No. _____

In the Supreme Court of the United States

NUNZIO CALCE, *et al.*,
Petitioners,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID H. THOMPSON
Counsel of Record
PETER A. PATTERSON
WILLIAM V. BERGSTROM
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

July 7, 2026

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether a challenger to a ban on a type of arm must demonstrate that the arm is "in common use" to establish that the ban implicates the Second Amendment's plain text.
2. Whether the challenged New York State and New York City bans on electronic arms such as tasers and stun guns implicate the Second Amendment's plain text.
3. Whether the challenged New York State and New York City bans on electronic arms such as tasers and stun guns violate the right to keep and bear arms protected by the Second and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

Petitioners Nunzio Calce, Shaya Greenfield, Raymond Pezzoli, Allen Chan, Amanda Kennedy, Second Amendment Foundation, and Firearms Policy Coalition, Inc. were plaintiffs before the District Court and the plaintiffs-appellants in the Court of Appeals.

Respondents Jessica Tisch, in her official capacity as the Commissioner of the New York City Polic Department, and the City of New York were defendants before the District Court and defendants-appellees before the Court of Appeals. The District Court substituted Tisch as a defendant to this proceeding after she became the Commissioner of the New York City Police Department, replacing Dermot Shea who was originally named as a defendant in her place. *See* Pet.App.7a.

CORPORATE DISCLOSURE STATEMENT

Firearms Policy Coalition, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Second Amendment Foundation has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Calce v. Tisch*, No. 25-861-cv (2d Cir. April 13, 2026)
- *Calce v. The City of New York*, No. 1:21-cv-8208 (S.D.N.Y. March 24, 2025)

There are no other proceedings in state or federal court, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

This case essentially is *Caetano* 2.0. In *Caetano v. Massachusetts*, this Court summarily vacated a Massachusetts Supreme Judicial Court decision denying Second Amendment protection to stun guns that blatantly "contradict[ed] this Court's precedent." 577 U.S. 411, 412 (2016) (per curiam). The decision below similarly flouted this Court's precedent to reject a challenge to a ban on stun guns. The Second Circuit held that bans on electronic arms do not even implicate the plain text of the Second Amendment because Petitioners purportedly "failed to provide evidence that stun guns and tasers are in common use for lawful purposes." Pet.App.5a. But as this Court repeatedly has emphasized, the Second Amendment's plain text encompasses "*all* instruments that constitute bearable arms," *Caetano*, 577 U.S. at 411 (emphasis added) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)), not just those that are in common use. Thus, a ban implicates the Second Amendment if it "concern[s] *any* form of 'Arms,' *i.e.*, *any* weapon customarily used for offensive or defensive purposes." *Wolford v. Lopez*, 609 U.S. ----, 2026 WL 1825723, at *6 (U.S. June 25, 2026) (emphases added). Whether an arm is in common use is relevant only at the second, historical step of the analysis, and it is an issue on which the government, not Petitioners, bear the burden.

Unfortunately, the Second Circuit is not the only Circuit that improperly has "smuggle[d] additional limits, drawn from our regulatory tradition, into the plain-text stage of the inquiry." *Id.* at *14 n.1 (Barrett, J., concurring). As exemplified by the Second Circuit's decision below, this tendency has been particularly

pronounced in cases concerning restrictions on types of arms. *See, e.g.*, *Bevis v. Naperville*, 85 F.4th 1175, 1198 (7th Cir. 2023) (assessing a ban on so-called "assault weapons"). The Sixth Circuit, by contrast, properly has held that the common use inquiry is derived from history, not the Second Amendment's plain text. *See United States v. Bridges*, 150 F.4th 517, 524–26 (6th Cir. 2025).

Following *Wolford*, this case provides an ideal vehicle for the Court to resolve confusion in the lower courts over the proper standards for assessing bans on types of arms. In *Wolford*, this Court addressed a Hawaii law presumptively banning the carry of arms on property open to the public. In illustrating the burden Hawaii's law placed on the right to carry arms, this Court used a multi-paragraph hypothetical discussing the "impact on a resident of Hawaii whose situation is like that of Jaime Caetano, a young Boston woman who wanted to carry a weapon to defend herself from a violent ex-boyfriend but was criminally prosecuted when she used a non-lethal weapon to fend him off." *Wolford*, 2026 WL 1825723, at *9 (discussing *Caetano*, 577 U.S. 411). Under the Second Circuit's reasoning, however, this hypothetical was completely inapt because stun guns are not even "arms" within the meaning of the Second Amendment's plain text. Thus, individuals can be banned conclusively, not just presumptively, from possessing or carrying stun guns anywhere, not just in establishments open to the public. The City of New York thus remains free to criminally charge individuals who possess electronic arms—as it did after discovering that Petitioner Kennedy displayed a stun gun to defend herself from assault.

This Court should grant review to clarify the standards that apply in arms ban cases and to establish that nonlethal, electronic arms are just as much arms for Second Amendment purposes as are firearms. The Second Amendment give no warrant for courts to "demand[ ] that citizens use *more* force for self-defense than they are comfortable wielding." *Caetano*, 577 U.S. at 421 (Alito, J., concurring). Indeed, just as in its precursor in *Caetano*, the error in the Second Circuit's decision below is so patent that this Court would be justified in resolving this Petition summarily.

OPINIONS BELOW

The summary order of the court of appeals is unpublished but can be found at 2026 WL 980092 and is reproduced at Pet.App.1a. The memorandum opinion of the district court is unpublished but can be found at 2025 WL 895414 and is reproduced at Pet.App.6a.

JURISDICTION

The court of appeals issued its summary order on April 13, 2026. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the Second Amendment and Section One of the Fourteenth Amendment to the United States Constitution and relevant provisions of the New York Penal Law and the New York City Admin-

istrative Code are reproduced in the appendix beginning at Pet.App.38a.

STATEMENT

I. New York City enforces bans on nonlethal electronic weapons.

The laws at issue here restrict the possession of certain electronic weapons, such as stun guns and tasers, that "work by producing electrical pulses that make the target's muscles spasm, and thus quickly but temporarily disable him." Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 204 (2009). Some, like stun guns, are close-quarters weapons that require the user to touch the target with the source of the electrical shock, while others, most familiarly the taser, fire barbed and electrified darts at a short distance, permitting self-defense at a greater range. *Id.* Both types of weapons are dramatically less damaging and deadly than firearms or knives and therefore "merit being viewed as tantamount to generally non-deadly force, such as a punch or a shove." *Id.* at 205. But they have advantages over punches or shoves because "they generally stop the target with one blow, and can be used even by people who are weak or disabled." *Id.* at 204.

Nevertheless, New York City bans possession of electronic arms. New York state law prohibits possession of an "electronic dart gun" (defined to cover electronic arms that fire a projectile, hereinafter "tasers"), or "electronic stun gun" (defined to cover electronic arms that do not, hereinafter "stun guns"). N.Y. PENAL LAW §§ 265.00(15-a), (15-c), 265.01(1). New York

City separately makes it a crime to possess an "electronic stun gun" (defined only to cover electronic arms that do not fire a projectile). Although there are exceptions to both laws to allow police officers or members of the armed forces to possess electronic weapons, *see* N.Y. PENAL LAW § 265.20(a)(1)(a), (b) (police and military); N.Y.C. ADMIN. CODE § 10-135(d) (police), there is no exception that would permit ordinary, peaceable civilians in New York to possess or carry such an arm for self-defense. Even individuals who have licenses to carry deadly handguns are barred from even possessing electronic weapons. *See* N.Y. PENAL LAW § 265.20(a)(3).

Collectively, these laws form an Electronic Arms Ban that precludes individuals in New York City from possessing stun guns and tasers. These laws effectively only apply in New York City, because New York state officials have been enjoined from enforcing, at the state level, these laws since 2019, following a decision in the Northern District of New York holding the restrictions violate the Second Amendment—a decision the State elected not to appeal. *See Avitabile v. Beach*, 368 F. Supp. 3d 404 (N.D.N.Y. 2019). The City, however, *does* enforce the restriction. Indeed, one of the petitioners in this case, Amanda Kennedy, has previously used an electronic weapon to ward off an attack by a pedestrian who assaulted her when she was driving in New York City, striking her car and her face (through her window) and trying to open her car's door. Pet.App.10a; Defs.' Counter Statement at 11–12, Doc. 40 (S.D.N.Y. Apr. 26, 2024). Kennedy's use of her taser went exactly as one would hope—the mere presence of the weapon, displayed to her attacker, ended the altercation. Pet.App.10a. But when the police officers who responded to the attack learned that Ken-

nedy possessed a stun gun, they charged *her* with a crime. *Id.* Kennedy's case was eventually resolved through an adjournment in contemplation of dismissal. *Id.* But she, just like the other Petitioners and their members, still faces threats of future prosecution that keep them from possessing electronic weapons in New York City.

II. Procedural history.

A. Petitioners are several individuals who desire to own and to carry an electronic weapon in New York City for personal defense but who currently refrain from doing so because of the Ban, and two organizations, Firearms Policy Coalition and Second Amendment Foundation, that seek to promote and defend the Second Amendment and count the named individuals as members. Pet.App.2a.

Petitioners filed this suit on October 5, 2021, in the Southern District of New York, alleging that the Electronic Arms Ban violates the right to keep and bear arms protected by the Second and Fourteenth Amendments. Compl., Doc. 1 (S.D.N.Y. Oct. 5, 2021). The district court had subject matter jurisdiction to adjudicate this federal question under 28 U.S.C. §§ 1331 and 1343. The City answered on April 22, 2022 and, following discovery, the parties cross-moved for summary judgment in 2024. On June 12, 2024, the State was notified pursuant to Federal Rule of Civil Procedure 5.1 that this case challenges the constitutionality of New York's statutes banning electronic arms, but the State did not seek to intervene. Pet.App.15a.

B. On March 24, 2025, the district court granted summary judgment in favor of the City and denied Pe-

titioners' motion. Purporting to apply the *Bruen* framework, the district court concluded that Plaintiffs' challenge did not merit any Second Amendment scrutiny at all because it did not implicate the Amendment's "plain text." Pet.App.35a. To reach that conclusion, the district court determined that Amendment's text reaches only to arms that are "in common use." Pet.App.29a. Though the district court did not offer a textual justification for this decision, it claimed that it was "follow[ing] the weight of authority" in treating "common use" as a textual issue. Pet.App.22a.

That analytical decision was ultimately dispositive, as it led the district court to put the burden on Petitioners to prove, at this threshold step, "that stun guns and tasers are in 'common use.' " *Id.* It concluded that Petitioners had failed to carry that burden, ignoring the findings and conclusions regarding the commonality of these arms from every other court to consider the issue and faulting Petitioners for not "provid[ing] any studies, reports, or data for the Court to conduct a 'statistical inquiry' into whether stun guns and tasers are in common use." Pet.App.30a–31a.

C. The Second Circuit affirmed in an unpublished summary order. Like the district court, and following Circuit precedent, *see United States v. Gomez*, 159 F.4th 172, 177–78 (2d Cir. 2025), the Second Circuit treated "whether the weapons at issue are 'weapons in common use today for self-defense' " as part of the threshold question of "whether the Second Amendment's plain text covers [the proposed] conduct," Pet.App.4a (quoting *Gomez*, 159 F.4th at 177–78). And it held, therefore, that Petitioners "bear the

burden of proof" of demonstrating that an arm is "in common use." *Id.* (citing *Gomez*, 159 F.4th at 178).

Characterizing this as a case about the burden, the court faulted Plaintiffs with failing to "introduce[e] the required evidence before the trial court." *Id.* The Second Circuit declined to give any weight to "a slew of non-binding cases and a concurrence by Justice Alito, which cites a Michigan Court of Appeals decision relying on a 2009 law review article, for the proposition that 'stun guns are common.' " *Id.* It similarly refused to consider as evidence of commonality newspaper articles and a Congressional Research Service Report which Petitioners cited on appeal because "they failed to introduce these materials in the district court" and because it viewed them as "bits and pieces insufficient to establish that stun guns and tasers are in common use for lawful purposes." Pet.App.4a–5a.

REASONS FOR GRANTING THE PETITION

I. The circuits are split over what plaintiffs need to show to demonstrate that their desire to possess a type of weapon falls within the Second Amendment's "plain text."

Although both the district court and the Second Circuit cast this case as one about the facts in evidence, the dispositive feature of both was really the *legal* conclusion that a plaintiff bears the burden of proving a type of weapon is in "common use" to fall within the presumptive protection of the Second Amendment's plain text. This is a critically important issue that has sharply divided the courts of appeals. As the Seventh Circuit has noted, there currently "is no consensus on whether the common-use issue be-

longs at *Bruen* step one or *Bruen* step two." *Bevis*, 85 F.4th at 1198.

A. Several circuits have held that "common use" is a prerequisite showing to prove that an item is an "arm" under the Second Amendment's "plain text" at the first step of the analysis laid out in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022). The Second Circuit, after gamely dodging the question because it "prefer[red] not to venture into an area in which such uncertainty abounds," *see Nat'l Ass'n for Gun Rts. v. Lamont*, 153 F.4th 213, 235 (2d Cir. 2025), has held that "the first step of the *Bruen* inquiry 'requires courts to consider' … 'whether the weapon concerned is in common use,' " *Gomez*, 159 F.4th at 176 (quoting *Antonyuk v. James*, 120 F.4th 941, 981 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 1900 (2025) (mem.)). That meant, in the case below, that Plaintiffs bore the burden to demonstrate that stun guns are "in common use" and that their failure to do so to the Second Circuit's satisfaction prematurely ended their case.

The Fourth Circuit fractured over this issue in *United States v. Price*, 111 F.4th 392, 400 (4th Cir. 2024) (en banc), with the majority siding with the Second Circuit. It too explained its decision with reference to *Bruen*, similarly claiming that *Bruen* asked at the plaint-text stage "whether the weapons regulated by the challenged regulation were 'in common use' for a lawful purpose." *Id.* (quoting *Bruen*, 597 U.S. at 31–32).

Concurring in the judgment, Judge Quattlebaum referred to the question of whether "common use fit[s] into *Bruen*'s first step as a matter of plain text or into *Bruen*'s second step as a matter of historical tradition" as "*Bruen*'s puzzle." *Id.* at 415 (Quattlebaum, J., con-

curring in the judgment). Despite agreeing with the majority as to the ultimate result in that case (that unserialized firearms were not protected), he diverged on this doctrinal point, concluding that "digging unearths additional puzzle pieces that confirm common use falls under step two." *Id.* at 416–17. The two dissenting judges also divided over where to place common use in the analysis. *See id.* at 424 (Gregory, J., dissenting) (identifying "common use" as part of the textual analysis); *id.* at 428 (Richardson, J., dissenting) (rejecting that argument as "atextual").

The Tenth Circuit has followed the Second and Fourth Circuit's reasoning to conclude, also putatively based on *Bruen*, that "common use" is a limitation on the scope of the right that is inherent in the Amendment's plain text. *See United States v. Morgan*, 150 F.4th 1339, 1346 (10th Cir. 2025). And while the issue is formally open in the D.C. Circuit, in *Hanson v. District of Columbia*, the court "assume[d], without deciding, this issue falls under *Bruen* step one because the *Bruen* Court determined that handguns are in common use before conducting its historical analysis." 120 F.4th 223, 232 n.3 (D.C. Cir. 2024).

The Seventh Circuit has reached the same destination via a different route. In *Bevis*, 85 F.4th at 1192–94, the court held that determining whether a ban on a type of arms implicates the plain text of the Second Amendment hinges on whether the ban reaches "bearable arms." But "bearable," the court held, "must mean more than 'transportable' or 'capable of being held,' " reasoning that because this Court in *Heller* concluded that "the historical understanding of the scope of the right" indicated that "the Second Amendment does *not* protect those weapons *not* typi-

cally possessed by law-abiding citizens for lawful purposes," the *textual* meaning of "bearable Arms" must be limited to "weapons in common use for a lawful purpose." *Id.* at 1193 (quoting *Heller*, 554 U.S. at 625 (emphases added)).

B. The Sixth Circuit, on the other hand, has eschewed any commingling of the "plain text" inquiry with the "common use" analysis. In *Bridges*, 150 F.4th at 524–26, the court assessed the constitutionality of Section 922(o)'s prohibition on possession of machineguns. In concluding that machineguns are arms within the meaning of the Second Amendment's plain text, the Sixth Circuit explained that *Heller* defined arms to include "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 524 (quoting *Heller*, 554 U.S. at 582). It was not until the court turned to the historical analysis that it asked, as part of its application of *Heller*'s holding that there existed a "historical tradition of prohibiting the carrying of dangerous and unusual weapons," "whether machineguns are weapons that are 'in common use.' " *Id.* at 525–26 (quoting *Heller*, 554 U.S. at 624–27).

In a now-vacated opinion, the Ninth Circuit was even more explicit on this point. In *Teter v. Lopez*, the court had no difficulty concluding that the plain text meaning of "arms" extends to cover "bladed weapons and, by necessity, butterfly knives," without reference to anything other than *Heller*'s binding interpretation of the meaning of that term. 76 F.4th 938, 949 (9th Cir. 2023), *vacated as moot on reh'g en banc*, 125 F.4th 1301 (9th Cir. 2025). In so doing, it rejected Hawaii's argument "that the purported 'dangerous and unusual' nature of butterfly knives means that they are

not 'arms' as that term is used in the Second Amendment," because "*Heller* itself stated that the relevance of a weapon's dangerous and unusual character lies in the '*historical tradition* of prohibiting the carrying of dangerous and unusual weapons.' It did not say that dangerous and unusual weapons are not *arms*." *Id.* at 949–50 (citation omitted) (emphases in original). Therefore, the court concluded, whether an arm is "dangerous and usual" or rather in common use "is a contention as to which Hawaii bears the burden of proof in the second prong of the *Bruen* analysis." *Id.* at 950.[1]

II. The Second Circuit's approach is contrary to this Court's binding precedent.

In taking the side of the Fourth, Seventh and Tenth Circuits in the split below, the Second Circuit set itself up in opposition to this Court's binding interpretation of the Second Amendment—a point that is irrefutable following this Court's decision in *Wolford*.

A. *Bruen* and *Heller* both reject the notion that "common use" is a textual limitation on the scope of the right.

For the Second Circuit, like every court on its side of the issue except for the Seventh, its conclusion that the "plain text" incorporates a "common use" require-

[1] Judge Quattlebaum suggested in *Price* that another Ninth Circuit case, *United States v. Alaniz*, 69 F.4th 1124, 1129 (9th Cir. 2023), agrees with the other side of this split. *See Price*, 111 F.4th at 415 n.1 (Quattlebaum, J., concurring). *Alaniz*'s statement, which mirrors the Fourth and Second Circuit's assessments of what the "plain text" entails, was dicta. The better view is that the Ninth Circuit currently has no precedent on this point.

ment stemmed from a misunderstanding of *Bruen*. After making "the constitutional standard endorsed in *Heller* more explicit," *Bruen* turned to "apply[ing] that standard to New York's proper-cause requirement." 597 U.S. at 31. It began that application by saying: "It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects. Nor does any party dispute that handguns are weapons 'in common use' today for self-defense. We therefore turn to whether the plain text of the Second Amendment protects ... carrying publicly for self-defense." *Id*. at 31–32 (citations omitted). It was this statement and its placement in *Bruen* that led the Second Circuit to conclude that "common use" is a "plain text" issue. *See Antonyuk*, 120 F.4th at 981 (citing *Bruen*, 597 U.S. at 31–32). But that is a misinterpretation of this passage in *Bruen*.

First, the statement that the arms Koch and Nash wished to carry were "in common use," comes *before Bruen*'s textual analysis—it was stated as a prefatory, housekeeping matter, to make clear what was not at issue or in dispute, before the Court began its analysis of the disputed issues before it. It did not indicate, by its placement, that "common use" was part of the step one analysis.

Second, as *Bruen* had just explained, that something falls within the "plain text" of the Second Amendment is not conclusive—it only means that "the Constitution presumptively protects that conduct." 597 U.S. at 24. The ultimate question of the scope of the right depends upon both the constitutional text *and* an analysis of "the Nation's historical tradition of firearm regulation." *Id.* at 17. So, if all *Bruen* had

meant when it noted that Koch and Nash's handguns were "in common use" was that they were, textually, "arms," it would have needed to assess their protected status as a historical matter (or at least cite *Heller* on that point). But it never did. Its statement at the outset established that they were not just arms but *protected* arms, and no further work needed to be done.

Third, *Bruen* itself discussed both the semantic meaning of the term "arms" and the "common use" principle in a way that made clear that they were separate concepts and that the latter was drawn from history, not the Amendment's text. As to "common use," *Bruen* explicitly identified it as a principle "[d]raw[n] from [a] historical tradition" that is relevant to the historical analysis (where this discussion occurred). *Id.* at 47. But it omitted any mention of common use when it reiterated *Heller*'s assurance that the "historically fixed meaning" of the term "arms" covers "all instruments that constitute bearable arms," and recognized that this "general definition covers modern instruments that facilitate armed self-defense." *Id.* at 28 (quoting *Heller*, 554 U.S. at 582). That *Bruen* offered a "Cf." cite here to *Caetano*, with a parenthetical note that "stun guns" were the specific arms which this Court had recognized the Second Amendment's definition to embrace, makes the error below all the more patent.

This interpretation of *Bruen* is the only one that is consistent with *Heller*. *Bruen* was emphatic that it was reaffirming *Heller* and making its mode of analysis "more explicit;" it did not purport to *change Heller*'s analysis. *Id.* at 31; *see also, e.g.*, *id.* at 22–23. And *Heller* was extremely clear on this point. Its textual analysis of the Amendment was separate from its histori-

cal discussion. And in its textual discussion, the Court concluded that the plain-text meaning of "Arms" was "no different [in 1791] from the meaning today" and encompassed "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Heller*, 554 U.S. at 581 (quoting Timothy Cunningham's 1771 legal dictionary). *Heller* did not discuss "common use" until later in its opinion and when it did, it explicitly tied its discussion to history, concluding that "the sorts of weapons protected [by the Second Amendment] were those 'in common use at the time,' " a "limitation" on the all-encompassing textual "Arms" that "is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " *Id.* at 627.

B. *Wolford* could not be clearer that "common use" has nothing to do with the "plain text" inquiry.

For the foregoing reasons, *Heller* and *Bruen* make clear that the "common use" standard is a product of the second step of the *Bruen* analysis, and therefore that Second Amendment plaintiffs have no burden to demonstrate common use to establish that an arm is covered by the Second Amendment's plain text. This conclusion is further reinforced by *Wolford*, which removes any possible dispute on the issue.

In *Wolford*, this Court provided yet another corrective discussion of the *Heller*/*Bruen* analysis for lower courts that continue fundamentally to misunderstand the roles of text and history. Though specifically aimed at reversing the Ninth Circuit's conclusion that a ban on carrying firearms on public property absent the owner's permission was consistent with the Second Amendment, much of the opinion dealt with

how lower courts should address *any* Second Amendment challenges that come their way. And with respect to the first-step textual analysis, *Wolford* held that the inquiry "entails three subsidiary questions," namely: (1) "does the law apply to 'the people'—which is to say, to 'all members of the political community,' " (2) "does it concern any form of 'Arms,' *i.e.*, any weapon customarily used for offensive or defensive purposes," and (3) "does the law place any restrictions on either the 'keep[ing]' (*i.e.*, possession) or the 'bear[ing]' (*i.e.*, carrying) of arms?" 2026 WL 1825723, at *6. The textual "arms" question framed by *Wolford* notably omits the "common use" element employed by the Second Circuit below. That is fully consistent with *Heller* which, as *Wolford* explained, held that the term "refers to implements used for offense or defense" generally. *Id.* at *4. Historical limits on the right factor into the analysis, of course, "but they are out of place at *Bruen*'s first step. At that stage … the question is simply whether a challenged law falls within the Second Amendment's 'plain text.' " *Id.* at *10. Justice Barrett's concurrence emphasized the point and took aim at exactly the types of maneuvers the Second Circuit engaged in below, expressly rejecting the argument that "courts can smuggle additional limits, drawn from our regulatory tradition, into the plain-text stage of the inquiry." *Id.* at *14 n.1 (Barrett, J., concurring).

Any doubt as to the upshot of *Wolford* for arms-ban cases such as this one should be removed by Justice Jackson's dissent. Justice Jackson would have adopted a mode of analysis essentially along the Second Circuit's lines, asking at the first step "whether the activity asserted is part of this pre-existing right." *Id.* at *24 (Jackson, J., dissenting). But the majority made clear that determining whether activity is pro-

tected by the "pre-existing right" is the result of the *complete Bruen* analysis—text *and* history—and the "first step" textual analysis is more limited. *See, e.g.*, *id.* at *5 (majority op.) ("Because the Second Amendment protects a right that already existed when the Amendment was adopted, *Heller* instruct[s] courts to ascertain the scope of the right by looking to history."). Justice Jackson's complaints that "the majority seeks to confine history to *Bruen*'s second step—when the government must identify a history and tradition that relevantly limits the scope of the Second Amendment right," a shift which "remov[es] any real burden of proof on gun owners at step one," were, as a descriptive matter, exactly right. *Id.* at *26, *29 (Jackson, J., dissenting).

The Second Circuit's approach, which stressed that "Plaintiffs bear the burden of proof" on the question of "whether the weapons at issue are 'weapons in common use today for self-defense' " and faulted them for "fail[ing] to adduce evidence to satisfy *Bruen* step one" is therefore, under this Court's clear statements in *Wolford*, erroneous. Pet.App.4a.

III. The Second Circuit's errors at the first step of *Bruen* have the effect of greatly narrowing the Second Amendment and favoring anti-rights states in litigation.

In addition to resolving a circuit split and correcting a persistent misreading of the *Bruen* methodology, granting certiorari and reversing the decision below would remove a significant barrier to litigants seeking to vindicate their Second Amendment protected rights. "Resolving th[e] question concerning the placement of the common-use issue in the *Bruen* inquiry is highly significant not only in this case, but in any fu-

ture Second Amendment challenge." *United States v. Berger*, 715 F. Supp. 3d 676, 686 (E.D. Pa. 2024). Requiring plaintiffs to prove "common use" at the outset flips the presumption that a law implicating the conduct covered by the "plain text" is unconstitutional. And worse still, when courts require significant evidentiary showings to substantiate what should be the default assumption, they effectively insulate arms bans from constitutional scrutiny.

The placement of the burden in Second Amendment litigation flows directly from the nature of the right. *See Bruen*, 597 U.S. at 24–25. The Second Amendment enshrines a right to keep and bear arms free from the interference of the government, outside of narrow, long-recognized exceptions. It makes no more sense, in this context, to permit the government to ban whatever it wants and require rights holders to come to court and prove the arm they wish to possess is *worth* the protection, than it would to allow the government to place a prior restraint on publishing unless a writer can affirmatively prove his content is not defamatory or obscene. *See id.*; *see also United States v. Stevens*, 559 U.S. 460, 468–71 (2010). A regime that requires a showing of common use at the outset effectively infringes the right itself—even in cases where that burden is ultimately met—by requiring a showing from law-abiding, responsible firearm owners that they should never have to make.

In some cases, showing commonality at the outset—even where courts attempt to make that an inappropriately high bar—is not a particularly difficult task. Take bans on so-called "assault weapons" including the AR-15, for instance. "The AR-15 is the most popular semi-automatic rifle in America and therefore

is undeniably in common use today." *Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024) (mem.) (statement of Thomas, J., regarding denial of certiorari) (citation and internal quotation marks omitted). The commonality of such arms is irrefutable and has been recognized by this Court in a unanimous opinion. *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 297 (2025) ("The AR-15 is the most popular rifle in the country."). Similarly, the commonality of handguns as a general class of arms was so obvious that *Heller* did not even have to cite anything for the proposition.

But courts that have taken the view that "common use" is a prerequisite to coverage have also contorted the test to make it an onerous evidentiary showing, which can be a significant impediment in cases such as this one. While there are many sources that attest to the broad legality and popularity of stun guns and other electronic arms, divining specifically how many are in private hands, versus in the hands of law enforcement, is not so simple. And if a court, like the courts below, refuses to consider such evidence as more than "miscellaneous bits and pieces" that do not conclusively prove common use, the burden becomes almost insurmountable. Pet.App.4a. In *Avitabile v. Beach*, another case raising the constitutionality of the New York state ban at issue here, the district court emphasized "the difficulty inherent in … developing the 'common use' issue in discovery," as the plaintiff had "solicited sales data from several electric arms companies, many of which were unwilling to provide it." 368 F. Supp. 3d at 411. It is inconsistent with *Bruen*, and with this Court's repeated instruction that the Second Amendment is to be accorded the same respect as other constitutional rights,

to permit such obstacles to be placed in front of meaningful judicial review.

If the burden had not been artificially inflated below, Petitioners would have carried it. As they demonstrated to the Second Circuit, stun guns are lawful across the country and increasingly popular choices for self-defense by ordinary Americans. Several courts and judges, including Justice Alito in *Caetano*, have found that stun guns are chosen in large numbers by ordinary Americans. *See, e.g.*, 577 U.S. at 420 (Alito, J., concurring in the judgment) ("[H]undreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States." (internal quotation marks omitted)); *People v. Yanna*, 824 N.W.2d 241, 245 & n.5 (Mich. Ct. App. 2012) (similar); *O'Neil v. Neronha*, 594 F. Supp. 3d 463, 472 (D.R.I. 2022) ("[A]pproximately 6.5 million stun guns have been sold to consumers between 2008 and 2020" alone.). And other sources attest to their popularity, even in New York City where they are contraband. *See* Dana Kennedy, *Self-defense Tasers and stun guns surge in popularity across NYC*, N.Y. POST (Feb. 27, 2021), https://perma.cc/XUN8-M63Q; Jordan B. Cohen & Matthew D. Trout, *Stun Guns, TASERs, and Other Conducted Energy Devices: Issues for Congress* at 2, CONG. RSCH. SERV. (2024) (reporting a 300% increase in consumer sales of TASER brand devices in 2020 compared to 2019).

This is precisely the type of information that this Court has previously relied on to conclude that an arm is "in common use." Indeed, some of the sources Plaintiffs cited below are the very same as the sources Justice Alito relied on in *Caetano*. And in *Heller*, to support the proposition that handguns are "the most pre-

ferred firearm in the nation to keep and use for protection of one's home and family," this Court cited the opinion below, *see* 554 U.S. at 628–29 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)), which in turn cited social science papers, not record evidence, for that proposition, *see Parker*, 478 F.3d at 400 (citing Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995)). And in doing so, the Court declined the Department of Justice's requests to build out portions of the record that purportedly were lacking. *See* Br. for United States of America at 31 n.9, *District of Columbia v. Heller*, No. 07-290 (U.S. Jan. 11, 2008). Demanding proof of common use by Plaintiffs at all is contrary to this Court's precedents. But confining that proof to a narrow conception of "record evidence," is doubly so.

IV. This case is an ideal vehicle for clarifying that "common use" is not a plain text issue.

This case presents an ideal vehicle for resolving this circuit split and making clear that, in challenging a ban on a type of arms, the only burden Plaintiffs bear is to plead that the item they wish to possess is a weapon they are not allowed to possess. In addition to presenting the circuit split cleanly, there can be no question in this case that where the burden of showing common use fell was outcome determinative below. *See* Pet.App.4a–5a. Furthermore, whether electronic arms are "arms" within the plain text of the Second Amendment is not a difficult question and holding that they are would require this Court to break no new ground. Indeed, this Court has already acknowledged

that electronic arms are "arms" within the meaning of the Second Amendment. *Caetano* is unintelligible if they are not, as is this Court's citation of *Caetano* for the principle that "stun guns" are 20th-century weapons that are nevertheless protected under the Second Amendment's 18th-century text. *Bruen*, 597 U.S. at 28. And this Court's recent lengthy discussion of Jaime Caetano, as an exemplar of an individual seeking to exercise her rights, would be difficult to understand if she was understood to be carrying something that might not even be an arm within the Second Amendment's plain text. *See Wolford*, 2026 WL 1825723, at *9–10.

Indeed, this case has made it this far only because New York City remains one of the only (if not the only) jurisdictions in the country recalcitrant enough not to have learned the lesson of *Caetano*. When *Caetano* was decided, Justice Alito noted that stun guns could be lawfully possessed in 45 states. 577 U.S. at 420 (Alito, J., concurring). Today, New York State does not defend the laws at issue here and stun guns can be possessed in all 50 states, either because the state that previously had a restriction has since repealed it, or because a court held it unconstitutional and the state ceased enforcement. *See* H.B. 891, 31st Leg. (Haw. 2021) (repealing restriction because the legislature found Caetano "has raised questions regarding the constitutionality of bans on electric guns, and may make amendments to Hawaii's law on electric guns advisable"); *Ramirez v. Commonwealth*, 479 Mass. 331, 332 (2018); *Yanna*, 824 N.W.2d at 245–46; *Avitabile*, 368 F. Supp. 3d at 421; *O'Neil*, 594 F. Supp. 3d at 479; Consent Order 3–4, *N.J. Second Amend. Soc'y v. Porrino*, No. 16-cv-4906 (D.N.J. Apr. 25, 2017), Doc. 30 ("Defendants … in light of the [*Caetano*]

United States Supreme Court decision … enter into this consent decree and do hereby concede that the aforementioned statute banning electronic arms in New Jersey is unconstitutional."); WIS. STAT. § 941.295 (allowing licensed possession and carriage of electronic weapons); *see also People v. Webb*, 131 N.E.3d 93, 98 (Ill. 2019).

New York City's outlier restriction is an excellent opportunity to eliminate the final holdout on this issue. Indeed, the Court would be well within its authority to grant and reverse, not just vacate, because the City will be unable to show that electronic arms like stun guns and tasers are dangerous and unusual weapons. They are legal to possess in all fifty states, and regardless of the precise numbers, it is undisputed that they are owned by many normal Americans. That is all that is required to resolve the issue. *See Caetano*, 577 U.S. at 420 (Alito, J., concurring); *see also Snope v. Brown*, 605 U.S. ----, 145 S. Ct. 1534, 1534 (2025) (mem.) (statement of Kavanaugh, J.) ("Given that millions of Americans own AR-15s and that a significant majority of the States allow possession of those rifles, petitioners have a strong argument that AR-15s are in 'common use' by law-abiding citizens and therefore are protected by the Second Amendment under *Heller*."); *Friedman v. City of Highland Park*, 577 U.S. 1039, 136 S. Ct. 447, 449 (2015) (mem.) (Thomas, J., dissenting from the denial of certiorari); *see also Staples v. United States*, 511 U.S. 600, 612 (1994) (recognizing that semiautomatic rifles "traditionally have been widely accepted as lawful possessions"); *Smith & Wesson*, 605 U.S. at 297. In a world in which handguns are the quintessential defensive weapon protected by the Second Amendment, it is inconceivable that a non-lethal arm like a stun

gun can be banned as a dangerous and unusual weapon.

V. In the alternative, summary disposition or holding the petition for *Viramontes* would be appropriate.

This Court has said that summary disposition is appropriate where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). Here, the fundamental error, which was wrong under this Court's caselaw when the decision below issued, is indefensible in light of this Court's further clarification of the *Bruen* methodology in *Wolford*. There simply is no room for a dispute at this point that the Second Circuit erred in holding that, to state a claim under the Second Amendment, Petitioners must affirmatively prove that "stun guns" and other electronic arms are "in common use" before they can be treated as "arms" within the Second Amendment's plain text.

Indeed, this case concerns the same type of error as was at issue in this Court's *last* Second Amendment summary reversal, *Caetano*. The specific error discussed above is different than the specific errors committed by the Supreme Judicial Court in *Caetano*: whereas here the Second Circuit has held that a weapon cannot be considered an "arm" unless a plaintiff brings proof that it is "in common use today," in *Caetano*, the Massachusetts Supreme Judicial Court refused to recognize arms that were not "in common use at the time of the Second Amendment's enactment" and that were not "readily adaptable to use in the military." 577 U.S. at 411–12 (quoting *Commonwealth v. Caetano*, 470 Mass. 774, 781 (S.J.C. 2015)).

But they are more alike than they are different, as both stem from a refusal to treat this Court's Second Amendment interpretations fairly. Only by taking a jaundiced eye to the right to keep and bear arms and to this Court's precedents could Massachusetts have concluded that "in common use today" in *Heller* meant "in common use" at the Founding. And it is hardly easier to explain how a court could conclude that "bearable" is effectively a code-word in the Amendment to smuggle in the secret meaning "not in common use," *Bevis*, 85 F.4th at 1193, or that *Bruen* endorsed "considering the historical limitations on the scope of the right at … step one of the *Bruen* framework by looking to the historical scope of the Second Amendment right," *Price*, 111 F.4th at 401. That this case also involves the same, counterintuitive, result as *Caetano*—a judicial decision under the Second Amendment that ratifies the authority of a state to ban non-lethal modern tools for self-defense—only underscores the intractable refusal to take the Second Amendment seriously that is at the heart of this issue. And a summary disposition would go a long way to correcting the problem.

In the alternative, this case meets the standard for a GVR, as this Court's discussion of the textual scope of "arms" in *Wolford* is an "intervening development" that at least "reveal[s] a reasonable probability that the decision below that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Or, as a final alternative, failing either a summary disposition or a GVR, this Court should hold this petition pending a decision in *Viramontes v. Cook County*, No. 25-238 (cert. granted June 30, 2026).

CONCLUSION

The Court should grant petition for a writ of certiorari.

Dated: July 7, 2026

Respectfully submitted,

DAVID H. THOMPSON
Counsel of Record
PETER A. PATTERSON
WILLIAM V. BERGSTROM
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED APRIL 13, 2026

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 25-861-cv

NUNZIO CALCE, SHAYA GREENFIELD, RAYMOND PEZZOLI, SECOND AMENDMENT FOUNDATION, FIREARMS POLICY COALITION, INC., ALLEN CHAN, AMANDA KENNEDY,

Plaintiffs-Appellants,

v.

JESSICA TISCH, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT, CITY OF NEW YORK,

Defendants-Appellees.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of April, two thousand twenty-six.

SUMMARY ORDER

PRESENT: BARRINGTON D. PARKER,
RAYMOND J. LOHIER, JR.,
SARAH A. L. MERRIAM,
Circuit Judges.

Appendix A

Appeal from a judgment of the United States District Court for the Southern District of New York (Edgardo Ramos, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiffs Nunzio Calce, Allen Chan, Shaya Greenfield, Amanda Kennedy, Raymond Pezzoli, the Second Amendment Foundation, and the Firearms Policy Coalition, Inc., (together, "Plaintiffs") bring this action against the City of New York and Jessica Tisch, in her official capacity as Commissioner of the New York City Police Department (together, "Defendants"). Plaintiffs challenge under the Second Amendment the constitutionality of N.Y. Penal Law § 265.01 and N.Y.C. Admin. Code § 10-135, New York State and City laws that prohibit the possession of electronic weapons, such as stun guns and tasers. Plaintiffs appeal from a judgment of the United States District Court for the Southern District of New York (Ramos, *J.*) "denying Plaintiffs' motion for summary judgment and granting Defendants' cross-motion for summary judgment." App'x at 497. We review *de novo* a district court's award of summary judgment. *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 254 (2d Cir. 2015). We assume the parties' familiarity with the underlying facts and record.

The District Court held that summary judgment was appropriate because Plaintiffs failed to establish that a genuine dispute of material fact existed as to the

constitutionality of N.Y. Penal Law § 265.01 or N.Y.C. Admin. Code § 10-135 under the Second Amendment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Specifically, the court concluded that Plaintiffs "failed to provide any evidence that stun guns and tasers are in common use" and therefore, on the summary judgment record before it, "no reasonable jury could return a verdict that stun guns and tasers are presumptively protected by the Second Amendment." Spec. App'x at 20 (quotation marks omitted). We agree.

The Second Amendment provides that "[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." U.S. Const. amend. II. To determine whether a law regulating the possession of a weapon violates an individual's exercise of their Second Amendment right, the Supreme Court set out a two-step framework in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*. *See* 597 U.S. 1, 19-24, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022); *Antonyuk v. James*, 120 F.4th 941, 964 (2d Cir. 2024). Under this framework, at step one a reviewing court must look to whether the Second Amendment's plain text as historically understood covers an individual's conduct, and if it does, then the Constitution presumptively protects that conduct. *See Antonyuk*, 120 F.4th at 964; *United States v. Gomez*, 159 F.4th 172, 176 (2d Cir. 2025). Then, at step two the "government must . . . justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Antonyuk*, 120 F.4th at 964 (quotation marks omitted).

Appendix A

To determine under step one whether the Second Amendment's plain text covers certain conduct, this Court looks to: whether the weapons at issue are "weapons in common use today for self-defense" and whether the conduct at issue implicates the right to armed self-defense. *Gomez*, 159 F.4th at 177-78 (quotation marks omitted). Plaintiffs bear the burden of proof on both of these inquiries. *See id.* at 178; *Nat'l Ass'n for Gun Rts. v. Lamont*, 153 F.4th 213, 229 (2d Cir. 2025).

This appeal really concerns Rule 56 of the Federal Rules of Civil Procedure, which governs motions for summary judgment. Under Rule 56, Plaintiffs failed to adduce evidence to satisfy *Bruen* step one. In other words, their submissions opposing Defendants' cross-motion for summary judgment were insufficient to establish that the "weapons [are] in common use today for self-defense." *Gomez*, 159 F.4th 177 (quotation marks omitted). Instead of introducing the required evidence before the trial court, Plaintiffs cited a slew of non-binding cases and a concurrence by Justice Alito, which cites a Michigan Court of Appeals decision relying on a 2009 law review article, for the proposition that "stun guns are common." Now, for the first time on appeal, Plaintiffs cite additional materials that were not introduced below, including newspaper articles from the 1980s, a New York Post article, and a Congressional Research Service Report that references a large increase in civilian purchases of stun guns from 2019 to 2020. They failed to introduce these materials in the district court and we decline to consider them now. The materials they do cite are miscellaneous bits and pieces insufficient to establish that stun guns and tasers are

in common use for lawful purposes. We have been clear that plaintiffs cannot "rely on conclusory allegations or unsubstantiated speculation" in opposition to summary judgment. *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). This is a basic requirement under Rule 56. Here, Plaintiffs have submitted no evidence establishing common use for lawful purposes, let alone sufficient "evidence from which a jury might return a verdict in [their] favor." *Anderson*, 477 U.S. at 257.

Therefore, because Plaintiffs failed to provide evidence that stun guns and tasers are in common use for lawful purposes, they have failed in this case to carry their burden at step one of the *Bruen* analysis, and summary judgment in favor of Defendants was appropriate. *See Giannullo v. City of New York*, 322 F.3d 139, 141 n.2 (2d Cir. 2003) ("[A] defendant may move for summary judgment on the ground that the plaintiff has failed to adduce any evidence of an element of plaintiff's claim, and if the plaintiff fails in response to . . . adduce such evidence, defendant, without more, will prevail.").

We have considered Plaintiffs' remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 24, 2025

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 Civ. 8208 (ER)

NUNZIO CALCE, ALLEN CHAN, SHAYA GREENFIELD, AMANDA KENNEDY, RAYMOND PEZZOLI, SECOND AMENDMENT FOUNDATION, AND FIREARMS POLICY COALITION, INC.,

Plaintiffs,

– against –

THE CITY OF NEW YORK AND JESSICA TISCH, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT,

Defendants.

Filed March 24, 2025

OPINION & ORDER

RAMOS, D.J.:

Nunzio Calce, Allen Chan, Shaya Greenfield, Amanda Kennedy, Raymond Pezzoli, the Second Amendment

Foundation, and the Firearms Policy Coalition, Inc. (collectively, "Plaintiffs") bring this § 1983 action against the City of New York (the "City") and Jessica Tisch,[1] in her official capacity as Commissioner of the New York City Police Department (the "NYPD Commissioner," and collectively, "Defendants"), for enforcing a New York State law which prohibits private citizens from possessing stun guns and tasers, and a New York City law which prohibits private citizens from possessing and selling stun guns.

Before the Court are Plaintiffs' motion for summary judgment and Defendants' cross-motion for summary judgment. For the following reasons, Plaintiffs' motion for summary judgment is DENIED, and Defendants' cross-motion for summary judgment is GRANTED.

---

1. Plaintiffs originally named Dermot Shea as a defendant in his official capacity as Commissioner of the New York City Police Department. *See* Doc. 1. Pursuant to Federal Rule of Civil Procedure 25(d), "when a public officer who is a party in an official capacity . . . ceases to hold office while the action is pending[,] [t]he officer's successor is automatically substituted as a party." Fed. R. Civ. P. 25(d). Jessica Tisch was appointed NYPD Commissioner effective November 25, 2024, and she currently serves in that role. *See Mayor Adams Appoints Jessica Tisch as NYPD Commissioner*, https://wwwnyc.gov/office-of-the-mayor/news/847-24/mayor-adams-appoints-jessica-tisch-nypd-commissioner#/0 (last visited Mar. 23, 2025). Therefore, Tisch is automatically substituted as party to this case.

Appendix B

I. BACKGROUND

A. Factual Background[2]

The Parties

Plaintiffs Calce, Chan, Greenfield, and Pezzoli are New York City residents. Doc. 50 ¶¶ 1–4. Plaintiff Kennedy lives in Bristol, Connecticut, however her agent and recording studio are located in New York City, so she visits New York "on a regular basis," for both social and work-related reasons. Doc. 40 at 10–11.

The Second Amendment Foundation ("SAF") and Firearms Policy Coalition, Inc. ("FPC") are nonprofit organizations. *Id.* at 17, 19. Each have members in New York State and City, including all the individual plaintiffs. *Id.* at 18, 20. SAF, which has over 720,000 supporters nationwide, "promot[es] both the exercise of the right to keep and bear arms, as well as education, research, publishing, and legal action focusing on the constitutional right to privately own and possess firearms." *Id.* at 18.[3]

---

2. The following facts are taken from the parties' Local Rule 56.1 Statements, and the parties' responses thereto, Docs. 40 (Defendants' Response to Plaintiffs' SOF), 50 (Plaintiffs' Response to Defendants' SOF). The facts recited here are undisputed unless otherwise noted.

3. "SAF publishes three periodicals (The New Gun Week, Women and Guns, and The Gottlieb-Tartaro Report) and also publishes the academic publication Journal of Firearms and Public Policy. SAF promotes research and education on the consequences of abridging the right to keep and bear arms and on the historical grounding and importance of the right to keep and bear arms as one of the core civil rights of United States citizens." Doc. 40 at 18.

Plaintiffs allege that SAF has spent a "significant" amount of time responding to requests from its members and supporters, as well as from the general public, resulting from "New York City's enforcement of the State and City laws prohibiting stun guns and tasers." *Id.* at 19.

"FPC's mission is to defend and promote . . . the fundamental, individual Second Amendment right to keep and bear arms[,] advance individual liberty, and restore freedom." *Id.* at 20. FPC additionally conducts "legislative and regulatory advocacy, grassroots advocacy, litigation and legal efforts, research, education, outreach, and other programs." *Id.* Representatives from FPC have "spent time, money and other resources answering questions and providing advice" concerning the "legal status of stun guns and tasers in New York City." *Id.* at 21.

Calce, Chan, Greenfield, Pezzoli, and Kennedy each "would like to purchase, possess and carry a stun gun or a taser in the City of New York." *Id.* at 3, 5, 7, 9, 11. Calce, Chan, Greenfield, and Pezzoli specifically desire a stun gun and taser to protect themselves both at home and in public. Doc. 50 ¶ 1–4.[4] None of the individual plaintiffs have ever been convicted of a felony nor confined to a mental institution, and to the best of their knowledge, they are each legally eligible to purchase and possess firearms under New York law and federal law. Doc. 40 at 4, 6, 8, 10, 13.

However, each of them has refrained from purchasing, possessing, or carrying a stun gun or taser in New York

4. Neither of the 56.1 statements discusses a specific purpose behind Kennedy's desire to purchase the weapons.

City, out of fear that they will be arrested or otherwise prosecuted by NYPD officers for doing so. *Id.* at 3, 5, 7, 9, 11. All of them have an "understanding that NYPD officers will enforce the prohibitions against stun guns and tasers." *Id.* at 4, 6, 8, 9, 13. On November 16, 2021, when she lived in Brooklyn, Kennedy was charged by the NYPD with possession of a stun gun, in violation of New York City Administrative Code § 10-135. *Id.* at 12–13. The charge resulted from an incident in which Kennedy brandished her stun gun to deter a woman who had hit her in the face from further attacking her. *Id.* at 11–12. FPC assisted Kennedy in paying for counsel to defend against the charge, *id.* at 21, which was ultimately resolved through an adjournment in contemplation of dismissal, which the Kings County Criminal Court issued on December 6, 2021. Doc. 50 ¶ 7.

Defendant City of New York is a municipal corporation incorporated under the laws of the State of New York. *Id.* ¶ 10. The current NYPD Commissioner is Jessica Tisch.

2. Stun Guns and Tasers

An electronic stun gun is defined as "any device designed primarily as a weapon, the purpose of which is to stun, cause mental disorientation, render unconscious or paralyze a person by passing a high voltage electrical shock to such person." Doc. 50 ¶ 18 (quoting N.Y. Penal Law § 265.00(15-c)). Stun guns "require direct contact between the device and an individual." *Id.* ¶ 19.

An electronic dart gun, commonly referred to as a "taser," is defined as "any device designed primarily as

a weapon, the purpose of which is to momentarily stun, knock out or paralyze a person by passing an electrical current to such person by means of a dart or projectile." *Id.* ¶ 20 (quoting N.Y. Penal Law § 265.00(15-a)). Tasers "incapacitate individuals by transmitting pulses of electric current" by "fir[ing] two small darts that are connected to the device with wires." *Id.* ¶ 21–22.

"Improper use of stun guns and tasers can result in serious injury, including death." *Id.* ¶ 28. From 2000 through 2020, "tasers were the third leading cause of death among fatalities resulting from civilian-police encounters." *Id.* ¶ 31. Defendants' expert report cites to a USA Today article which provides that "[s]ince 2010, there have been at least 513 cases in which subjects died soon after police used Tasers on them, according to fatalencounters.org." *Id.* ¶ 30. Moreover, according to Defendants, both stun guns and tasers have been "used by criminals to intimidate and even torture victims." *Id.* ¶ 29.

"Between 1970 and the early 2000s, seven states, including New York, enacted laws banning civilian possession of stun guns and tasers." *Id.* ¶ 24. "Approximately 40 localities within 15 states enacted similar restrictions[.]" *Id.* ¶ 25.

3. New York State and New York City Provisions

New York Penal Law § 265.01, adopted in 1974 by the State of New York,[5] provides that "[a] person is guilty of

5. Plaintiffs state that the 1974 enactment of N.Y. Penal Law § 265.01 "did not address electronic dart guns or electronic stun guns," although it does now. Doc. 40 ¶ 14.

criminal possession of a weapon in the fourth degree," a Class A misdemeanor, when:

> (1) He or she possesses any firearm, **electronic dart gun**, **electronic stun gun**, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shuriken, or throwing star[.]

N.Y. Penal Law § 265.01 (emphasis added); *see also* Doc. 50 ¶ 14–15.

New York City Administrative Code § 10-135, adopted in 1985 by the City of New York, "prohibits the possession and sale of electronic stun guns," a Class A misdemeanor, providing:

> a. As used in this section, "electronic stun gun" shall mean any device designed primarily as a weapon, the purpose of which is to stun, render unconscious or paralyze a person by passing an electronic shock to such person, but shall not include an "electronic dart gun" as such term is defined in § 265.00 of the penal law.
>
> b. It shall be unlawful for any person to sell or offer for sale or to have in his or her possession within the jurisdiction of the city any **electronic stun gun**.

New York City, N.Y., Code § 10-135 (emphasis added); *see also* Doc. 50 ¶ 16–17.[6]

The NYPD Police Student Guide[7] identifies the "electronic dart gun" and "electronic stun gun" as being among the weapons for which "[n]o intent is required, so that the mere possession of [them] is a crime." Doc. 40 at 16 (emphasis in original); *see also* Doc. 35-5 at 8.

According to public information that the City provides online, the NYPD arrested 1,307 individuals in 2021, 1,552 in 2022, and 2,229 in 2023, for violating N.Y. Penal Law § 265.01(1). Doc. 40 at 14. However, Defendants explain that they "do not readily have at their disposal records illustrating the number of arrests made pursuant to [N.Y.] Penal Law § 265.01 specifically for the possession or use of stun guns and tasers." *Id.* at 15. As for N.Y.C. Admin. Code § 10-135, Defendants explain that NYPD employees would have to "look up individual arrest reports to determine if an arrestee was charged with a violation of Administrative Code § 10-135" on the dates Plaintiffs requested, and in any event, Defendants "do not readily have at their disposal records illustrating the number of arrests made pursuant to Administrative Code § 10-135

6. There is no City regulation of tasers being challenged in the instant case. *See* Doc. 50 at ¶¶ 13-17.

7. Defendants produced this document in response to Plaintiffs' discovery request for "[a]ll training materials that pertain to or address Stun Guns and/or Tasers, which have been used at any point from January 1, 2017 to present." Doc. 35-5 ¶ 7; *see* Doc. 35-4 at 9.

specifically for the possession or use of stun guns and tasers."[8] *Id.* at 16.

4. Historical Regulations on Non-Firearm Weapons

Between the 1800s and 1900s, many states and jurisdictions enacted laws which regulated, to various extents, the carry, sale, and/or possession of Bowie knives, bludgeons, billy clubs, slungshots, sandbags, and/or toy guns—items which Defendants liken to stun guns and tasers as "non-firearm weapons." *See* Doc. 50 ¶¶ 32–43.

B. Procedural History

Plaintiffs filed their initial complaint on October 5, 2021, and an amended complaint on December 22, 2021. Docs. 1, 5 (First Amended Complaint, "FAC"). Plaintiffs allege that N.Y. Penal Law § 265.01(1) and N.Y.C. Admin. Code § 10-135 are unconstitutional, and Defendants therefore deprived them of their right to bear arms under color of state law, in violation of 42 U.S.C. § 1983, by enforcing those laws. Doc. 5 ¶¶ 50, i–ii. Plaintiffs seek (1) a declaratory judgment that § 265.01(1) and § 10-135 are facially unconstitutional, or alternatively, unconstitutional as applied; (2) a preliminary and/or permanent injunction restraining Defendants from enforcing § 265.01(1) and

8. It is unclear why Defendants mention tasers in this response, given that N.Y.C. Admin. Code § 10-135 states it does "not include an 'electronic dart gun' as such term is defined in § 265.00 of the penal law." *See* Doc. 50 ¶ 16.

§ 10-135; (3) attorney's fees and costs; and (4) any other relief the Court deems just and equitable. *Id.* ¶¶ i–v. Defendants answered the FAC on April 22, 2022. Doc. 15.

Following discovery, Plaintiffs moved for summary judgment on March 1, 2024. Doc. 25. Defendants filed an opposition and cross-motion for summary judgment on April 26, 2024. Doc. 38.

On June 12, 2024, Plaintiffs filed a notice of constitutional question, pursuant to Federal Rule of Civil Procedure 5.1(a)(2), noting that the FAC and motion for summary judgment "draw into question the constitutionality of the prohibition on 'electronic stun guns' and 'electronic dart guns' set forth in § 265.01(1) of the Penal Law under the Second and Fourteenth Amendments to the United States Constitution."[9] Doc. 51.

9. Federal Rule of Civil Procedure 5.1 provides, "[a] party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly: (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if: . . . (B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity." Fed. R. Civ. P. 5.1(a)(1)(B). In their Memorandum of Law in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, filed on April 26, 2025, Defendants had noted that Plaintiffs "fail[ed] to comport with the requirements" of Rule 5.1. Doc. 43 at 6 n.2.

II. STANDARD OF REVIEW

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Senno v. Elmsford Union Free School District*, 812 F. Supp. 2d 454, 467 (S.D.N.Y. 2011) (citing *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133, 137 (2d Cir. 2009)). A fact is "material" if it might affect the outcome of the litigation under the governing law. *Id.* The party moving for summary judgment is first responsible for demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Saenger v. Montefiore Medical Center*, 706 F. Supp. 2d 494, 504 (S.D.N.Y. 2010) (quoting *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008)).

In deciding a motion for summary judgment, the Court must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (quoting *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004)). However, in opposing a motion for summary judgment, the non-moving party may not rely on

unsupported assertions, conjecture or speculation. *Kulak v. City of New Yor*k, 88 F.3d 63, 71 (2d Cir. 1996); *see also Ridinger v. Dow Jones & Co.*, 651 F.3d 309, 317 (2d Cir. 2011). To defeat a motion for summary judgment, "the non-moving party must set forth significant, probative evidence on which a reasonable fact-finder could decide in its favor." *Senno*, 812 F. Supp. 2d at 467–68 (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 256–57, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

The same legal standard applies when analyzing cross-motions for summary judgment. *See Schultz v. Stoner*, 308 F. Supp. 2d 289, 298 (S.D.N.Y. 2004) (quoting *Aviall, Inc. v. Ryder System, Inc.*, 913 F. Supp. 826, 828 (S.D.N.Y. 1996)). "[E]ach party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." *Morales v. Quintel Entertainment, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001) (citing *Schwabenbauer v. Board of Education*, 667 F.2d 305, 314 (2d Cir. 1981)). The Court is not required to grant summary judgment in favor of either moving party. *See id.* (citing *Heublein Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993)).

III. DISCUSSION

The question before the Court is whether there is any genuine dispute of material fact as to the constitutionality of N.Y. Penal Law § 265.01 and N.Y.C. Admin. Code § 10-135 under the Second Amendment.

Appendix B

A. Applicable Law

The Second Amendment 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." U.S. Const. amend. II. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment is not limited to the "right to bear arms in a state militia," but rather includes the "individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592, 620, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). In *McDonald v. Chicago*, the Supreme Court held for the first time that the Second Amendment's protections apply fully to the states through the Due Process Clause of the Fourteenth Amendment. 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Supreme Court recognized *Heller* and *McDonald* as protecting the right of an "ordinary, law-abiding citizen to possess a handgun in the home for self-defense," and it held that individuals also have a "right to carry a handgun for self-defense *outside* the home." 597 U.S. 1, 10, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022) (emphasis added).

However, the "the right secured by the Second Amendment is not unlimited," and it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. The Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. Put differently, the Supreme Court has stated it is "fairly supported by the historical

tradition of prohibiting the carrying of 'dangerous and unusual weapons' that the Second Amendment protects the possession and use of weapons that are 'in common use at the time.'" *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627). Consistent with that principle, in holding that a ban on the possession of handguns was unconstitutional, the *Heller* Court emphasized "that the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* at 629.

After *Heller* and *McDonald*, but before *Bruen*, the Second Circuit, "as well as every other regional circuit," applied the following two-step framework for analyzing Second Amended challenges:

> At step one, [courts] asked whether a challenged law burdened conduct that fell within the scope of the Second Amendment based on its text and history. If so, [they] proceeded to step two, assessing whether the challenged law burdened the core of the Second Amendment, defined by *Heller* as self-defense in the home. If the burden was *de minimis*, the law was subject to intermediate scrutiny; if the burden was substantial and affected the core of the right, the law was subject to strict scrutiny.

Antonyuk v. James, 120 F.4th 941, 963 (2d Cir. 2024) (internal citations omitted) (collecting pre-*Bruen* cases from every circuit court except the Eighth). In *Bruen*, the Supreme Court rejected Step 2 of that framework and "set out a new 'test rooted in the Second Amendment's text, as

informed by history.'" *Id.* at 964 (quoting *Bruen*, 597 U.S. at 19). *Bruen* established a new standard for applying the Second Amendment:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 597 U.S. at 24 (citation omitted). Accordingly, therefore, in analyzing a challenge to a law on Second Amendment grounds, a court has to analyze whether "the Second Amendment's plain text covers an individual's conduct," and if it does, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Antonyuk*, 120 F.4th at 964. As to Step 1—the "plain text" inquiry—the *Bruen* Court reiterated its statement from *Heller* that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Bruen*, 597 U.S. at 28 (quoting *Heller*, 554 U.S. at 582). "By that same logic," as to Step 2—the examination of "the Nation's historical tradition of firearm regulation"—"the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." *United States v. Rahimi*, 602 U.S. 680, 689,

691–92, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024). That is, for the government to "justify its regulation" by showing that it is "'relevantly similar' to laws that our tradition is understood to permit," it need only point to a "historical analogue," not a "historical twin." *Id.* at 691, 701 (quoting *Bruen*, 597 U.S. at 30).

B. Analysis

"[T]he Second Amendment protects only the carrying of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627). In this context, "in common use at the time" refers to "weapons in use *today*," not at the time of ratification. *Maloney v. Singas*, 106 F. Supp. 3d 300, 310 (E.D.N.Y. 2015).

1. Burden of Proof for "Common Use" Analysis

The parties agree that the two-step Second Amendment test is a burden-shifting framework, whereby after Step 1, the burden shifts to the government to establish that its regulation accords with this Nation's history and tradition. *See Bruen*, 597 U.S. at 24 (emphasis added) (after Step 1, "[t]he government must *then* justify its regulation" at Step 2). However, the parties dispute whether the "common use" analysis takes place during Step 1 or Step 2 of the Second Amendment framework, and therefore, which party carries the burden to prove it.

Appendix B

Plaintiffs assert that "the question of commonality is relevant to the *historical* prong," Step 2, and is thus the government's burden, since the "'historical tradition of prohibiting the carrying of dangerous and unusual weapons' was the Court's whole justification in the first place for interpreting the Second Amendment as protecting arms 'in common use.'" Doc. 49 at 4; Doc. 26 at 10 (quoting *Heller*, 554 U.S. at 627). Plaintiffs explain that Step 1 focuses "solely on the 'plain text' of the Second Amendment," and argue that stun guns and tasers "plainly qualify" as arms, and thus Step 1 is "quickly and conclusively" satisfied. Docs. 26 at 9, 49 at 3, 4. Defendants, on the other hand, argue that the textual analysis at Step 1 itself involves a determination of whether "the weapon at issue is 'in common use' today" for lawful purposes, as the court must find that stun guns and tasers are within the *scope* of the Second Amendment's protections before turning to the question of whether the government's regulation is nonetheless valid based on the Nation's history and tradition. Therefore, Defendants argue, Plaintiffs' bear the initial burden of showing that stun guns and tasers are in "common use." Doc. 43 at 8.

This Court follows the weight of authority in determining that the "common use" analysis is part of Step 1. *See United States v. Berger*, 715 F. Supp. 3d 676, 681–82 (E.D. Pa. 2024) ("Following Bruen, most federal courts considering Second Amendment challenges address the common-use issue at step one of the analysis.") (collecting cases); *see, e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254–55 (2d Cir. 2015), *cert. denied Shew v. Malloy*, 579 U.S. 917, 136 S. Ct. 2486,

195 L. Ed. 2d 822 (2016); *United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023); *United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023), *reversed and remanded on other grounds*, 602 U.S. 680, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024). *Heller* framed the "common use" analysis as part of the determination of what "sorts of weapons" are protected by the Second Amendment. *Heller*, 554 U.S. at 627; *see also id.* at 625 (emphasis added) (stating it "accords with the historical understanding of the *scope of the right*" to bear arms to say that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes"); *Rahimi*, 602 U.S. at 735 (Kavanaugh, J., concurring) (emphasis added) (internal citation omitted) ("*Heller* . . . recognized a few categories of traditional exceptions to the right. For example, *Heller* indicated that: . . . the Second Amendment *attaches* only to weapons 'in common use[.]'"). Therefore, "[b]ecause determining which 'arms' the amendment covers is a textual matter," the "common use" analysis is to be conducted at Step 1, in assessing whether the regulated conduct is presumptively protected by the Constitution. *United States v. Lane*, 689 F. Supp. 3d 232, 252 at n.22 (E.D. Va. 2023). Plaintiffs' contrary, narrower interpretation of the textual analysis—that Step 1 is "quickly and conclusively" satisfied because stun guns and tasers "plainly qualify" as arms, Docs. 49 at 3, 4; 26 at 9—is "far too facile and would essentially eliminate the step-one analysis whenever a regulation has the slightest connection to guns." *Mills v. New York City, New York*, No. 23 Civ. 7460 (JSR), 758 F. Supp. 3d 250, 2024 U.S. Dist. LEXIS 220617, 2024 WL 4979387, at *8, *9 (S.D.N.Y. Dec. 4, 2024) (granting motion to dismiss claim that various

New York City firearm licensing regulations violated the Second Amendment, based in part on plaintiffs' failure, at step one of the Second Amendment analysis, to "show that the challenged regulations are foreclosed by the text of the Second Amendment"). Indeed, in *Bruen* itself, *at the outset of its textual analysis*, the Supreme Court established that the handguns at issue were not disputed to be "in common use" for self-defense, and only then turned to Step 2, the assessment of the Nation's historical tradition of firearm regulation. *See Bruen*, 597 U.S. at 32–34.

While the Second Circuit has not squarely discussed which party bears the burden to establish whether an arm is in "common use," it has, like the Supreme Court in *Bruen*, treated the "common use" assessment as core to the "initial" question, at Step 1, of whether the "challenged legislation impinges upon conduct protected by the Second Amendment."[10] *Cuomo*, 804 F.3d at 254–55 (considering

10. The *Cuomo* court does note that, based on *Heller*'s statement that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms," it follows that "the State bears the initial burden of rebutting" the "presumption in favor of Second Amendment protection." *Cuomo*, 804 F.3d at 257 n.73. It would seem to follow that this "burden of rebutting" is triggered *after* the "First Step: Whether the Second Amendment Applies," *id.* at 254, given the Second Amendment only "extends" to a given case, *id.*, if the first step is satisfied. On the other hand, at least one court seems to have interpreted *Cuomo* to mean that the government's burden is triggered *during* Step 1, albeit still in response to a plaintiff's presentation of prima facie evidence that the Second Amendment protects the conduct and weapon at hand. *See Avitabile v. Beach*, 368 F. Supp. 3d 404, 411, 412, 421

under the "First Step: Whether the Second Amendment Applies," that "[t]he Second Amendment protects only 'the sorts of weapons' that are (1) 'in common use' and (2) 'typically possessed by law-abiding citizens for lawful purposes.'").[11] And, following *Bruen*, courts within the

(N.D.N.Y. 2019) (finding stun guns and tasers were in "common use" where plaintiff did his best to "develop[] the 'common use' issue in discovery" through data, the State stipulated to the limited factual record developed by plaintiff, and the State offered "no meaningful contrary evidentiary showing"; and finding N.Y. Penal Law § 265.01 unconstitutional as applied to stun guns and tasers). Another court, adopting a third approach, seems to have interpreted the "presumption in favor of Second Amendment protection" as attaching *before* Step 1, with the government bearing the "initial burden of rebutting" that presumption by affirmatively "disprov[ing]" either "common use" or "typical possession by law-abiding citizens" at Step 1, that is, without the plaintiff necessarily presenting any evidence first. *Maloney v. Singas*, 351 F. Supp. 3d 222, 233, 234 (E.D.N.Y. 2018) (concluding that the government needs to affirmatively "show that, at a minimum, [the arms at issue] are not typically possessed by law-abiding citizens for lawful purposes" in order to "exempt the challenged law from Second Amendment coverage"). However, *Maloney*'s statement that "nunchakus constitute a 'bearable arm' and so the rebuttable presumption that nunchakus are protected by the Second Amendment applies," *id.* at 234, is, like Plaintiffs' proposed approach, far too sweeping and "inconsistent with *Bruen* itself." *See Mills*, 2024 U.S. Dist. LEXIS 220617, 2024 WL 4979387, at *8. In any event, here, Plaintiffs argue that "common use" is not in Step 1 whatsoever but in Step 2. The *Cuomo* court is clear that "common use" is assessed at Step 1; therefore, the Court determines it is Plaintiffs' burden to establish it.

11. Although *Bruen* dispensed with the second step of the analysis applied in *Cuomo*, "means-end scrutiny," the first part of

Second Circuit have continued to analyze "common use" at Step 1—and generally as plaintiffs' burden. *See, e.g.*, *Grant v. Lamont*, No. 22 Civ. 1223 (JBA), 2023 U.S. Dist. LEXIS 151015, 2023 WL 5533522, at *4 (D. Conn. Aug. 28, 2023) ("Under *Heller* and *Bruen*, Plaintiffs 'bear the burden of producing evidence that the specific firearms they seek to use and possess are in common use for self-defense, that the people possessing them are typically law-abiding citizens, and that the purposes for which the

---

the analysis in *Cuomo* remains consistent with *Bruen*. *See Bruen*, 597 U.S. at 19 ("Step one of the predominant framework is broadly consistent with *Heller*, . . . [b]ut *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context."); *see id.* at 18–19 (internal citations omitted) (explaining that in "means-end scrutiny," courts would "analyze 'how close the law [came] to the core of the Second Amendment right and the severity of the law's burden on that right.' The Courts of Appeals [would] generally maintain 'that the core Second Amendment right is limited to self-defense *in the home*.' If a 'core' Second Amendment right [was] burdened [by the challenged law], courts [would] apply 'strict scrutiny' and ask whether the Government [could] prove that the law [was] "narrowly tailored to achieve a compelling governmental interest. Otherwise, they [would] apply intermediate scrutiny and consider whether the Government [could] show that the regulation [was] 'substantially related to the achievement of an important governmental interest.'"); *see also Frey v. Bruen*, 2022 U.S. Dist. LEXIS 158382, 2022 WL 3996713, at *3 and n.2 (S.D.N.Y. Sept. 1, 2022) (explaining that *Bruen* rejected the *second step* of the previous two-step approach, which involved, in the *first step*, analyzing "whether the challenged legislation impinges upon conduct protected by the Second Amendment, or weapons in common use and typically possessed by law-abiding citizens for lawful purposes," and in the second step, determining the appropriate level of scrutiny).

firearms are typically possessed are lawful ones.' . . . 'If Plaintiffs establish each of those elements, the burden shifts to Defendants to justify their regulation based on *Bruen*'s requirements for establishing relevant similarity to history and tradition.'"); *Mintz v. Chiumento*, 724 F. Supp. 3d 40, 55 (N.D.N.Y. 2024) ("*Bruen*'s first step . . . requires a textual analysis, determining whether the challenger is part of 'the people' whom the Second Amendment protects, whether the weapon at issue is 'in common use' today for self-defense, and whether the proposed course of conduct falls within the Second Amendment."); *Vermont Federation of Sportsmen's Clubs v. Birmingham*, 741 F. Supp. 3d 172, 187 (D. Vt. 2024) ("[A]ccording to *Bruen*, a plaintiff must prove that the regulated weapons are in common use in order to qualify for presumptive protection under the Second Amendment. Once a plaintiff has done that, the State may justify its regulation by demonstrating that the regulation 'is consistent with the Nation's historical tradition of firearm regulation.'); *Lane v. Rocah*, No. 22 Civ. 10989 (KMK), 2024 U.S. Dist. LEXIS 1839, 2024 WL 54237, at *8 (S.D.N.Y. Jan. 4, 2024) (emphasis in original) (finding Plaintiffs' proposed conduct was "*arguably* affected with a constitutional interest," because they desired to possess weapons "in common use," and "typically used for self defense and hunting," and deferring to a later stage in the case the assessment of "whether a law prohibiting that conduct turns out to be constitutional").

Other Circuit Courts have come to the same conclusion that whether a weapon is in "common use" is part of the

"textual analysis" in Step 1. For example, the Ninth Circuit expressly stated:

> *Bruen* step one involves a threshold inquiry. In alignment with *Heller*, it requires a textual analysis, determining whether the challenger is "part of 'the people' whom the Second Amendment protects," whether the weapon at issue is 'in common use' today for self-defense," and whether the "proposed course of conduct" falls within the Second Amendment.

Alaniz, 69 F.4th at 1128.

In *United States v. Rahimi*, the Fifth Circuit similarly stated that the firearms at issue were "in common use" and thus "within the scope" of the Second Amendment, before finding that "*Bruen*'s first step [wa]s met, and the Second Amendment presumptively protect[ed] Rahimi's right to keep the weapons officers discovered in his home." 61 F.4th at 454. The Fifth Circuit then found, at Step 2, that the Government failed to demonstrate that the restriction on the Second Amendment right imposed by 18 U.S.C. § 922(g)(8) "fits within our Nation's historical tradition of firearm regulation," thus concluding that the law was facially unconstitutional. *Id.* at 460–61. The Supreme Court ultimately reversed the Fifth Circuit's finding that the statute was unconstitutional—holding that the Second Amendment in fact "*permits the disarmament* of individuals who pose a credible threat to the physical safety of others"—however its reversal was premised on its findings that the Fifth Circuit engaged in an overly

demanding historical inquiry at Step 2, and incorrectly applied the Court's "precedents governing facial challenges." *Id.* at 693, 701 (emphasis added).[12] The Court did not, however, criticize the Fifth Circuit's analysis at Step 1, which included its finding that the handguns at issue were in "common use."

Therefore, Plaintiffs bear the burden to prove, at Step 1, that stun guns and tasers are in "common use."

2. "Common Use" Analysis

"[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. Therefore, Plaintiffs must show that stun guns and tasers are in "common use" today, and that they are "typically possessed by law-abiding citizens for lawful purposes." *Cuomo*, 804 F.3d at 255–56.

Whether an arm is in "common use" is "an objective and largely statistical inquiry." *Id.* at 256. "Since *Heller*, courts in this Circuit have require[d] substantial statistical

---

12. The Supreme Court explained: "The Fifth Circuit made two errors. First, like the dissent, it read *Bruen* to require a 'historical twin' rather than a 'historical analogue.' Second, it did not correctly apply our precedents governing facial challenges . . . Rather than consider the circumstances in which Section 922(g)(8) was most likely to be constitutional, the panel instead focused on hypothetical scenarios where Section 922(g)(8) might raise constitutional concerns. That error left the panel slaying a straw man." *Rahimi*, 602 U.S. at 701 (internal citations omitted).

evidence showing the popularity of a weapon before concluding that it is protected by the Second Amendment." *Jones v. Bermudez*, No. 15 Civ. 8527 (PKC) (BCM), 2019 U.S. Dist. LEXIS 25371, 2019 WL 2493539, at *9 n.7 (S.D.N.Y. Feb. 14, 2019), *report and recommendation adopted sub nom. Jones v. Burmudez*, No. 15 Civ. 8527 (PKC) (BCM), 2019 U.S. Dist. LEXIS 54455, 2019 WL 1416985 (S.D.N.Y. Mar. 29, 2019); *see also Berger*, 715 F. Supp. 3d at 691 (citation omitted) ("Every post-*Heller* case to grapple with whether a weapon is 'popular' enough to be considered 'in common use' has relied on statistical data of some form."). Courts have applied different statistical methodologies, such as evaluating the "raw" total number of a particular arm in the U.S., considering the "percentage and proportion" of ownership of that specific arm relative to total weapon ownership, and taking into account how many jurisdictions "allow or bar a particular weapon." *Berger*, 715 F. Supp. 3d at 691 (citation omitted). "[T]ypical possession," meanwhile, requires analyzing "both broad patterns of use and the subjective motives of gun owners." *Cuomo*, 804 F.3d at 256. "Looking solely at a weapon's association with crime . . . is insufficient. [The Court] must also consider more broadly whether the weapon is 'dangerous and unusual' in the hands of law-abiding civilians." *Id.* As to this "typical possession" analysis, the Second Circuit has recognized that "reliable empirical evidence of lawful possession for lawful purposes [i]s 'elusive,' beyond ownership statistics." *Id.* at 257.

Here, Plaintiffs have not provided any studies, reports, or data for the Court to conduct a "statistical

inquiry" into whether stun guns and tasers are in common use. *Id.* at 256. Plaintiffs do not "even identify the most basic of statistics including, for example, the number of stun guns and/or tasers purchased in the United States for any given year." Doc. 43 at 11. Thus, Plaintiffs provide "no evidence whatsoever to support their claim that stun guns and tasers are in common use in the United States for self-defense, let alone in New York City." *Id.* at 10–11.

Plaintiffs' reliance on "findings and conclusions" from non-binding cases is of no moment. Doc. 49 at 7; *see People v. Yanna*, 297 Mich. App. 137, 144, 824 N.W.2d 241 (Ct. App. 2012) (citation omitted) ("Hundreds of thousands of Tasers and stun guns have been sold to private citizens, with many more in use by law enforcement officers."); *Avitabile*, 368 F. Supp. at 411 ("[B]ased on the limited data available, the parties agree there are at least 300,000 tasers and 4,478,330 stun guns owned by private citizens across the United States."); *O'Neil v. Neronha*, 594 F. Supp. 3d 463, 473 (D.R.I. 2022) ("Defendants agree that millions of stun guns have been sold nationwide[.]"). Putting aside that the phrases "hundreds of thousands" and "millions" are indefinite, and that the figures in *Avitabile* were based on "limited data," Plaintiffs do not provide a legal basis for the Court to adopt those findings.[13]

13. Plaintiffs suggest that the Court should rely on those findings by quoting a Ninth Circuit case, *Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023), *vacated on rehearing en banc*, which provided: "[T]he historical research required under *Bruen* involves issues of so-called 'legislative facts'—those 'which have relevance to legal reasoning and the lawmaking process,' such as 'the formulation of a legal principle or ruling by a judge or court'—rather than

Moreover, Plaintiffs do not even attempt to argue how these scant sources could inform whether stun guns and tasers are commonly used for lawful purposes.

Plaintiffs erroneously state that the Second Circuit in *Cuomo* found a pump-action rifle was in "common use," without any "evidence going to the issue." Doc. 49 at 4. The *Cuomo* court considered the constitutionality of two laws regulating weapons and large-capacity magazines: a New York law, and a Connecticut law regulating "183 particular assault weapons," of which just one of the 183 weapons, the pump-action rifle, was a "non-semiautomatic firearm." *Cuomo*, 804 F.3d at 250 and n.17. The court initially found, based on various statistics offered by the plaintiff, that the assault weapons and large-capacity magazines being regulated by the laws at issue were "in common use." *Id.* at 255. Then, it analyzed whether the weapons were additionally "typically possessed by law-abiding citizens for lawful purposes"; after recognizing the difficulty of that analysis, the court opted to "*assume without deciding*" that the semiautomatic weapons were within the scope of the Second Amendment's protections. *Id.* at 256, 257 n.73. However, as to the pump-action rifle only, *i.e.* as to the "single non-semiautomatic firearm" covered by the Connecticut law, the court explicitly *decided*, as opposed to "*assum[ing] without deciding*," that the Second Amendment presumptively applied. *Id.* at

---

adjudicative facts, which 'are simply the facts of the particular case.'" Doc. 49 at 7 n.1 (quoting *Teter*, 76 F.4th at 946–47 (internal citation omitted)). However, the quoted language is not in reference to a "common use" analysis, nor do Plaintiffs provide any explanation as to why it should apply thereto.

257 n.73. The court reasoned that, since the government "focused on semiautomatic weapons," it "failed to make any argument that this pump-action rifle [wa]s dangerous, unusual, or otherwise not within the ambit of Second Amendment protection," such that "the presumption that the Amendment applies" to it "remain[ed] unrebutted." *Id.*; *see Virginia v. Black*, 538 U.S. 343, 369, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting Black's Law Dictionary 1190 (6th ed. 1990)) (defining "prima facie evidence" as that which, "if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports"). Therefore, the *Cuomo* court's determination as to pump-action rifles was entirely separate from its "common use" analysis, and it nowhere suggested "common use" can be established without any statistical evidence whatsoever.

Plaintiffs also overstate the Supreme Court's holding in *Caetano v. Massachusetts*, 577 U.S. 411, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (2016), arguing that the case "erases any conceivable doubt concerning the weapons at issue." Doc. 49 at 3. In *Caetano*, the Court vacated a Massachusetts court's judgment upholding a ban on the possession of stun guns, but it did so specifically because "the explanation the Massachusetts court offered for upholding the law contradict[ed] th[e] Court's precedent." *Caetano*, 577 U.S. at 412. The Court explained that the Massachusetts court (1) improperly relied on the fact that stun guns "were not in common use at the time of the Second Amendment's enactment," and (2) it improperly concluded stun guns were "unusual" because they are

"a thoroughly modern invention"—both in contradiction with the principles established in *Heller*. *Id.* at 411, 412 (quoting *Commonwealth v. Caetano*, 470 Mass. 774, 781, 26 N.E.3d 688 (2015), *judgment vacated sub nom. Caetano v. Massachusetts*, 577 U.S. 411, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (2016)).[14] In other words, *Caetano* reiterated that the Second Amendment can extend to arms "that were not in existence at the time of the founding." *Id.* at 412 (quoting *Heller*, 554 U.S. at 582); *see also Bruen*, 597 U.S. at 28 (same). The *Caetano* Court did not, however, conclusively determine, because it was not required to, that stun guns and tasers are in "common use."[15]

In sum, because Plaintiffs have failed to provide any evidence that stun guns and tasers are in "common use";

---

14. The Court additionally rejected the Massachusetts Court's third explanation for its holding that the Second Amendment did not protect stun guns: that the record did not "suggest that [stun guns] are readily adaptable to use in the military." *Caetano*, 470 Mass. at 781. The Court found this reasoning also contradicted *Heller*, as "*Heller* rejected the proposition 'that only those weapons useful in warfare are protected.'" *Caetano*, 577 U.S. at 412 (quoting *Heller*, 554 U.S. at 624–25).

15. The Court notes, however, that in concurrence, Justice Alito, joined by Justice Thomas, states: "While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment." *Caetano*, 577 U.S. at 420 (Alito, J. concurring). However, a concurrence is not binding precedent. *See Maryland v. Wilson*, 519 U.S. 408, 413, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997) (noting that a statement "contained in a concurrence" did not "constitute[] binding precedent").

they have clearly not "set forth significant, probative evidence on which a reasonable fact-finder could decide in [their] favor." *Senno*, 812 F. Supp. 2d at 467–68. Therefore, no "reasonable jury could return a verdict" that stun guns and tasers are presumptively protected by the Second Amendment at Step 1 of the analysis, and the Court does not proceed to Step 2. *Id.* at 467; *see Cuomo*, 804 F.3d at 254 ("If the challenged restriction does not implicate conduct within the scope of the Second Amendment, our analysis ends and the legislation stands.").

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' motion for summary judgment is DENIED, and Defendants' cross-motion for summary judgment is GRANTED.

The Clerk of Court is respectfully directed to terminate the motions, Docs. 25 and 38, and close the case.

It is SO ORDERED.

Dated: March 24, 2025
New York, New York

/s/ Edgardo Ramos
EDGARDO RAMOS, U.S.D.J.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 24, 2025

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 CIVIL 8208 (ER)

NUNZIO CALCE, ALLEN CHAN, SHAYA GREENFIELD, AMANDA KENNEDY, RAYMOND PEZZOLI, SECOND AMENDMENT FOUNDATION, AND FIREARMS POLICY COALITION, INC.,

Plaintiffs,

– against –

THE CITY OF NEW YORK AND JESSICA TISCH, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT,

Defendants.

Filed March 24, 2025

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED**: That for the reasons stated in the Court's Opinion & Order dated March 24, 2025, Plaintiffs' motion

for summary judgment is DENIED, and Defendants' cross-motion for summary judgment is GRANTED. Accordingly, the case is closed.

Dated: New York, New York

March 24, 2025

TAMMI M. HELLWIG
Clerk of Court

BY: /s/ Tammi Hellwig
Deputy Clerk

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. II

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.

U.S. Const. amend. XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix D

N.Y. Penal Law § 265.00(15-a), (15-c)

Definitions

15-a. "Electronic dart gun" means any device designed primarily as a weapon, the purpose of which is to momentarily stun, knock out or paralyze a person by passing an electrical shock to such person by means of a dart or projectile.

* * *

15-c. "Electronic stun gun" means any device designed primarily as a weapon, the purpose of which is to stun, cause mental disorientation, knock out or paralyze a person by passing a high voltage electrical shock to such person.

Appendix D

N.Y. Penal Law § 265.01(1)

Criminal possession of a weapon in the fourth degree

A person is guilty of criminal possession of a weapon in the fourth degree when:

1) He or she possesses any firearm, electronic dart gun, electronic stun gun, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shuriken, or throwing star;

Appendix D

N.Y.C. Admin. Code § 10-135

Prohibition on sale and possession of electronic stun guns.

a. As used in this section, "electronic stun gun" shall mean any device designed primarily as a weapon, the purpose of which is to stun, render unconscious or paralyze a person by passing an electronic shock to such person, but shall not include an "electronic dart gun" as such term is defined in section 265.00 of the penal law.

b. It shall be unlawful for any person to sell or offer for sale or to have in his or her possession within the jurisdiction of the city any electronic stun gun.

c. Violation of this section shall be a class A misdemeanor.

d. The provisions of this section prohibiting the possession of electronic stun guns shall not apply to police officers as defined in the criminal procedure law, who are operating under regular department procedure or operation guidelines established by their department.

e. The provisions of this section shall not apply to manufacturers of electronic stun guns or importers and exporters or merchants of electronic stun guns, when such stun guns are

scheduled to travel in the course of international, interstate, or intrastate commerce to a point outside the city. Such bulk shipments shall remain in their original shipping package, unopened, except for inspection and possible subdivision for further movement in interstate or intrastate commerce to a point outside the city.