18-1545

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

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,

—v.—

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.

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

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

JONATHAN K. BAUM
KATTEN MUCHIN ROSENMAN LLP
525 West Monroe Street
Chicago, Ilinois 60661
(312) 902-5200
jonathan.baum@kattenlaw.com

MARK T. CIANI
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, New York 10022
(212) 940-8800
mark.ciani@kattenlaw.com

Counsel for Amicus Curiae Giffords Law Center to Prevent Gun Violence

(*Counsel continued on inside cover*)

J. ADAM SKAGGS
GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE
223 West 38th Street, # 90
New York, New York10018
(917) 680-3473

HANNAH SHEARER
GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE
268 Bush Street # 555
San Francisco, California 94104
(415) 433-2062

Of Counsel for Amicus Curiae Giffords Law Center to Prevent Gun Violence

Table of Contents

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") is a non-profit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to effectively reduce gun violence. The organization was founded 25 years ago and renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization led by former Congresswoman Gabrielle Giffords. Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizen ns who seek to improve the safety of their communities. As an *amicus*, Giffords Law Center has provided informed analysis in a variety of firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Giffords Law Center has a particular interest in this litigation because it was formed in the wake of an assault weapon massacre at a San Francisco law firm in 1993. The shooter in that rampage was armed with two assault weapons and multiple large capacity ammunition magazines, some capable of holding up to 50 rounds of ammunition.

---

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amicus* states that no party's counsel authored this brief in whole or in part and that no party, party's counsel, nor any other person contributed any money to fund the preparation or submission of this brief, other than *amicus curiae*. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In 1998, Massachusetts prohibited the sale, transfer or possession of assault weapons and large capacity magazines ("LCMs"). Mass. Gen. Laws Ann. ch. 140, § 131M (2018) (the "Act"). In the years since, and particularly after the federal assault weapons ban lapsed in 2004, mass shootings across the country have made headlines with frightening regularity. There is no place in the United States, much less Massachusetts, where the specter of mass shootings does not hang over Americans as they go to church, work, or school, and while they gather in college campuses, movie theaters, urban centers, and rural areas. As the Sandy Hook massacre showed—where a man carrying an assault weapon with large capacity ammunition magazines shot 20 children and six adults before turning the gun on himself—even our children are in danger. Across the country, teachers routinely prepare their young charges for a day when someone roams their school's hallways with an assault weapon and high-capacity magazines.

These favored tools of mass shooters are not protected by the Second Amendment, and the District Court correctly upheld the Act on this basis. *Worman v. Healey*, 293 F. Supp. 251, 266 (D. Mass. 2018). In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that law-abiding citizens have a right to keep a handgun in the home for self-defense, but approved banning "dangerous

and unusual weapons." 554 U.S. at 626. The Court held that "[l]ike most rights, the right secured by the Second Amendment is not unlimited"; it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. Appellants, however, demand that this Court radically expand *Heller* to protect the possession of assault weapons and large capacity ammunition magazines, devices of military origin designed to kill large numbers of people quickly and efficiently. *Heller* does not support such an extension and, as other courts addressing the issue have ruled, it does not violate the Second Amendment to prohibit civilian access to devices that are ill-suited for self-defense and frequently employed in mass shootings and attacks on law enforcement officers.

Appellants' challenge to the Act fails because the Act does not burden the Second Amendment. However, even if it did implicate the Second Amendment, the Act would clearly pass constitutional muster under intermediate scrutiny or the "substantial relationship" test, the appropriate standards of review.

ARGUMENT

I. THE ACT REGULATES CONDUCT THAT FALLS OUTSIDE THE SCOPE OF THE SECOND AMENDMENT

A. Background of the Act.

The Act prohibits, among other things, the sale, transfer or possession of assault weapons, including various specific models of semiautomatic rifles and copycats thereof. *See* Mass. Gen. Laws Ann. ch. 140, § 121, 131M (2018). The Act

also bans the sale, transfer and possession of large capacity magazines ("LCMs"), named "large capacity feeding devices" in the Act. *See* Mass. Gen. Laws Ann. ch. 140, § 131M (2018). A LCM is defined in the Act as "a fixed or detachable magazine, box, drum, feed strip or similar device capable of accepting, or that can be readily converted to accept, more than ten rounds of ammunition." *See* Mass. Gen. Laws Ann. ch. 140, § 121 (2018).

State and local governments across the country have adopted laws restricting civilian access to assault weapons and LCMs because of the devastating role they repeatedly play in mass shootings and attacks on peace officers.[2] The shooting rampage at Sandy Hook is an unforgettable example of the enormous public safety threat posed by assault weapons and LCMs. However, this threat is neither new nor uncommon; indeed, the frequency and lethality of mass shootings has been increasing. For example, in just the past year:

[2] *See* Colo. Rev. Stat. Ann. §§ 18-12-301, 18-12-302 (West 2013); N.Y. Penal Law §§ 265.02(7)-(8), 265.37; Cal. Penal Code §§ 12275-12290 (2013); Haw. Rev. Stat. Ann. §§134-1, 134-4, 134-8 (2013); Conn. Gen. Stat. Ann. §§ 53-202a(1)(e), 53-202b(a)(1), 53-202w(b) (West 2013); Md. Code Ann., Crim. Law §§ 4-301(b), 4-301(d), 4-303(a)(2), 4-305(b); N.J. Stat. Ann. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13 (West 2014); D.C. Code §§ 7-2551.01 – 7-2551.03 (2012); Cook Cnty., Ill., Code of Ordinances §§ 54-211 – 54-213; Highland Park, Ill., City Code § 136.005; New York City, N.Y., Admin. Code § 10-301; San Francisco, Cal., Police Code § 619; Sunnyvale, Cal., Municipal Code § 9.44.050.

- In October 2017, a gunman armed with numerous semi-automatic rifles opened fire on a country music festival, killing 58 people and injuring hundreds more, in Las Vegas, Nevada.[3]

- In February 2018, the shooter responsible for the shooting at Stoneman Douglas High School in Parkland, Florida, armed himself with an AR-15 semi-automatic style rifle, killed 17 people and wounded 14.[4]

- In April 2018, a shooter armed with an AR-15 killed four people at a Waffle House in Antioch, Tennessee.[5]

More people die during mass shootings when assault weapons and large-capacity magazines are used. These weapons and magazines allow shooters to fire many more shots at greater velocity and without interruption, leaving more victims with multiple traumatic injuries.[6] A new study published in the Journal of the American Medical Association, for example, found that more people were shot, and more killed, when the perpetrator of an "active shooting" used a semiautomatic

---

[3] Alex Horton, *The Las Vegas Shooter Modified a Dozen Rifles to Shoot Like Automatic Weapons*, THE WASHINGTON POST (Oct. 3, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/10/02/video-from-las-vegas-suggests-automatic-gunfire-heres-what-makes-machine-guns-different/?utm_term=.8f71765b36d8.

[4] Will Drabold and Alex Fitzpatrick, *The Florida School Shooter Used An AR-15 Rifle. Here's What to Know About the Gun*, TIME (Feb. 20, 2018), http://time.com/5160267/gun-used-florida-school-shooting-ar-15.

[5] Christopher Mele and Jacey Fortin, *Man Sought in Waffle House Shooting Had Been Arrested Near White House*, N.Y. TIMES (April 22, 2018), https://www.nytimes.com/2018/04/22/us/waffle-house-shooting.html.

[6] *See* Jen Christensen, Gunshot Wounds Are Deadlier Than Ever As Guns Become Increasingly Powerful, CNN (Jun. 14, 2016), https://www.cnn.com/2016/06/14/health/gun-injuries-more-deadly/.

assault-style rifle compared with a handgun.[7] Another study concluded that, on average, shooters who use assault weapons or LCMs in mass shootings shoot twice as many victims, resulting in 47% more victims killed.[8]

Given these alarming facts, the Massachusetts Legislature made the reasonable—and constitutional—decision to prohibit the sale, transfer and possession of assault weapons and LCMs.

B. The Second Amendment Does Not Protect a Right to Possess Assault Weapons.

As other courts have ruled, the Constitution does not guarantee the right to possess the military-grade weapons and magazines selected by mass shooters to quickly kill and injure many people. *See, e.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. 2017) (*en banc*) (semiautomatic rifles are "like" M-16s and fall outside the scope of the Second Amendment); *Friedman v. City of Highland Park*, 784 F.3d

---

[7] Elzerie de Jager *et al.*, Lethality of Civilian Active Shooter Incidents With and Without Semiautomatic Rifles in the United States, J. AM. MED. ASS'N (Sept. 11, 2018), at https://jamanetwork.com/journals/jama/article-abstract/2702134.

[8] Everytown Research, Analysis of Recent Mass Shootings, at 4 (Aug. 2015), https://everytownresearch.org/documents/2015/09/analysis-massshootings.pdf; *see also* Adil Haider *et al.*, *Lethality of Civilian Active Shooter Incidents With and Without Semiautomatic Rifles in the United States*, 320 J. AM. MED. ASS'N 1034, 1034 (2018); Dina Maron, *Data Confirm Semiautomatic Rifles Linked to More Deaths, Injuries,* SCIENTIFIC AMERICAN (Sep. 11, 2018), https://www.scientificamerican.com/article/data-confirm-semiautomatic-rifles-linked-to-more-deaths-injuries/ ("in an active shooter incident, an assailant with a semiautomatic rifle may be able to hurt and kill about twice the number of people compared to if they had a non-semiautomatic rifle or a handgun").

406, 412 (7th Cir. 2015) (upholding assault weapon ban and observing "at least some categorical limits on the kinds of weapons that can be possessed are proper"). For the reasons discussed below, the assault weapons banned by the Massachusetts law at issue here fall outside of the scope of the Second Amendment's protections.

1. Assault Weapons Are Unprotected Because They Are Most Suited to Military Purposes.

Heller stated that access to weapons "most useful in military service" such as "M-16 rifles and the like," does not fall within the scope of the Second Amendment. *Heller*, 554 U.S. at 627. The district court concluded that the Act's ban on assault weapons did not implicate Second Amendment rights because assault weapons and fully-automatic machine guns like the M-16—which *Heller* permits prohibiting—"were designed and manufactured simultaneously for the military and share very similar features and functions." *Worman*, 293 F. Supp. at 266.

The AR-15 and the other banned assault weapons are military grade. The "phenomenal lethality" of the AR-15 led the Pentagon to adopt it as the standard-issue assault rifle in every war since Vietnam. (Joint Appendix ("JA")-3194.) As the district court explained, the assault weapons the Act bans are "almost identical to the [military's] M16, except for the mode of firing" (semiautomatic versus automatic). *Worman*, 293 F. Supp. at 265. In a police department test, an automatic UZI with a 30-round magazine "emptied in slightly less than two seconds…while the same magazine was emptied in just five seconds on semiautomatic" mode. (JA-

2240.) The M-16s that are the standard-issue weapon for the U.S. armed forces can be set to fire in both semiautomatic and full-auto modes, and the Army Field Manual instructs soldiers that semiautomatic fire "is the most important firing technique during fast-moving, modern combat," emphasizing that it is "surprising how devastatingly accurate rapid semi-automatic fire can be." (JA-3195.) Their characteristics are so similar that a semi-automatic assault weapon can be readily converted into a fully automatic weapon.[9]

By banning semiautomatic assault weapons, the Act prohibits precisely the type of powerful, rapid-fire, military weapons that fall outside the purview of Second Amendment protection.

2. Assault Weapons Are Unprotected Because They Are Dangerous and Not Typically Possessed for Lawful Purposes.

Unsurprisingly, the military-caliber weapon the Act bans are dangerous and not typically possessed by law-abiding citizens for lawful purposes. Courts have recognized that this is a second, independent reason that the Act's prohibition on selling and possessing assault weapons falls outside the scope of the Second Amendment's protections. *See N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d

[9] *See, e.g.*, *Lightning Link*, http://thehomegunsmith.com/pdf/fast_bunny.pdf (last visited December, 31 2014) (describing how AR-15 can be converted into fully automatic weapon in ten seconds).

242, 254-56 (2d Cir. 2015); *Commonwealth v. Cassidy*, 479 Mass. 527, 528 (Mass. 2018) (upholding assault weapon ban on grounds that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.").

a) Assault Weapons are Dangerous

Just like fully automatic weapons, assault weapons are "designed to enhance [the] capacity to shoot multiple human targets very rapidly." *Heller v. Dist. of Columbia ("Heller II")*, 670 F.3d 1244, 1262 (D.C. Cir. 2011). The Bureau of Alcohol, Tobacco, Firearms, and Explosives confirms that "[a]ssault weapons were designed for rapid fire, close quarter shooting at human beings. That is why they were put together the way they were." **(**JA-2240.) "You will not find these guns in a duck blind or at the Olympics. They are mass produced mayhem." *Id.* In 1959, the Pentagon promoted switching from the M-14 rifle to the "much more effective" AR-15 rifle concluding that a "5-7 man squad armed with the AR-15 would be as effective as a 10-man squad armed with the M-14." (JA-3197.) During the Vietnam War, ARPA found that the AR-15 was perfectly tailored for the "violent short clashes at close ranges which are characteristic of guerrilla warfare in Vietnam." (JA-3198.)

Moreover, semiautomatic assault weapons like the AR-15 that are prohibited by the Act are frequently chosen by criminals. Despite accounting for only 1% of

all firearms, assault weapons account for nearly 60% of all mass murders and 15% of murders of police officers, crimes for which weapons with greater firepower would seem particularly useful. (JA-2242, 3748.) Retired Navy trauma surgeon Dr. Philip Rhee—who operated on Congresswoman Gabrielle Giffords after she was shot in the head—compared handgun wounds to stabbings with a nail. Shooting someone with an AR-15, he concluded, "is as if you shot somebody with a Coke can." (JA-3194.)

Crime policy expert Christopher Koper recently studied the criminal use of assault weapons and LCMs. Koper analyzed a number of local and national data sources, including guns recovered by police in ten large cities, guns reported by police to federal authorities for investigative tracing, guns used in murders of police, and guns used in mass murders. (JA-3748.) He concluded that "high-capacity semiautomatics have grown from 33 to 112% as a share of crime guns since the expiration of the federal ban [in 2004]—a trend that has coincided with recent growth in shootings nationwide." (JA-3748.) Koper found that high-capacity semiautomatics were used in approximately 57% of mass murders and upwards of 40% of crimes involving serious violence, including murders of police. (JA-3748.) Assault weapons, excluding other high-capacity semiautomatics, were used in 13-16% of murders of police. (JA-3748.) These numbers, coupled with the routine reporting of mass shootings perpetrated by shooters carrying assault weapons,

demonstrate beyond dispute that assault weapons are dangerous.

b) Assault Weapons Are Not Typically Possessed for Lawful Purposes.

As the Second Circuit has explained, "typical possession" requires courts to "look into both broad patterns of use and the subjective motives of gun owners." *Cuomo*, 804 F.3d at 254-56. Assault weapons are not typically possessed for lawful purposes because there is no evidence that there is a "broad pattern of use" of assault weapons for self-defense or hunting. To the contrary, there is compelling evidence that they are not broadly used in self-defense and are disproportionately used in gun crimes. *See supra* at 9-10.

Appellants offer no evidence that assault weapons are in fact broadly used for self-defense or hunting. Instead, they rely on the legally irrelevant statement that gun owners would like to use assault weapons for self-defense and their baseless claim that law enforcement recommends assault weapons to civilians for self-defense. (Appellant Br. at 10.) None of Plaintiffs' cited experts support this contention, and police officials have repeatedly gone on record opposing civilian assault weapon ownership.[10] When it comes to self-defense, other weapons have far more to

[10] *Editorial: On Guns, Listen to the Cops and Kids*, NEW JERSEY STAR-LEDGER (Feb. 24, 2018), https://www.nj.com/opinion/index.ssf/2018/02/on_guns_listen_to_the_cops_and_kids_editorial.html (citing law enforcement officers critical of assault weapons, including Massachusetts Police Captain Emanuel Gomes); *see also* Charles Rabin, *In Wake of Parkland Massacre, Police Chiefs — Again —*

recommend. Trauma and ballistics experts have explained that "[i]n military and law enforcement, shotguns are used as close-range combat weapons or as a weapon for self-defense."[11] Among less-experienced shooters, shotguns can be an optimal defense weapon because they are easier to aim and hit at close range "and the delivered wound can be equivalent to an assault rifle."[12] And the shots fired from these weapons are far less likely to inflict collateral damage, making them better adapted to self-defense.[13]

Thus, because assault weapons are undoubtedly dangerous, and there is no evidence that they are broadly used for or well-suited to lawful self-defense, the Second Amendment does not protect their possession.

3. Assault Weapons Are Not in "Common Use."

Even if this Court determines that assault weapons and LCMs are typically possessed for lawful purposes (which they are not), regulation of such weapons may

---

Call for Assault-Weapons Ban, MIAMI HERALD (Feb. 19, 2018), https://www.miamiherald.com/news/local/article201002389.html.

[11] Peter M. Rhee et al., *Gunshot Wounds: A Review of Ballistics, Bullets, Weapons, and Myths*, 80 J. TRAUMA ACUTE CARE SURG. 853, 865 (2016).

[12] *Id.* Appellants erroneously argue that assault weapons are superior to shotguns in part because "the "spread" of shotgun pellets increases the likelihood that some projectiles will miss the intended target and penetrate others." (Appellant Br. at 10-11.) But assault weapons present the same risk. (*See* JA-0916, 0977, 2255.)

[13] *See supra* n.10 (quoting Massachusetts police captain: "You're talking about the kind of firepower that can go through vehicles, through vests, and that can literally go through a house.").

fall outside the scope of the Second Amendment because they are not "*in common use . . .*"[14] *Heller*, 554 U.S. at 624; *see also Cuomo*, 804 F.3d at 254-56.

Assault weapons are not commonly used or purchased by the public and comprise only a small percentage of the total firearms in circulation in the United States and certainly in Massachusetts.[15] Appellants claim that more than 4.8 million people own a sporting rifle. (Appellant Br. at 8.) Appellants offer only the unsubstantiated testimony of an industry expert to support that proposition. (*See* JA-0089, 0705.) Even if true, however, that number is consistent with other studies showing that assault weapons constitute only *1%* of guns in circulation. *See* Marianne W. Zawitz, U.S. DEP'T OF JUSTICE, *Guns Used in Crime*, 6 (1995). While gun sales in America have risen in recent years, the percentage of households owning guns has sharply dropped, reflecting the fact that more firearms are being sold to an ever-smaller group of enthusiasts. That gun ownership is concentrated among mega-owners undermines Appellants' argument that high production numbers equate with

[14] The District Court in this case concluded that a weapon's popularity is "not constitutionally material." *Worman*, 293 F. Supp. at 266.

[15] *Heller* did not dictate that a weapon's commonality must be assessed nationally, and *McDonald* confirmed that the Second Amendment permits continued "state and local experimentation with reasonable firearm regulations." 561 U.S. at 785. In other areas of constitutional law, such as First Amendment obscenity law, localized standards are employed. *See Miller v. California*, 413 U.S. 15, 32-33 (1973).

"common use," particularly when the numbers may only account for 1% of total guns in circulation.[16]

C. The Second Amendment Does Not Protect a Right to Possess LCMs.

Like assault weapons, LCMs are unprotected by the Second Amendment. The provisions of the Act regulating such magazines are constitutional.

1. LCMs Are Not "Arms."

As a threshold matter, the right protected under the Second Amendment applies only to "arms." *See Heller*, 554 U.S. at 581. The *Heller* Court relied on a 1773 dictionary defining "arms" as "weapons of offence, or armour of defence." 554 U.S. at 581 (citing 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). An LCM is not a "weapon of offence" or "armour."[17] Instead, it is an ammunition storage device that enhances a gun's ability to fire more rounds without reloading; it is neither an integral nor necessary component of the vast majority of firearms.[18] Indeed, as one court found after a full trial, prohibitions on LCMs do not

---

[16] *See* Hepburn *et al*., "The US Gun Stock: Results from the 2004 National Firearms Survey," INJURY PREVENTION (2007) 15-19.

[17] The *Heller* majority also relied on a historical legal definition of the term "arms": "Servants and labourers shall use bows and arrows on Sundays, . . . and not bear other arms." *Heller*, 554 U.S. at 581 (citing Timothy Cunningham, *A New and Complete Law Dictionary* (2d ed. 1771)). The definition is instructive here: guns are like bows and bullets are like arrows, but the analog to a LCM—the quiver—is conspicuously *not* an "arm."

[18] Historical sources support the conclusion that accessories like LCMs are not "arms." A founding-era militia law distinguished "arms" and "ammunition"

deprive gun owners of the magazines they need for their weapons to function. *Colo. Outfitters Association v. Hickenlooper*, 24 F. Supp. 3d 1050 (D. Colo. 2014), *vacated for lack of standing*, 823 F.3d 537 (10th Cir. 2016).

While a magazine necessary to supply a firearm with *some* number of bullets may be considered integral to its core functionality, *cf. Jackson v. San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014), the same cannot be said of a magazine that expands that supply beyond 10 rounds. Thus, for example, in *United States v. McCartney*, 357 F. App'x. 73 (9th Cir. 2009), the court held that silencers are "not protected by the Second Amendment." *Id.* at 76. Unlike ammunition, most firearms are fully operable without LCMs and function perfectly well with magazines permitted under Massachusetts law, including for use in self-defense. Indeed, for the majority of the last century and a half, an average American civilian using a handgun in the home for self-defense could generally fire six rounds before reloading.[19] There is no evidence to suggest this left Americans vulnerable; on the other hand, there is good

---

from a third category, "accoutrements"—analogous to accessories that enhance an already-functional firearm. *Heller*, 554 U.S. at 650 (Stevens, J., dissenting) (quoting Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2). The gun industry draws this distinction today, selling magazines as "accessories," not firearms or ammunition. *E.g.*, Parts & Accessories, ATLANTIC FIREARMS, https://www.atlanticfirearms.com/taxons/accessories (visited Sep. 14, 2018).

[19] Violence Policy Center, Backgrounder on Glock 19 Pistol and Ammunition Magazines Used in Attack on Representative Gabrielle Giffords and Others (Jan. 2011), http://www.vpc.org/fact_sht/AZbackgrounder.pdf.

reason to believe that access to more rounds per magazine poses a significantly increased threat to public safety.

2. Even If LCMs Are "Arms," They Fall Outside the Scope of the Second Amendment Because They are Best Suited for Military Purposes

Even if LCMs are "arms," they fall outisde the scope of the Second Amendment because, like assault weapons, they are "most useful in military service." *Heller*, 554 U.S. at 627. As the district court held in this case and the Fourth Circuit correctly determined in *Kolbe*, LCMs are "particularly designed and most suitable for military and law enforcement applications." *Kolbe*, 849 F.3d at 136-37. LCMs' lethality suits them to military use, but is precisely what makes them poorly-adapted for civilian defense. *See id.* at 127 ("in the hands of law-abiding citizens, large-capacity magazines are particularly dangerous"; "inadequately trained civilians… fire more rounds than necessary and thus endanger more bystanders"). Even setting aside the grave risks to bystanders, and assuming LCMs have theoretical utility for self-defense, this utility pales in comparison to the evidence that LCMs give criminals military-level firepower, enabling the shooting of "multiple human targets very rapidly." *Id.* at 137.

3. LCMs Are Unprotected Because They Are Dangerous and Not Typically Possessed for Lawful Purposes.

LCMs are not protected by the Second Amendment for the separate reason that they are exceedingly dangerous weapons not typically possessed for lawful purposes. *See supra* at 8.

a) LCMs are Dangerous

LCMs are dangerous because they fuel mass shootings and result in more fatalities when used. Professor Michael Siegel of Boston University found that states that have restricted access to LCMs—usually defined with a 10 round-limit—experience 63% fewer mass shootings.[20] Another expert determined that LCMs are the number one leading contributor to the increase in frequency and lethality of mass shootings in the United States.[21] As noted above, mass shooters who use such magazines or assault weapons shoot over twice as many victims as in comparable shootings. *See supra* note 8.

---

[20] Sam Petulla, *Here is 1 Correlation Between State Gun Laws and Mass Shootings*, CNN (Oct. 5, 2017), https://www.cnn.com/2017/10/05/politics/gun-laws-magazines-las-vegas/index.html.

[21] Louis Klarevas, Rampage Nation: Securing America from Mass Shootings 257 (2016); *see also id.* at 215-25; Tanya Basu, This Chart Shows How Mass Public Shootings in the U.S. Have Risen, TIME (Aug. 4, 2015), http://time.com/3983557/mass-shootings-america-increasing; Rob Arthur, No Matter How You Measure Them, Mass Shooting Deaths Are Up, FIVETHIRTYEIGHT (Nov. 7, 2017), https://fivethirtyeight.com/features/no-matter-how-you-measure-them-mass-shooting-deaths-are-up/.

LCMs are also disproportionately used in crimes against law enforcement. One study recently found that on average LCM-compatible firearms constituted a staggering 40.6% of weapons used to murder police officers (excluding cases where officers were killed with their own firearms), in some years reaching 48% of police murder weapons. Koper, *Criminal Use* 314 (2017).

Given the substantial contribution of LCMs to the number and lethality of gun crimes, mass shootings, and murders of law enforcement officers, there can be no question that they are dangerous.

b) LCMs Are Not Typically Possessed for Lawful Purposes.

There is no broad pattern of possessing LCMs for lawful purposes because LCM use is generally prohibited in hunting and it is exceedingly rare for more than ten shots to ever be fired in self-defense.[22] *Kolbe*, 849 F.3d at 127. Moreover, LCMs' exceedingly dangerous nature makes them unsuitable for lawful self-defense. *See, e.g.*, *Hightower v. City of Boston*, 693 F.3d 61, 66, 71-72 & n.7 (1st Cir. 2012) ("large capacity weapons" are not "of the type characteristically used to protect the home."); *Kolbe*, 849 F.3d at 127 ("in the hands of law-abiding citizens, large-

[22] Unable to produce an actual number for defensive uses of LCMs, Appellants are reduced to asserting that "their defensive use is too frequent to count." (Appellant Br. at 9.)

capacity magazines are particularly dangerous"; "inadequately trained civilians… fire more rounds than necessary and thus endanger more bystanders").

Responsible, lawful self-defense does not require the ability to continuously spray a multitude of bullets without reloading. The *Colorado Outfitters* court recognized as much, finding that a limitation on magazine capacity did not meaningfully impact "a person's ability to keep and bear (use) firearms for the *purpose of self-defense*." The court explained that "[e]ven in the relatively rare scenario where the conditions are 'ideal' for defensive firing, there is no showing of a severe effect [of the magazine capacity limitation] on the defensive shooter." *Colorado Outfitters*, 24 F. Supp. 3d at 1071.

Because LCMs are dangerous, ill-suited for self-defense and not "typically possessed for lawful purposes," they fall outside of the scope of the Second Amendment's protections.

II. EVEN IF THE ACT IMPLICATES THE SECOND AMENDMENT, IT REMAINS CONSTITUTIONAL.

The fact that the Act does not burden Second Amendment-protected activity should end this Court's inquiry. *See, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). But even if this Court were to conclude that the Act implicates the Second Amendment, it would still pass constitutional muster. As the many courts facing an identical question have held, intermediate scrutiny or a "substantial

relationship" inquiry is the most appropriate level of review and the Act easily meets these standards. *See infra* at 21.

A. Intermediate Scrutiny or a "Substantial Relationship" Inquiry Is the Appropriate Level of Review.

Protecting public safety is the bedrock function of government, and state and local governments have a profound interest in safeguarding the public and law enforcement personnel from gun violence. *See Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("promotion of safety of persons and property is unquestionably at the core of the State's police power"). Given these considerations, most courts employ intermediate scrutiny when reviewing Second Amendment challenges. *See, e.g.*, *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (noting that firearms' "inherent risks" distinguish Second Amendment rights from "other fundamental rights that have been held to be evaluated under a strict scrutiny test"); *see also Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 692 (6th Cir. 2016) (*en banc*) (a review of post-*Heller* circuit court decisions "reveals a near unanimous preference for intermediate scrutiny").

This Court has not had occasion to apply intermediate scrutiny in a Second Amendment challenge, but held in *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) that it was appropriate to evaluate gun regulations under a "substantial relationship" test that operates like intermediate scrutiny. *See id.* at 25 (since the challenged law categorically restricted "gun ownership by a class of individuals," it

was appropriate to require a "'strong showing,' necessitating a substantial relationship between the restriction and an important governmental objective").

Application of either intermediate scrutiny or the "substantial relationship" test is appropriate here, as other courts have repeatedly held, because the Act's prohibitions do not touch on "core" Second Amendment protections. Rather, the Act addresses military-grade weaponry. *See, e.g.*, *Heller II*, 670 F.3d at 1252-53; *Kolbe*, 849 F.3d at 137, 139, 140-41; *Cuomo*, 804 F.3d at 261-64; *see also Friedman*, 784 F.3d 406; *Colo. Outfitters*, 24 F. Supp. 3d 1050. Moreover, the Act leaves open ample alternative avenues for Massachusetts residents to exercise armed self-defense, including access to the handguns protected under *Heller*.

Appellants argue that bans on "bearable arms commonly kept for lawful purposes are per se unconstitutional."[23] (Appellant Br. at 17.) That argument, however, is premised on a misreading of *Heller*. The *Heller* Court struck down the handgun ban at issue because the regulation "bann[ed] from the home the most preferred firearm in the nation to keep and use for protection of one's home and family." 554 U.S. at 628-29. But the Court specifically held that the Second

[23] Appellants rely primarily on the Supreme Court's decision in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam), in which the Court considered a ban on stun guns. The *Caetano* Court did not rule that stun guns enjoyed a per se constitutional protection from all regulation. The Court merely stated that the standards of review used by the Supreme Judicial Court of Massachusetts—none of which was an intermediate scrutiny or "substantial relationship" test—were inappropriate under *Heller*.

Amendment does not confer—even in the home—"a right to keep and carry any weapon whatsoever," *id.* at 526, and endorsed a ban on machine guns, putting the lie to Appellants' argument.[24] Indeed, following *Heller*, this Court has rejected an as-applied Second Amendment challenge to a firearm licensing law on the basis that a more restrictive license was still available to the plaintiff that "would permit [him] to have a firearm in the home for purposes of self-defense." *Morin v. Leahy*, 862 F.3d 123, 127 (1st Cir. 2017).

Here, the Act's prohibition on a limited class of weapons that are particularly dangerous and ill-suited for self-defense leaves citizens free to possess a vast array of firearms and magazines with which to defend themselves. Accordingly, this Court should apply intermediate scrutiny or a "substantial relationship" test to the Act's prohibition on assault weapons and LCMs.

---

[24] Appellants concede that the *Heller* Court blessed bans on "M-16 rifles and the like" but argue that the Act's ban on assault weapons is nevertheless unconstitutional because the *Heller* Court was referring to weapons "subject to an existing regulation." (Brief of Appellants dated August 22, 2018 ("Appellant Br.") at 23.) *Heller* offers no support for this interpretation and no court has endorsed such a reading. If Appellants' argument were true—that only weapons already subject to regulation can be further regulated—then no new weapons could ever be subject to regulation under the Second Amendment. At least one appellate court has recognized the fallacy in this argument. *Friedman v. City of Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015) ("Nothing in *Heller* suggests that a constitutional challenge to bans on private possession of machine guns brought during the 1930s, soon after their enactment, should have succeeded—that the passage of time creates an easement across the Second Amendment.").

B. The Assault Weapons and LCM Bans Satisfy Intermediate Scrutiny and the "Substantial Relationship" Test.

Intermediate scrutiny requires a showing that the asserted governmental end is "significant," "substantial," or "important." *See, e.g.*, *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010). It requires that the fit between the challenged regulation and the stated objective be reasonable, not perfect, and does not require that the regulation be the least restrictive means of serving the interest. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001); *Marzzarella*, 614 F.3d at 98; *Jackson*, 746 F.3d at 965. This Court requires a "'strong showing,' necessitating a substantial relationship between the restriction and an important governmental objective." *Booker*, 644 F.3d at 25. The Act easily satisfies both of these standards.

1. Preservation of Public Safety and Prevention of Crime Are Paramount Government Interests.

The Massachusetts Legislature passed the Act to help mitigate the enormous public safety threat posed by assault weapons and LCMs. The Act was modeled on the 1994 federal assault weapons ban, which Congress passed to curb the dangers posed by assault weapons and LCMs. *See Navegar, Inc. v. United States*, 192 F.3d 1050, 1061 (D.C. Cir. 1999) (stating that the federal assault weapons ban was "[b]ased on the grave dangers posed by such [assault] weapons . . ."). This Court

has held that curtailing gun violence is "is [an] undeniably important" government objective. *Booker*, 644 F.3d at 25.

2. Assault Weapons and LCMs Jeopardize Public Safety.

As demonstrated above, assault weapons and LCMs are particularly dangerous, military-style devices designed for combat use, making them a significant threat to public safety. Massachusetts has an interest in preventing devastating attacks committed with these weapons and also has a substantial interest in protecting its police officers from harm. "[C]riminals using assault rifles pose a heightened risk to law enforcement." *Kolbe*, 42 F. Supp. 3d at 794.

3. The Act is Substantially Related to the Government's Significant Interests.

The evidence proffered by the State and summarized throughout this brief (*see supra* at 7) is more than adequate to show that the Act serves Massachusetts' substantial government interests and survives constitutional review. The Act strikes a constitutionally appropriate balance: its prohibitions on dangerous instruments of mass mayhem are demonstrably likely to mitigate gun violence, while preserving access to other standard firearms and magazines typically used for lawful purposes.

As discussed above, the Act prohibits a narrow class of weapons that are disproportionately used in crimes, rampage shootings, and violence against law enforcement, and it bans magazines that facilitate mass murder by reducing the number of times a shooter must stop to reload. For law enforcement confronting

dangerous shootouts, "the 2 or 3 second pause to reload [ammunition] can be of critical benefit." *Heller v. Dist. of Columbia*, 698 F. Supp. 2d 179, 194 (D.D.C. 2010). The *Colorado Outfitters* court found that "[a] pause, of any duration, imposed on the offensive shooter can only be beneficial, allowing some period of time for victims to escape, victims to attack, or law enforcement to intervene."[25] *Colorado Outfitters*, 24 F. Supp. 3d 1050.

Appellants argue that "bans, by their very nature, infringe upon the constitutional right at the core of the Second Amendment and lack the tailoring required even under intermediate scrutiny." (Appellant Br. at 28.) That is not so. The *Heller* Court held that the District of Columbia's ban on handguns could not withstand constitutional scrutiny not simply because it banned a class of firearms, but rather because the prohibited firearm constituted "the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 629.[26] Under the *Heller* rationale, the assault weapon prohibition is not marred by a similar defect as it only regulates a small subset of firearms which, as shown above, are exceedingly deadly and ill-suited for self-defense purposes. The Act does not

[25] In the attack on Congresswoman Gabrielle Giffords in Tucson, Arizona in 2011, the shooter was only prevented from continuing his rampage because he was subdued while reloading his weapon.

[26] The *Heller* Court specifically endorsed the constitutionality of a ban on an entire class of firearms: machine guns. *Id.* at 624-25.

substantially burden the ability to possess a firearm in the home for self-defense, and leaves available countless firearms to Massachusetts residents. It prohibits only a fraction of available firearms—those with military-style features which facilitate rapid devastation of human life—that the Massachusetts Legislature deemed to be exceedingly dangerous. Significantly, it leaves handguns—the weapons "overwhelmingly chosen" by the American people for self-defense in the home—untouched, *see Heller*, 554 U.S. at 628, as it does a wide variety of standard rifles and shotguns.[27] Most importantly for purposes of the intermediate scrutiny inquiry or substantial relationship test, the Act targets only those weapons that have been compellingly shown to endanger law enforcement and the public by contributing disproportionately to deadly shootings and mass shooting fatalities. *See supra* at 9-10.

To prevail under the appropriate constitutional standard, the State need not disprove each of Plaintiffs' assertions that assault weapon and LCM bans are ineffectual, that criminals will not obey them, or that these weapons and magazines might be desirable for self-defense. Rather, the State must demonstrate a reasonably

[27] Banning assault weapons and LCMs prohibits the possession of weapons most capable of massive violence. That assault weapons are deadlier than their semiautomatic handgun counterparts cannot be disputed. Bullets from assault weapons leave the weapon at a higher velocity, with more energy, and greater likelihood of fragmenting or causing tissue to violently ripple once they pierce human flesh. Sarah Zhang, *What an AR-15 Can Do to the Human Body*, WIRED (June 17, 2016), https://www.wired.com/2016/06/ar-15-can-human-body/.

strong fit between the challenged regulation and its stated objective. *See Booker*, 644 F.3d at 25 (1st Cir. 2011) (citing *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (*en banc*)). It has amply done so here.

CONCLUSION

For all of the reasons set forth above, this Court should affirm the District Court's Order.

Dated: September 28, 2018
Chicago, Illinois

Respectfully submitted,

KATTEN MUCHIN ROSENMAN LLP

By: /s/Jonathan K. Baum
JONATHAN K. BAUM
525 West Monroe Street
Chicago, Illinois 60661-3693
(312) 902-5200
www.kattenlaw.com

KATTEN MUCHIN ROSENMAN LLP
MARK T. CIANI
575 Madison Avenue
New York, New York 10022-2585
Tel: (212) 940-8800
www.kattenlaw.com

Counsel for Amicus Curiae Giffords Law Center to Prevent Gun Violence

Of Counsel:

J. Adam Skaggs
Giffords Law Center to Prevent Gun Violence
223 West 38th St. # 90
New York, NY 10018
(917) 680-3473
askaggs@giffords.org

Hannah Shearer
Giffords Law Center to Prevent Gun Violence
268 Bush St. # 555
San Francisco, CA 94104
(415) 433-2062
hshearer@giffords.org

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28(e)(2)(a) because this brief contains 6,314 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(viii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: September 28, 2018

/s/Jonathan Baum
Jonathan Baum, Esq.

Counsel for Amicus Curiae Giffords Law Center to Prevent Gun Violence

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2018 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Maura T. Healey

Daniel John Bennett

Richard D. McKeon

Massachusetts State Police

David Seth Worman

Anthony Linden

Jason William Sawyer

Nicholas Andrew Feld

Paul Nelson Chamberlain

Gun Owners' Action League, Inc.

On Target Training, Inc.

Overwatch Outpost

Charles D. Baker

Kerry Gilpin.

KATTEN MUCHIN ROSENMAN LLP

September 28, 2018

/s/Jonathan K. Baum
JONATHAN K. BAUM
525 West Monroe Street
Chicago, Illinois 60661-3693
(312) 902-5200
www.kattenlaw.com

MARK T. CIANI
575 Madison Avenue
New York, New York 10022-2585
Tel: (212) 940-8800
www.kattenlaw.com

Counsel for Amicus Curiae Law Center to Prevent Gun Violence