The Supreme Court of the United States
Spring Term, 2020

Docket No. 20 – 01234

JOHN SMITH
Petitioner,

v.

NITA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT

Brief for Petitioner

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Question Presented

Is the State of NITA's statute which bans the possession, sale, or transfer of an assault weapon constitutional?

Statement of the Case

The state of NITA has a statute prohibiting the possession, sale, or transfer of any assault weapons. John Smith, who moved to NITA this year from Florida, owned such a weapon. A neighbor who saw John's weapon in his yard the police that John owned the weapon. The NITA police obtained a warrant and found the weapon. John Smith was arrested and charged with the illegal possession of an assault rifle. He was convicted in the state court and petitioned the Supreme Court to hear the case arguing the NITA statute violates the Second Amendment.

Argument

I. **The NITA statute prohibiting the possession, sale, or transfer of assault weapons is unconstitutional following the decision in *District of Columbia v. Heller,* 554 U.S. 570 (2008).**

The statute enacted by the state of NITA banning the possession, sale, or transfer of assault weapons (herein, "assault weapons" shall be given the meaning as the term used in the NITA statute) is unconstitutional when viewed under the Second Amendment. In 2008, this Court decided the case of *District of Columbia v. Heller,* 554 U.S. 570 (2008), which struck down a District of Columbia statute that banned handguns and determined that the Second Amendment was an individual right applicable to all Americans. *Heller,* 554 U.S. at 581. This decision came following the decision in *United States v. Miller,* 307 U.S. 174 (1939) which established that the Second Amendment only protected the right to keep and bear arms for military purposes. The *Heller, supra* Court determined this was not in fact the meaning of the Second Amendment and held that the right to "keep and bear arms" did not specifically refer to the term "militia" written in the language of the Amendment , but rather it referred to the militia and "everyone else*." Heller,* 554 U.S. at 584. Through examining the original meaning of the operative clause in the Second Amendment, the Court held that individuals are guaranteed the right to carry and possess weapons used for self-defense. *Id.* at 592. The Court explained that the Second Amendment is a declared right and it is one that cannot be infringed. *Id.*

Heller, supra determined that weapons in "common use" and used for lawful purposes at the time an individual is called for service, is what the Second Amendment protects. *Id.* at 624. Those weapons that fall under the category of "dangerous and unusual" weapons have a history of being banned showing there is some limitation as to what is protected under the Second Amendment. *Id.* at 624-25. The handgun ban in the District of Columbia was struck down because, similar to the statute the petitioner was convicted under, it completely banned an entire class of arms that is used by a large amount of the American population for lawful purposes. *Id.* at 628. This Court found that banning the most preferred firearm for the purpose of defending one's home and family would fail constitutional muster. *Id.* at 628-29. This holding in *Heller, supra* established that self-defense of an individual's family and property is a fundamental right afforded through the Constitution. *Id.* at 629.

This issue was raised before the Court again when *McDonald v. City of Chicago,* 561 U.S. 742 (2010) held that the Second Amendment protections established in *Heller, supra* were made applicable to the states. The majority held that the Fourteenth Amendment incorporates the fundamental right of using firearms for the lawful purpose of self-defense as protected by the Second Amendment. *Id.* at 742. The Court reiterated the holding in *Heller, supra* that although the Second Amendment does not come without limitations, self-defense is the basic component of the Second Amendment deeply rooted in our nation's history. *Id.* The analysis set out in *Heller*, *supra,* evaluates potential violations of the Second Amendment by determining

whether the weapon at issue burdens the activity protected by the Second Amendment. *Fryock v. Sunnyvale,* 779 F.3d 991,996 (9th Cir.2015). This first step is determined by deciding if the weapon in question is commonly used, and if the weapon falls under the category of "dangerous and unusual" weapons, which would allow it to be restricted. *Id.* Once the statute implicating a firearm is held to burden the protected activity, a level of scrutiny is then identified. *Id.* The statute that NITA has enacted, violates the petitioner's fundamental right to protect his family and home, afforded to him by the Second Amendment. The NITA statute burdens the petitioner's Second Amendment right under *Heller, supra*, and cannot hold up against the required level of scrutiny.

A. Assault weapons are in "common use" and are the preferred weapon of many Americans.

The assault weapon statute enacted by NITA burdens the protections afforded through the Second Amendment because they ban an entire class of weapons that are commonly used. As this Court held in *Caetano v. Massachusetts,* ___ U.S. ___ (2016), "common use" does not refer to "common use" at the time the Second Amendment was enacted. In this case, which addresses the protection of stun guns under the Second Amendment, it was held that although stun guns were not in "common use" at the time the amendment was ratified, neither were most weapons Americans use for self-defense today. *Id.* at ___. "Common use" cannot be viewed in terms of whether the weapon in question is in "common use" during the

time of the Founders, but rather if they are in "common use" today. In *Caetano, supra*, the Court explained that stun guns were viewed as not being commonly used by the Massachusetts Supreme Judicial Court because they are possessed and used significantly less that firearms. *Id.* at ___. The Court held that this view of "common use" is not consistent with its holding in *Heller, supra*. If *Heller, supra* only meant to cover handguns as the most popular weapon, all other firearms would be banned. *Id.* This applies to assault weapons as well. "Common use" of assault weapons cannot be measured in terms of their popularity as compared to handguns either, otherwise every other firearm would also have to be banned by the NITA statute.

The "common use" analysis presents the question whether a weapon is commonly used for lawful purposes by law-abiding citizens. *Friedman v. City of Highland, Illinois,* 784 F.3d 406,415 (7th Cir.2015). In this case, the City of Highland Park had an ordinance (§136.005 of the city code) that prohibited the possession of assault weapons and large capacity magazines. *Id.* at 407. The ordinance, §136.005, defines an assault weapon as "any semi-automatic gun that can accept a large-capacity magazine and has one of five other features" that it lists by name. *Id.* In *Friedman, supra* the Court notes that *Heller, supra* did not explain where the line is drawn that separates common from uncommon use. *Id.* at 409. Evaluating "common use" through percentages, the *Friedman, supra* Court held that a statistic showing 9% of firearms owners are also owners of assault weapons is too minimal to be considered "common use". *Id.* In *Hollis v. Lynch,* 827 F.3d 436, 449 (5th Cir.2016)

held that a similar statistic showing approximately 5% of all firearms and 14% of all rifles produced in the United States are assault weapons satisfied "common use." *Id.* "Common use" can be determined through absolute numbers and the Court decided 50 million owners of large capacity magazines was sufficient to show this ammunition and the weapons that hold it are in "common use." *Id.* The *Hollis, supra* case also cited the statistic that "more than 8 million AR-and AK-platform semiautomatic rifles are manufactured or imported into the United States." *Id.* at 449. The fact that the statistics show a significant number of Americans own and use AR-type rifles and large capacity magazines demonstrates that they are commonly used for lawful purposes. *Friedman,* 783 F.3d at 416. The key to examining "common use" is that the weapon is being used for a lawful purpose. In *Friedman, supra* the Court repeatedly refers back to *Heller, supra* stating that machine guns were not protected, but the fact remains that if machine guns were used for lawful purposes by even the smallest number of law-abiding citizens, than they may have been held to be protected under the Second Amendment. *Id.*

In a decision regarding a statute banning large capacity magazines, it has been noted that there are firearms capable of being used with the prohibited magazines. *Fryock v. Sunnyvale,* 779 F.3d 991 (9th Cir. 2015). These firearms, such as semi-automatic handguns, are commonly used, possessed by law-abiding citizens, and used for lawful purposes. This establishes that there must be at least some right to possess the magazines needed to use the firearm. In the petitioner's case the reverse

can be applied. If assault weapons do not constitute commonly used weapons, then the ammunition and magazines that are sold to accompany the weapon would be banned as well. That is not the case here. The statute bans only the weapon, and not the ammunition and magazines which can still be legally used.

The fact remains that the petitioner, along with millions of other Americans are law-abiding citizens who possess and use assault weapons for lawful purposes. Courts that have considered the term "common use" since *Heller, supra* have relied on statistical data to decide whether a weapon is popular enough to be considered in "common use." This data should include the use of weapons for recreational purposes, not just for defensive purposes. *Maloney v. Singas,* 351 F.Supp.3d 222, 237-38 (E.D.N.Y. 2018). In this case, which held that the use of nunchakus is protected under the Second Amendment, explained that the decision in *Heller, supra* noted that founding-era Americans believed that owning a firearm was more important for self-defense and hunting than for use in the militia. *Id.* at 238.

The analysis provided here of the courts that have examined the issue, establishes that since there is no specific definition of what constitutes "common use," it leaves open the important prospect that assault weapons owned by law-abiding citizens can be considered to be in "common use" because they are frequently owned for both the purpose of self-defense and recreationally. The petitioner, a law-abiding citizen is one of a significantly large number of law-abiding

citizens that owns this style weapon for the lawful purposes of both self-defense and recreation, making it a weapon of "common use."

B. <u>Assault weapons are not "dangerous" nor "unusual" firearms.</u>

Now that assault weapons are shown to be in "common use", an assault weapon would only fall outside of the Second Amendment protection if it is proven to be "dangerous" and "unusual." In the *Heller, supra* case, the Court held that "dangerous and unusual" weapons fell outside the scope of the Second Amendment. *Heller,* 554 U.S. at 627. The Court also noted that our history of banning "dangerous" and "unusual" weapons, such as the machine gun, support such a limit. *Id.* A weapon needs to be both "dangerous" and "unusual" to be acceptably banned under the *Heller, supra*, decision. *Id.* The relative dangerousness of a weapon cannot be a factor when the weapon at issue in the statute belongs to a class of weapons commonly used for a lawful purpose. *Caetano,* ___ U.S. at ___. The Court notes in *Caetano, supra*, that if *Heller, supra* leaves one to conclude anything, it is that an entire class of firearms cannot be categorically excluded just because they are dangerous. *Id.* at ___. All firearms are dangerous in their own way. If assault weapons were to be banned simply because they are dangerous, then there is no reason that handguns should not be banned as well.

In *Friedman, supra,* the Court does not specifically address whether assault weapons and large capacity firearms are dangerous. *Friedman,* 784 F.3d at 409.

Instead, the Court relies on arguments that show why these weapons should not be considered dangerous and unusual. *Id.* First, they explain that if a weapon is shown to be commonly used, then by definition they are "usual" weapons. *Id.* Second, in examining the dangerousness of the weapon, they cite the statistic showing that handguns are responsible for the vast majority of gun violence in the United States. *Id.* They go a step further to cite that nearly the same amount of people are killed each single year with handguns in Chicago alone, then have been killed overall in mass shootings that have occurred across the span of a decade. *Id.* These facts that the Court rely on, can be used to more strongly support the argument that handguns are dangerous weapons than the use of these facts in regard to assault weapons. If dangerousness is the mark of determining what type of firearm is categorically prohibited under the Second Amendment, then assault weapons should be protected at least to the same extent as handguns as an entire class of firearms.

The opinion in *Friedman, supra* notes that dangerousness should be evaluated in terms of how deadly a single weapon of one kind is compared to another weapon that is significantly different. *Id.* at 409. By presenting this evaluation of dangerousness, the Court provides ample support for the position that assault weapons cannot be considered more dangerous than a handgun. *Id.* The Court notes that semi-automatic guns with large capacity magazines are designed to fire bullets faster than a handgun that uses a small magazine. *Id.* These semi-automatic assault weapons are chambered with small rounds which causes them to fire out of the

barrel with less momentum, leaving them lethal only when they are fired within close range to the individual. *Id.* By this definition, they are less dangerous than a handgun in terms of each bullet fired, but they have the ability to fire more bullets. *Id.* Through this analysis of dangerousness, all that is shown is that firearms in general are dangerous. There is a level of danger that comes with each type of firearm. In the case of assault weapons, although they may cause a greater amount of bodily harm compared to handguns, the latter can be considered more lethal.

Once the assault weapon is not found to be "dangerous," it does not have to be proven unusual, but assault weapons still do not fall into this category of "dangerous" and "unusual by simply evaluating if they are unusual. In *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo,* 804 F.3d 242 (2nd Cir. 2015), the court determined if assault-style weapons were "unusual" by looking at the decision in *Heller, supra.* The Court noted that *Heller, supra* banned weapons that are most useful in military service, such as the M-16, and this did not implicate the Second Amendment because these are "unusual" weapons not usually owned or used by civilians. *Cuomo,* 804 F.3d at 256. The Court then went on to explain that the AR-15, a type of assault weapon, was referred to in *Heller, supra* as the "civilian version of the M-16 assault-style rifle." *Id.* at 258. The Court's decision to refer to the AR-15 assault-rifle as the "civilian" version of this "unusual" weapon leads to the implication that such guns have a usual tradition of being widely accepted as lawfully owned, by lawful citizens, for lawful civilian purposes. *Id.*

In *Duncan v. Becerra,* 366 F.Supp.3d 1131 (S.D. Cal. 2019) the federal District Court recently struck down a ban against large capacity magazines and found that the AR-15 rifle is the most popular civilian rifle as more than five million have been sold in the last thirty years. *Duncan,* 366 F.Supp.3d at 1145. Thus, the statistics that advance the theory that an assault-style weapon is commonly used, also supports the analysis that demonstrates that the weapon is "usual." *Friedman,* 784 F.3d at 409.

Assault-style weapons cannot be shown to be any more dangerous than a handgun or any other type of firearm. Whether one views the dangerousness of a weapon by the number of people that have been killed or the amount of harm that results compared to other weapons, assault weapons cannot be shown to be more dangerous than the handgun that was found to be constitutionally protected. In viewing all of the relevant firearm statistics, if a handgun was not found to be "dangerous" nor "unusual" under *Heller, supra*, allowing it Second Amendment protection, then an assault weapon should be afforded the same protection. Even if an assault weapon as a "dangerous" weapon can be proven, by virtue of "common use", the assault-style weapon in question is also usual. The weapon cannot be "dangerous" *or* "unusual," but instead has to fail under *both* classifications and assault weapons do not fail under either. The lawful use for self-defense and recreational purposes of the assault weapons covered by the NITA statute by significant numbers of law-abiding citizens, demonstrates that it is a "usual "weapon.

C. **The NITA statute banning the possession of assault weapons infringes on the fundamental right of the use of firearms for self-defense which should be analyzed under the "strict scrutiny" constitutional standard.**

Many of the cases that have reviewed statutes implicating the Second Amendment have reviewed the statutes under a heightened level of intermediate scrutiny. *See Friedman v. City of Highland Park,* 784 F.3d 406, 418 (7th Cir. 2015); *District of Columbia v. Heller,* 670 F.3d 1244, 1244 (D.C. Cir. 2011); *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo,* 804 F.3d 242, 258 (2d Cir. 2015); *Fryock v. Sunnyvale,* 779 F.3d 991, 998-99 (9th Cir. 2015); *Maloney v. Singas,* 351 F.Supp.3d 222, 238-40 (E.D.N.Y.2018). In cases implicating a constitutional right, "intermediate scrutiny" can only be applied if the statute at issue does not implicate the core of the fundamental right or places a substantial burden on that right. *Fryock v. Sunnydale*, 779 F.3d 991, 998-99 (9th Cir. 2015). In *Fryock, supra,* the provision at issue, Cal.Muni.Code §§ 9.44.030-060 (hereafter, Measure C), provides that "no person may possess a large-capacity magazine whether assembled or disassembled." *Id.* at 994. The majority opinion relies on the federal Court of Appeals decision in *Heller v. District of Columbia,* 670 F.3d 1244 (D.C.Cir.2011), (herein, *Heller II*) which upheld a statute banning large capacity magazines. The Court held that a prohibition only on

the magazines, not on the actual firearms capable of receiving the magazines, does not completely disarm individuals under the Second Amendment and therefore does not place a substantial burden on their right to self-defense. *Heller II,* 670 F.3d at 1262. Measure C was also upheld because it was not a completely "sweeping" ban like Court held the handgun to be in *Heller, supra*. *Fryock,* 779 F.3d at 999.

The Measure C provision was not a general restriction that leads to a firearm being inoperable and it does not prohibit the number of regular magazines a person may possess. *Id.* Finally, Measure C contains an exception allowing the use of such magazines if a lawfully owned firearm cannot function with a lower capacity magazine. *Id."* Intermediate scrutiny" was the standard applied in *Fryock, supra* based on a substantial government issue that protects public safety by limiting the number of rounds being fired to reduce the harm done to citizens. *Id.* at 1000. This is not the case in NITA's statute. NITA's statute is a complete categorical ban on a class of weapons that hold various capacities of ammunition. In these cases, unlike the case here, "intermediate scrutiny" was used to evaluate the provisions at issue because the provisions did not directly violate the core of the Second Amendment right and place a substantial burden that a categorical ban places on the Second Amendment.

This "sweeping" ban on assault weapons directly implicates the petitioner's right to defend his home and property placing a substantial burden on his fundamental right to self-defense. In upholding statutes in New York and Connecticut that prohibit assault weapons with military features, the Court

determined that "strict scrutiny" did not apply because a substantial burden was not placed on the fundamental right of self-defense. *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo,* 804 F.3d 242, 260 (2nd Cir. 2015). Finding that it was not an entire class of guns being prohibited, and that it was only a limited subset of assault weapons being banned by the provisions," intermediate scrutiny" was applied rather than "strict scrutiny". *Id.* The provisions were not found to require "strict scrutiny" because there were alternatives for weapons in this class to be possessed for self-defense. *Id.* The Court in *Heller II, supra* came to the same conclusion that prohibiting semi-automatic weapons and large capacity ammunition does not place a burden on the fundamental right to self-defense because it does not leave the citizen disarmed and does not affect the way that they choose to defend themselves. *Heller II,* 670 F.3d at 1262.

Assault weapons are preferred by many Americans as the firearm of choice for self-defense in their home. In *Friedman, supra,* the Court stated that assault weapons are easier to use for elderly homeowners and those who are frightened because it does not require them to carefully draw and aim the weapon precisely on an intruder while under duress. *Friedman,* 784 F.3d at 409. Taking this fact into consideration, an assault weapon may be the only firearm that an individual might have to defend their home. A categorical ban on this entire class of weapons would then substantially burden the core right of the Second Amendment activating "strict scrutiny." Evaluating NITA's statute under "strict scrutiny" would require that the

statute is narrowly tailored to achieve the government interest that it is seeking to protect. *Cuomo,* 804 F.3d at 261. The statute must be the least restrictive way of accomplishing what the statute is intended to protect. *Id.*

A complete ban on assault weapons is in no way the least restrictive way to achieve a governmental interest of public safety. Many of the previously discussed cases have shown that a number of states have placed restrictions on assault weapons through prohibiting the size of the magazine that they hold or the military features that certain assault style weapons are capable of possessing. *See New York State Rifle and Pistol Ass'n, Inc. v. Cuomo,* 804 F.3d 242, 249-51(2d Cir. 2015); *Fryock v. Sunnyvale,* 779 F.3d 991, 994-5 (9th Cir. 2015); *Friedman v. City of Highland Park,* 784 F.3d 406, 407-08 (7th Cir. 2015); *Duncan v. Becerra,* 366 F.Supp.3d 1131, 1138 (S.D. Cal. 2019). Statutes prohibiting assault weapons with specialized features and functions, along with prohibiting large capacity magazines show that there is a less restrictive way of achieving public safety through regulating the use of firearms. A provision that bans an all-out possession of a certain type of weapon is a restriction on an individual's right to defend his home. "The right to self-defense is largely meaningless if it does not include the right to choose the most effective means in defending oneself." *Friedman v. City of Highland Park,* 784 F.3d 406, 418 (Manion, J., dissenting). By banning the possession of assault weapons, the statute enacted by NITA implicates the petitioner's fundamental right and does so where there are less restrictive means available to employ. Even if NITA's statute is evaluated through

the less heightened standard of intermediate scrutiny, it still does not pass constitutional muster.

In *Ezell v. City of Chicago,* 651 F.3d 684, 707 (7th Cir. 2011), the lower Court upheld a statute that banned firing ranges within the City of Chicago. The Court decided that a level of scrutiny higher than intermediate scrutiny must be applied because the statute at issue was not a mere regulatory provision, but it instead prohibits the "law-abiding, responsible citizen" which is exactly what *Heller, supra* sought to protect. *Id.* at 708. By prohibiting firing ranges in the city, the lawful gun owner's right to maintain proficiency in using these weapons is in jeopardy, and this is a serious encroachment on the core right to own firearms for self-defense. *Id.* Emphasizing that *Heller, supra* and *McDonald, supra* made clear that the central component of the Second Amendment includes the right to keep and bear arms to defend one's self, family, and home, the Court reversed the decision in *Ezell, supra* back to the lower Court to decide the constitutionality under strict scrutiny. *Id.* at 711.

The statute enacted by the state of NITA is a complete categorical ban on a popular firearm. The assault weapon is possessed by many law-abiding citizens whom use the weapon for lawful purposes such as self-defense, hunting, and target shooting. As in *Ezell, supra* this statute is infringing on the right of lawful citizens for its use of weapons for a lawful purpose. A level of scrutiny higher than intermediate must be used as the standard of evaluation because this categorical ban on assault

weapons directly implicates and poses a heavy burden on the core of the fundamental right to self-defense afforded by the Second Amendment.

II. **<u>The NITA statute is void for vagueness because it fails to define what constitutes an "assault weapon."</u>**

Under the NITA statute that prohibits the possession, sale, or transfer of an assault weapon, a reasonable citizen would not be able to identify if they were in violation of the statute because it does not define what an assault weapon is. A principle that is derived from an individual's right to due process, the "void-for-vagueness" doctrine provides that an individual's life, liberty, or property, cannot be put in jeopardy for a criminal statute that forces them to speculate to its meaning. *Cuomo,* 804 F.3d at 265. A criminal statute must explain the offense in definite terms that allows an ordinary citizen to understand what conduct is being prohibited. *Id.* When a constitutional right is implicated, the statute is subject to a more vigorous vagueness standard. *Id.*

This Court held that the void-for-vagueness doctrines mandates that the statute defines the criminal offense with "sufficient definiteness." *Kolander v. Lawson,* 461 U.S. 352, 357 (1983). The definition must be defined in a way that ordinary people understand what the criminal offense is prohibiting and does so in a way that prevents arbitrary and discriminatory enforcement. *Id.* In *Kolander, supra* this Court held a statute requiring an offender to give officer's "credible and reliable" identification was unconstitutional because it "credible and reliable" was not defined

in a definite manner. *Id.* at 358. The legislature failed to establish even minimal guidelines to determine what constituted "credible and reliable." *Id.*

Just as "credible and reliable" has no minimal guidelines for enforcement, a general ban "assault weapons" sets no minimal guidelines. This statute enacted by the state of NITA allows for arbitrary and discriminatory enforcement. Under the NITA statute, the provision bans an "assault weapon" but does not define what would fall under such a label. Assault weapons come in a variety of forms. Some assault weapons are semi-automatic, and others are fully automatic. A semi-automatic weapon is only capable of firing as fast as one's finger can pull the trigger, which by definition is not any different than a handgun. A handgun can also be fired just as fast, it depends on the person pulling the trigger. The lack of definiteness in the statute allows law enforcement, prosecutors, and juries the option of what constitutes an "assault weapon" and when a weapon should be classified as an "assault weapon." This Court struck down the statute in *Kolander, supra* for the exact purpose of preventing such an instance. This Court held that "where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standard less sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolander,* 461 U.S. at 358.

In *Kolbe v. Hogan,* 849 F.3d 114 (4th Cir.2017) the Court of Appeals decided that a statute was not considered to be vague under the Fourteenth Amendment because the Attorney General had rendered an opinion that explained what the term

in question meant under the law. *Id.* at 148. The statute in question did not explain what the term "copies" meant in a statute that banned certain semi-automatic and automatic assault rifles. *Id.* The statute in the *Kolbe, supra* case made clear that the assault weapons prohibited included rifles with certain features, but the statute also included that "copies" of the same weapons were included under the statute. *Id.* at 122. A reasonable person is more likely to identify a copy of a firearm that is adequately described in detail than identify if a firearm falls under a broad class of weapons with no parameters. It is not within reason that an individual should be at risk to lose their life, liberty, and property over a weapon not clearly defined in the statute that made it criminal in the first place. Convicting the petitioner, or any individual, of violating this "assault weapon" statute when the illegal conduct has not been defined does not control the act that the governmental interest is looking to protect. The term "assault weapon" is not sufficiently defined in a sufficient way that would allow a reasonable person to know they were violating the statute.

III. CONCLUSION

The petitioner has been charged under a NITA statute prohibiting the possession, sale, or transfer of an assault weapon which is in direct conflict with the holding of *Heller, supra.* The statute bans a weapon that is commonly used for lawful purposes by law-abiding citizens. Whether this is for the defense of an individual's home or for recreational purposes, it is a commonly used weapon for these lawful purposes. Assault weapons may be considered dangerous weapons, but they are no

more dangerous than the handgun that was found to be protected under the Second Amendment in *Heller, supra. Heller,* 554 U.S. at 628. Even if a weapon is dangerous, it also has to be shown as "unusual" to be excluded and showing "common use" will suffice to show that the weapon is not unusual.

The level of scrutiny for evaluating such a "sweeping" ban such as this one that prohibits the possession of an entire class of "arms" should be "strict scrutiny," not "intermediate scrutiny. Even if strict scrutiny is not applied, this statute still fails constitutional muster when evaluated under intermediate scrutiny. This statute places a significant burden on and implicates the core of the Second Amendment, self-defense of one's hearth and home and is not done in the least restrictive means. Instead of protecting the governmental interest through the least restrictive means necessary, the NITA statute, a "sweeping" ban is the most restrictive means the state has to achieve their goal.

Finally, if a statute is enacted that is going to infringe on an individual's fundamental rights, the illegal conduct should be so plainly defined so that any reasonable person would know what conduct is prohibited. This statute is not sufficiently definite and would allow for law enforcement officers, prosecutors, and juries to enforce NITA's statute in an arbitrary and discriminatory manner. By not explaining what constitutes an "assault weapon", it leaves citizens guessing as to what is actually illegal under the statute. This violates the "Due Process" clause, as the statute should be found "void for vagueness." The Second Amendment right to

bear arms is a fundamental right that is so important it is listed second in the Bill of Rights., right after those like freedom of speech and religion in the First Amendment.

For the reasons set forth, the petitioner asks that this Court find the NITA statute prohibiting the possession, sale, and transfer of assault weapons unconstitutional and reverse the lower court's decision.