narrow tailoring forbids the government from burdening substantially more protected conduct than necessary); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989).

By any measurement, Highland Park's approach to regulating the protected firearms goes too far. The "ordinance serves as the bluntest of instruments, banning a class of weapons outright, and restricting the rights of its citizens to select the means by which they defend their homes and families." *Friedman v. City of Highland Park*, 784 F.3d 406, 419 (7th Cir. 2015) (Manion, J., dissenting). No doubt, Highland Park has an interest in preventing the prohibited firearms, and all other constitutionally protected arms, from being misused by criminals. But it may not attempt to further that objective by extinguishing the rights of law-abiding citizens to possess them for lawful purposes.

It is no answer to ban protected firearms because they might on occasion be used for an unlawful purpose. *Abusus non tollit usum* – abuse is not a valid argument against proper use. As this Court made clear in *Heller*, there is a presumption in favor of the lawful, constitutional exercise of the right. 554 U.S. at 636. There, D.C. sought to ban handguns for the

same reasons Highland Park bans common rifles and magazines – to decrease criminal misuse and prevent injuries involving those firearms through decreased availability. *Id*. at 681-82, 693-96 (Breyer, J., dissenting). Despite these interests, the Court concluded that D.C.'s approach to regulating handguns was plainly impermissible under any standard applied to enumerated rights. *Id*. at 628-29 (maj. op.).

If the D.C. handgun ban could not pass heightened scrutiny, it follows that Highland Park's ban on a large class of protected firearms and magazines cannot survive such scrutiny either. For if prohibiting law-abiding citizens from acquiring or possessing protected firearms in their homes were a valid means of reducing criminal access and misuse, *Heller* would have been decided differently. But despite the widespread criminal use of handguns and the government's compelling interest in keeping these easily concealed firearms out of the hands of criminals, *Heller* instructs that a ban on the possession of those protected arms by the law-abiding lacks the required fit under either strict or intermediate scrutiny. *Id*.

In sum, this Court's precedent establishes that Highland Park's ban is unconstitutional. Because the Second Amendment right *applies* to the common semi-automatic firearms and magazines the City targets, they *cannot* be banned.

B. Protected Firearms Cannot Be Banned Simply Because They Function More Effectively

Just as it is no answer to ban protected firearms because they might sometimes be misused by criminals, Highland Park cannot ban them because they are *too good* at what they are supposed to do. Broken down to its most basic function, a firearm is a tool that is designed to leverage force. And millions of Americans prefer the prohibited firearms because they more effectively leverage force due to their increased accuracy, reliability, versatility, and safety. Pet. Writ Cert. at 9-11, 19-20, 29; *infra* pp. 17-27. The fact that the prohibited firearms perform better cannot be a justification for their confiscation.

But here, the City has done precisely that – effectively banning modern designs that make a firearm easier and safer to use in a self-defense emergency, simply because they might also function better in the hands of a criminal. The City thus inherently promotes the use of less effective firearms that are more difficult to operate. If Highland Park were permitted to ban firearms on this basis, the result, followed to its natural conclusion, would be that law-abiding citizens are reduced to relying upon outmoded, less effective firearms for self-defense in the home, a result that is incompatible with this Court's holdings in *Heller* and *McDonald*.

Similarly, the fact that common firearms are also used by the military (or in the case of the banned

firearms, have a similar appearance to those used by the military) does not warrant a ban on civilian ownership. Highland Park claims that "given their military heritage, semi-automatic weapons. . . . are not intended for self-defense but instead are based on military designs." Response Brief for Defendant-Appellee at 25, *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015) (No. 14-3091) ECF No. 27. This is patently false. Many firearms that are popular among the American public for self-defense and other lawful purposes have military roots. For example, the iconic 1911 pistol, which has been one of the most popular handguns in American society over the past century, was adopted by the Army on March 29, 1911, and by the Navy and the Marines in 1913.[2] And the American M1 Garand rifle, which proved itself during World War II and the Korean War, became one of the most popular rifles for hunting, target shooting, and self-defense. Julian S. Hatcher, *Book of the Garand* 251, 256 (Canton Street Press, 2012).

Another firearm popular both with the military and the American people is the Winchester Model 12 Shotgun.[3] Used by the Army and Marines during World War I, World War II, and the Vietnam War, it

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[2] *The History of the 1911 Pistol*, Browning (Jan. 24, 2011), http://www.browning.com/library/infonews/detail.asp?ID=301.

[3] Chris Eger, *The Winchester Model 12 Shotgun: Once Loved, Now Forgotten*, Guns.com (May 31, 2013), http://www.guns.com/2013/05/31/the-winchester-model-12-shotgun-once-loved-now-forgotten/.

was also one of the most ubiquitous shotguns of its day.[4] It was later replaced by the Mossberg 500,[5] which like its predecessor, is popular for self-defense – with more than 10 million having been produced.[6] Additionally, the Beretta 92 is the standard sidearm of the U.S. Military and one of the best-selling handguns on the civilian market.[7]

Inherently, any firearm can be used for either offensive or defensive purposes. The performance capabilities that cause many firearms to be adopted by the military also make them a preferred choice among the American people. The inextricably intertwined history of parallel use by both the military and civilians necessarily means a firearm's military heritage cannot foreclose its civilian use.

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[4] *Id*.

[5] David E. Petzal, *The 50 Best Guns of All Time*, Field & Stream, http://www.fieldandstream.com/node/1005010586 (last visited Aug. 25, 2015).

[6] Brad Fitzpatrick, *G&A Perspective: Why the Mossberg 500 Is the Best Home Defense Shotgun of All Time*, Guns & Ammo (Oct. 21, 2013), http://www.gunsandammo.com/personal-defense/ga-perspectives-mossberg-500-best-home-defense-shotgun-time/.

[7] *92 FS*, Beretta, http://www.beretta.com/en-us/92-fs/ (last visited Aug. 25, 2015).

II. Judge Easterbrook's Approach Conflicts with Precedent of This Court, Ultimately Culminating in a Test That Would Unravel the Bill of Rights by Justifying Infringements That Make the Public *Feel* Safer

The Seventh Circuit's divided panel opinion directly contradicts this Court's holdings in *Heller* and *McDonald*. Rather than follow these precedents, the majority adopted its own novel standards to determine whether certain arms may be banned, concluding with a "perceived safety" test that, left standing, would effectively eradicate the guarantees enshrined in the Bill of Rights. Review is thus critical to prevent lower courts from abdicating their duties and to restore the proper treatment of enumerated rights.

The majority first examined whether the firearms and magazines in question were "common at the time of ratification." *Friedman*, 784 F.3d at 410. But as both the dissent and Petitioners pointed out, this approach "border[s] on the frivolous," – in fact, it has been squarely rejected by this Court. *Id*. at 413 (Manion, J., dissenting); Pet. Writ Cert. at 2 (citing *Heller*, 554 U.S. at 582). "Just as the First Amendment protects modern forms of communications . . . and the Fourth Amendment applies to modern forms of search . . . 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 (emphasis added). The majority's approach directly conflicts with these holdings.

Judge Easterbrook then looked to whether the banned firearms have "some reasonable relationship to the preservation or efficiency of a well-regulated militia." *Friedman*, 784 F.3d at 410. The majority found support for this based on the predication that this Court interpreted *Miller* to mean that "states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms, so as to have them available when the militia is called to duty." *Id*. The majority desperately misreads *Heller*. This Court read "*Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. Rather than apply this test, the majority adopted a novel one that finds no support in *Heller*.

Next, the majority examined "whether law-abiding citizens retain adequate means of self-defense" with other firearms that are not banned. *Friedman*, 784 F.3d at 410. While Judge Easterbrook correctly observed that in *Heller* "the availability of long guns [did] not save a ban on handgun ownership," he incorrectly assumed that this was because the Court decided that long guns did not provide an "adequate means of defense." *Id*. at 411. To be sure, *Heller* observed that there were a number of reasons why many people prefer handguns for self-defense. 554 U.S. at 629. But *Heller*'s analysis of D.C.'s ban did not turn on whether rifles and shotguns were sufficient for that purpose. Rather, the Court observed that "*whatever the reason*," the American

people commonly select handguns for self-defense. *Id*. (emphasis added). Ultimately, bans on protected firearms are invalid not because other firearms might not suffice, but because those bans supplant the constitutional choices of the American people with the policy choices of lawmakers. The panel majority failed to appreciate this distinction.

Ultimately, the majority's determination of whether common firearms can be banned turned on a novel and unsound inquiry – whether the restriction "makes the public *feel* safer." *Friedman*, 784 F.3d at 412 (emphasis added). The problems with this approach – and the need for Supreme Court intervention – cannot be overstated.

As an initial matter, Judge Easterbrook's "perceived safety" or "fear" test is markedly worse than the interest balancing approach rejected in *Heller*. In rebuking that approach, the Court instructed that:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. . . . A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 554 U.S. at 635. If a constitutional right subject to the judiciary's view of its utility is *no guarantee* at all – what guarantee remains of a right that is subject to public fears concerning its exercise? Setting aside the panel's speculation about what

makes the public *feel* safer, even if a ban might entirely relieve the public's fears of criminal violence, it would not justify a constitutional infringement. Allowed to stand, the majority's "fear test" would effectively permit legislators to trample the constitutional rights of the minority at the whims of the majority.

Casting aside constitutional protections based on a "fear test" in one context will inevitably weaken them in others. As the Court confirmed, "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle." *McDonald*, 561 U.S. at 788. For "[t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *Id*. at 783.

Certainly the public might *feel* safer if police dispensed with probable cause requirements and engaged in warrantless searches of the homes of anyone in the neighborhood who looks too dangerous. But "[j]ustifications founded only on fear and apprehension are insufficient to overcome" constitutional rights. *Teterud v. Burns*, 522 F.2d 357, 361-62 (8th Cir. 1975). And certainly this must be, lest, "[w]here in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens?" The Federalist No. 29 (Alexander Hamilton).

The purpose of the Bill of Rights is to protect against the destruction of those rights, particularly in the face of emotional arguments when it might be easier to ignore them. During times when the flames of public fears are stoked, upholding the Constitution in the face of these fears is a solemn task.

> Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. . . . The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 867-68 (1992).

Rather than perform their duty to enforce the Constitution, lower courts are attempting to eradicate the Second Amendment by disregarding the Bill of Rights and the precedents of this Court. Indeed, the panel here abdicated its responsibility and merely concluded that, in light of "ambiguous passages in the Supreme Court's opinions," it was best to leave a determination of what firearms American citizens have

a right to possess up to the "political process and scholarly debate." *Friedman*, 784 F.3d at 412.

But a constitutional right that is meant to protect against infringements by the executive and legislative branches – and has its scope simultaneously manipulated by them – is no guarantee at all. "The dangers inherent in allowing even well intentioned executive [or legislative] action to go unchecked" even if it "was undertaken in the name of national security were among the primary reasons the founding fathers insisted upon the protections embodied in our constitutional system of checks and balances and more particularly the specific commands of the bill of rights." *Burkhart v. Saxbe*, 448 F. Supp. 588, 604 (E.D. Pa. 1978) *aff'd in part sub nom. Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979).

If legislators wish to limit the scope of the Second Amendment, the Constitution provides a mechanism for doing so. U.S. CONST. art. V. This is a difficult and time-consuming process, and intentionally so. The majority's decision effectively allowed the City to circumvent this process, casting aside the inalienable rights of the American people based on the perceived feelings of some members of the public.

If fundamental rights are left to fluctuate on the ever-changing tide of public sentiment, they will cease to have meaning. Without instruction from the Court, "there will be much to fear from the bias of local views and prejudices, and from the interference of local regulations." The Federalist No. 22

(Alexander Hamilton). Because lower federal courts are not free to disregard clear holdings from the Supreme Court, review by the Court is critical to correct the majority's improper treatment of Petitioners' Second Amendment claims and to enforce the Bill of Rights.

III. The Prohibited Firearms and Features Are Hugely Popular for Self-Defense and Other Lawful Purposes Because They Offer Greater Accuracy, Reliability, Overall Practicality, and Safety

It is no surprise that the firearms the City prohibits are overwhelmingly preferred by millions of law-abiding Americans. Pet. Writ Cert. at 9-11, 19-20, 29. Their popularity is a natural consequence of their innate utility, particularly for self-defense. Indeed, each design characteristic and feature the City restricts enhances the firearm's suitability for that purpose. Cosmetically, these features may appear daunting to some. But their presence results in firearms that are extremely accurate, reliable, and practical – and among the safest on the market.

A. The Prohibited Firearms Provide Greater Accuracy

One of the most important factors for determining a firearm's suitability for self-defense is accuracy, or the ability of the operator to hit his or her intended target. This reality notwithstanding, Highland Park

bans firearms based on features and design characteristics that increase their accuracy.

First, Highland Park prohibits certain firearms that have a "semi-automatic" function. Highland Park, Ill., City Code § 136.001(C) (2013). Despite misconceptions resulting from misleading media reports and attempts by proponents of firearm bans to liken the prohibited firearms to automatic military arms, they are not machine guns. With automatic firearms, if the operator holds down the trigger, the gun will fire rapidly and continuously until the trigger is released. Sporting Arms and Ammunition Manufacturer's Institute, *Non-Fiction Writer's Guide – A Writer's Resource to Firearms and Ammunition* (1998). By contrast, the banned firearms discharge one bullet per pull of the trigger, just like all other semi-automatic rifles and handguns, classic revolvers, and even bolt-action rifles. What's more, these firearms have nearly identical rates of fire to one another. They are all much slower than machine guns. David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. Contemp. L. 381, 389-90 (1994).

Semi-automatic pistols and rifles are often preferred over manual firearms like revolvers and bolt-action rifles because they reduce a firearm's recoil or "kick." Recoil causes the barrel of the firearm to move off target, and often causes the operator to flinch, inherently making it more difficult to hit one's target. Semi-automatic firearms reduce recoil by naturally harnessing that energy to load the next cartridge into the firing chamber. *Id*. at 402.

"Muzzle brakes" and "compensators" are also designed to reduce a firearm's recoil. These features, which are banned by Highland Park, City Code §§ 136.001(C)(1)(e), 136.001(C)(3)(d), channel a portion of the excess gasses generated by firing a round backward or to the side and away from the operator to act as a counter-force to the recoil. Both the semi-automatic design and the presence of a "muzzle brake" or "compensator" make the prohibited firearms more accurate and easier to control. This is true for all users, but particularly for novice operators and weaker individuals.

The City next targets firearms with a "protruding grip" in front of the trigger guard. City Code §§ 136.001(C)(1)(b), 136.001(C)(3)(a), 136.001(C)(4)(b). These forward grips allow users to better stabilize the firearm. Similar to features designed to reduce recoil, the incorporation of an additional grip for the user's non-trigger hand keeps the muzzle from rising after a shot is fired, thereby allowing the user to fire a more accurate shot. Kopel, *supra*, at 402.

Finally, Highland Park prohibits the use of "telescoping" and "thumbhole" stocks, City Code §§ 136.001(C)(1)(c), 136.001(C)(3)(b), 136.001(C)(4)(c), each of which promote accuracy. "Telescoping stocks" allow length of the firearm to be adjusted for use by different family members or other users depending on their size, stature, thickness of clothing, and shooting position. A fitted rifle naturally allows for improved comfort and control during use. And "thumbhole stocks" allow the user to place the thumb

on the firing hand into the stock of a rifle behind the trigger guard, allowing for a better grip. The thumbhole functions similarly to a pistol grip for the trigger hand, promoting increased control and stability, as well as recoil management, thereby improving accuracy.

Because the prohibited features greatly increase accuracy, firearms equipped with them have become ubiquitous in modern society.[8] As one decorated firearm expert explained, "men and women alike just shoot better with a carbine than with a pistol. The AR is unbelievably versatile. . . . It will outperform the pistol. [It] has little to no recoil."[9]

B. The Prohibited Firearms Are Extremely Durable and Reliable

Improved designs and functional developments in the firearm industry over the last century have made the banned firearms among the most reliable and durable firearms on the civilian market. They generally utilize very simple, streamlined designs with few

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[8] Patrick Mott, *In Defense of the AK-47: The Controversial Weapon, Like Other Semiautomatics, Is Actually Precise and Durable and Has Nostalgic Appeal, Owners Say*, L.A. Times, Feb. 24, 1989, http://articles.latimes.com/1989-02-24/news/vw-154_1_semiautomatic-weapon.

[9] American Rifleman Staff, *The AR for Home Defense: One Expert's Opinion*, Am. Rifleman (May 26, 2015), http://www.americanrifleman.org/articles/2015/5/26/the-ar-for-home-defense-one-experts-opinion/.

moving parts and loose internal frictions that reduce the likelihood that the firearm will jam. The banned firearms are also typically manufactured from rust proof materials such as aluminum, advanced polymers, and carbon fiber – further decreasing the risk that the firearm will fail to function properly.[10] They are thus particularly desirable for users in hot climates and marine environments, where the combination of sweat, salt, high temperatures, and/or humidity rapidly eats away at less advanced materials, causing the firearm to fail.[11] They are also extremely durable and easy to maintain. "You can drop [it] . . . get it muddy. You don't have to baby it. Some other guns you have to clean every five rounds. . . ."[12]

C. The Prohibited Firearms Are Highly Versatile, Practical, and Affordable

Men and women also commonly select the prohibited firearms because they are highly customizable to the user, they offer many practical benefits for home defense, and they offer great value for the cost.

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[10] *Windham Weaponry Carbon Fiber SRC AR-15*, Tactical-Life (Oct. 8, 2013), http://www.tactical-life.com/firearms/windham-weaponry-carbon-fiber-src-ar-15/#windham-weaponry-carbonfiber.

[11] Patrick Sweeney, *Guide to Gun Metal*, RifleShooter (Dec. 29, 2011), http://www.rifleshootermag.com/rifles/ar-15/guide-to-gun-metal/.

[12] Mott, *supra*, note 8.

One of the primary reasons the prohibited firearms have become so popular is their unique adaptability to a wide range of operator sizes, strengths, infirmities, and age, as well as to a variety of locations where citizens may need to defend themselves. For example, they are typically designed to allow the user to mount various lights and scopes that are tailored to his or her use, the nature of the property, and the amount of light. Similarly, "protruding grips" can easily be changed to suit different hand sizes. Adjustable or "telescoping" stocks also allow family members to comfortably use the same firearm and adjust it to their needs.

Firearm owners also prefer the prohibited firearms because they are designed to accept a variety of popular ammunition cartridges. The standard cartridge used in many of the prohibited firearms is the .223 Remington – a lightweight, highly accurate cartridge that produces little recoil and will not over penetrate, making it a desirable choice in urban environments. Unlike more powerful cartridges, the .223 decreases the risk that a bullet will travel through a common wall and strike a neighbor. But the prohibited firearms can also be chambered to accept many other types of ammunition, allowing firearm owners to use them for a variety of different lawful uses by selecting the cartridge most suitable for their needs.

These are but a few examples of how the prohibited firearms can be customized to the user. *Brownells Catalog*, a popular resource for firearms

accessories, has nearly 100 pages of product listings for the AR-15 alone, offering tools, parts, triggers, books, sights, magazines, cleaning products, stocks, and much more. *Brownells Catalog* (Brownells, 68th ed. 2015).

The prohibited firearms and magazines also have many characteristics that give them widespread practical appeal for home defense. For example, a shorter, "telescoping stock" makes rifles more maneuverable and thus harder for an attacker to wrestle away. Kopel, *supra*, at 398-99. "Protruding grips" and "thumbhole stocks" also promote better handling, avoiding drops and allowing individuals to hold the firearm with one hand while the other hand opens a door or dials 911.

The City also bans the use of firearms with a magazine capable of holding more than ten rounds, City Code § 136.001(C)(2), despite these being the standard capacities for the most common handguns and rifles in American society, Pet. Writ Cert. at 10-11, 20. There are a number of reasons why Americans prefer magazines over ten rounds for self-defense. Critically, they decrease the risk of running out of ammunition before one can successfully repel a criminal attack. The availability of more ammunition for self-defense is particularly preferable given that: (1) over 480,000 violent crimes per year involve three

or more attackers,[13] thus increasing the likelihood that a greater number of defensive discharges will be required to eliminate the threat, Declaration of Massad Ayoob in Support of Motion for Preliminary Injunction at 2-7, *Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267 (N.D. Cal. 2014) (No. 13-5807) ECF No. 11; (2) the stress of a criminal attack greatly reduces the likelihood that shots fired will hit the aggressors, Appellants' Appendix at 183, *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015) (No. 14-3091) ECF No. 16-1; *see also* Declaration of Massad Ayoob at 10, *Fyock*, No. 13-5807; and (3) a single shot that does strike an aggressor will rarely incapacitate him before he can complete his attack. Declaration of Massad Ayoob at 3-4, *Fyock*, No. 13-5807.

Finally, the prohibited firearms are routinely selected by millions of Americans due to their affordability. Many can be purchased for as little as a few hundred dollars,[14] they often use sporting cartridges that are available at discount stores,[15] and most can

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[13] *Criminal Victimization in the United States, 2008 Statistical Tables, National Crime Victimization Survey*, Bureau of Justice Statistics (2010), http://bjs.gov/content/pub/pdf/cvus08.pdf; *see also* Appellants' Appendix at 183, 784 F.3d 406 (No. 14-3091) ECF No. 16-1.

[14] *See, e.g.*, Hi-Point Firearms, http://www.hi-pointfirearms.com/Hi-Point-carbines/9MM_carbine.html (last visited Aug. 23, 2015).

[15] Tom McHale, *Surplus Ammo: Shooting a Little Bit of History – Literally*, Ammoland Shooting Sports News (July 15, 2014),

(Continued on following page)

be modified to accept inexpensive rimfire ammunition.[16] Moreover, the highly adaptable nature of the banned firearms allows consumers to select one firearm for the family for a variety of lawful purposes rather than purchasing multiple firearms.

D. The Prohibited Firearms Are Among the Safest on the Civilian Market

The prohibited firearms are perhaps the safest options available to American consumers today. Indeed, many of the features that the City criminalizes are specifically designed to reduce the risk of injury to both the user and bystanders.

Most notably, the City bans the use of "barrel shrouds" – properly referred to as handguards. Handguards surround the barrel (either partially or completely encircling it), allowing the user to hold the firearm with his or her forward hand without being burned. The need to insulate the barrel is not unique to the banned firearms due to an alleged increased rate of fire. The banned firearms fire at the same rate as other common firearms. Moreover, the barrel of any firearm is typically too hot to touch after two or three discharges. For this reason, handguards (or

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http://www.ammoland.com/2014/07/surplus-ammunition-shooting-a-little-bit-of-history-literally/#axzz3jfJoNZcM.

[16] Shelby Murdoc, *.22 Conversion Kits for the Budget Minded*, Shooting Sports Retailer (June 30, 2015), http://www.shootingsportsretailer.com/2015/06/30/22-conversion-kits-budget-minded/.

wooden stocks on historical rifles) have long been incorporated to prevent user injury, and they are found on virtually every rifle today. Handguards reduce the risk of burns to both the operator and family members and prevent against errant shots by allowing the user to properly grip the firearm during discharge.

Incredibly, Highland Park exempts devices that would otherwise be prohibited as a "barrel shroud" if they do not allow "the bearer to hold the firearm with the non-trigger hand *without being burned*." City Code §§ 136.001(C)(1)(d), 136.001(C)(2)(c). Thus, the City authorizes the use of firearms that will burn the operator by banning firearms with safety features that protect her from being burned.

Other features like grips, adjustable stocks, and components designed to reduce recoil also make the prohibited firearms safer. Again, these features make the firearm easier to control, thereby minimizing the risk of errant shots. Moreover, they reduce the risk of drops and accidental discharges, while making it less likely that an attacker will gain control of the firearm. Like handguards, these features have contributed to the ubiquity of the banned firearms by enhancing their safety.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

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Respectfully submitted,

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