

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
SJC No. 13432

COMMONWEALTH

v.

DAVID E. CANJURA,

Defendant

**MOTION OF *AMICI CURIAE* KNIFE
RIGHTS, INC., THE KNIFE RIGHTS
FOUNDATION, INC., TO SUBMIT
VERY SHORT POST ARGUMENT
BRIEF**

Now comes *pro hac vice* counsel for *amici curiae* Knife Rights, Inc, and The Knife Rights Foundation, Inc. and hereby respectfully moves the Court pursuant to Appellate Procedure Rule 22(c)(2) for an Order allowing *amici curiae* Knife Rights, Inc. and The Knife Rights Foundation, Inc., to submit a very short post argument brief to correct a likely dispositive mistake of law at oral argument. As grounds therefore, movants rely on the accompanying Affidavit of Daniel L. Schmutter.

Respectfully submitted,

s/ Daniel L. Schmutter

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January 17, 2024

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the eFileMa system will be sent electronically to the registered participants as identified on the eFileMa Party Information.

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**AFFIDAVIT IN SUPPORT OF MOTION
OF *AMICI CURIAE* KNIFE RIGHTS, INC.,
THE KNIFE RIGHTS FOUNDATION,
INC., TO SUBMIT VERY SHORT POST
ARGUMENT BRIEF**

I, Daniel L. Schmutter, hereby make the following affidavit under oath:

1. I, Daniel L. Schmutter, am an attorney at law of the States of New Jersey and New York and a member of the law firm of Hartman & Winnicki, P.C. I have been admitted *pro hac vice* in this matter as counsel to *amici curiae* Knife Rights, Inc. and The Knife Right Foundation, Inc.
2. I submit this affidavit in support of the motion of *amici* to submit a very short post argument brief as to a likely dispositive mistake of law arising at oral argument.
3. The court held oral argument in this matter on December 4, 2023.
4. Upon viewing the oral argument it became clear that several of the Justices have a mistaken understanding of the so-called “common use” test for determining whether an arm is protected by the Second Amendment.
5. At several points during the argument questions from several of the Justices suggested incorrectly that to be considered “in common use” and thus protected by the Second Amendment an arm must be in common use today “for self-defense.” (*See, e.g.*, oral argument at 7:00-13:35). Justice George makes this error clear in the following colloquy with counsel for Canjura beginning at 10:47:

You gave us a lot of numbers in terms of how many switchblades are in the stream of commerce, but it doesn't answer the question about whether or not they're in common use for self-defense. Just because there's a whole lot of switchblades out there doesn't mean there are a whole lot of people carrying them for self-defense. It's a very different question.

6. This is a grave error and a material misreading of *Heller* and threatens to result in the wrong disposition by the Court. The test is *not* whether the arm is in common use *for self-defense*. Unfortunately, the term "common use" is misleading because the lynchpin of the "common use test" is not actual use but possession. The reason for this is plain from *Heller*.
7. The *actual* test is whether the arms that have been banned are "typically possessed by law-abiding citizens for lawful purposes." *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008); *Caetano v. Massachusetts*, 577 U.S. 411, 416 (2016) (Alito, J., concurring). *Heller* actually speaks of possession rather than use. And the purpose can be for *any lawful purpose*, not merely for self-defense.
8. In *Heller*, key to the Supreme Court's holding that the District of Columbia could not ban handguns was the fact that handguns are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family . . ." *Heller*, 554 U.S. at 628. Thus it is the choice of the people that matters, not how they actually end up using them if at all.
9. Thus, the facts in the record identified by Justice George at oral argument are fully dispositive of the case. "[T]here's a whole lot of switchblades out there" is all the Court needs to know to hold in favor of Canjura because that is the only fact relevant to the common use test. Both Canjura and *amici curiae* Knife Rights, Inc. and The Knife Rights Foundation, Inc. have already established this key fact.

10. Accordingly, *amici curiae* Knife Rights, Inc. and The Knife Rights Foundation, Inc. respectfully request that the Court allow *amici* to submit a short post argument brief of no more than 3 pages setting forth the foregoing or in the alternative accepting the foregoing paragraphs on the merits as filed.
11. The above information is true and accurate to the best of my knowledge and belief.

Signed under the penalties of perjury this 17th day of January in the year 2024.

s/ Daniel L. Schmutter
Daniel L. Schmutter, Esq.