

COMMONWEALTH OF MASSACHUSETTS SUPREME JUDICIAL COURT
S.J.C. No. 10480

COMMONWEALTH OF MASSACHUSETTS, Plaintiff-Appellant

v.

RICHARD RUNYAN, Defendant-Appellee

ON APPEAL FROM ORDER OF DISMISSAL OF THE DISTRICT COURT

***AMICI CURIAE BRIEF OF BRADY CENTER TO PREVENT GUN VIOLENCE,
INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LEGAL
COMMUNITY AGAINST VIOLENCE, MASSACHUSETTS CHIEFS OF POLICE,
MASSACHUSETTS MILLION MOM MARCH CHAPTER OF THE BRADY
CAMPAIGN TO PREVENT GUN VIOLENCE, AND STOP HANDGUN VIOLENCE
IN SUPPORT OF APPELLANT***

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INTEREST OF AMICI

Brady Center to Prevent Gun Violence

The Brady Center to Prevent Gun Violence is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that gun laws are properly interpreted to allow strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous *amicus curiae* briefs in cases relating to gun violence prevention and firearms laws, including in the Massachusetts Supreme Judicial Court gun storage case *Jupin v. Kask* and the U.S. Supreme Court Second Amendment case *District of Columbia v. Heller*.

International Brotherhood of Police Officers

The International Brotherhood of Police Officers ("IBPO") is the largest police union in the AFL-CIO, representing more than 50,000 members. While the IBPO fully supports and defends the Second Amendment right to keep and bear arms, it strongly supports the Massachusetts safe gun storage law that reduces the

number of tragic gun-related accidents, particularly among children.

Legal Community Against Violence

Legal Community Against Violence ("LCAV") is a national law center dedicated to preventing gun violence. Founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993, LCAV is the country's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV tracks and analyzes federal, state and local firearms legislation, as well as legal challenges to firearms laws. As an *amicus*, LCAV has provided informed analysis in a variety of firearm-related cases, including those brought on the basis of the Second Amendment.

Massachusetts Chiefs of Police

The Massachusetts Chiefs of Police Association, Inc. is a non-profit corporation composed primarily of the police chiefs of cities and towns of the Commonwealth, and also includes federal law enforcement agencies, campus police chiefs, and other law enforcement and homeland security agencies. It is the largest law enforcement executive membership

organization in Massachusetts. Established in 1887, the Association provides traditional membership services, including meetings, member support, legislative advocacy, training and legal assistance. Through its affiliate, the Municipal Police Institute, Inc., a private non-profit charitable research and training organization, sample Policies & Procedures, Rules & Regulations, Legal Updates, training manuals and both classroom and on-line training are provided to police officers of all ranks across the state.

Massachusetts Million Mom March Chapter of the Brady Campaign to Prevent Gun Violence

The Massachusetts Million Mom March Chapter of the Brady Campaign to Prevent Gun Violence is part of a nationwide network of local volunteer activists of the Brady Campaign to Prevent Gun Violence, the country's largest, non-partisan, grassroots organization leading the fight to prevent gun violence. The Massachusetts chapter works locally on federal and state legislation and elections, education and awareness campaigns, linking with victims, and coalition building and community outreach. It is devoted to creating an America free from gun violence,

where all Americans are safe at home, at school, at work, and in their communities.

Stop Handgun Violence

Stop Handgun Violence ("SHV") is a non-profit organization founded in 1995 by a group of businesspeople, including gun owners and victims of gun violence, concerned about the increasing number of gun deaths and injuries in America. SHV works to prevent firearm violence through education, public awareness and sensible legislation, without banning guns. SHV was a lead advocate of the Massachusetts Gun Control Act of 1998, which includes safe storage mandates and has been successful in keeping guns out of the hands of children and criminals. Since the law was passed SHV has seen significantly reduced numbers of accidental injuries and deaths among 0-19 year olds and Massachusetts currently has the second lowest firearm fatality rate in the Nation, second only to Hawaii. SHV strongly supports the Massachusetts Safe Storage Law that promotes public safety and has been instrumental in preventing accidental shooting deaths and injuries.

STATEMENT OF THE ISSUE

Does Massachusetts' gun storage law, requiring that a firearm be secured in a locked container or equipped with a safety device only when it is not carried by or under the control of the owner or other lawfully authorized user, make it impossible for law-abiding citizens to possess firearms for the lawful purpose of self-defense in the home and thereby violate the Second Amendment of the United States Constitution?¹

SUMMARY OF ARGUMENT

Massachusetts' gun storage law, G.L. ch. 140, § 131L, is a life-saving gun safety law that protects children and others from gun deaths and injuries, while still allowing a gun owner or authorized user to use the firearm in self-defense. The Massachusetts legislature enacted this and other gun laws to prevent gun violence, helping Massachusetts achieve the lowest gun death rate of any state in the continental United States.² *Amici* gun violence prevention and law

¹ *Amici curiae* otherwise rely on the Statement of the Issues, Case and Facts contained in the brief of Plaintiff-Appellant.

² Ctrs. for Disease Control and Prevention, Nat'l Ctr. for Injury Prevention and Control, WISQARS Fatal

enforcement organizations have a strong interest in ensuring that legislators are permitted to enact crucial public safety laws such as Section 131L to protect families and communities from gun violence.

In *District of Columbia v. Heller*, the U.S. Supreme Court struck down District of Columbia gun laws that broadly barred handgun possession and prohibited use of a firearm in the home, even for self-defense. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The Court declared that law-abiding citizens have a Second Amendment right to possess a firearm in the home for self-defense, but cautioned that this right “is not unlimited” and is not a right to keep a gun “in any manner whatsoever.” *Id.* at 2816. Indeed, the Court specifically noted that its ruling does not call into question “laws regulating the storage of firearms to prevent accidents.” *Id.* at 2820. While the Court ruled that a law so “severe” that it “makes it *impossible* for citizens to use [guns]” for self-defense would run afoul of the Second

Injuries: Mortality Reports, available at <http://webappa.cdc.gov/sasweb/ncipc/mortrate.html> (last visited June 24, 2009). In 2006, the most recent year with data, Massachusetts had a gun death rate of one-third the national average; only Hawaii had a lower rate. See *id.*

Amendment, the Court approved of laws such as Section 131L that merely prevent unauthorized users from obtaining guns, without preventing self-defense use by lawful users. *Id.* at 2818, 2820 (emphasis added). Section 131L is clearly constitutional under *Heller*. (See *infra* at pp. 9-11).³

The court below erred in ruling that it was “unable to distinguish” Section 131L’s requirement that a gun be safely stored when not carried by or under the control of its owner or authorized user from the District of Columbia’s total ban on handgun possession or use in the home. *Commonwealth v. Runyan*, No. 0811 CR 2207 (Lowell Dist. Ct. dismissed Oct. 15, 2008). While the District of Columbia laws

³ As discussed in detail in appellant’s brief, numerous courts, both pre and post *Heller*, have held that the Second Amendment is not incorporated by the Fourteenth Amendment and does not apply to the states. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876); *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886); *National Rifle Association v. City of Chicago*, Nos. 08-4241, 08-4243 & 08-4244, 2009 U.S. App. Lexis 11721, at *6 (7th Cir. June 2, 2009); *Maloney v. Cuomo*, 470 F. Supp. 2d 205, 214 (E.D.N.Y. 2007); *but see Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). Indeed, *Heller* does not purport to change the law on incorporation. *Heller*, 128 S. Ct. at 2813, n.23. Regardless of the incorporation issue, *Heller* made clear that the Second Amendment does not prohibit the type of safe storage requirements in Section 131L.

at issue in *Heller* amounted to a total “ban on handgun possession in the home” and prohibited the “use [of] firearms to stop intruders,” *Heller*, 128 S. Ct. at 2818-19, 2821, Section 131L contemplates safe storage of a firearm only when it is not carried by or under the control of its owner or authorized user for self-defense or other purposes. (See *infra* at pp. 12-13).

In addition, the safe storage requirements of Section 131L are a reasonable mandate by the legislature to promote public safety while still allowing for self-defense. Studies have repeatedly found that accidental shootings increase where firearms are not stored securely. This public safety issue is of particular concern for children, as they are disproportionately affected by unintentional shootings. Safe storage and trigger lock laws have been found effective in preventing unauthorized access to firearms and accidents resulting from their use. Such laws have also been found to reduce the number of tragic deaths owed to suicide. (See *infra* at pp. 13-25).

Furthermore, this Court and other courts around the Nation have recognized that safe gun storage is such an integral part of the responsibilities of gun

ownership that there is a common law duty to secure firearms from dangerous or unauthorized persons. Legislative bodies in Massachusetts also have recognized the responsibility of safe gun storage since the time of our Nation's founding, with such laws existing concurrently with enactment of the Second Amendment itself. This long history of safe storage requirements highlights the reasonableness of Section 131L and its compatibility with the Second Amendment. (See *infra* at pp. 25-36).

ARGUMENT

I. INTRODUCTION

Massachusetts' safe gun storage law, G.L. ch. 140, § 131L, is a vital gun safety law that does not infringe on the Second Amendment right recognized by the U.S. Supreme Court in *District of Columbia v. Heller* and is, in fact, the type of law explicitly permitted by *Heller*. In *Heller*, the Supreme Court stated that safe storage laws are permissible under the Second Amendment, explaining that nothing in the Court's "analysis suggest[s] the invalidity of laws regulating the storage of firearms to prevent accidents." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2820 (2008). The Court further noted that

governments have "a variety of tools for combating" gun violence as long as they do not cross the threshold of making it "impossible" for law-abiding gun owners to possess a firearm in the home for self-defense. *Id.* at 2818, 2822. Thus, the court below erred in holding that Section 131L is unconstitutional under the Second Amendment.⁴

II. MASSACHUSETTS' SAFE GUN STORAGE LAW IS ENTIRELY CONSISTENT WITH THE LIMITED SECOND AMENDMENT RIGHT OF LAW-ABIDING GUN OWNERS TO POSSESS FIREARMS FOR SELF-DEFENSE IN THE HOME.

The Supreme Court's decision in *Heller* was narrow. The Court held that the District of Columbia's total "ban on handgun possession in the home" deprived petitioner, "a D.C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center," of his Second Amendment rights. *Heller*, 128 S. Ct. at 2788, 2821. The Court

⁴ G.L. ch. 140, § 131L(a) states:

It shall be unlawful to store or keep any firearm, rifle or shotgun including, but not limited to, large capacity weapons, or machine gun in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user. For purposes of this section, such weapon shall not be deemed stored or kept if carried by or under the control of the owner or other lawfully authorized user.

struck down D.C.'s ban as an outlier among our Nation's gun laws, noting that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id.* at 2818.⁵

The Court also found that the District's gun storage law was so "severe" that it amounted to a total "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Heller*, 128 S. Ct. at 2818, 2822. Rather than simply requiring that guns be stored to prevent use by unauthorized persons, as Massachusetts calls for under Section 131L, the District mandated that firearms "be rendered and kept inoperable at all times," making it "impossible" to ever use a firearm for self-defense in the home. *Id.* at 2818. The Court noted that the District's law was "unequivocal" and even "forbids residents to use firearms to stop intruders" *Id.* at 2818-19.

⁵ In contrast to the U.S. Constitution, the Massachusetts Declaration of Rights does not grant an individual right to possess firearms for self-defense. See *Commonwealth v. Davis*, 369 Mass. 886, 887-88 (1976).

The court below erred in ruling that it was “unable to distinguish” Section 131L’s requirement that guns be safely stored when not carried by or under the control of their owner or authorized user from the District of Columbia’s storage law prohibiting a firearm from ever being used in the home. *Commonwealth v. Runyan*, No. 0811 CR 2207 (Lowell Dist. Ct. dismissed Oct. 15, 2008). Indeed, the *Heller* Court stressed that nothing in its “analysis suggest[s] the invalidity of laws regulating the storage of firearms to prevent accidents.” *Heller*, 128 S. Ct. at 2820.

In highlighting the limited nature of its ruling, the *Heller* Court specifically identified numerous “presumptively lawful regulatory measures,” and went out of its way to stress that it was not invalidating safe storage laws. *Id.* at 2817, 2817 n.25, 2820. The Court recognized that there exists a “problem of handgun violence in this country,” but that the Second Amendment leaves governments “a variety of tools for combating” such problems, such as storage laws like Section 131L. *Id.* at 2821-22.

Here, abundant research shows that unsafe storage of firearms poses a grave risk of accidental and

suicidal fatalities. See *infra* at Part III.

Restricting the ability of Massachusetts to ensure the safe storage of firearms, in other words, does not protect hearth and home, but rather threatens the safety of others, including children, in their home.

The Second Amendment does not prevent states from protecting public safety by ensuring that firearms are safely stored.

III. THE SAFE STORAGE REQUIREMENT IN SECTION 131L PROMOTES PUBLIC SAFETY AND SAVES LIVES.

Firearm injuries pose a serious threat to the health and well-being of Americans of all ages and as such, pose a serious public health risk and impose an economic strain on all. Each year, more than 100,000 Americans are shot and more than 30,000 are killed by firearms.⁶ Every day, forty-seven children and teens

⁶ Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *WISQARS Fatal Injuries: Mortality Reports*, available at <http://webappa.cdc.gov/sasweb/ncipc/mortrate.html> (in 2006, the most recent year with data, Massachusetts had a gun death rate of one-third the national average). Only Hawaii had a lower gun death rate. See Press Release, Violence Policy Ctr., *States with Higher Gun Ownership and Weak Gun Laws Lead Nation in Gun Death* (May 6, 2009), available at <http://www.vpc.org/press/0905gundeath.htm>.

are shot and nine are killed.⁷ Between 1999 and 2006, 1614 Massachusetts residents were killed by guns.⁸

David Hemenway, Director of the Harvard Injury Research Center and the Youth Violence Prevention Center, declared that "gun violence is a modern-day public health epidemic."⁹ Approximately 79 Americans die each day as a result of firearm injuries.¹⁰ For those who survive a gunshot wound, devastating, long-lasting and serious health issues such as chronic post-traumatic stress disorder, traumatic brain injuries and serious spinal cord injuries often

⁷ Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *WISQARS Fatal Injuries: Mortality Reports*, available at <http://webappa.cdc.gov/sasweb/ncipc/mortrate.html> ; *WISQARS Nonfatal Injuries: Nonfatal Injury Reports*, available at <http://webappa.cdc.gov/sasweb/ncipc/nfirates.html>

⁸ *Id.*

⁹ DAVID HEMENWAY, *PRIVATE GUNS, PUBLIC HEALTH* 9 (2004). Recognizing violence as a public health epidemic is not a new concept. In 1992, then Surgeon General Antonia Novello declared that "[v]iolence in the United States is a public health emergency." *Id.* at 18 (quoting former Surgeon General Antonia C. Novello, et al., *From the Surgeon General: A medical response to violence*, 267 J. AM. MED. ASSOC. 3007 (1992)).

¹⁰ Jean Lemaire, *The Cost of Firearm Deaths in the United States: Reduced Life Expectancies and Increased Insurance Costs*, 72 J. Risk & Ins. 359 (2005).

arise.¹¹ A gunshot injury generates an average of \$17,000.00 in medical costs, a figure that would be higher if the statistic did not factor in gunshot injuries that result in death at the scene of a shooting.¹²

The solution for reducing gunshot injuries necessarily relies on strong governmental action.¹³ The Massachusetts Legislature recognized the risks to public safety and health that guns pose and took vitally important government action by passing 131L to protect the health and well-being of Massachusetts citizens.¹⁴ Laws such as Section 131L strike the careful balance of addressing “the problem of handgun violence in this country” while avoiding “the absolute prohibition of handguns held and used for self-defense in the home” barred by *Heller*. *District of Columbia v. Heller*, 128 S. Ct. 2783 at 2822 (2008).

¹¹ DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 4 (2004).

¹² *Id.*

¹³ *See id.* at 4-5.

¹⁴ Law enforcement officers also strongly support firearm safety in the home. For a discussion from the law enforcement perspective of how best to ensure public safety by regulating firearms, see INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, TAKING A STAND: REDUCING GUN VIOLENCE IN OUR COMMUNITIES (2007).

The present case illustrates the crucial importance of keeping guns locked and secured from unauthorized persons such as those who are underage and are unfit to handle firearms. When police officers responded to reports of BBs being fired into Mr. Runyan's neighbor's window, they found an eighteen year-old boy home alone with a BB gun and access to firearms, including an unsecured semiautomatic rifle and ammunition. Brief and Record Appendix for the Commonwealth, *Commonwealth v. Runyan* (S.J.C. No. 10480) The boy, Alexander Runyan, appeared to be severely handicapped and admitted to firing a BB gun into his neighbor's window because he "hate[d] him." Brief for the Commonwealth, *Runyan* (S.J.C. No. 10480). Clearly, Massachusetts has a keen interest in keeping unsecured firearms, such as semiautomatic rifles, away from persons such as Alexander. Nothing in *Heller* even remotely suggests a Second Amendment right to keep firearms unlocked and accessible to unauthorized users and persons likely to misuse a firearm such as Alexander.

A. Section 131L Prevents Accidental Shooting Deaths

Section 131L is a crucial measure in preventing accidental shooting deaths. Studies have found a direct correlation between improper gun storage and accidental shooting deaths. For example, a ten year study found that a disproportionately large share of unintentional firearm fatalities occurred in states where gun owners were more likely to store their firearms loaded or unlocked.¹⁵ The unintentional firearm death rate was, on average, four percent higher in states where an additional one percentage point of gun-owning households stored their guns loaded.¹⁶ In the six states where firearm owners were most likely to store their firearms loaded, twice as many people died from unintentional firearm injuries, compared with the ten states where firearm owners were least likely to store their firearms loaded.¹⁷ Safe storage laws prevent many such deaths; one study found

¹⁵ Matthew Miller, Deborah Azrael, David Hemenway, & Mary Vriniotis, *Firearm Storage Practices and Rates of Unintentional Firearm Deaths in the United States*, 37 ACCIDENT ANALYSIS & PREVENTION 661, 665 (2005).

¹⁶ *Id.*

¹⁷ *Id.* at 665, 665 tbl.3.

that unintentional shooting deaths among children were reduced by twenty-three percent in states with safe storage laws.¹⁸

Safe gun storage regulation is particularly important in preventing accidental deaths of children. Hundreds of accidental shooting deaths and injuries involving children occur annually as a result of unsafe storage of firearms.¹⁹ Studies have concluded that unintentional firearm-related deaths involving children are most likely to occur at residences with inappropriately stored weapons.²⁰ Despite any gun safety training they may receive, children will still

¹⁸ See Larry Tye, *Gun Laws are Linked to a Decline in Deaths*, BOSTON GLOBE, Oct. 2, 1997 at A3. The study estimates that if safe storage laws were in place throughout the nation, some 216 children might not have died in unintentional shootings. See *id.*

¹⁹ See, e.g., Dennis Henigan, *Victims' Litigation Targets Gun Violence*, TRIAL, Feb. 1995, at 50.

²⁰ Ctr. for Disease Control, *Firearm-Related Fatalities Among Children and Teenagers - US, 1982*, 41 MORBIDITY & MORTALITY WKLY. REP. 442, 444 (1992). Accordingly, one of the CDC's national health objectives for the year 2000 was to reduce the proportion of households with improperly stored weapons by twenty percent. *Id.* "Appropriate storage should include locked and separate storage of weapons and ammunition." *Id.* at 444-45.

play with guns if they gain access to them.²¹ In at least twenty percent of accidental shootings involving children, the child who fired the gun did not know it was loaded.²² For this reason, the American Academy of Pediatrics views firearms as inherently dangerous when stored in homes with children.²³

Studies have shown that fewer than half of United States families with both firearms and children secure their firearms separate from ammunition.²⁴ This

²¹ Marjorie S. Hardy et al., *A Firearm Safety Program for Children: They Just Can't Say No*, 17 J. DEV. & BEHAV. PEDIATRICS 216 (1996); Michael B. Himle et al., *An Evaluation of Two Procedures for Training Skills to Prevent Gun Play in Children*, 113 PEDIATRICS 70, 73-74 (2004) (children learn to repeat safety messages but are not deterred from handling a gun when found).

²² See Garen J. Wintemute et al., *Unintentional firearm deaths in California*, 29 J. TRAUMA 457 (1989); Garen J. Wintemute et al., *When Children Shoot Children: 88 Unintended Deaths in California*, 257 JAMA 3107 (1987); see also Himle, *supra* note 21, at 73-74.

²³ See Linda Matchan, *Many Learn to Live with Guns: More Children are Experiencing Firearms as Part of Home Security*, BOSTON GLOBE, July 2, 1995 at 1 ("There is no way to keep children safe with guns around") (quoting Dr. Katherine Christoffel of the A.A.P.). "From a safety standpoint, the official position of the American Academy of Pediatrics is that guns should not be kept in homes with children." *Id.*

²⁴ See, e.g., Mark A. Schuster et al., *Firearm Storage Patterns in US Homes with Children*, 90 AM. J. OF PUB. HEALTH 588, 590-91 (2000).

practice is especially troubling because children as young as three are able to pull the trigger of most handguns.²⁵ Approximately 70 percent of all unintentional firearm injuries and deaths are a result of handguns.²⁶

Children also represent a disproportionate share of unintentional firearm deaths. In 2004, firearms accounted for 27 percent of the unintentional deaths in 2004 among youth aged ten to nineteen, while accounting for only 22 percent of unintentional deaths among the population as a whole.²⁷ Additionally, each year nearly ninety children are killed and approximately 1400 are treated in hospital emergency rooms for unintentional firearm-related injuries.²⁸

²⁵ *Id.* at 588.

²⁶ Am. Acad. of Pediatrics Comm. on Inj. and Poison Prevention, *Firearm-Related Injuries Affecting the Pediatric Population*, 105 PEDIATRICS 888, 890 (2000).

²⁷ See Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *WISQARS Fatal Injuries: Mortality Reports*, available at <http://webappa.cdc.gov/sasweb/ncipc/mortrate.html>

²⁸ SAFE KIDS USA, Press Release, Unintentional Shooting Prompts SAFE KIDS to Issue Warning About Dangers of Guns in the Home, (2003) http://www.usa.safekids.org/tier3_cd.cfm?folder_id=300&content_item_id=11370 (last visited Oct. 3, 2007).

Most of these deaths occur in or around the home, and most involve guns that are loaded and accessible to children.²⁹

Educating children about gun safety alone is not successful in protecting them from gunshot injuries. For example, the NRA's Eddie Eagle GunSafe program ostensibly teaches children to stop when they see a gun, to not touch the gun, to leave the area and to immediately find an adult.³⁰ However, studies show that even after completing the training, children still will play with a gun if they find it.³¹ One study shows that even after receiving gun safety training and being told specifically not to play with a gun if they find one, seventy-five percent of the eight to twelve year old boys left alone in a room who

²⁹ *Id.*

³⁰ See Eddie Eagle Safety Program, <http://www.nrahq.org/safety/eddie>.

³¹ See generally Michael B. Himle et al., *An Evaluation of Two Procedures for Training Skills to Prevent Gun Play in Children*, 113 PEDIATRICS 70, 73-74 (2004) (children learn to repeat safety messages but are not deterred from handling a gun when found).

found the gun handled it.³² Of those, more than half of them pulled the trigger.³³

B. Section 131L Helps Prevent Suicide

In addition to preventing accidental deaths, Section 131L plays a pivotal role in preventing suicides. Because a suicide attempt with a firearm is so much more likely to result in death before family or medical professionals can intervene, if a gun is used in a suicide attempt, the attempt is fatal more than ninety percent of the time.³⁴ By comparison, suicide attempts made by overdosing on drugs are fatal only three percent of the time.³⁵ Thus, while suicides involving firearms account for only five percent of the suicide attempts in America, they accounted for more than half of the 31,665 fatalities.³⁶

In a major study, the Youth Suicide by Firearms Task Force, a conglomerate of individuals from ten

³² Geoffrey A. Jackman, *Seeing is Believing: What Do Boys Do When They Find a Real Gun?*, 107 PEDIATRICS 1247, 1249 (2001).

³³ *Id.*

³⁴ Matthew Miller et al., *Household Firearm Ownership and Rates of Suicide Across the 50 United States*, 62 J. OF TRAUMA 1029, 1031 (2007).

³⁵ *Id.*

³⁶ *Id.* at 1029, 1032.

health-related groups, concluded that youth suicides can be prevented by restricting youth access to firearms.³⁷ They determined that the safe storage of guns results in a decrease in youth suicides.³⁸ Specifically, the Task Force found that: (1) "There is a positive association between the accessibility and availability of firearms in the home and the risk for youth suicide;" (2) "The risk conferred by guns in the home is proportional to the accessibility (e.g., loaded and unsecured firearms) and the number of guns in the home;" and (3) "Public policy initiatives that restrict access to guns . . . are associated with a reduction of firearm suicide and suicide overall, especially among youth."³⁹

³⁷ The Youth Suicide by Fire Arms Task Force included individuals from American Association of Suicidology, AMA, Violence Policy Center, Department of Emergency Medicine at Medical College of Wisconsin, Institute for Juvenile Research, American Firearms Association, Harvard School of Public Health, National Shooting Sports Foundation, American Academy of Child and Adolescent Psychiatry, and the Children's Defense Fund. See PBS - The Silent Epidemic: Depression, <http://www.pbs.org/thesilentepidemic/riskfactors/guns.html>.

³⁸ *Id.*

³⁹ *Id.*

Public health evidence confirms that easy access to firearms significantly increases the risk of youth suicide.⁴⁰ Case studies reveal that suicide by firearm is strongly associated with the presence of a gun in the home of the victim.⁴¹ In fact, the risk of suicide is at least five times greater in households with guns.⁴²

Furthermore, studies have found that unsecured guns were associated with a higher risk of suicide than guns kept in a locked place.⁴³ If firearms were securely stored, there would be fewer firearms tragedies of all varieties, including adolescent suicide. The public health studies linking firearms

⁴⁰ Andrew J. McClurg, *The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More "Smoking Gun,"* 51 HASTINGS L.J. 953, 975-76 (2000) (chronicling various studies that correlate safe storage of firearms with a decrease in youth suicide).

⁴¹ See generally Matthew Miller, Deborah Azrael and David Hemenway, *Household Firearm Ownership and Suicide Rates in the United States*, 13 EPIDEMIOLOGY 517 (2002); Gary Kleck et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENGL. J. MED. 1878 (1992); and David A. Brent et al., *Firearms and Adolescent Suicide*, 147 AM. J. OF DISEASES OF CHILD 1066, 1068 (1993) (noting that at that time the risk of suicide was fivefold in homes with guns).

⁴² Brent, *supra* note 41, at 1068.

⁴³ McClurg, *supra* note 40, at 975-76.

to suicides in general, and to adolescent suicides in particular, strongly supports the proposition that, were guns not easily available to impulsive teenagers in despair, fewer of them would be able to commit suicide.⁴⁴

IV. MASSACHUSETTS CASE LAW AND LEGISLATIVE HISTORY SUPPORT A FINDING THAT SECTION 131L IS A REASONABLE REGULATION THAT DOES NOT VIOLATE THE SECOND AMENDMENT.

Courts around the Nation have recognized that the safe "storage of firearms to prevent accidents," described by the *Heller* Court as a permissible regulation under the Second Amendment, *Heller*, 128 S. Ct. at 2819-2820, is also so intertwined with the responsibilities of gun ownership that there is a common law duty to secure firearms from dangerous or unauthorized persons. Moreover, the *Heller* Court's acknowledgement that the Second Amendment does not allow guns to be kept "in any manner whatsoever and for whatever purpose," *id.* at 2816, certainly supports the validity of safe gun storage mandates, which Massachusetts has had both since the time of our Nation's founding and concurrently with enactment of the Second Amendment itself.

⁴⁴ See *id.* at 994.

A. Courts Have Recognized the Importance of Safe Gun Storage to Prevent Gun Violence.

Because of the danger posed by guns, this court has recognized Massachusetts' "legislative enactments acknowledging that the unauthorized use of firearms is a significant problem and placing requirements on owners of guns for the purpose of preventing their use by persons not competent to use them." *Jupin v. Kask*, 447 Mass. 141, 153.

Safe gun storage is so important to public safety that this Court has recognized a common law duty of care to properly store firearms, holding that "there is a significant social benefit to be realized by recognizing a duty of the person in control of the premises to exercise due care with regard to the storage of guns on the premises." *Id.* This reflects "the societal concern with weapons reaching the hands of unauthorized users." *Id.* at 154. The *Jupin* Court acknowledged that the "goal of firearms control legislation in Massachusetts is to limit access to deadly weapons by irresponsible persons and the Legislature has adopted a wide range of methods to accomplish this goal, including . . . the imposition of serious penalties for infractions of the firearms

control laws." *Id.* (quoting *Ruggiero v. Police Comm'r of Boston*, 18 Mass. App. Ct. 256, 258 (1984)) (internal quotations omitted). The Court asserted that "these enactments include a measure requiring gun owners to ensure that the firearms they own are 'secured in a locked container' when stored." *Jupin*, 447 Mass. at 154."

Other courts have similarly held that safe gun storage is so crucial to public safety that gun owners have a duty to secure firearms to prevent access by dangerous or unauthorized persons. In *Estate of Heck v. Stoffer*, a unanimous Indiana Supreme Court found that "[i]t is a responsible gun owner's duty to exercise reasonable care in the safe storage of a firearm." *Estate of Heck v. Stoffer*, 786 N.E.2d 265, 271 (Ind. 2003). In finding such a duty, the Court held that "[b]ased upon the significant number of gun-related crimes and the ease of securing a firearm in the home, we find that public policy favors the safe storage of firearms." *Id.* at 270. In so holding, the court also noted that the National Rifle Association advises that guns be properly secured:

When Using or Storing a Gun, Always Follow These NRA Rules.... *Store guns so they are not accessible to unauthorized persons.* Many factors

must be considered when deciding where and how to store guns. A person's particular situation will be a major part of the consideration. *Dozens of gun storage devices, as well as locking devices that attach directly to the gun, are available.*

Id. at 271 (quoting NRA.org, Safety & Training)

(emphasis added).

Likewise, in a Georgia case, a police officer shot by a felon sued the felon's father for storing his gun in an area of his home where his son could access it. See *Edmunds v. Cowan*, 386 S.E.2d 39 (Ga. Ct. App. 1989). The court held that the father owed a duty of care to the policeman because the father "had a duty to exercise ordinary care in storing the pistol." *Id.* at 41. The court found a duty even though the father did not give his son permission to use the gun and had secured the gun with a trigger lock. *Id.* at 40; see also *Foster v. Arthur*, 519 So. 2d 1092, 1094 (Fla. Dist. Ct. App. 1988) (duty of care owed to person injured with gun when harmful use was foreseeable by gun owner); *Estate of Strever v. Cline*, 924 P.2d 666, 671 (Mont. 1996) (duty owed "to the general public to store the firearm in a safe and

prudent manner," though finding no ultimate liability in that particular case).⁴⁵

B. Massachusetts Has Regulated Gun Storage Since Enactment of the Second Amendment.

Massachusetts - home to many of our Nation's founding fathers - also has a long history of enacting legislation aimed at protecting its citizens and ensuring their safety by limiting access to firearms by persons not competent to use them.⁴⁶ Indeed, safe

⁴⁵ Massachusetts courts have also repeatedly recognized that guns are highly dangerous instrumentalities. See *Sojka v. Dlugosz*, 293 Mass. 419, 423 (1936) (calling rifle a "highly dangerous instrumentality"); *Moutsos v. Clark*, 19 Mass. L. Rptr. 49 (Mass. Super. 2004) (noting "the inherent danger of firearms"). Other states similarly have recognized a responsibility to exercise the "highest degree of care" in safeguarding a firearm. See, e.g., *Wood v. Groh*, 7 P.3d 1163, 1169 (Kan. 2000) (holding that homeowners "owed the highest duty to protect the public from the misuse of the gun, a dangerous instrumentality, stored in their home."); *Reida v. Lund*, 96 Cal. Rptr. 102, 103-07 (Cal. Ct. App. 1971) (finding a valid "cause of action ... for negligent safeguard of a dangerous instrumentality," and declaring that a "highest standard of due care" in firearm storage is owed "to the public"); *Palmisano v. Ehrig*, 408 A.2d 1083, 1084 (N.J. Super. Ct. App. Div. 1979) (stating "One who possesses firearms is under a duty to use extraordinary care in their handling[, including] tak[ing] such steps as will protect an innocent person from the expectable actions of other persons.").

⁴⁶ See 1919 Mass. Acts 180 (individuals prohibited from providing firearms, air guns or other dangerous

firearm storage laws in Massachusetts date back to the time of ratification of the Second Amendment, and those were far more restrictive than current gun storage requirements under Section 131L.

For example, a 1783 Massachusetts storage law cited by Justice Scalia in the *Heller* majority decision restricted the possession of loaded firearms in "any Dwelling House, Stable, Barn, Out-house, Warehouse, Store, Shop or other Building." Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts p. 218. The *Heller* Court interpreted this statute to allow for the use of firearms in self-defense while otherwise restricting possession of loaded firearms in the abovementioned locations. In contrast, Section 131L allows gun owners to freely access unlocked and loaded firearms while the guns are carried or under their control. Additionally, even in situations where the gun is required to be locked, it can be accessed quicker than a colonial-period firearm would even take to load.

weapons, or ammunition to minors under the age of fifteen); 1925 Mass. Acts 284, § 4 (license to carry pistol or revolver may be issued to person residing or having place of business in Commonwealth but not to unnaturalized person, person convicted of a felony or the unlawful use or sale of drugs, or a minor under 15).

Furthermore, the *Heller* majority explicitly noted that "[n]othing about those fire-safety laws undermines our analysis; they do not *remotely* burden the right of self-defense as much as an absolute ban on handguns. Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents." *Heller*, 128 S. Ct. at 2819-2820 (emphasis added).

The 1783 safe storage statute is only one of many firearm regulations in Massachusetts in the 18th and early-19th centuries. From 1746 to 1801, at least seven other statutes regulated gun usage in Massachusetts.⁴⁷ A 1746 law, also cited in *Heller*, prohibited the discharge of "any Gun or Pistol charged

⁴⁷ See Act of Oct. 4, 1780, ch. V, 1780 Mass. Acts 326 (governing a "powder house" in Boston); Act of June 26, 1792, ch. X, 1792 Mass. Acts at 208 (governing the storage of gunpowder in Massachusetts); Act of June 19, 1801, ch. XX, 1801 Mass. Acts 507 (same); Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31 (requiring a statement of allegiance in order to possess firearms); Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay 208 (prohibiting the firing of guns within Boston town limits); Act of July 19, 1776, ch. I, 1775-1776 Mass. Acts 15 (requiring an inventory of all firearms possessed by members of the militia every six months); Act of Feb. 16, 1787, ch. VI, 1787 Mass. Acts 555 (requiring those pardoned for their participation in Shays' Rebellion to remain disarmed for three years).

with Shot or Ball in the Town of Boston." *Heller*, 128 S. Ct. at 2820; Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay 208. A 1776 law disarmed those "disaffected to the Cause of America" and required any male over the age of 16 to give an oath of allegiance to the state in order to possess firearms. Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31. Finally, 1780, 1792, and 1801 laws all further regulated the storage and use of gunpowder. Act of Oct. 4, 1780, ch. V, 1780 Mass. Acts 326; Act of June 26, 1792, ch. X, 1792 Mass. Acts 208; Act of June 19, 1801, ch. XX, 1801 Mass. Acts 507. The abundance of such laws during the time of ratification firmly supports the ability of the government to regulate gun storage in Massachusetts.

Justice Scalia also addressed the 1825 Massachusetts case of *Commonwealth v. Blanding*. 20 Mass. 304 (1825). Justice Scalia cited this case to support the proposition that the Second Amendment confers an individual rather than a collective right. However, *Blanding* also reinforces that, shortly after ratification, the Second Amendment allowed for government regulation of firearms. In *Blanding*, this Court explicitly found that the possession of firearms

could be curtailed in certain instances: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."

Blanding, 20 Mass. 304, 313-314.

The gun regulations in place in Massachusetts since the colonial days that did "not remotely burden the right of self-defense as much as an absolute ban on handguns" were more stringent than Section 131L. One expert on colonial gun laws, Professor Saul Cornell, remarked that "[t]he laws were clearly crafted to meet the needs of public safety, but they also provided a check on the creation of a private arsenal."⁴⁸ Cornell continued, "[t]he gunpowder storage laws of the eighteenth century thus constituted a significant limit on the right to bear arms."⁴⁹ Section 131L's far more modest regulation offers significant protections to the continued public safety of Massachusetts with less restrictions than

⁴⁸ See Saul Cornell & Nathan DeDino, *A Well Regulated Right*, 73 *FORDHAM L. REV.* 487, 512 (2004).

⁴⁹ *Id.*

the laws that were in place in Massachusetts since the time of the ratification of the Second Amendment.

Likewise, modern Massachusetts gun laws like Section 131L reasonably ensure public safety while also allowing for lawful gun use for self-defense and other purposes. For example, the Massachusetts Office of the Attorney General first proposed gun safety regulations in 1996 for the purpose of "stem[ming] the tide of handgun violence..., and [making] handguns safer for use by law-abiding citizens who purchase them to protect themselves, their families and their property."⁵⁰ The legislature incorporated these Massachusetts Consumer Regulations on Handgun Sales (Consumer Regulations) into Chapter 180 of the Acts of 1998.⁵¹ The lack of federal agency regulation of handguns when even children's toys were heavily

⁵⁰ Benjamin Bejar, *Wielding the Consumer Protection Shield: Sensible Handgun Regulation in Massachusetts a Paradigm for a National Model?*, 7 B.U. PUB. INT. L.J. 59, 59-60 (1998) (quoting *Harshbarger Moves to Ban Sale of Saturday Night Specials*, News Release (Off. of Att'y Gen., Mass.), July 29, 1996).

⁵¹ See generally 940 C.M.R. 16.00.

regulated prompted the Massachusetts Attorney General to take action.⁵²

In enacting Massachusetts gun laws, the legislature has recognized that there is a legitimate and cognizable public interest in gun safety, through gun manufacturing, storage and care, use and access, and even the types allowed. That public interest is reflected in the Massachusetts law. The Consumer Regulations, for example, came first to ensure handguns did not cause "unjustified consumer injury" when used properly.⁵³ One of the five general remedies for gun safety the Attorney General presented in the regulations was to require "child-proofing" or safety devices be provided at the time of sale.⁵⁴

⁵² The Bureau of Alcohol, Tobacco, and Firearms (ATF) had no regulatory power to ensure safe gun design, and the Consumer Product Safety Act (CPSA) specifically exempts firearms and ammunition from regulation. Bejar, 7 B.U. PUB. INT. L.J. at 61; 15 U.S.C. § 2052(a)(5)(E).

⁵³ See Bejar, 7 B.U. PUB. INT. L.J. at 68.

⁵⁴ Bejar, 7 B.U. PUB. INT. L.J. at 69 (listing the five remedies); 940 C.M.R. 16.05. This idea came from gun manufacturers' own policies. See Brief for Defendant-Appellant's Brief at 5, *American Shooting Sports Council v. Attorney General*, No. 98-07860 (Mass. 1998). It was reiterated through a gun industry promise to the Clinton Administration to provide child-proof trigger locks on all handguns. See Bejar, 7 B.U. PUB. INT.

The challenge to the Attorney General's authority to promulgate the Consumer Regulations prompted the Massachusetts legislature to act by drafting what became the gun laws of 1998, and the Attorney General's authority to issue the Consumer Regulations was confirmed after the codification of G.L. c. 140 § 131L.⁵⁵ These and other Massachusetts gun laws have reasonably ensured public safety while allowing for lawful self-defense, making Massachusetts one of the safest states in the Nation in terms of gun violence.⁵⁶

V. CONCLUSION

Massachusetts' safe gun storage statute is a crucial law to protect children and others from the ravages of gun violence, while permitting lawful self-defense. The *Heller* Court specifically acknowledged

L.J. at 75; see Editorial, *Voluntary Handgun Safeguards*, BOSTON GLOBE, Oct. 10, 1997, at A3.

⁵⁵ When the Massachusetts Superior Court rejected the Consumer Regulations, the legislature decided to step in and codify the regulations while the Attorney General was proceeding with the appeals process. The Supreme Judicial Court affirmed the Attorney General's authority to issue the regulations under G.L. c. 93A and stated that the legislature incorporated the regulations into the 1998 gun laws for the purpose of increasing consumer safety. *American Shooting Sports Council v. Attorney General*, 429 Mass. 871, 877-879 (1999).

⁵⁶ See *supra* note 2.

the importance of government action to stem the problem of gun violence, explicitly noting the validity of safe storage laws. As Section 131L is entirely consistent with *Heller*, the lower court ruling should be reversed.

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FOR THE *AMICI*

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CERTIFICATON UNDER RULE 16 OF MASS.R.A.P.

Now comes Scott Harshbarger, counsel for the Amici Curiae, and hereby certifies that the brief submitted for the Amici Curiae herein complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass.R.A.P. A.P. 16 (a)(6) (pertinent findings or memoranda of decision); Mass.R.A.P. 16(e) (references to the record); Mass.R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass.R.A.P. 16(h) (length of brief); Mass.R.A.P. 18 (appendix to the briefs); and Mass.R.A.P. 20 (form of briefs, appendices and other papers).

I further attest, that this brief is being filed under rule 13a, and that the day of mailing is within the time fixed for filing by the court.


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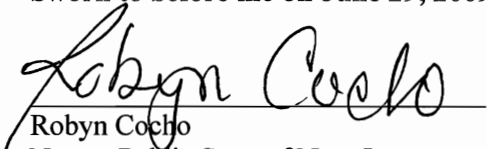
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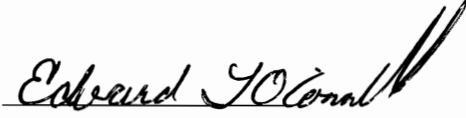
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