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Before the
Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights

Concerning

"Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment"

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Good morning Mr. Chairman, and Members of the Subcommittee. Thank you for inviting me to participate in today's hearing entitled "Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment." I am honored to be included among the very distinguished members of this panel and to share with you my thoughts on the constitutional issues raised by this important subject.[1]

It is critical, of course, that any legislation enacted to reduce gun violence respect the Second Amendment, which provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Supreme Court's recent decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and

[1] I have spent much of my professional life working on issues relating to the meaning of the United States Constitution. Shortly after serving as law clerk to Judge Paul Roney of the Fifth (now Eleventh) Circuit Court of Appeals and to Justice William H. Rehnquist, I joined the Civil Rights Division of the U.S. Department of Justice in 1981. In 1985 President Reagan appointed me to serve as Assistant Attorney General for the Office of Legal Counsel. I reentered private practice in 1988, and in October 1996 I became a founding partner of Cooper & Kirk, PLLC.

In private practice, I have litigated numerous cases involving the meaning of the Second Amendment. Long before the Supreme Court's decision in *Heller*, I was appointed a Special Assistant Attorney General for the State of Alabama for the purpose of presenting oral argument as an amicus in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). *Emerson* was a seminal case because the Fifth Circuit agreed that the Second Amendment guaranteed an individual right to keep and bear arms and decided the case based on the Founding-era history surrounding the adoption of the Second Amendment. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), I submitted an amicus brief on behalf of former officials in the Department of Justice arguing that the Second Amendment guarantees an individual right to keep and bear arms. Subsequent to *Heller*, the State of Oklahoma appointed me a Special Assistant Attorney General for the purpose of presenting oral argument in defense of its statute allowing employees to keep a firearm locked in their vehicles in their employers' parking lots. *See Ramsay Winch Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009). I am currently litigating cases on behalf of individuals and organizations, including the National Rifle Association, seeking to vindicate rights under the Second Amendment, including a case in which the Seventh Circuit recently struck down the State of Illinois's ban on carrying operable firearms in public for self-defense. *See Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

McDonald v. City of Chicago, 130 S. Ct. 3020 (2010), provide authoritative guidance for interpreting and applying the Second Amendment. I believe that the principles established by these decisions cannot be reconciled with certain gun control measures pending before the Congress, including the proposed ban on certain semiautomatic rifles, pistols, and shotguns tendentiously dubbed "semiautomatic assault weapons" and the proposed 10-round limitation on the capacity of ammunition magazines.

I. Principles Established by *Heller* and *McDonald*.

In analyzing the constitutional implications of the proposed gun control measures, one must first identify the pertinent principles established by the *Heller* and *McDonald* decisions.

First, the Second Amendment protects an "*individual right*" that "*belongs to all Americans*." *Heller*, 554 U.S. at 581, 595 (emphasis added). The Court thus rejected the notions that the Second Amendment protects only a "collective" right and that it protects a right only to bear arms in connection with militia service. While the right to arms was "*codified* . . . to prevent elimination of the militia . . ., most [Americans] undoubtedly thought it even more important for self-defense and hunting." *Id*. at 599 (emphasis added). Indeed, the Court repeatedly emphasized in both *Heller* and *McDonald* that the "inherent" and "pre-existing" right of self-defense is the "core" and "the *central component* of the right itself."[2]

[2] *See id.* at 592, 594 ("[T]he Second Amendment codified a *pre-existing* right. . . . It was, [Blackstone] said, 'the natural right of resistance and self-preservation, and 'the right of having and using arms for self-preservation and defence.' ") (original emphasis, citation omitted); *id.* at 599 ("Justice Breyer's assertion that individual self-defense is merely a 'subsidiary interest' of the right to keep and bear arms is profoundly mistaken. . . . [S]elf-defense . . . was the *central component* of the right itself.") (original emphasis); *id.* at 628 ("[T]he inherent right of self-defense has been central to the Second Amendment right."); *id.* at 630 ("[T]he District's requirement . . . that firearms in the home be rendered and kept inoperable at all times . . . makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional."); *McDonald*, 130 S. Ct. at 3026 (all citations to controlling opinion of Alito, J.) ("Two years ago, in *District of Columbia v. Heller*, . . . we held that the Second Amendment

Second, the right to keep and bear arms is a *fundamental* right, implicit in our constitutional scheme of ordered liberties and "deeply rooted in this Nation's history and tradition." *McDonald*, 130 S. Ct. at 3042. It "was considered . . . fundamental by those who drafted and ratified the Bill of Rights" and by the "Framers and ratifiers of the Fourteenth Amendment," *id*. at 3037, 3042, and it is still considered fundamental by countless millions of Americans today. The fundamental Second Amendment right to arms, accordingly, is entitled to no less respect than the other fundamental rights protected by our Constitution. As the Court emphasized in *McDonald*, it is not to be "treat[ed] . . . as a second-class right" or "singled out for special – and specially unfavorable – treatment." *Id*. at 3043, 3044.

Third, the line between permissible and impermissible arms regulations is established by looking to the Second Amendment's *text* and *history* and to the history of arms regulations in this country. The Second Amendment is "enshrined with the scope [it was] understood to have *when the people adopted [it]*, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35 (emphasis added). This passage from *Heller* is an express admonition that all government officials, including Members of this body, are oath-bound to respect and obey the command of the Second Amendment as it was understood in 1791, no matter how much they may disagree with the breadth of that constitutional command. To be sure, this does not mean that the Second Amendment right has no limits. Rather, it means that the Second Amendment's scope is determined through "historical analysis" and that any

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protects the right to keep and bear arms for the purpose of self-defense . . . ."); *id.* at 3036 ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right.") (original emphasis); *id.* ("[W]e concluded [in *Heller* that] citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.' "); *id.* at 3047 (*Heller* "stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was 'the *central component* of the right itself.' ") (original emphasis).

limits on the right must be supported by "historical justifications." *Id*. at 627, 635. Indeed, even as the Court in *Heller* recognized the presumptive validity of certain "longstanding prohibitions on the possession of firearms," it expressly reserved for future cases the ultimate question whether "the historical justifications for [those] exceptions" would suffice to uphold their validity. *Id.* at 626, 635.

Fourth, and relatedly, the line between permissible and impermissible arms regulations *is not* to be established by balancing the individual right protected by the Second Amendment against purportedly competing government interests. This balance has already been struck, for the Second Amendment "is the very *product* of an interest-balancing by the people," and "[t]he very enumeration of the right 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 634-35 (original emphasis).

Thus, while *Heller* made clear that the District of Columbia's handgun ban would fail "any of the standards of scrutiny that [the Court has] applied to enumerated constitutional rights," *id.* at 628, the Court pointedly did not apply any of those standards but rather flatly and categorically struck down the ban after finding it irreconcilable with the Second Amendment's text and history. Likewise, the Court categorically invalidated the so-called "trigger-lock requirement" – the separate, independent provision of D.C. law requiring "that firearms in the home be rendered and kept inoperable at all times" – without subjecting it to any form of heightened scrutiny. *Id.* at 630. Indeed, the Court squarely rejected the "interest-balancing" approach proposed by Justice Breyer in dissent, *see id.* at 634-35, an approach that was in substance if not in name a form of intermediate scrutiny, *see, e.g.*, *Heller*, 554 U.S. at 704-05 (Breyer, J., dissenting) (finding "no cause here to depart from the standard set forth in *Turner*

[*Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997)]," a "First Amendment case[] applying intermediate scrutiny"). *McDonald* reiterated that *Heller* "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 130 S. Ct. at 3047. Indeed, *McDonald* emphasized that resolving Second Amendment cases *would not* "require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." *Id*. at 3050.[3]

In sum, *Heller* and *McDonald* establish that the Second Amendment guarantees a fundamental, individual right to keep and bear arms, the scope of which is established by the Second Amendment's text and history and which cannot be circumscribed by appeal to countervailing government interests.

[3] Despite the Supreme Court's clear guidance on this issue, a number of lower courts in the wake of *Heller* have resolved Second Amendment claims by applying a levels-of-scrutiny analysis, often settling on an intermediate scrutiny approach that resembles Justice Breyer's rejected interest-balancing test. These decisions fly in the face of *Heller* and *McDonald*. *See, e.g.*, Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706-07 (2012) ("The lower courts . . . have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned . . . ."); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 855 (2013) ("Some judges . . . have simply ignored the Court's rejection of balancing tests. Instead they have allowed the right to keep and bear arms to be gobbled up by intermediate scrutiny or similar tests that weigh serious, important, or compelling government interests against Second Amendment commands."). *But see, e.g.*, *Moore v. Madigan*, 702 F.3d 933, 939, 941 (7th Cir. 2012) (recognizing that "the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts," and striking down the State of Illinois's ban on publicly carrying firearms "not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states"); *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) ("*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not a balancing test . . . ."); *Houston v. City of New Orleans*, 675 F.3d 441, 448 (Elrod, J., dissenting) (5th Cir. 2012), *withdrawn and superseded on rehearing on other grounds*, 682 F.3d 361 (5th Cir. 2012) (agreeing with Judge Kavanaugh that "*Heller* and *McDonald* rule out scrutiny analysis").

II. The Second Amendment's Protection of Certain "Arms" Is Absolute.

As noted earlier, the text of the Second Amendment provides that "the right of the people to keep and bear *Arms*, shall not be infringed." U.S. CONST. amend. II (emphasis added). The amendment is thus one of the few enumerated constitutional rights that specifically protects the possession and use of a particular kind of personal property – "arms." It follows that there are certain "instruments that constitute bearable arms," *Heller*, 554 U.S. at 582, that law-abiding, responsible adult citizens have an absolute, inviolable right to acquire, possess, and use. Indeed, the Court in *Heller* made clear that the Second Amendment's "core protection" – the right to armed self-defense, including, most acutely, in the home – is no less absolute than the First Amendment's protection of the expression of unpopular opinions: "The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong headed views. The Second Amendment is no different. . . . And whatever else it leaves to future evaluation, it surely *elevates above all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 634-35 (emphasis added).

The key question, then, is what arms are protected by the Second Amendment. For again, under the Supreme Court's categorical approach, the Second Amendment guarantees a fundamental, inviolable right to own and possess the arms that fall within its scope.

While *Heller* and *McDonald* instruct that we look to history to determine the types of arms that fall within the Second Amendment's scope, those cases have already done the analysis and answered the question: The arms protected by the Second Amendment are those weapons that are "of the kind in common use . . . for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. Conversely, "the Second Amendment *does not* protect those weapons not typically

possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Id*. at 625 (emphasis added).

This distinction – between firearms in common use by ordinary Americans and unusual, sophisticated weapons historically confined to military use – is hardly novel.[4] Indeed, the distinction was central to the Supreme Court's 1939 decision in *United States v. Miller*, 307 U.S. 174 (1939), which rejected a Second Amendment challenge to convictions for unlawfully transporting in interstate commerce a short-barreled shotgun. As *Heller* emphasized, the *Miller* Court's "basis for saying that the Second Amendment did not apply . . . was that the type of weapon at issue was not eligible for Second Amendment protection." *Heller*, 554 U.S. at 622 (emphasis omitted). "*Miller* said . . . that the sorts of weapons protected [by the Second Amendment] were those 'in common use at the time.' " *Id.* at 627. According to *Heller*, then, possession and use of short-barreled shotguns, like modern-day "M-16 rifles" and other "sophisticated arms that are highly unusual in society at large," can be banned or otherwise regulated without constitutional concern. *Id*. But possession and use of firearms of the kind in common use for self defense and other lawful purposes are constitutionally protected.

Applying this "common use" test, *Heller* flatly and categorically struck down the District of Columbia's handgun ban. "The handgun ban," the Court reasoned, "amounts to a prohibition

[4] This is the distinction Judge Silberman adopted in the D.C. Circuit decision that was affirmed by *Heller*. *See Parker v. District of Columbia*, 478 F.3d 370, 394-95 (D.C. Cir. 2007). This distinction is "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,' " 554 U.S. at 627 – a tradition that did not bar "Persons of Quality [from] wearing *common Weapons* . . . for their Ornament or Defence, in such places, and upon such Occasions, in which it is common Fashion to make use of them, without causing the least Suspicion of an intention to commit any Act of Violence or Disturbance of the Peace." 1 HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 136 (1716) (emphasis added). And this distinction is rooted in founding-era militia practices: "Ordinarily when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind *in common use* at the time." *Heller*, 554 U.S. at 625 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)) (emphasis added, brackets omitted).

of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Id*. at 628; *see also id.* at 628-29 (Handguns are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family.") (quotation marks omitted); *id.* at 629 ("[T]he American people have considered the handgun to be the quintessential self-defense weapon."); *id.* ("[H]andguns are the most popular weapon chosen by Americans for self-defense in the home . . . ."). The Court thus held "that the District's ban on handgun possession in the home violates the Second Amendment," and ordered that, "[a]ssuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Id.* at 635. Because "[t]he vast majority of handguns today are semi-automatic," *Heller II*, 670 F.3d at 1286 (Kavanaugh, J., dissenting), *Heller* necessarily holds that semiautomatic handguns are constitutionally protected and cannot be banned. *See id.* at 1289 ("semi-automatic handguns are constitutionally protected under the Supreme Court's decision in *Heller*").

The constitutionality of the pending proposals to ban certain "arms" thus turns on whether the banned rifles, shotguns, and pistols are in common use for lawful purposes in this Nation. The answer to that question is plainly yes.

Indeed, the answer to that question should be apparent from the very term that one of the pending bills, S.150, uses for the weapons it seeks to ban: "*semiautomatic* assault weapons." As explained below, "assault weapon" is a term of opprobrium invented for political and public relations purposes. But "semiautomatic" *is* a term that has a distinct meaning, and it is a weapon type that has been in existence for over a hundred years. *See* David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 413 (1994) ("semiautomatics are more than a century old"). And unlike "machineguns, sawed-off shotguns, and artillery

pieces," semiautomatic firearms "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 611-12 (1994). "Automatic" refers to the fact that the user need not manipulate the firearm (via mechanisms such as a bolt or lever) to place another round in the chamber after each round is fired. *See id*. at 602 n.1. A fully automatic firearm on one pull of its trigger will fire continuously until the trigger is released or until the ammunition in the firearm's magazine is expended. *See id*. But a semiautomatic firearm requires the user to pull the trigger each time he or she wants to discharge a bullet – hence the qualifier "semi."

A large percentage of firearms in common civilian use in the United States are semiautomatic, including many handgun, rifle, and shotgun models that fall outside S.150's definition of "assault weapons." *See Heller II*, 670 F.3d at 1269 (Kavanaugh, J., dissenting) ("the vast majority of [handguns] today are semi-automatic"); Declaration of Mark Overstreet ¶ 13 ("Overstreet Decl."), *Heller v. District of Columbia*, No. 08-1289 (D.D.C. July 23, 2009), ECF No. 23-8 ("Annual firearm manufacturing and export statistics published by ATF indicate that semiautomatic pistols rose as a percentage of total handguns made in the United States and not exported, from 52 percent of 1.3 million handguns in 1986, to 77 percent of 1.5 million handguns in 2007."); Nicholas J. Johnson, *Supply Restrictions at the Margins of* Heller *and the Abortion Analogue*, 60 HASTINGS L.J. 1285, 1293-95 (2009) (noting that in a 1994 survey "sixty percent of gun owners reported owning some type of semiautomatic firearm" and that "it is just not credible to say that semiautomatic technology is unusual or uncommon"). Again, all semiautomatic firearms – including so-called "semiautomatic assault weapons" banned under S.150 – discharge only a single shot per trigger pull. They are thus functionally distinguishable from fully automatic, military weapons. But the semiautomatic "assault weapons" that would be

banned by S.150 are *not* functionally distinguishable from the semiautomatic firearms that would be permitted under the measure.

Indeed, Americans own millions of the very semiautomatic firearms S.150 seeks to ban. Take, for example, the AR-15 rifle, which S.150 would prohibit along with any "copies, duplicates, variants, or altered facsimiles with the capability . . . thereof." § 2(a)(1). The AR-15 "is the most popular semi-automatic rifle; since 1986, about two million semi-automatic AR-15 rifles have been manufactured. In 2007, the AR-15 *alone* accounted for 5.5 percent of firearms and 14.4 percent of rifles produced in the United States for the domestic market." *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting) (citation omitted, original emphasis); *see also id.* at 1261 (majority opinion); Johnson, 60 HASTINGS L.J. at 1296 ("the AR-15" is "now the best-selling rifle type in the United States"). Indeed, the AR-15 is the very firearm that the Supreme Court in *Staples* deemed among those weapons that "traditionally have been widely accepted as lawful possessions." 511 U.S. at 611-12.

The AR-15, of course, is just one of scores of specific firearm types singled out by S.150. In addition to these specifically identified firearms, S.150 would also outlaw an untold number of other weapons through its ban on semiautomatic rifles, handguns, and shotguns with certain features. Semiautomatic rifles with the capacity to accept detachable magazines, for example, are banned if they have one additional enumerated feature such as a pistol grip, a folding stock, or a threaded barrel. A detachable magazine does nothing to distinguish a semiautomatic weapon from the mine-run of familiar, commonly-possessed firearms. Indeed, most semiautomatic firearms in America have a detachable magazine. *See* Johnson, 60 HASTINGS L.J. at 1298 n.100 (citing David B. Kopel, *Assault Weapons*, in GUNS: WHO SHOULD HAVE THEM? 159, 165 (David B. Kopel, ed., 1995)).

To be sure, under S.150 a detachable magazine, standing alone, is not enough to transform an otherwise lawful pistol or rifle into a "semiautomatic assault weapon" (a detachable magazine standing alone would make a semiautomatic shotgun unlawful). But to the extent the additional attributes that, when combined with a detachable magazine, push a firearm over the line from acceptable to contraband make a difference in the functionality of the firearm at all, they tend to *improve* the firearm's utility and safety for self-defense and other lawful purposes. A pistol grip, for example, makes it easier to hold and stabilize a rifle or shotgun when fired from the shoulder, and therefore promotes accuracy. *See* Kopel, 20 J. CONTEMP. L. at 396 ("The defensive application is obvious, as is the public safety advantage in preventing stray shots."). A grip that can be held by the non-trigger hand – such as a forward grip on a long gun or a second pistol grip on a handgun – also promotes better control by the user. A threaded barrel facilitates the attachment of a muzzle brake, which "reduces the gun's recoil and makes it easier to control," resulting in a weapon that is "significantly more accurate . . . and more comfortable to shoot." *Id.* at 396-97. A telescoping or folding stock not only makes it easier to transport a firearm in a vehicle or to store it in the home, *id*. at 398-99, but, more importantly, also promotes accuracy by allowing the stock to be adjusted to fit the individual user's physique, thickness of clothing, and shooting position.

What, then, can possibly explain why S.150 singles out the firearms that it does? A little history goes a long way towards providing an explanation. The term "assault weapon" is a neologism – a recent invention that does not denote any pre-existing category of weapon recognized in the history of firearms. "Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of 'assault rifles' so as to allow an attack on as many additional firearms as possible on

the basis of undefined 'evil' appearance." *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (quotation marks omitted)). The leaders of this movement were not coy about the political agenda behind their invention of this term:

> Assault weapons . . . are a new topic. The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons – anything that looks like a machine gun is assumed to be a machine gun – can only increase the chance of public support for restrictions on these weapons.

Josh Sugarmann, *Assault Weapons and Accessories in America* (Violence Policy Center 1988), *available at* http://www.vpc.org/studies/awaconc.htm (emphasis omitted). *See also* Johnson, 60 HASTINGS L.J. at 1289-90 ("Some people still believe the assault weapons debate is about machine guns. This is not surprising given that proponents of the 1994 ban were counting on precisely that confusion. The calculation was political.").

In accord with this pedigree, S.150's definition of "assault weapons" turns not on a firearm's value or appropriateness for self-defense or other lawful civilian purposes, nor on features that render a firearm "unusually dangerous" to the public or the police. *Heller*, 554 U.S. at 627. Rather, firearms are classified (and banned) based primarily on whether they have features used on military firearms – which, like their civilian defensive counterparts, are designed to be accurately fired under life-threatening circumstances – or are believed simply to have particularly "menacing looks." Sugarmann, *Assault Weapons and Accessories in America*. This is perhaps best exemplified by S.150's ban on semiautomatic pistols that both (a) have the capacity accept a detachable magazine and (b) are "[a] semiautomatic version of an automatic firearm." § 2(a)(1). The *only* thing that distinguishes these pistols from other, permissible semiautomatic pistols that accept a detachable magazine is that they *look like* (but in fact are not) automatic weapons.

III. The Public Interest.

Because S.150 outlaws firearms that are "of the kind in common use . . . for lawful purposes," *Heller*, 554 U.S. 624, it is unconstitutional – period. But even if some sort of "interest balancing" test were allowed, S.150's ban on such firearms would not pass constitutional muster.

As an initial matter, the only balancing test that possibly could be appropriate is strict scrutiny, which requires that a restriction on a fundamental constitutional right be narrowly tailored to serve a compelling governmental interest. As explained above, the Supreme Court held in *McDonald* that the Second Amendment right to keep and bear arms is *fundamental*. And when a law interferes with "fundamental constitutional rights," it generally is subject to "strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). *See also, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("classifications affecting fundamental rights . . . are given the most exacting scrutiny"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"). Because S.150 strikes directly at the fundamental, enumerated right to keep and bear arms, nothing less than strict scrutiny would be appropriate.

At any rate, S.150's ban on "semiautomatic assault weapons" could not pass even intermediate scrutiny, for it is not even "substantially related to the achievement" of the government's objective of advancing public safety. *United States v. Virginia*, 518 U.S. 515, 533 (1996). As an initial matter, it is wholly implausible that criminals bent on committing murder or other acts of deadly violence would give serious thought to whether their weapon of choice would be legal for them to possess. And even if this were not the case, a criminal could simply

substitute for a banned "semiautomatic assault weapon" another equally powerful – or even more powerful – semiautomatic weapon. *See* GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 128 (1997) (Assault rifles "are generally less lethal than ordinary hunting rifles, while ['assault weapon'] pistols are no more lethal than [non-'assault weapon'] handguns."). Again, the term "semiautomatic assault weapon" does not denote any mechanically distinct category of semiautomatic firearms, but rather bans certain semiautomatic firearms because of certain user-friendly features or simply because of the way they look, while leaving other functionally indistinguishable and equally (or more) lethal firearms untouched. *See id.* at 121 (noting that "[t]he few dozen models of semiautomatic guns that ha[d] been banned as ['assault weapons' by the 1994 federal ban and similar State laws] are, as a group, mechanically identical to the hundreds of models not banned" in relevant respects, and "[t]herefore, there is no basis for expecting that the outcomes of *any* shootings would be different . . . if unbanned semiautomatic guns capable of accepting detachable magazines were used instead of mechanically identical, though cosmetically different, banned ['assault weapons']") (original emphasis). Indeed, as explained above, several of the forbidden features singled out by S.150 actually serve to *enhance* a firearm's utility and safety for self-defense. Thus, far from *substantially serving* its goal of advancing public safety, S.150's ban on certain types of semiautomatic firearms is actually at war with it. Indeed, such a ban on "semiautomatic assault weapons," as Professor Randy Barnett has recently noted, "is simply irrational and therefore unconstitutional" under any standard of review. Randy Barnett, *Gun Control Fails Rationality Test*, WASH. EXAMINER, Jan. 29, 2013, http://washingtonexaminer.com/gun-control-fails-rationality-test/article/2519971.

Not surprisingly, empirical evidence from the now-expired 1994 federal ban on semiautomatic "assault weapons" supports the commonsense proposition that S.150 will not

materially advance public safety. To begin, this evidence indicates that criminals use "assault weapons" so infrequently that it cannot reasonably be expected that banning them will have a significant impact on crime or homicide rates. Assault weapons "were used in only a small fraction of gun crimes prior to the [1994] ban: about 2% according to most studies and no more than 8%." Christopher S. Koper et al., Report to the National Institute of Justice, United States Department of Justice, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003* 2 (2004); *see also* KLECK, TARGETING GUNS at 41-42, 112. These results are consistent with studies conducted in prisons indicating that "criminals not only did not 'prefer' military-style guns, they were strongly *dis*inclined to carry them during commission of their crimes, even when they owned one." KLECK, TARGETING GUNS at 116-17 (original emphasis). Police officers also report that criminals prefer not to use "the sophisticated and expensive assault weapons as commonly thought." Thomas E. Romano, *Firing Back: Legislative Attempts to Combat Assault Weapons*, 19 SETON HALL LEGIS. J. 857, 890 & n.171 (1995) (citing George R. Wilson, chief of the firearms division for the Washington, D.C. police department).

Of course, one could "artificially increase the share of crime guns that are ['assault weapons'] simply by expanding the definition of an ['assault weapon']," KLECK, TARGETING GUNS at 112-13, and S.150's definition of prohibited weapons is broader than that contained in the 1994 ban. But a definition of assault weapons that sweeps in a broader range of guns used by criminals simply means that more criminals will either ignore the law or use a different semiautomatic gun that is equally effective for their criminal purposes. In other words, at most "violent criminals will simply resort to more easily attainable, equally lethal weapons." Romano, 19 SETON HALL LEGIS. J. at 892; Eugene Volokh, *Implementing the Right to Keep and*

Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda, 56 UCLA L. REV. 1443, 1468 (2009) ("[A]nyone who is denied an 'assault weapon' will almost certainly substitute another gun that is equally lethal. It's therefore hard to see how assault weapons bans will do much to reduce danger of crime or injury."); KLECK, TARGETING GUNS at 106 ("restrictions on one subtype of firearms encourage criminals to substitute other gun types, and in some cases the most likely substitutes are even more dangerous than the targeted"). This is not mere conjecture, it has already occurred. *See* Koper, Report to the National Institute of Justice at 2 (noting that following the 1994 federal ban any "decline in ['assault weapon'] use was offset throughout at least the late 1990s by steady or rising use of other guns equipped with" magazines holding more than 10 rounds).

Therefore, it is not surprising that the 10-year national "assault weapons" ban had "very modest effects on homicide" which were "statistically insignificant." Peter Reuter & Jenny Mouzos, *Australia: A Massive Buyback of Low-Risk Guns, in* EVALUATING GUN POLICY 121, 141 (Jens Ludwig & Philip J. Cook eds., 2003); National Research Council, *Firearms and Violence: A Critical Review* 97 (Charles F. Wellford et al. eds., 2005) ("[G]iven the nature of the [1994 assault weapons ban], the maximum potential effect of the ban on gun violence outcomes would be very small and, if there were any observable effects, very difficult to disentangle from chance yearly variation and other state and local gun violence initiatives that took place simultaneously."). Indeed, before the 1994 ban expired in 2004, a study sponsored by the National Institute of Justice reported that, if the ban were continued, "effects on gun violence [were] likely to be small at best and perhaps too small for reliable measurement." Koper, Report to the National Institute of Justice at 3. *See also* Johnson, 60 HASTINGS L.J. at 1290, 1302; Kopel, 20 J. CONTEMP. L. at 404-13.

In sum, given S.150's arbitrary classification of firearms on the basis of largely cosmetic differences and the ready ability of criminals to substitute functionally indistinguishable lawful weapons for the weapons it would ban, enacting the Bill's ban on certain semiautomatic firearms plainly will not improve public safety. This dooms S.150 under intermediate scrutiny, for a legislative restriction on a constitutional right is presumed invalid unless it can be shown to serve an important government interest in a direct and substantial way. *See, e.g.*, *Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001) (upholding sex classification because it was based on "basic biological differences" between men and woman, not "misconceptions and prejudices"); *Virginia*, 518 U.S. at 533 (striking down sex classification that the Court deemed relied on "overbroad generalizations" rather than "enduring" or "inherent" differences between men and women). Indeed, it is unlikely that the proposed ban on semiautomatic firearms could even pass rational basis review. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985) (requiring a special use permit for a home for the mentally disabled failed rational basis review when there was no "rational basis for believing" that the "home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not"); *Department of Agriculture v. Moreno*, 413 U.S. 528, 537 (1973) (a limitation on food stamp eligibility failed rational basis review when "[m]ost people in the category" targeted by Congress "can and will alter their living arrangements in order to remain eligible for food stamps").

IV. The Ban on 11-Plus Round Magazines Would Also Violate the Second Amendment.

1. The principles established by *Heller* and *McDonald* likewise demonstrate that S.150's proposed ban on magazines with a capacity to accept more than 10 rounds of

ammunition is unconstitutional. Again, the key question is whether firearms equipped with such magazines are of a kind that are in common use for lawful purposes. Clearly they are.

Americans own tens of millions of magazines fitting this description. *See* Koper, Report to the National Institute of Justice at 65 ("[G]un industry sources estimated that there were 25 million [such magazines] available as of 1995 . . . . [N]early 4.8 million . . . were imported for commercial sale . . . from 1994 through 2000 . . . . During this period, furthermore, importers received permission to import a total of 47.2 million [such magazines]; consequently, an additional 42 million may have arrived after 2000 or still be on their way, based just on those approved through 2000."). Indeed, magazines with a capacity to accept more than ten rounds of ammunition are standard equipment on many popular firearms owned by many millions of Americans for self-defense, hunting, and target shooting. *See* Overstreet Decl. ¶ 14 ("Standard magazines for very commonly owned semiautomatic pistols hold up to 17 rounds of ammunition. In 2007, about two-thirds of the 1.2 million pistols made in the United States and not exported were in calibers typically using magazines that hold more than 10 rounds."); *id.* ¶ 17 ("More than six million M1 Carbine series rifles have been made since their introduction in the 1940s, and the standard magazines for them hold 15 or 30 rounds. . . . Numerous other rifle makes and models also have the capacity to accept, and are commonly equipped with, magazines holding more than 10 rounds."); *What Should America Do About Gun Violence?: Hearing Before the Senate Comm. on the Judiciary*, 113th Cong. 15-17 (2013) (Written Testimony of David B. Kopel) ("Kopel Testimony").[5]

[5] A review of the most recent edition of Gun Digest, a standard reference work that includes specifications of currently available firearms, indicates that about two-thirds of the distinct models of semiautomatic centerfire rifles listed are normally sold with detachable magazines that hold more than ten rounds of ammunition. (Even many rifles normally sold with magazines of smaller capacity are also capable of accepting standard magazines without

The defensive utility of having a magazine with more than ten rounds of ammunition is obvious. As an initial matter, while the need for armed self-defense rarely, if ever, arises for the vast majority of people, it can be a matter of life and death when it does. And when life or serious bodily injury is at stake, the prudent person would, obviously, rather have ammunition that she does not need than need ammunition that she does not have. A law-abiding person who runs out of ammunition before her attacker does is very likely to become a crime victim. And a person faced with one or more armed assailants could well need to fire more than ten shots to defend herself and may not be able to change magazines immediately. Because criminals rarely announce their intentions in advance, victims will rarely have more than a single magazine immediately available. And a law-abiding person who is suddenly confronted by an armed assailant may take longer to change magazines under such stress than when calmly shooting the firing range. If she is elderly or disabled, changing magazines may prove to be no easy task.

Defensive utility is also demonstrated by the fact that police officers' duty handguns are typically equipped with magazines capable of holding more than ten rounds. *See* Kopel Testimony at 16. To be sure, a police officer is more likely than a private citizen to face a situation in which he would need to fire more than ten rounds, but private citizens nonetheless reasonably choose to arm themselves with firearms equipped with magazines capable of holding more than ten rounds of ammunition. *Cf.* Overstreet Decl. ¶ 15. And S.150 would exempt from its limit on magazine capacity not only active duty law enforcement officers but also, in certain

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modification.) GUN DIGEST 2013 455-64, 497-99 (Jerry Lee, ed., 67th ed. 2012). The same book indicates that about one-third of distinct models of semiautomatic handguns listed – even allowing for versions sold in different calibers, which often have different ammunition capacities – are normally sold with magazines that hold more than ten rounds of ammunition. *Id.* at 407-39. In both cases, but especially for handguns, these figures underestimate the ubiquity of magazines holding more than 10 rounds of ammunition, because they include many minor variations of lower-capacity firearms offered by low-volume manufacturers.

situations, retired officers. *See* § 3(a)(1). "If retired cops need 15 rounds to effectively protect themselves and others, then so do other citizens. Arbitrarily discriminating among Americans in this way is irrational and unconstitutional." Barnett, *Gun Control Fails Rationality Test*.

While some people, including no doubt members of this committee, believe that private citizens do not need these magazines for self-defense, hunting, or other lawful purposes, tens of millions of Americans disagree. And it is the judgment of these law-abiding, responsible citizens, made manifest through the choices they have made in exercising their fundamental, individual right to keep and bear arms for lawful purposes, that matters under the Second Amendment.

2. Because firearms equipped with magazines capable of holding more than ten rounds of ammunition are in "common use" for "lawful purposes," the Constitution guarantees the right of law-abiding, responsible citizens to acquire, possess, and use them. *Heller*, 554 U.S. at 624. But even if a levels-of-scrutiny-analysis were to apply, and even if, contrary to *Heller*, intermediate scrutiny was the applicable standard of review, S.150's magazine ban could not stand.

To be sure, the time it takes to change magazines could, in some situations, make a difference in the outcome of a confrontation. But it is clear that, on balance, restricting magazines to 10 rounds will work to the advantage of criminals, not law-abiding citizens. First, there are many millions of 11-plus round magazines already in circulation, and while most law-abiding citizens will obey any new law restricting the purchase or transfer of such magazines, most criminals will not. And even if one indulges the notion that such a ban will operate equally on law-abiding citizens and criminals alike, it is criminals, not their victims, that generally choose the time and place of an armed confrontation. A criminal can thus plan in advance for

the possibility that he will need more than a single 10-round magazine and equip himself accordingly.

Nor does available empirical evidence support a substantial connection between a ban on 11-plus round magazines and public safety. As an initial matter, limiting magazine capacity to ten rounds will be simply irrelevant to the vast majority of gun crimes. *See* KLECK, TARGETING GUNS at 123 ("It is unlikely that large-capacity magazines are currently relevant to the outcome of a large number of violent incidents, since few cases involve large numbers of shots fired."). "[A]vailable studies on shots fired show that assailants fire less than four shots on average . . ., a number well within the 10-round limit . . . ." Koper, Report to the National Institute of Justice at 90. While these studies generally did not report how many incidents involved more than ten shots fired, one study that did address the issue reported that only "2.5% of the gunfire cases involved more than 10 shots." *Id*.

Further, it is unlikely that magazine size would have much of an impact even in those rare instances in which more than ten shots are fired. A study of "mass shootings" – *i.e.*, incidents in which "six or more victims were shot dead with a gun, or twelve or more total were wounded" – from 1984 to 1993 found that "[f]or those incidents where the number of rounds fired and the duration of the shooting were both reported, the rate of fire never was faster than about one round every two seconds, and was usually much slower than that." KLECK, TARGETING GUNS at 124-25. Thus, "[n]one of the mass killers maintained a sustained rate of fire that could not also have been maintained – even taking reloading time into account – with either multiple guns or with an ordinary six-shot revolver and the common loading devices known as 'speedloaders.' " *Id*. at 125. Furthermore, as more recent incidents demonstrate, a mass shooter may simply change magazines each time one is spent. *See* Kopel Testimony at 19 ("At

Newtown, the murderer changed magazines many times, firing only a portion of the rounds in each magazine. . . . In the Virginia Tech murders, the perpetrator changed magazines 17 times.").

Putting this data to the side, it is not even evident that S.150 would reduce attacks with firearms equipped with magazines capable of holding more than ten rounds of ammunition. Indeed, although the 1994 federal law also limited magazine capacity to ten rounds, research sponsored by the National Institute of Justice found that "it seems unlikely that the federal ban had any such effect." Koper, Report to the National Institute of Justice at 90 n.107. To be sure, S.150 is stricter than the 1994 federal ban, for unlike the 1994 ban, it would prohibit the transfer of grandfathered magazines that were lawfully possessed before the date of enactment. But again, given that "most of the methods through which criminals acquire guns and virtually everything they ever do with those guns are already against the law," JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS xxxv (new 2d ed. 2008), it is highly implausible that this distinction will make much of a difference.

V. *Heller II*.

In *Heller II*, a divided panel of the D.C. Circuit held that the District of Columbia's ban on semiautomatic "assault rifles" did not violate the Second Amendment. I commend to the subcommittee the dissenting opinion of Judge Kavanaugh, which forcefully and compellingly explains why *Heller* and *McDonald* mandate a textual and historical inquiry, not an intermediate scrutiny analysis, and why D.C.'s assault rifle ban – and thus the "assault weapon" ban proposed in S.150 – is unconstitutional under either of these approaches.

Here, though, I would like to address several of the flaws in the *Heller II* majority opinion, for they are indicative of the types of arguments that will be advanced to justify S.150's

proposed bans on certain semiautomatic firearms and on ammunition magazines holding more than 10 rounds.

1. *First*, the panel majority acknowledged that semi-automatic rifles are in "common use" (without identifying the purposes for which they are commonly used) and that there is no "longstanding" tradition of prohibiting their use. *See Heller II*, 670 F.3d at 1260-61. Under *Heller*, that should have been the end of the case, and the District of Columbia's ban should have been struck down. But the panel majority instead proceeded to apply a levels-of-scrutiny analysis, with the level of scrutiny turning on the Court's view of "how severely the prohibitions burden the Second Amendment right." *Id*. at 1261. Under the panel majority's analysis, in other words, the level of scrutiny to be applied in Second Amendment cases turns on the very type of balancing of interests assessment that *Heller* forbids.

Second, the panel majority erred by deeming intermediate scrutiny the proper standard. As explained above, the *Heller* majority rejected the test Justice Breyer advanced in his dissent, which essentially was a form of intermediate scrutiny. Indeed, it is telling that in explicating the intermediate scrutiny standard it was applying, the panel majority in *Heller II* repeatedly invoked *Turner*, the very case that Justice Breyer held up as exemplary of the interest-balancing approach he was advocating, and indeed the panel majority *quoted much of the same language from Turner quoted by Justice Breyer*. *Compare Heller II*, 670 F.3d at 1259, *with Heller*, 554 U.S. at 704-05 (Breyer, J., dissenting). *Heller* prohibits application of this standard to a ban on possessing arms protected by the Second Amendment.

Third, the panel majority's reasoning for applying intermediate scrutiny cannot be squared with *Heller*. In particular, the panel majority reasoned that "the laws at issue here do not prohibit the possession of 'the quintessential self-defense weapon,' to wit, the handgun," *id.* at

1261-62 (quoting *Heller*, 554 U.S. at 629), and thus that "the ban on certain semi-automatic rifles [does not] prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting," *id.* at 1262. "But that's a bit like saying books can be banned because people can always read newspapers. That is not a persuasive or legitimate way to analyze a law that directly infringes an enumerated constitutional right." *Id.* at 1289 (Kavanaugh, J., dissenting). And under *Heller*, it is not the government's prerogative to pick and choose which constitutionally protected arms may be used for lawful purposes; rather, that right is reserved to the law-abiding citizens of this Nation. Thus, in *Heller*, "[i]t [was] no answer to say . . . that it is permissible to ban handguns, so long as the possession of other firearms . . . is allowed." 554 U.S. at 629. And in *Heller II*, it likewise should have been no answer to say that it is permissible to ban some semiautomatic rifles so long as the possession of other firearms is allowed.

Fourth, the panel majority's application of intermediate scrutiny cannot be reconciled with *Heller*. *Heller* concluded, as noted earlier, that the District of Columbia's handgun ban would "fail constitutional muster" under "any of the standards of scrutiny the Court has applied to enumerated constitutional rights," 554 U.S. at 571, including intermediate scrutiny, which is applied in some situations in which an enumerated right is burdened in an incidental or marginal way. *See, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) ("expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so"); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (commercial speech, which has a "subordinate position in the scale of First Amendment values"). If the District of Columbia's ban on handguns could not pass intermediate scrutiny (*i.e.*, was not substantially related to public safety), it follows that its ban on certain semiautomatic rifles likewise could not pass this level of

heightened scrutiny. For while the panel majority attempted to build a case that criminals could misuse "assault weapons," *see Heller II*, 670 F.3d at 1262-63, the far more prevalent misuse of handguns by violent urban criminals could not save the District of Columbia's handgun ban. *See, e.g.*, *Heller*, 554 U.S. at 697-99 (Breyer, J., dissenting) ("From 1993 to 1997, 81% of firearm-homicide victims were killed by handgun. . . . Handguns also appear to be a very popular weapon among criminals. . . . [T]he linkage of handguns to firearms deaths and injuries appears to be much stronger in urban than in rural areas.").

This points to another flaw in the panel majority's reasoning: its focus on ways in which certain firearms may be misused by criminals, rather than on ways in which they may be put to lawful defensive use by law-abiding citizens. Unlike the *Heller* dissenters, the Supreme Court's majority opinion focused on the latter, not the former, explaining that a handgun "is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police." 554 U.S. at 629. Many of these attributes, of course, likely also explain why criminals prefer to use handguns, but that is not what the *Heller* majority deemed relevant. Conversely, many of the attributes of "assault weapons" that the *Heller II* panel majority deemed pernicious enhance their fitness as defensive, *anti-assault* weapons when in the hands of law-abiding citizens. *See Heller II*, 670 F.3d at 1262-63 (*e.g.*, features that "help stabilize the weapon during rapid fire").

The Supreme Court's approach is authoritative, of course, but it also makes more sense. Criminals are by definition much less likely than law-abiding citizens to abide by restrictions on the types of guns that may be owned. Thus, to the extent a certain weapon gives one party to a

confrontation an advantage, banning that weapon will on the whole work to the benefit of the criminals, not the law-abiding.

At any rate, the panel majority's intermediate scrutiny analysis ultimately is at war with itself. For recall the panel majority's reasoning for applying intermediate scrutiny in the first place: that the ban would not "prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting." *Id*. at 1262. Of course, it is also true that the ban would not prevent a criminal from simply substituting for a banned semiautomatic "assault rifle" another equally lethal semiautomatic firearm just as "suitable and commonly used" for criminal purposes. As explained above, it is therefore simply irrational to expect that dubbing a subcategory of semiautomatic weapons "assault weapons" and banning their possession will improve public safety.

Fifth, and finally, the panel majority erred by likening semiautomatic "assault weapons" to fully automatic firearms. According to the panel majority, "*Heller* suggests 'M-16 rifles and the like' may be banned because they are 'dangerous and unusual.' " *Heller II*, 670 F.3d at 1263 (quoting *Heller*, 554 U.S. at 627). Citing the *Staples* decision, the panel majority then concluded that the two firearms are essentially equivalent: "The Court had previously described the 'AR-15' as 'the civilian version of the military's M-16 rifle.' " *Id.* (quoting *Staples*, 511 U.S. at 603). But *Staples* was not *equating* the AR-15 with the M-16; to the contrary, it held that the AR-15, *unlike* the M-16, is among weapons that "traditionally have been widely accepted as lawful possessions." 511 U.S. at 612. The key distinction between these two firearms, of course, is that the AR-15 is semiautomatic, while the M-16 is fully automatic, and thus has long been effectively restricted to military use. The panel majority acknowledged this difference, but instead of recognizing its importance, sought to diminish it: "Although semi-automatic firearms,

unlike automatic M-16s, fire only one shot with each pull of the trigger, semi-automatics still fire almost as rapidly as automatics." 670 F.3d at 1263 (quotation marks and citation omitted). There are two problems with this argument. Not only does "the majority opinion's data indicate that semi-automatics actually fire two-and-a-half times slower than automatics," *id.* at 1289 (Kavanaugh, J., dissenting), but, taken to its logical conclusion, the majority opinion's reasoning would justify a ban on *all* semiautomatic weapons. This cannot possibly be right under *Heller*, given that semiautomatic firearms are ubiquitous and used by tens of millions of Americans for self-defense and other lawful purposes.

2. The plaintiffs in *Heller II* also challenged the District of Columbia's ban on magazines capable of holding more than ten rounds of ammunition. The *Heller II* panel majority also rejected this challenge. (Judge Kavanaugh would have remanded for further proceedings on this issue.) Given that the panel majority addressed both bans together, the panel majority's ruling on the magazine ban is subject to many of the same criticisms as its ruling on the semiautomatic "assault rifle" ban. For example, like "assault rifles," the panel majority found it "clear enough" that "magazines holding more than ten rounds are indeed in 'common use.' " *Heller II*, 670 F.3d at 1261. That should have been the end of the matter, yet rather than striking down the law, the panel majority proceeded to apply intermediate scrutiny. And in applying intermediate scrutiny, the panel majority invoked testimony that "the '2 or 3 second pause' during which a criminal reloads a firearm 'can be of critical benefit to law enforcement' " without acknowledging the fact that a 2 or 3 second pause during which a victim reloads a firearm can be of equally critical benefit to a criminal. *Heller II*, 570 F.3d at 1264. And the panel majority did not address the evidence discussed above showing that banning magazines capable of holding more than ten rounds of ammunition is unlikely to promote public safety.

VI. Conclusion.

In sum, the principles established by the Supreme Court's decisions in *Heller* and *McDonald* must guide Members of this body as it considers various proposals intended to reduce gun violence. In applying these principles to S.150's proposed ban on what it calls "semiautomatic assault weapons" and on magazines capable of holding more than ten rounds of ammunition, I have concluded that these provisions would violate the Second Amendment by prohibiting the use of arms that are in common use by ordinary Americans for self defense and other lawful purposes.