
United States Court of Appeals
for the
First Circuit

Case No. 18-1545

DAVID SETH WORMAN; ANTHONY LINDEN; JASON WILLIAM
SAWYER; PAUL NELSON CHAMBERLAIN; GUN OWNERS' ACTION
LEAGUE, INC.; ON TARGET TRAINING, INC.; OVERWATCH OUTPOST,

Plaintiffs-Appellants,

NICHOLAS ANDREW FELD,

Plaintiff,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS, BOSTON

**BRIEF FOR *AMICUS CURIAE* BRADY CENTER
TO PREVENT GUN VIOLENCE IN SUPPORT
OF APPELLEES AND AFFIRMANCE**

MARIEL GOETZ
(application in progress)
BRADY CENTER TO PREVENT
GUN VIOLENCE
840 First Street NE, Suite 400
Washington, DC 20002
(202) 370-8159
mgoetz@bradymail.org

KIMBERLY A. MOTTLEY
LAURA STAFFORD
PROSKAUER ROSE LLP
One International Place
Boston, Massachusetts 02110
(617) 526-9600
kmottley@proskauer.com
lstafford@proskauer.com

Attorneys for Amicus Curiae

– against –

MAURA HEALEY, in her official capacity as Attorney General of the Commonwealth of Massachusetts; DANIEL BENNETT, in his official capacity as the Secretary of the Executive Office of Public Safety and Security; KERRY GILPIN, in her official capacity as Superintendent of the Massachusetts State Police,

Defendants-Appellees,

CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MASSACHUSETTS STATE POLICE,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c)(1), the Brady Center to Prevent Gun Violence states that it is not a corporation but rather is a 501(c)(3) social welfare organization.

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE1

PRELIMINARY STATEMENT2

ARGUMENT4

 I. The Second Amendment Does Not Confer The Right To Bear Assault
 Weapons And Large Capacity Magazines.5

 A. Assault weapons and large capacity magazines are not protected by
 the Second Amendment because they are most useful in military
 service.6

 B. Assault weapons and large capacity magazines are not, and never
 have been, “commonly used” “for lawful purposes.”9

 C. Assault weapons and large capacity magazines are dangerous and
 unusual.14

 II. Even If The Ban Implicates The Second Amendment, It Is Constitutional
 Because It Is Substantially Related To The Important Governmental
 Objective Of Protecting Public Safety And Preventing Gun Violence. ..20

 A. Intermediate scrutiny applies here.21

 B. The ban is substantially related to the Commonwealth’s interest in
 protecting its citizens.23

CONCLUSION28

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bonidy v. U.S. Postal Serv.</i> , 790 F.3d 1121 (10th Cir. 2015)	22
<i>Clark v. Jeter</i> , 486 U.S. 456 (1988).....	23
<i>Day v. State</i> , 37 Tenn. 496 (1857).....	15
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	passim
<i>Drake v. Filko</i> , 724 F.3d 426 (3d Cir. 2013)	22
<i>English v. State</i> , 35 Tex. 473 (1871).....	15
<i>Ezell v. City of Chicago</i> , 651 F.3d 684 (7th Cir. 2011)	22
<i>Gould v. Morgan</i> , --- F.3d ---, No. 17-2202, 2018 WL 5728640 (1st Cir. Nov. 2, 2018)	4, 21, 23, 24
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011).....	22, 25, 26
<i>Hightower v. City of Boston</i> , 693 F.3d 61 (1st Cir. 2012).....	11
<i>Kachalsky v. Cty. of Westchester</i> , 701 F.3d 81 (2d Cir. 2012)	22
<i>Kolbe v. Hogan</i> , 849 F.3d 114 (4th Cir. 2017)	9, 14, 28

<i>Kolbe v. O’Malley</i> , No. 13-cv-2841, 2014 WL 4243633 (D. Md. Aug. 22, 2014).....	10, 13
<i>McDonald v. City of Chicago</i> , 561 U.S 742 (2010).....	1, 11, 21
<i>Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives</i> , 700 F.3d 185 (5th Cir. 2012)	16, 22
<i>New York State Rifle & Pistol Ass’n, Inc. v. Cuomo</i> , 804 F.3d 242 (2d Cir. 2015)	26, 27
<i>Schenck v. Pro-Choice Network of W.N.Y.</i> , 519 U.S. 357 (1997).....	24
<i>Schrader v. Holder</i> , 704 F.3d 980 (D.C. Cir. 2013).....	22
<i>Tyler v. Hillsdale Cty. Sheriff’s Dep’t</i> , 837 F.3d 678 (6th Cir. 2016)	21, 23
<i>United States v. Chester</i> , 628 F.3d 673 (4th Cir. 2010)	14, 21, 22
<i>United States v. Marzzarella</i> , 614 F.3d 85 (3d Cir.2010)	14, 22
<i>United States v. Masciandaro</i> , 638 F.3d 458 (4th Cir. 2011)	22
<i>United States v. Morrison</i> , 529 U.S. 598 (2000).....	24
<i>United States v. Reese</i> , 627 F.3d 792 (10th Cir.2010)	22
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	24
<i>United States v. Skoien</i> , 614 F.3d 638 (7th Cir. 2010) (en banc)	22

<i>Woollard v. Gallagher</i> , 712 F.3d 865 (4th Cir. 2013)	11, 21, 22
--	------------

STATUTES

G.L. c. 140, §§ 121 and 131M	11
------------------------------------	----

OTHER AUTHORITIES

Adam Winkler, <i>Gunfight: The Battle over the Right to Bear Arms in America</i> 113-18 (2011)	15
ATF, <i>Study on the Importability of Certain Shotguns</i> (2011)	8
ATF, <i>Youth Crime Gun Interdiction Initiative Report</i> (1998).....	12
Brady Center, <i>Assault Weapons: Mass Produced Mayhem</i> , (Oct. 2008)	13
C. Ingraham, <i>There Are Now More Guns Than People in the United States</i> , Wash. Post (Oct. 5, 2015)	10
Christopher Koper, <i>America’s Experience with Federal Assault Weapons Ban, 1994-2004</i> , in <i>Reducing Gun Violence in America</i> 157, 167 (Daniel W. Webster and John S. Vernick eds., 2013).....	17
David Hemenway, Sara J. Solnick, <i>The epidemiology of self-defense gun use: Evidence from the National Crime Victimization Surveys 2007-2011</i> , Preventive Medicine, Oct. 2015, 79:22-27.	13
Dep’t of the Army, <i>Rifle Marksmanship: M16-/M4-Series Weapons</i> (August 2008)	9
Dep’t of the Treasury, <i>Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles</i> (Apr. 1998)	8
Kevin Ashton, <i>The Physics of Mass Killing</i> (Jan. 24, 2013), http://kevinjashton.com/2013/01/24/the-physics-of-mass-killing/	18
Mayors Against Illegal Guns, <i>Mass Shootings Since January 20, 2009</i> (Feb. 2013).....	18

Samantha Raphelson, *How Often Do People Use Guns in Self-Defense?*, NPR (April 13, 2018), <https://www.npr.org/2018/04/13/602143823/how-often-do-people-use-guns-in-self-defense>13

Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 502-13 (2004).....15

Violence Policy Ctr., *New Data Shows One in Four Law Enforcement Officers Slain in the Line of Duty in 2016 Felled By an Assault Weapon* (Feb. 27, 2018), <http://vpc.org/press/new-data-shows-one-in-four-law-enforcement-officersslain-in-the-line-of-duty-in-2016-felled-by-an-assault-weapon/>27

4 William Blackstone, *Commentaries* (1769).....16

INTEREST OF AMICUS CURIAE¹

The Brady Center to Prevent Gun Violence is a non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. In support of that mission, the Brady Center files this brief as *amicus curiae* in support of Appellees.

The Brady Center has a substantial interest in ensuring that the Second Amendment is not interpreted or applied in a way that would jeopardize the public's interest in protecting families and communities from the devastating effects of gun violence. The Brady Center has filed numerous *amicus curiae* briefs in cases concerning gun violence prevention and firearms laws, including in the Massachusetts Supreme Judicial Court's gun storage case, *Jupin v. Kask*; the First Circuit's case addressing the requirement that guns sold in Massachusetts contain load indicators, *Draper v. Healey*; the United States Supreme Court's Second Amendment cases, *District of Columbia v. Heller* and *McDonald v. City of Chicago*; and numerous cases in other circuits upholding bans on assault weapons and large capacity magazines. For all of these reasons, the Brady Center has a strong interest in the outcome of this appeal.

¹ All parties have consented to the filing of this brief. No counsel to a party authored the brief in whole or in part, and no person other than *amicus* and its counsel contributed any money towards its preparation or submission.

PRELIMINARY STATEMENT

In 2018 alone, two high-profile mass shootings have taken dozens of lives: 17 students and staff members at Marjory Stoneman Douglas High School in Parkland, Florida, and, most recently, 11 people at the Tree of Life Synagogue in Pittsburgh, Pennsylvania. These shootings occurred on the heels of two of the deadliest mass shootings in American history: at the Pulse nightclub in Orlando, Florida, where 49 people were killed; and at a country music concert in Las Vegas, Nevada, where 58 people lost their lives and several hundred were injured. Five years before that, a gunman shot and killed 20 schoolchildren and six adults at Sandy Hook Elementary School.

Each of these mass shootings—and many others not identified here—was perpetrated by assailants armed with military-style assault weapons and large capacity magazines. Assault weapons are the weapons of choice for mass shooters for a reason: they permit assailants to fire high-velocity ammunition at a rapid rate and from a considerable distance, with maximum lethality. Those same features render these weapons uniquely inappropriate for self-defense within the home or for hunting.

Recognizing the significant public risk associated with assault weapons and large capacity magazines, the Massachusetts legislature in 1998 passed a law forbidding their sale or possession in the Commonwealth. Studies have

demonstrated that bans like the Commonwealth's reduce the rate of crimes committed using assault weapons. For good reason, numerous other states, including Maryland, New York, and Connecticut, as well as the District of Columbia, have enacted similar bans. All have been upheld as constitutional.

Although the benefits to public safety are undeniable, Appellants contend that the Massachusetts ban nonetheless tramples on their Second Amendment rights because they cannot purchase certain particular assault weapons in the Commonwealth. That argument fails for at least two reasons.

First, the Second Amendment does not guarantee a right to possess Appellants' preferred style of firearm or ammunition—particularly where, as here, their preferred weapon is most suited for military uses. As the Supreme Court has held, the Second Amendment protects a citizen's right to keep and bear arms for self-defense in his or her own home. The challenged ban does not impact Appellants' core Second Amendment right because it does not prevent them from exercising that right; they may still purchase, keep, or use a wide range of firearms in their homes and elsewhere. Indeed, the Massachusetts ban has no impact whatsoever on Appellants' right to purchase, keep, or use handguns, the firearm most commonly used for self-defense.

Second, even if the Massachusetts ban did implicate Appellants' Second Amendment rights, the ban withstands constitutional scrutiny because it is

substantially related to a significant government interest. Protecting the public’s health and safety is a compelling interest of the Commonwealth, as this Court repeatedly has held in upholding other gun laws. Banning assault weapons and large capacity magazines—the weapons of choice in the deadliest mass shootings—is an effective means of protecting that interest.

ARGUMENT

Under the two-step approach recently adopted by the First Circuit, the Massachusetts ban easily survives Second Amendment scrutiny. *See, e.g., Gould v. Morgan*, --- F.3d ---, No. 17-2202, 2018 WL 5728640, at *6-7 (1st Cir. Nov. 2, 2018) (upholding the Commonwealth’s firearms licensing statute from Second Amendment challenge). In the first step, the Court must ask “whether the challenged law burdens conduct that falls within the scope of the Second Amendment’s guarantee.” *Id.* at *6. This “backward-looking inquiry” asks “whether the regulated conduct was understood to be within the scope of the right at the time of ratification.” *Id.* If the law does not impose a burden on conduct within the scope of the Second Amendment right, the inquiry ends there and the law is valid. If it does burden conduct within the scope of the Second Amendment right, the court must “determine what level of scrutiny is appropriate and must proceed to decide whether the challenged law survives that level of scrutiny.” *Id.*

The Massachusetts ban does not burden Appellants' Second Amendment rights because, as numerous other circuits have held, the Second Amendment does not protect the right to possess particularly dangerous, military-style assault weapons and large capacity magazines. These arms are not commonly used by law-abiding, responsible citizens for lawful purposes, and never have been at any point in history.

Even if the ban did burden conduct protected by the Second Amendment, however, it is plainly constitutional because it is reasonably adapted to the important governmental objective of promoting public safety.

I. The Second Amendment Does Not Confer The Right To Bear Assault Weapons And Large Capacity Magazines.

“Like most rights, the right secured by the Second Amendment is not unlimited” and does not amount to “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). In *Heller*, the Supreme Court identified numerous “presumptively lawful regulatory measures,” including, for example, “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27, n.26. The Court also explicitly noted the constitutionality of “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons,’” holding that it would be constitutional to ban M-16 rifles and other

“weapons that are most useful in military service.” *Id.* at 627 (citations omitted).

The right to possess assault weapons and large capacity magazines falls squarely within this “historical tradition” of banning weapons that are “most useful in military service” or that are “dangerous and unusual.”

A. Assault weapons and large capacity magazines are not protected by the Second Amendment because they are most useful in military service.

According to the Supreme Court, “weapons that are most useful in military services—M-16 rifles and the like—may be banned.” *Heller*, 554 U.S. at 627.

Each of the assault weapons and large capacity magazines covered by the ban were either designed for military use or derived from weapons designed for military use, and are therefore not protected by the Second Amendment.

The AK and similar models of assault weapons, all of which fall within the ban, were originally developed during World War II for national governments, including the U.S., the U.K., Germany, and the Soviet Union, to use as weapons of war. *See* December 15, 2017 Declaration of James E. Yurgealitis (“Yurgealitis Decl.”), Dkt. No. 61-6, at ¶¶ 27-35. The AR models regulated by the ban have characteristics very similar to those found in the AK and other similar models. *Id.* at ¶¶ 34-35, 46-48 (“These civilian versions [AR-15/M-16], including the Colt AR-15, retained the performance capacities of the military weapons they were based on, including the effective range, muzzle velocity and semiautomatic rate of fire.

In addition, the weapons retained the capability to accommodate large capacity magazines (more than ten rounds) as originally issued for military use.”); December 12, 2017 Affidavit of David M. Bolcome (“Bolcome Aff.”), Dkt. No. 61-1 at ¶ 11 (“AR-15s have the same functionality and operating system as the M16.”).

Both the AK and AR models are configured comparably to their original military counterparts to achieve a similar rate of fire, muzzle velocity, and range. Yurgealitis Decl. at ¶ 57. The AR-15, for example, was designed to meet U.S. Army requirements for a gun that could penetrate body armor and a steel helmet, hold a detachable 20-round magazine, have a weight of less than 6 pounds fully loaded, and allow troops to rapidly fire multiple rounds in a controlled, yet dispersed pattern. December 15, 2017 Declaration of Elizabeth Kaplan in Support of Defendants’ Motion for Summary Judgment (“Kaplan Decl.”), Dkt. No. 65, Ex. 36, at 17; Ex. 58, at C-1; Ex. 75, at 10. Large capacity magazines were likewise developed prior to or during WWI for use as weapons of war. Yurgealitis Decl. at ¶¶ 44-45. The increased capacity for ammunition improved the lethality of small arms in combat because it reduced reloading time, allowing the soldier to spend more time shooting and killing enemy soldiers. *Id.* at ¶ 45.

These features render assault weapons, including the AK and AR models, particularly suited for military uses. According to the ATF, while assault rifles are

“no longer machineguns,” they still have “a military configuration that was designed for killing and disabling the enemy and that distinguished the rifles from traditional sporting rifles.” Kaplan Decl. Ex. 66, at 1. Large capacity magazines are also “particularly designed and most suitable for military and law enforcement applications,” ATF, *Study on the Importability of Certain Shotguns*, (2011), and “serve[] no sporting purpose,” Dep’t of the Treasury, *Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles* (Apr. 1998).

Because they can be fired rapidly, and are often used with large capacity magazines, assault weapons cause a higher number of wounds in a higher number of victims than non-assault weapons. November 8, 2017 Deposition Transcript of Christopher B. Colwell (“Colwell Dep.”), Dkt. No. 81-6, at 110:18-24. In military testing, the AR-15 performed so well that the military concluded a five-man squad armed with AR-15s was as good or better “in hit-and-kill potential in combat-style tests” than an 11-man squad armed with M14 rifles. *Id.* at 19. In field testing in Vietnam, troops reported that “[a]mputations of limbs, massive body wounds, and decapitations had all been caused by the very high velocity AR-15 projectiles.” Kaplan Decl. Ex. 76, at 131. The Army’s Marksmanship Manual recognizes that semiautomatic assault weapons such as those subject to the ban are highly effective for military purposes when it instructs soldiers to utilize semiautomatic modes at

most ranges because it is “superior to automatic fire in all measures.” Dep’t of the Army, *Rifle Marksmanship: M16-/M4-Series Weapons* (August 2008).

Where the civilian and military versions of these weapons differ, civilians can readily purchase modifications to close the gap. *See* Bolcome Aff. ¶¶ 25-28 (describing bump stocks, trigger cranks, binary triggers, and large capacity feeding devices). For example, AR models can readily be modified to fire at even faster rates. *See* Yurgealitis Decl. at ¶ 52 (describing “modular construction” of AR type rifles, making them easier to modify to the owner’s preferences), ¶ 66 (describing practice of cosmetically modifying banned firearms to meet “the features test”), ¶¶ 72-75 (noting that parts can be purchased to modify weapons).

In light of their similarities to and effectiveness as military weapons, the banned assault weapons and large capacity magazines are not protected by the Second Amendment. *Kolbe v. Hogan*, 849 F.3d 114, 135-37 (4th Cir. 2017).

B. Assault weapons and large capacity magazines are not, and never have been, “commonly used” “for lawful purposes.”

The Second Amendment does not protect weapons that are “not typically possessed by law-abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 625. To be protected under the Second Amendment, a weapon must be “in common use” for lawful purposes by law-abiding users “at the time of ratification.” *Id.* at 627. Even assuming that “common use” may be measured by looking to modern day weapons’

predecessors, no such predecessors of either assault weapons or large-capacity magazines were in common use at the time of the Second Amendment's ratification. Brief of Defendants-Appellees ("C'wealth Br.") at 26-28 (refuting "lineal descendants" arguments). Accordingly, these weapons are beyond the scope of, and thus not subject to, the Second Amendment.

Nor are assault weapons or large capacity magazines in "common use" today, to the extent that is relevant to the Court's analysis. Assault weapons represent only a small fraction of privately-owned guns, comprising only about 3% of the approximately 357 million guns in the United States. *See* C. Ingraham, *There Are Now More Guns Than People in the United States*, Wash. Post (Oct. 5, 2015). Other courts have upheld laws similar to the Massachusetts law in part because assault weapons represent a small component of the civilian gun stock in the U.S. *Kolbe v. O'Malley*, No. 13-cv-2841, 2014 WL 4243633, at *11 (D. Md. Aug. 22, 2014). Ownership of these weapons is also highly concentrated, as only 1% of the U.S. population owns such a weapon. *Kolbe*, 2014 WL 4243633, at *11. These small percentages also do not establish that these guns are commonly used for lawful purposes. Under any reasonable interpretation of the phrase, the weapons regulated by the ban are not in "common use." Indeed, if less than 1% could mean "common," it is hard to imagine what "uncommon" would be.

Even if Appellants somehow could show that assault weapons were commonly owned (they are not), the Massachusetts ban does not prohibit *all* such weapons. Instead, the ban targets a specific list of weapons designed to mimic military-grade weapons, as well as any weapons that are mere copies or duplicates of their military counterparts. *See* G.L. c. 140, §§ 121 and 131M. Many other semiautomatic weapons, including semiautomatic handguns and certain hunting rifles, were specifically exempted from the ban. G.L. c. 140, §§ 121 and 131M.

Instead of banning all semiautomatic weapons, the ban covers specific weapons sharing specific features that make them exceptionally dangerous—and that render them particularly inappropriate for lawful purposes, such as self-defense in the home, the primary lawful purpose identified by *Heller* as the core of the Second Amendment. *See Woollard v. Gallagher*, 712 F.3d 865, 874 (4th Cir. 2013) (“*Heller* . . . was principally concerned with the ‘core protection’ of the Second Amendment: ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’”) (quoting *Heller*, 554 U.S. at 634-35)); *see also McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (reiterating that the “central holding in *Heller*” is that “the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home”).

The functionalities of assault weapons and large capacity magazines are not suited for self-defense or hunting. With respect to self-defense, this Court has

already recognized as much, observing that assault weapons, unlike handguns, are not “weapons of the type characteristically used to protect the home.” *Hightower v. City of Boston*, 693 F.3d 61, 71 (1st Cir. 2012). The record evidence confirms this simple truth. As Mr. James Yurgealitis, a former law enforcement officer and former Senior Special Agent/Program Manager for ATF at the U.S. Department of Justice, testified, the banned weapons incorporate military features, including battlefield ranges and increased muzzle velocity, that render them particularly ill-suited for self-defense in the home. Using a banned weapon in one’s home—a confined space—poses serious risks not just to the structure of the home, but also to by-standers and family members who could be hit with shredded wall, pipe, or electronic fragments. Yurgealitis Decl. at ¶ 79. Moreover, Mr. Yurgealitis further testified that the complex firing mechanisms on assault weapons do not lend themselves to operation in stressful situations, such as confrontations within the home. *Id.* at ¶ 80-81. Rather, these weapons are better suited for offensive use (as in the military) to inflict as many casualties in as short a time period as possible and with the least amount of effort required. This lethality also makes assault weapons a poor choice for hunting. In a 1998 survey, the “vast majority” of hunting guides reported that “*none* of their clients used [assault weapons] on hunting trips during the past 2 hunting seasons.” ATF, *Youth Crime Gun Interdiction Initiative Report* (1998) (emphasis added).

Large capacity magazines likewise are poorly suited for typical self-defense scenarios because large amounts of ammunition are not typically required for this purpose. In most cases of self-defense, crime victims do not defend themselves with a gun at all. A 2015 Harvard University study based on data from the National Crime Victimization Survey found that less than one percent of crime victims actually used a gun in self-defense. Samantha Raphelson, *How Often Do People Use Guns in Self-Defense?*, NPR (April 13, 2018), <https://www.npr.org/2018/04/13/602143823/how-often-do-people-use-guns-in-self-defense> (citing David Hemenway, Sara J. Solnick, *The epidemiology of self-defense gun use: Evidence from the National Crime Victimization Surveys 2007-2011*, *Preventive Medicine*, Oct. 2015, 79:22-27.). And on the rare occasion that guns *are* used in self-defense, the number of bullets fired is quite low. One study of self-defense incidents determined that, on average, only 2.1 bullets were fired per incident. *See Kolbe*, 2014 WL 4243633, at *10 (citing expert testimony of Lucy Allen, who analyzed two years' worth of reports on self-defense incidents); Yurgealitis Decl. at ¶ 79 (explaining that self-defense situations rarely result in extensive exchanges of gunfire). Law enforcement officials have likewise confirmed that typical self-defense scenarios do not require more ammunition than is available in a standard 6-shot revolver or 6-10 round semiautomatic pistol, which the ban does not regulate. *See Brady Center, Assault Weapons: Mass*

Produced Mayhem, (Oct. 2008) *supra* at 16 (citing statement of former Baltimore County Police Department Colonel Leonard J. Supenski). As the Commonwealth persuasively notes, even Appellants themselves could not identify a single example of an assault weapon being used in self-defense. C’wealth Br. at 30. And neither self-defense nor other lawful uses of firearms, such as hunting, require the immediate, continuous access to more rounds of ammunition that large capacity magazines provide.

Because the banned weapons represent only a small percentage of privately owned guns, and are uniquely ill-suited for lawful purposes, there is no basis to conclude that the ban materially affects law-abiding citizens’ ability to use commonly used weapons for lawful purposes.

C. Assault weapons and large capacity magazines are dangerous and unusual.

The *Heller* decision also establishes that a prohibition on the possession or sale of “dangerous and unusual weapons” does not burden conduct protected by the Second Amendment. 554 U.S. at 571; *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir.2010); *see also United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (“[A] citizen’s right to carry or keep sawed-off shotguns, for instance, would not come within the ambit of the Second Amendment.”); *Kolbe v. Hoban*, 849 F.3d 114, 142 (4th Cir. 2017) (quoting *Heller*, 554 U.S. at 627). The assault weapons

and large capacity magazines regulated by the Massachusetts ban are precisely the type of “dangerous and unusual” weapons *Heller* references, and accordingly, their prohibition does not impinge on Appellants’ Second Amendment rights.

Historical evidence demonstrates that states have routinely regulated dangerous and unusual firearms and gunpowder in order to protect public safety. *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *Fordham L. Rev.* 487, 502-13 (2004); *see also* Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* 113-18 (2011). Laws regulating the storage and transport of gun powder, for example, were “crafted to meet the needs of public safety” and “also provided a check on the creation of a private arsenal.” *See* Cornell & De Dino, 73 *Fordham L. Rev.* at 512.

Nineteenth-century restrictions on certain types of arms further reflect the historical understanding that the state has the power to regulate firearms for the sake of public safety—especially when those firearms pose a heightened risk to the public. *See id.* at 512-16. In *Day v. State*, 37 *Tenn.* 496, 500 (1857), for example, the Supreme Court of Tennessee upheld a law “intended to abolish these most dangerous weapons [concealed knives] entirely from use ... They were induced to do this on account of the savage character of the instrument and for the saving of blood.” *See also English v. State*, 35 *Tex.* 473, 476 (1871) (“No kind of travesty, however subtle or ingenious, could so misconstrue [the Second Amendment] as to

make it cover and protect that pernicious vice [pistols], from which so many murders, assassinations, and deadly assaults have sprung”). Commentators likewise recognized that the Second Amendment’s guarantee does not grant citizens the right to carry weapons that terrify the population. *See* 4 William Blackstone, *Commentaries* *148 (1769) (“The offense of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land”).

The Massachusetts ban comports with this strong and long-settled American tradition of categorically restricting “dangerous and unusual” weapons on public safety grounds. Accordingly, the ban is a “presumptively lawful regulatory measure[]” under *Heller*. *See* 554 U.S. at 626-27, n.26.²

Contemporary evidence further confirms that the regulated weapons are “dangerous and unusual” and fall outside the scope of the Second Amendment’s protection. As explained in Section I.A above, the banned weapons were specifically designed with military purposes in mind. Because of their military-

² As *Heller* recognizes, it is not necessary to identify a “precise founding-era analogue” in order for a regulation to be deemed “longstanding. . . . After all, *Heller* considered firearm possession bans on felons and mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage.” *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) (citations omitted).

style design, assault weapons cause greater injuries and more extensive, complex wounds, which result in higher complications, than those caused by non-assault weapons. Colwell Dep. 109:2-13, 119:7-23, 147:16-22; December 15, 2017 Declaration of Christopher B. Colwell “(Colwell Decl.)”, Dkt. No. 61-7, at 2-4. This is because the velocity and power of bullets fired by assault weapons cause greater damage to the muscles, bones, joints and tissue, and result in more amputations and infection, than non-assault weapons. Colwell Dep. 110:18-111:16, 146:2-15, 147:16-148:3; Colwell Decl., at 2.

Assault weapons and large capacity magazines are thus a poor choice for self-defense, but ideal for mass murder. Statistics bear this out. Mass shootings committed using assault weapons and large capacity magazines result in a significantly higher rate of injury and death as compared to other firearms:

- Between January 2009 and January 2013, mass shootings committed using assault weapons or large capacity magazines resulted in more than double the number of people shot and over 50 percent more people killed. *See* Christopher Koper, *America’s Experience with Federal Assault Weapons Ban, 1994-2004*, in *Reducing Gun Violence in America* 157, 167 (Daniel W. Webster and John S. Vernick eds., 2013).
- In an analysis of mass shootings from 1984 to 2012, more rounds fired per minute correlated to higher numbers of people hit and killed. *See*

Kevin Ashton, *The Physics of Mass Killing* (Jan. 24, 2013),

<http://kevinjashton.com/2013/01/24/the-physics-of-mass-killing/>.

- A study published by Mayors Against Illegal Guns found that shootings involving assault weapons and large capacity magazines resulted in 123% more people shot and 54% more deaths as compared to shootings not involving those kinds of weapons. *See* Mayors Against Illegal Guns, *Mass Shootings Since January 20, 2009* (Feb. 2013).

It is no accident, then, that assault weapons and large capacity magazines have been used in some of the deadliest mass shootings in this country:

- In Newtown, Connecticut, in 2012, a gunman used a Bushmaster XM15 assault rifle and multiple 30-round magazines to kill 26 people, 20 of whom were children attending first grade at Sandy Hook Elementary School. *See* Kaplan Decl. Ex. 42, 80.
- In Aurora, Colorado, in 2012, a gunman killed 12 people and wounded scores more inside a movie theatre using a Smith & Wesson M&P15 and a 100-round magazine. *See* Kaplan Decl. Ex. 42, 80, 89.
- In a 2015 shooting in San Bernardino, California, two assailants killed 14 people and wounded 19 more at an office holiday party using two AR-15 platform rifles, a Smith & Wesson model and a DPMS model, and four 30-round magazines. *See* Kaplan Decl. Exs. 42, 80, 87. The

gunman fired more than 150 rounds in less than five minutes. *See* Kaplan Decl. Ex. 88.

- In the 2016 shooting at the Pulse nightclub in Orlando, Florida, a gunman killed 49 people and wounded 53 more. *See* Kaplan Decl. Ex. 42, 86. The gunman used at least two guns, one of which was a Sig Sauer AR-15 platform rifle, and multiple 30-round magazines. *See* Kaplan Decl. Exs. 42, 80, 86.
- In Sutherland Springs, Texas, in 2017, a gunman using a “Ruger AR 15 variant” in Sutherland Springs, Texas, killed 26 people and wounded at least 20 when he opened fire inside a church during a Sunday service. *See* Kaplan Decl. Exs. 83, 84.
- Also in 2017, in Las Vegas, Nevada, in the deadliest mass shooting in United States history, a gunman killed 59 people and injured hundreds more when he fired on an outdoor concert. *See* Kaplan Decl. Exs. 69, 72, 85. Law enforcement found 23 firearms in the hotel suite from which the gunman fired the shots, including at least two AR-15s and one AK-47 type rifle. *See* Kaplan Decl. Exs. 68, 69, 85. The gunman had outfitted twelve of the rifles found in the suite with bump stocks, which allowed them to fire at a rate approximating automatic fire. *See* Kaplan Decl. Ex. 69; Bolcome Aff. ¶ 25; October 30, 2017 Deposition

Transcript of James Supica (“Supica Dep.”), Dkt. No. 65-1 Ex. 11, at 147:15-150:8; November 6, 2017 Deposition Transcript of Guy Rossi (“Rossi Dep.”), Dkt. No. 77-5, at 38:19-41:19; October 24, 2017 Deposition Transcript of J. Buford Boone, III (“Boone Dep.”), Dkt. No. 65-1 Ex. 13, at 67:8-15. Each one of these assault rifles would have been banned in Massachusetts as “copies” of a Colt AR-15. Kaplan Decl. Ex. 70.

And in 2018 alone, two more tragic mass shootings were conducted using assault weapons: Marjory Stoneman Douglas High School in Parkland, Florida (17 dead); and, most recently, Tree of Life Synagogue in Pittsburgh, Pennsylvania (11 dead).

These grim statistics demonstrate the exceptionally lethal character of the military-style weapons covered by the ban. These weapons are simply not protected by the Second Amendment.

II. Even If The Ban Implicates The Second Amendment, It Is Constitutional Because It Is Substantially Related To The Important Governmental Objective Of Protecting Public Safety And Preventing Gun Violence.

Even if this Court were to conclude that the ban impinges on conduct protected by the Second Amendment, any such burden is only marginal and is far outweighed by Massachusetts’ compelling governmental interest in protecting its citizens’ safety and security. The Massachusetts ban is thus precisely the type of

“reasonable firearms regulation” the Supreme Court anticipated States would continue to pass. *See McDonald v. City of Chicago*, 561 U.S 742 (2010) (noting that the Second Amendment does not eliminate a state’s “ability to devise solutions to social problems that suit local needs and values” and predicting that “state and local experimentation with reasonable firearms regulations will continue under the Second Amendment”).

A. Intermediate scrutiny applies here.

This Court recently held that intermediate scrutiny is the appropriate standard to evaluate “firearms regulations that burden rights on the periphery of the Second Amendment.” *Gould*, 2018 WL 5728640, at *10; *see also Chester*, 628 F.3d at 680; *Woollard*, 712 F.3d at 875 (4th Cir. 2013). The ban exists, at most, at the outer bounds of that periphery: it does not interfere with a citizen’s right to self-defense in his own home (the “core Second Amendment right” according to *Heller*), and as to other contexts, it removes only a narrow, especially lethal class of military-like firearms and a particular type of ammunition from one’s slate of weapon choices. *See id.* at *8. Accordingly, intermediate scrutiny is the appropriate standard of review. *See id.*; *see also Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 692 (6th Cir. 2016) (observing “a near unanimous preference for intermediate scrutiny”); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) (applying intermediate scrutiny to New Jersey handgun permit law); *Woollard v.*

Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (applying intermediate scrutiny to Maryland handgun permit law); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of ATFE (NRA)*, 700 F.3d 185, 206 (5th Cir. 2012) (applying intermediate scrutiny to federal law prohibiting sale of handguns to persons under the age of 21); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) (applying intermediate scrutiny to New York licensing scheme for full-carry handgun permits).³

Appellants contend that strict scrutiny applies because the challenged ban prohibits citizens from keeping “common firearms” in their homes for self-defense. Appellants are incorrect. The challenged ban does not implicate a citizen’s right of self-defense in the home at all, as it in no way limits an individual’s ability to use other weapons—including the “quintessential self-defense weapon,” the

³ Indeed, intermediate scrutiny applies to nearly all Second Amendment claims. *See, e.g., Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015); *Drake*, 724 F.3d at 435; *Schrader v. Holder*, 704 F.3d 980, 990 (D.C. Cir. 2013); *Kachalsky*, 701 F.3d at 96; *Woollard*, 712 F.3d at 876; *NRA*, 700 F.3d at 196; *Heller v. District of Columbia (“Heller II”)*, 670 F.3d 1244, 1261-64 (D.C. Cir. 2011); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc). And although a divided Ninth Circuit panel held that a district court did not abuse its discretion in issuing a preliminary injunction on California’s ban on possession of large capacity magazines, that decision is neither a final decision nor binding precedent.

handgun—to defend their homes. *Heller*, 554 U.S. at 629. Indeed, each individual Appellant here already owns other weapons for such purposes. *See* C’wealth Br. at 11-12. And contrary to Appellants’ contention, the banned assault weapons are not “common”: as explained in Section I.B, assault weapons represent only 3% of privately-owned guns, and are owned by only 1% of the United States population. Because citizens in Massachusetts retain the right to defend themselves in their homes with weapons that are *actually* available in common use, the challenged ban does not impair core Second Amendment rights, and at most, intermediate scrutiny applies.

B. The ban is substantially related to the Commonwealth’s interest in protecting its citizens.

To determine whether a challenged law survives intermediate scrutiny, a court asks whether the law is “substantially related to an important governmental objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see also Tyler*, 837 F.3d at 693. The Massachusetts ban easily passes this standard.

It is beyond peradventure that “Massachusetts has compelling governmental interests in both public safety and crime prevention.” *Gould*, 2018 WL 5728640, at *11 (*citing Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 376 (1997)). Indeed, “few interests are more central to a state government than protecting the safety and well-being of its citizens.” *Id.* (*citing United States v.*

Salerno, 481 U.S. 739, 755 (1987)); *United States v. Morrison*, 529 U.S. 598, 618 (2000)).

The ban is substantially related to this public interest because it prohibits the possession and sale of weapons that are especially likely to be used in a mass shooting. As explained in Section I.C above, the weapons targeted by the ban are the weapons of choice in mass shootings and have been implicated in some of the country's deadliest shootings to date. Moreover, these weapons are poorly suited to defense of the home, including because their rapid firing rate and high-velocity ammunition can easily cause severe unintentional injuries to family members and bystanders when fired in close quarters. *See* Section I.B.

In addition to protecting civilian life, the ban also protects the lives of law enforcement. Between 1998 and 2011, one in five law enforcement officers killed in the line of duty was slain by an assault weapon. *See* Kaplan Decl. Ex. 57, at 5. The body armor typically used by police officers can be penetrated by assault weapons, and because of these weapons' speed, range, and accuracy, officers face increased risk when an assailant is armed with such a weapon. Boone Dep. 123:6-23, 130:15-133:7.

The legislative and judicial record is replete with evidence from Massachusetts and elsewhere that banning assault weapons and large capacity magazines effectively improves public safety and reduces crime. According to one

study, while the federal assault weapons ban was in effect, crimes committed with assault weapons declined between 17% and 72% across major cities, with Boston showing the greatest decline. *See* Kaplan Decl. Ex. 47, at 46–62 & n. 55; Ex. 48, at 7–9; Ex. 49, at 19–20; December 15, 2017 Affidavit of Robert Spitzer (“Spitzer Aff.”), Dkt. No. 61-6, at ¶¶ 22–23. Another study concluded that in Virginia, the proportion of gun crimes committed using assault weapons dropped from between 13% and 16% in the early years of the federal ban to 9% by the last year of the ban. After the federal ban expired, the share of gun crimes committed using large capacity magazines rose to 20% by 2010. *See* Kaplan Decl. Ex. 50.

Recognizing the effectiveness of assault weapons bans in protecting public safety, other states have enacted similar bans, and other courts have upheld them against Second Amendment challenges. For example, in *Heller II*, the D.C. Circuit upheld the District of Columbia’s ban on certain semiautomatic rifles and large capacity magazines, holding that the regulation did not burden the Second Amendment’s “core” protections because it did not “prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting, whether a handgun or a non-automatic long gun.” *See Heller II*, 670 F.3d 1244, 1249 (D.C. Cir. 2011).

Applying intermediate scrutiny, the D.C. Circuit upheld the regulation because the District had demonstrated a “substantial relationship between” the

regulation and “the objectives of protecting police officers and controlling crime.” *Id.* at 1264. Like the record here, the record in *Heller II* demonstrated that the prohibited assault weapons posed a specific public safety risk because they were designed to enable an assailant to “shoot multiple human targets very rapidly,” posing a “danger to innocent people” and “plac[ing] law enforcement officers at particular risk.” *Id.* at 1263-64 (citations omitted).

Likewise, in *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) the Second Circuit, applying intermediate scrutiny, upheld New York and Connecticut laws prohibiting possession of certain semiautomatic weapons and large capacity magazines. The Second Circuit applied intermediate scrutiny because the challenged laws banned only a particular “subset of firearms with characteristics New York State has determined to be particularly dangerous and unnecessary for self-defense.” *Id.* at 260.

The court upheld the challenged acts because the statutes specifically addressed “these particularly hazardous weapons” and were “specifically targeted to prevent mass shootings like that in Newtown, in which the shooter used a semiautomatic assault weapon.” *Id.* The court also observed that the ban particularly benefited the law enforcement community because the banned assault weapons were “disproportionately used to kill law enforcement officers: one study shows that between 1998 and 2001, assault weapons were used to gun down at

least twenty percent of officers killed in the line of duty.” *Id.* at 262 (internal citations omitted). Notably, Massachusetts police officers face the same threat; as many as one in four officers killed in the line of duty are murdered by an assault weapon. Violence Policy Ctr., *New Data Shows One in Four Law Enforcement Officers Slain in the Line of Duty in 2016 Felled By an Assault Weapon* (Feb. 27, 2018), <http://vpc.org/press/new-data-shows-one-in-four-law-enforcement-officersslain-in-the-line-of-duty-in-2016-felled-by-an-assault-weapon/>. As to the ban on large capacity magazines, the court reached the same conclusion, finding that “evidence suggests that large-capacity magazines may present even greater dangers to crime and violence than assault weapons alone ... Like assault weapons, large-capacity magazines result in more shots fired, persons wounded, and wounds per victim than do other gun attacks.” *Id.* at 263-264 (internal quotations and citations omitted). Accordingly, the court concluded that both the New York and Connecticut bans passed constitutional muster because they “adequately established a substantial relationship between the prohibition of both semiautomatic assault weapons and large-capacity magazines and the important—indeed, compelling—state interest in controlling crime.” *Id.* at 264.

More recently, in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), the Fourth Circuit likewise upheld a similar ban. After deciding that the assault weapons were most suitable for military use, and therefore not protected by the Second

Amendment, the court went on to hold in the alternative that the challenged law survived intermediate scrutiny because it did not “burden the core protection of the Second Amendment, i.e., the right of law-abiding, responsible citizens to use arms for self-defense in the home.” *Id.* at 138. As is the case in Massachusetts, citizens in Maryland remained free to “protect themselves with a plethora of other firearms and ammunition ... [including] magazines holding ten or fewer rounds, nonautomatic and some semiautomatic long guns, and—most importantly—handguns.” *Id.* The court therefore held that the challenged law readily survived intermediate scrutiny because it “reduc[ed] the availability” of assault weapons and “lessen[ed] their use in mass shootings, other crimes, and firearms accidents.” *Id.* at 138-141.

The same reasoning applies here. Ample evidence supports the Commonwealth’s conclusion that the assault weapons and large capacity magazines covered by the ban pose a unique threat to public safety, as well as to the safety of law enforcement officials. Because banning their possession and sale substantially furthers the Commonwealth’s strong interest in protecting the public and controlling crime, the Massachusetts ban should be upheld.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: November 13, 2018

Respectfully submitted,

/s/ Kimberly A. Mottley

Kimberly A. Mottley
Laura Stafford
PROSKAUER ROSE LLP
One International Place
Boston, Massachusetts 02110
(617) 526-9600 (telephone)
(617) 526-9800 (facsimile)
kmottley@proskauer.com
lstafford@proskauer.com

Mariel Goetz (application in progress)
BRADY CENTER TO PREVENT GUN
VIOLENCE
840 First Street NE, Suite 400
Washington, DC 20002
(202) 370-8159 (telephone)
mgoetz@bradymail.org

Counsel for Proposed *Amicus Curiae*
Brady Center to Prevent Gun Violence

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and 32(g)(1), I hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) and typeface and type style requirements set forth in Fed. R. App. P. 29(a)(4) and 32(a)(5)(A) and (6). This brief contains 6,460 words, excluding those exempted by Fed. R. App. P. 32(a)(f), and was prepared in a proportionally spaced 14-point Times New Roman font.

Dated: November 13, 2018

/s Kimberly A. Mottley

Kimberly A. Mottley

Laura E. Stafford

PROSKAUER ROSE LLP

One International Place

Boston, Massachusetts 02110

(617) 526-9600

kmottley@proskauer.com

Mariel Goetz (application in progress)

BRADY CENTER TO PREVENT GUN
VIOLENCE

840 First Street NE, Suite 400

Washington, DC 20002

(202) 370-8159 (telephone)

mgoetz@bradymail.org

Counsel for Proposed *Amicus Curiae*

Brady Center to Prevent Gun

Violence

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

Dated: November 13, 2018

/s Kimberly A. Mottley
Kimberly A. Mottley
Laura E. Stafford
PROSKAUER ROSE LLP
One International Place
Boston, Massachusetts 02110
(617) 526-9600
kmottley@proskauer.com
Mariel Goetz (application in progress)
BRADY CENTER TO PREVENT GUN
VIOLENCE
840 First Street NE, Suite 400
Washington, DC 20002
(202) 370-8159 (telephone)
mgoetz@bradymail.org
Counsel for Proposed *Amicus Curiae*
Brady Center to Prevent Gun
Violence