No. 23-1072

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

OCEAN STATE TACTICAL, LLC, et al.,
Plaintiffs-Appellants,
v.

STATE OF RHODE ISLAND, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT COURT OF RHODE ISLAND

MOTION BY BRADY CENTER TO PREVENT GUN VIOLENCE, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, AND MARCH FOR OUR LIVES FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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1. Pursuant to Federal Rule of Appellate Procedure 29, Brady Center to Prevent Gun Violence ("Brady"), Giffords Law Center to Prevent Gun Violence ("Giffords"), and March for Our Lives ("MFOL") (collectively, the "Gun Violence Prevention Groups") respectfully move, through undersigned counsel, for leave to file the attached brief, as *amici curiae,* in support of Defendants-Appellees and affirmance. The proposed brief accompanies this motion.

2. Defendants-Appellees and Plaintiffs-Appellants consent to the filing of the attached *amicus* brief.

3. *Amicus curiae* Brady is the nation's most longstanding non-partisan, non-profit organization dedicated to reducing gun violence through education, research, legal advocacy and political action. Brady has filed numerous *amicus* briefs in cases involving the constitutionality of firearms regulations, and multiple decisions have cited Brady's research and expertise on these issues.

4. *Amicus curiae* Giffords is a survivor-led non-profit policy organization that researches, drafts and defends the laws, policies and programs proven to effectively reduce gun violence. Giffords has filed numerous *amicus* briefs involving firearms regulations and constitutional principles affecting gun policy.

5. *Amicus curiae* MFOL is a youth-led non-profit organization dedicated to promoting civic engagement, education and direct action by youth to achieve sensible gun violence prevention policies that will save lives. MFOL has filed numerous *amicus* briefs in cases involving firearms regulations.

6. Courts have recognized the utility of *amicus* briefs to "assis[t] the court in cases of general public interest . . . so that the court may reach a proper decision." *Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J.*, 940 F.2d 792, 808 (3d Cir. 1991) (quotation marks and citation omitted). "Even when a party is very well represented, an amicus may provide important assistance to the court," *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002), by "[o]ffering a different analytical approach to the legal issues before the court," by "[h]ighlighting factual, historical, or legal nuance," or by "[s]upplying empirical data informing one or another question implicated by an appeal," *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020); *see also Washington All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 50 F.4th 164, 193 (D.C. Cir. 2022) (*amicus* brief can provide "unique information or perspective that can help the [c]ourt beyond the help that the lawyers for the parties are able to provide" (quotation marks and citation omitted)).

7. Under Federal Rule of Appellate Procedure 29(a)(3)(B), this proposed brief by the Gun Violence Prevention Groups is "desirable" and "relevant to the disposition of the case" because it does not duplicate the parties' arguments and provides the Court with additional reasons why the judgment of the district court should be affirmed.

8. Under Rule 29(a)(3)(A), the Gun Violence Prevention Groups have a significant interest in the issues involved in this matter. As national gun violence prevention organizations, they have an acute interest in ensuring that firearms are regulated in ways that will reduce the staggering incidence of gun violence in this country. And they have a particular interest in ensuring that litigation related to the constitutionality of firearms regulations is fully informed by empirical research and factual information of the sort addressed in the proposed *amicus* brief.

9. In particular, the Gun Violence Prevention Groups have extensive experience in research, programs, legislative advocacy and litigation concerning gun control policies. They also provide unique perspectives based on the experiences of those whose lives have been altered by the epidemic of gun violence.

10. In the attached *amicus* brief, the Gun Violence Prevention Groups undertake to provide supplemental authority and argument beyond those

advanced by the parties. This is intended to "assis[t] the court" in this case of "general public interest," *Newark Branch, N.A.A.C.P.*, 940 F.2d at 808 (citation omitted), by providing unique "information," *New England Patriots Football Club, Inc. v. Univ. of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979), or "perspective" that "can help the [c]ourt beyond the help that the lawyers for the parties are able to provide," *Washington All. of Tech. Workers*, 50 F.4th at 193 (quotation marks and citation omitted). Further, it is particularly appropriate to permit the filing of this *amicus* brief given *amici*'s "interest in the case," *Neonatology Assocs., P.A.*, 293 F.3d at 133 (citing Fed. R. App. P. 29), and the prospect that *amici* may "assis[t] the court . . . [in] "reach[ing] a proper decision," *Newark Branch, N.A.A.C.P.*, 940 F.2d at 808 (quotation marks and citation omitted).

WHEREFORE, Brady, Giffords and MFOL respectfully request leave of the Court to file the attached brief as *amici curiae*.

Dated: June 28, 2023

Respectfully submitted,

/s/ Timothy C. Hester

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 756 words, excluding the parts of the brief exempted by Rule 32(f). This document complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in Times New Roman and 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2023, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the First Circuit using the Court's *CM-ECF* system and was served electronically by the Notice of Docket Activity upon registered *CM-ECF* participants.

Dated: June 28, 2023

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, none of the *amici curiae* has a parent corporation and no publicly held corporation holds 10% or more of the membership or ownership interests of any *amici*.

CERTIFICATION PURSUANT TO RULE 29(a)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* certify (a) that no party's counsel authored this brief in whole or in part, (b) that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and (c) that no person other than *amici*, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are national gun violence prevention organizations that have filed numerous amicus briefs involving firearms regulations and constitutional principles affecting gun policy. Brady Center to Prevent Gun Violence is the nation's most longstanding non-partisan, non-profit organization dedicated to reducing gun violence through education, research, legal advocacy and political action. Giffords Law Center to Prevent Gun Violence is a survivor-led non-profit policy organization that researches, drafts and defends the laws, policies and programs proven to effectively reduce gun violence. March for Our Lives is a youth-

led non-profit organization dedicated to promoting civic engagement, education and direct action by youth to achieve sensible gun violence prevention policies.

INTRODUCTION

R.I. Gen. Laws §11-47.1-3 (the "Challenged Law"), which prohibits the manufacture or sale of large-capacity magazine feeding devices ("LCMs"), is constitutional under the Second Amendment because it does not impose any burden on the "right of armed self-defense" recognized by the Supreme Court in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2133 (2022) and *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008). As the Court stated in *Bruen*, "the Second and Fourteenth Amendments protect an individual right to keep and bear arms ***for self-defense***." 142 S. Ct. at 2125.[1]

Here, Appellants (hereinafter "Ocean State Tactical") make no showing that the Challenged Law impinges on the "right of armed self-defense" recognized in *Bruen* and *Heller*. Nor could Ocean State Tactical make any such showing—the overwhelming body of case law and empirical data demonstrate that LCMs are not needed for "armed self-defense." For this reason, Ocean State Tactical's claim should be rejected at the threshold because it has failed to make the required showing that the Challenged Law impinges on the Second Amendment rights articulated in *Bruen* and *Heller*. *See* Part I, *infra*.

[1] All emphases supplied unless otherwise noted.

Beyond that fundamental flaw, Ocean State Tactical's claim should also be rejected because the Challenged Law is "relevantly similar" to historical regulations that limited *what* weapons could lawfully be possessed, *where* firearms could be carried, and the *manner* in which firearms could be carried. *See* Part II, *infra*. Although the Court need not reach this question of historical analogues, given Ocean State Tactical's failure to make any showing that the Challenged Law "burden[s] … the right of armed self-defense" articulated in *Bruen*, 142 S. Ct. at 2133, these historical analogues further demonstrate that the Challenged Law is constitutional under the Second Amendment standards established in *Bruen* and *Heller*.

In addition, under the "more nuanced approach" to historical analogues that *Bruen* contemplates where there have been "dramatic technological changes" in weaponry, the Challenged Law is "relevantly similar" to restrictions on firearms capable of firing repeatedly without reloading. 142 S. Ct. at 2132. These restrictions proliferated in the early 20th century once civilians gained widespread access to these weapons. *See* Part III, *infra*.

The Challenged Law is also constitutional because (i) LCMs are not required to use a firearm and therefore are not subject to constitutional protection as "arms"

under the Second Amendment,[2] and (ii) "'weapons that are most useful in military service' fall outside of Second Amendment protection," *Hanson v. District of Columbia*, No. 22-cv-2256, 2023 WL 3019777, *8 (D.D.C. Apr. 20, 2023), *appeal docketed*, No. 23-7061 (D.C. Cir. May 17, 2023) (quoting *Heller*, 554 U.S. at 627). This brief does not address these separate bars to Ocean State Tactical's claims.

ARGUMENT

I. THE CHALLENGED LAW DOES NOT IMPLICATE THE SECOND AMENDMENT BECAUSE IT IMPOSES NO BURDEN ON THE RIGHT TO SELF-DEFENSE.

Ocean State Tactical makes no showing that the Challenged Law has any impact on the "individual right to self-defense" articulated in *Bruen* and *Heller*. *See* Brief for Appellants 19-37 ("Br."). Nor could it. Accordingly, the Challenged Law raises no Second Amendment issue. Ocean State Tactical's claims should therefore be rejected at the threshold, as a matter of law, for failure to demonstrate that the Challenged Law "burden[s] a law-abiding citizen's right to armed self-defense." *Bruen*, 142 S. Ct. at 2133.

[2] *See Oregon Firearms Fed'n, Inc. v. Brown*, No. 22-01815, 2022 WL 17454829, *9 (D. Or. Dec. 6, 2022), *appeal dismissed*, No. 22-36011, 2022 WL 18956023 (9th Cir. Dec. 12, 2022); *Ocean State Tactical, LLC v. State of Rhode Island*, No. 22-cv-246, 2022 WL 17721175, *12 (D.R.I. Dec. 14, 2022).

A. The Second Amendment Right Articulated in *Bruen* and *Heller* Is Based on Lawful "Self-Defense."

Ocean State Tactical asserts that, under *Bruen* and *Heller*, the "end [of] [the] analysis" is whether arms "are typically possessed by law-abiding citizens for lawful purposes." Br. 29 (quotations and citations omitted). According to Ocean State Tactical, if LCMs are "in common use today," then "Rhode Island cannot ban them." *Id.* at 14 (citation omitted).

Ocean State Tactical flatly misstates the scope of the Second Amendment right as articulated in *Bruen* and *Heller*. Under *Bruen*, "the Second and Fourteenth Amendments protect an individual right to keep and bear arms ***for self-defense***." 142 S. Ct. at 2125. The Court's entire analysis in *Bruen* centered on the "individual right to ***armed self-defense***." *Id.* at 2128. Thus, *Bruen* evaluated "whether modern and historical regulations impose a comparable burden on the right of ***armed self-defense***." *Id*. at 2133. And it broadly recognized "[t]he constitutional right to bear arms in public ***for self-defense***." *Id*. at 2156. Justice Alito made the point plainly: "All that we decide in this case is that the Second Amendment protects the rights of law-abiding people to carry a gun outside the home ***for self-defense***." *Id*. at 2159 (Alito, J., concurring).

Ocean State Tactical (Br. 14, 24) quotes a phrase out of context from *Bruen* to suggest that the operative test is whether LCMs are "in common use today." But the prior sentence in *Bruen* (which Ocean State Tactical does not quote) states that

handguns "are indisputably in 'common use' ***for self-defense today***." 142 S. Ct. at 2143. That context makes apparent that the Court was referring to weapons "in common use today" ***for self-defense***—as reflected in its conclusion (in the same paragraph) that handguns "are, in fact, '***the quintessential self-defense weapon***.'" *Id.* (quoting *Heller*, 554 U.S. at 629).

Like *Bruen*, *Heller* reflects the same emphasis on self-defense as defining the scope of the Second Amendment right. *Heller* analyzed the historical understanding of "the right of having and using arms for ***self-preservation and defence***" and found that colonial Americans "understood the right to enable individuals ***to defend themselves***." 554 U.S. at 594 (citations omitted). It found that analogous state constitutional provisions "secured an individual right to bear arms ***for defensive purposes***," *id*. at 602, and that "the understanding in the post-Civil War Congress [was] that the Second Amendment protected an individual right to use arms ***for self-defense***," *id*. at 616. *Heller* held that "the inherent right ***of self-defense*** has been central to the Second Amendment right," *id*. at 628, and that handguns were constitutionally protected because they were the "***quintessential self-defense weapon***," *id*. at 629; *see also McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) ("In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home ***for the purpose of self-defense***.").

Courts evaluating LCM restrictions since *Bruen*, including the district court in this litigation, have confirmed that the relevant inquiry is whether the restrictions burden the "right of armed self-defense" articulated in *Bruen* and *Heller*. *See Ocean State Tactical, LLC v. State of Rhode Island*, No. 22-cv-246, 2022 WL 17721175, *7, 11 (D.R.I. Dec. 14, 2022) ("whether the LCM Ban unduly impairs the right of an individual to ***engage in self-defense*** … is the primary focus of the Second Amendment analysis"); *Hanson*, 2023 WL 3019777, *7 ("the question this Court must now resolve" is whether LCMs "are commonly used or are useful specifically ***for self-defense***" (emphasis in original) (quotations and citations omitted)); *Delaware State Sportsmen's Ass'n v. Delaware Dep't of Safety & Homeland Sec.*, No. 22-cv-951-RGA, 2023 WL 2655150, *4 (D. Del. Mar. 27, 2023) ("the Second Amendment extends only to bearable arms that are 'in "common use" for ***self-defense*** today'" (quoting *Bruen*, 142 S. Ct. at 2143)); *Oregon Firearms Fed'n, Inc. v. Brown*, No. 22-cv-01815, 2022 WL 17454829, *7-9 (D. Or. Dec. 6, 2022) ("Plaintiffs have not shown … that magazines specifically capable of accepting more than ten rounds of ammunition are necessary to the use of firearms for ***self-defense***.").

B. Ocean State Tactical Cannot Establish that the Challenged Law Burdens the Right to Lawful Self-Defense.

In the trial court, Ocean State Tactical made no showing that the Challenged Law burdens the "right to armed self-defense" articulated in *Bruen* and *Heller*—nor

could it. Empirical research, thoroughly examined by numerous courts,[3] establishes that LCM restrictions do not burden the "right to armed self-defense" because the ability to fire more than ten rounds without reloading is empirically unnecessary for self-defense. The database maintained by the National Rifle Association ("NRA") of "armed citizen" accounts demonstrates that the use of more than ten rounds of ammunition for self-defense is "extremely rare."[4] Studies of this database establish that the average number of shots fired by civilians in self-defense was about ***two***.[5] Of 736 self-defense incidents from January 2011 to May 2017 reflected in the NRA

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[3] *See Ocean State Tactical, LLC*, 2022 WL 17721175, *16; *Hanson*, 2023 WL 3019777, *10-12; *Oregon Firearms Fed'n, Inc.*, 2022 WL 17454829, *9; *Duncan v. Bonta*, 19 F.4th 1087, 1104-05 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2895, *and vacated and remanded on other grounds*, 49 F.4th 1228 (9th Cir. 2022); *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. (ANJRPC) v. Att'y Gen. New Jersey,* 910 F.3d 106, 121 n.25 (3d Cir. 2018), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *State v. Misch*, 214 Vt. 309, 356-57 (2021), *reargument denied* (Mar. 29, 2021); *Rocky Mountain Gun Owners v. Polis*, 467 P.3d 314, 331 (Colo. 2020).

[4] Declaration of Lucy P. Allen ¶ 7, *Oregon Firearms Fed'n, Inc.*, 2:22-cv-01815 (D. Or. Feb. 6, 2023) (ECF No. 116) [hereinafter "Allen Decl."]; *see also Armed Citizen Stories*, NRA-ILA, https://perma.cc/H9BC-95HF.

[5] *See* Claude Werner, *The Armed Citizen—A Five Year Analysis*, Guns Save Lives (Mar. 12, 2012), https://perma.cc/QTL7-U8EM (average of 2.2 defensive shots fired per incident from 1997-2001); Allen Decl., *supra* note 4, ¶¶ 9-11 (same, from January 2011 to May 2017).

database, the defender was reported to have fired more than ten bullets in only "***two*** incidents (0.3% of all incidents)."[6]

Numerous court decisions have similarly found no evidence that firing more than ten bullets without reloading is necessary for self-defense. *See, e.g.*, *Worman*, 922 F.3d at 37 ("not one of the plaintiffs or their six experts could identify even a single example of … a self-defense episode in which ten or more shots were fired"); *Duncan*, 19 F.4th at 1104-05 ("The use of more than ten bullets in defense of the home is '***rare***,' or ***non-existent***." (citations omitted)); *Rocky Mountain Gun Owners*, 467 P.3d at 331 ("[I]n no case had a person fired even five shots in self-defense, let alone ten, fifteen, or more." (quotations and citation omitted)); *Misch*, 214 Vt. at 356 ("it appears from the available data that … the large-capacity magazine … is ***almost never used for self-defense***").

Experts have similarly testified that the ability to fire more than ten rounds without reloading is unnecessary for self-defense. *See* Declaration of Edward Troiano ¶ 10, *Ocean State Tactical, LLC v. State of Rhode Island*, No. 1:22-cv-00246 (D.R.I. Oct. 14, 2022) (ECF No. 19-3) ("I am unaware of ***any incident*** in which a civilian has ***ever*** fired as many as 10 rounds in self-defense."); Declaration of James W. Johnson ¶¶ 2, 30, 31, *Kolbe v. O'Malley*, 42 F. Supp. 3d 768 (D. Md. 2014), No. 1:13-cv-02841 (ECF No. 44-3) (filed Feb. 14, 2014) (then-Baltimore County Police

[6] Allen Decl., *supra* note 4, ¶ 10.

Chief testifying that he was "***unaware of any self-defense incident***" in Baltimore County or "anywhere else in Maryland" for which "it was necessary to fire as many as 10 rounds in self-defense").

Courts evaluating LCM restrictions since *Bruen* have overwhelmingly found that such laws do not burden the "right of armed self-defense." In this litigation, the district court found that "[t]here is simply no credible evidence in the record to support the plaintiffs' assertion that LCMs are weapons of self-defense and there is ample evidence put forth by the State that they are not." *Ocean State Tactical, LLC*, 2022 WL 17721175, *14. *See also Hanson*, 2023 WL 3019777, *12 ("[T]he Second Amendment does not cover LCMs because they are not typically possessed for self-defense."); *Oregon Firearms Fed'n, Inc.*, 2022 WL 17454829, *11 (LCMs do not "fall within the plain text of the Second Amendment" because "large-capacity magazines are rarely used by civilians for self-defense").

In short, Ocean State Tactical does not and cannot demonstrate that LCMs are needed for "armed self-defense," the central inquiry directed by the Supreme Court in *Bruen*, 142 S. Ct. at 2133, and *Heller*, 554 U.S. at 628-29. Unlike the regulations addressed in *Bruen* and *Heller*, which the Supreme Court held heavily burdened or prevented the "right to armed self-defense," 142 S. Ct. at 2133, 2156, the Challenged Law does not affect armed self-defense at all. The Challenged Law therefore does not infringe on the Second Amendment rights articulated in *Bruen* and *Heller*.

II. THE CHALLENGED LAW IS RELEVANTLY SIMILAR TO HISTORICAL FIREARMS REGULATIONS.

Because the Challenged Law does not impose ***any*** burden on "armed self-defense," *see* Part I, *supra*, the Court need not evaluate whether the Challenged Law is "consistent with this Nation's historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2126. That analogical step only applies in evaluating whether a challenged regulation imposes a "***comparable burden on the right of armed self-defense***" and "whether that burden is comparably justified." *Id*. at 2133. Here, where Ocean State Tactical has made no showing of any "burden on the right of armed self-defense," the analysis does not even proceed to the analogical reasoning called for by *Bruen*; the Challenged Law is constitutional under *Bruen* and *Heller* without any consideration of historical analogues.

But, in any event, the Challenged Law is constitutional because it is "relevantly similar" to historical laws that regulated arms without unduly burdening armed self-defense. *See id*. at 2132. As *Bruen* recognized, "the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms," *id*. at 2138, because such laws did not "burden a law-abiding citizen's right to armed self-defense," *id.* at 2133. "Properly interpreted, the Second Amendment allows a

'variety' of gun regulations." *Id*. at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 636).

Since the Founding Era, states have regulated firearms and other dangerous weapons, and courts have consistently upheld laws that imposed no meaningful burden on self-defense. These include 18th and 19th century laws restricting where and when firearms could be carried or discharged, *see Hill v. State*, 53 Ga. 472, 474, 482-83 (1874), laws prohibiting certain excessively dangerous weapons, *see State v. Langford*, 10 N.C. 381, 383-84 (1824); *English v. State*, 35 Tex. 473, 474, 477 (1871); *Andrews v. State*, 50 Tenn. 165, 171, 188-89 (1871), and laws regulating the manner in which arms could be carried, *see State v. Mitchell*, 3 Blackf. 229, 229 (Ind. 1833); *State v. Reid*, 1 Ala. 612, 614, 621 (1840); *State v. Jumel*, 13 La. Ann. 399, 399-400 (1858).

For example, in the 18th century, Philadelphia, New York and Boston prohibited the discharge of firearms within their cities and New Hampshire, Connecticut, Georgia, North Carolina and Rhode Island restricted the discharge of firearms after dark.[7] New Jersey prohibited the setting of "gun traps" that fired automatically if triggered by a device such as a trip wire,[8] and numerous states

[7] *See* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 162-63 (2007).

[8] *Id*.

banned the possession of certain blunt weapons deemed excessively dangerous, Declaration of Robert Spitzer ¶¶ 65-72, *Oregon Firearms Fed'n, Inc.*, 2:22-cv-0181 (D. Or. Feb. 6, 2023) (ECF No. 123) (quotations and citations omitted) [hereinafter "Spitzer Decl."].

In the 19th century, states responded to a nationwide surge in homicides by passing laws severely restricting access to certain dangerous weapons. *See* Declaration of Randolph Roth ¶¶ 28-32, *Nat'l Ass'n for Gun Rights v. Campbell*, 22-cv-11431 (D. Mass. Jan. 31, 2023) (ECF No. 21-9) [hereinafter "Roth Decl."]. For example, beginning in the 1830s and continuing through the early 20th century, every state plus the District of Columbia (except for New Hampshire) passed laws restricting Bowie knives, a distinctive long-bladed knife commonly used in violent crime. *See* Spitzer Decl. ¶¶ 55-63. In addition, in the 19th century, at least 43 states passed laws restricting the concealed carry of certain arms, most commonly pistols and various types of knives and clubs. *See id.* Several additional states also passed law banning "trap guns" during the 19th century. *Id*. ¶ 77.

The Challenged Law is relevantly similar to these 18th and 19th century laws because, like these historical laws, it does not meaningfully burden armed self-defense. *See* Part I.B, *supra*. Moreover, the Challenged Law is "comparably justified" because it was enacted in response to a dramatic rise in mass shootings in order to reduce gun violence and protect the public. *See* Part III.D, *infra*.

Courts that have considered the issue since *Bruen* have overwhelmingly held that modern laws banning LCM are "relevantly similar" to these historical laws. For example, a court held that 19th century restrictions on Bowie knives, trap guns, concealed carry, and private military organizations were "relevantly similar" to Oregon's LCM ban because "the burden imposed by [Oregon's LCM ban] on the core Second Amendment right of self-defense is minimal" and the law "does not impose a greater burden on the right to self-defense than did [these] analogous historical regulations." *Oregon Firearms Fed'n, Inc.*, 2022 WL 17454829, *13-14. The court also held that Oregon was "comparably justified in regulating large-capacity magazines to protect the public" given "the evidence of the rise in mass shooting incidents and the connection between mass shooting incidents and large-capacity magazines." *Id*. *14.

Similarly, another court found that 19th century restrictions on Bowie knives, "melee weapons," and concealed carry were "relevantly similar" to Delaware's LCM ban. *Delaware State Sportsmen's Ass'n*, 2023 WL 2655150, *11-13. The court held that the historical laws and the LCM ban were relevantly similar because "the burden that the challenged regulations impose is slight" and the burden was "comparably justified" because "[t]he modern regulations at issue … were enacted in response to a recent rise in mass shooting incidents, the connection between those incidents and assault weapons and LCMs, and the destructive nature of those

weapons." *Id* at *13; *see also Bevis v. City of Naperville*, No. 22-4775, 2023 WL 2077392, *10-16 (N.D. Ill. Feb. 17, 2023) (holding that 18th and 19th century restrictions on Bowie knives, other "particularly dangerous weapons," concealed carry, and trap guns were relevantly similar to Illinois' LCM ban).

III. THE CHALLENGED LAW IS CONSISTENT WITH HISTORICAL LAWS REGULATING FIREARMS CAPABLE OF FIRING REPEATEDLY WITHOUT RELOADING.

The Challenged Law is also consistent with a century of state firearms laws restricting weapons capable of firing repeatedly without reloading. Such weapons were not in widespread circulation until after ratification of the Fourteenth Amendment in 1868, and long after ratification of the Second Amendment in 1791. As a result, these analogous historical laws date to those weapons' entry into widespread circulation rather than to the Founding or Antebellum Eras, when virtually no citizens possessed them legally.

A. Firearms Capable of Firing Repeatedly Without Reloading Were Not Broadly Available Until After Enactment of the Fourteenth Amendment.

During the Founding Era, civilians did ***not*** have widespread access to firearms capable of firing more than ten rounds without reloading. Ocean State Tactical, pointing to various historical firearms, misleadingly asserts that "[f]irearms capable of firing more than ten rounds of ammunition without reloading are nothing new."

Br. 34. However, such firearms were not widely available to civilians in the United States or in common use prior to at least the late 19th century:

- **Wheel-lock firearm.** Ocean State Tactical claims (Br. 34) that "[t]he first firearm that could fire more than ten rounds without reloading was invented around 1580." Ocean State Tactical does not name this firearm, but appears to be referring to a 16-round wheel-lock firearm invented in the late 16th century. However, this firearm was "anything but common," Spitzer Decl. ¶ 38, and according to the NRA, "might have been affordable only [to] kings and nobility."[9]

- **Pepperbox-style pistol.** Ocean State Tactical asserts (Br. 34) that "[s]everal" firearms capable of firing more than ten rounds without reloading "pre-dated the Revolution, some by nearly a hundred years." It cites Pepperbox-style pistols and the Girandoni Air Rifle, *see id.*, but neither supports its claim. According to David Kopel (a gun-rights advocate cited extensively by Ocean State Tactical), Pepperbox pistols capable of firing more than ten rounds without reloading were not invented

[9] @NRA_museums, *Gun of the Day: Wheellock 16-Shooter*, TWITTER (Oct. 21, 2018, 9:01 AM), https://perma.cc/6H68-TF7Y.

until around the 1830s, decades after the Revolution.[10] The Pepperbox pistol was also notorious because of its shortcomings: its accuracy did not extend "much beyond the width of a poker table"[11]; its firing power was extremely modest[12]; and it was so unreliable that at times all of its barrels would fire at the same time (a dangerous defect known as "chain-firing").[13] According to one expert, Pepperbox pistols quickly faded from view in the early 19th century because they were "heavy, lumpy, and impractical." Spitzer Decl. ¶ 45 (citations omitted).

- **Girandoni air rifle.** The Girandoni air rifle (Br. 34), which Kopel describes as "the state of the art for multi-shot guns" when the Second Amendment was ratified,[14] never achieved widespread popularity. It was a military firearm that was impractical for civilian use because it required a wagon-mounted pump filled with water to sustain the pressure needed to operate; without the pump, the weapon required nearly 1,500 manual hand

[10] David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 853-54 (2015).

[11] Charles Worman, *The Iconic Pepperbox Revolving Pistol*, J. Antiques & Collectibles, https://perma.cc/E3K8-W3LH.

[12] Danielle Hollembaek, *The Pepperbox Pistol*, Rock Island Auction Co. (Jan. 16, 2019), https://perma.cc/2ERY-26CX.

[13] *Id.*

[14] *See* Kopel, *supra* note 10, 853.

pumps to restore power.[15] Moreover, the weapon was delicate, would frequently malfunction, and faced significant manufacturing difficulties.[16] Only 1,500 or so were ever built. Spitzer Decl. ¶ 42.

- **Volcanic Arms lever-action rifle.** Ocean State Tactical inaccurately claims that by the end of the Civil War "'cartridge-fed' 'repeating' firearms" became "ubiquitous among civilians." Br. 34-35 (citations omitted). Ocean State Tactical cites the 1855 Volcanic Arms lever-action rifle, the 16-round Henry lever action rifle, and the Winchester repeating rifle, but none supports its claim. The Volcanic Arms lever-action rifle was "[u]npopular because of its unreliability" as "it suffered from design defects including gas discharge around the breech and misfires."[17] Far from being "ubiquitous," Br. 35, the firearms were "few, flawed, and experimental." Spitzer Decl. ¶ 43. As a result of the Volcanic rifle's "radical defects," only 3,200 were ever produced. *Id*. (citation omitted).

[15] John Paul Jarvis, *The Girandoni Air Rifle: Deadly Under Pressure*, Guns.com (Mar. 15, 2011), https://perma.cc/57AB-X2BE.

[16] *Girandoni Air Rifle*, Fandom: Military Wiki, https://perma.cc/4RFA-Q9BK.

[17] John Sammon, *The Case for Caselessness: The Volcanic Rifle*, Guns.com (April 19, 2011), https://perma.cc/462K-M6TA.

- **Henry lever action rifle.** Although the Henry rifle (Br. 35) featured technological advances, it had significant flaws: the rifle's firing was underpowered; the rifle was prone to becoming jammed; the barrel became hot with repeated firing; the firing pins were fragile and could break; and the frame was prone to damage, causing the cartridges not to feed into the rifle.[18] Just 14,000 Henry rifles were manufactured by 1866 (primarily for military use), and the Henry company ceased production of the Henry rifle after the Civil War.[19]

- **Winchester repeating rifle.** Ocean State Tactical (Br. 35) cites the Winchester repeating rifles of 1866, 1873 and 1892 as purported evidence that repeating firearms "were ubiquitous among civilians by the end of the Civil War." However, the first deliveries of the Winchester Model 1866 occurred in 1867,[20] two years ***after*** the end of the Civil War. Moreover, far from being "ubiquitous among civilians," Br. 35, experts have estimated that fewer than 800 Henrys and Winchesters ***combined*** were sold to civilians in the United States prior to 1872. *See* Declaration of

[18] *1st DC Cavalry Martial Henry Rifle*, College Hill Arsenal, https://perma.cc/LFP3-AVDY.

[19] *Henry Rifle*, Civil War @ Smithsonian, https://www.civilwar.si.edu/weapons_henry.html (last accessed June 26, 2023).

[20] *Winchester 1866 Prototype Musket*, The Armourer's Bench, https://perma.cc/PB83-TSM4.

Brian DeLay ¶ 59, *Oregon Firearms Fed'n, Inc.*, 2:22-cv-01815 (D. Or. Feb. 6, 2023) (ECF No. 118) [hereinafter "DeLay Decl."]; Spitzer Decl. ¶¶ 48-49. Sales of the 1873 and 1892 Winchester rifles entirely postdated ratification of the Fourteenth Amendment in 1868, and the Winchester did not become popular with civilians until at least the late 19th or early 20th century. Spitzer Decl. ¶ 48.

- **Evans repeating rifle.** Ocean State Tactical (Br. 36) cites the Evans repeating rifle, which it claims first hit the market in 1873. By its own admission, this firearm was not available until five years ***after*** ratification of the Fourteenth Amendment. Moreover, the firearm was a military and commercial failure. The U.S. Army refused to purchase any because the rifles were "heavy, cumbersome, and unreliable."[21] The rifle was extraordinarily slow to reload,[22] and the rifle's cartridge fired "comparatively weak" rounds.[23] Just 12,000 Evans rifles were manufactured before the company went bankrupt in 1879.[24]

[21] *Evans Repeating Rifle*, Forgotten Weapons, YouTube (Oct. 6, 2013), https://www.youtube.com/watch?v=QM6Rg91WT3E.

[22] *Evans Repeating Rifle*, Fandom: Military Wiki, https://guns.fandom.com/wiki/Evans_repeating_rifle.

[23] *See* Art Merrill, *All About the Evans Repeating Rifle*, NRA Shooting Sports USA (Mar. 30, 2023), https://www.ssusa.org/content/all-about-the-evans-repeating-rifle/.

[24] *Id.*

In sum, and contrary to Ocean State Tactical's assertions, no firearm capable of firing more than ten rounds without reloading became broadly available in the United States before at least the late 19th or early 20th century. Such firearms "constituted less than 0.002% of all firearms in the United States as late as 1872." DeLay Decl. ¶ 60. Furthermore, legal possession of such firearms before the late 19th century "was limited almost exclusively to U.S. soldiers and civilian law enforcement officers." Declaration of Michael Vorenberg ¶ 43, *Ocean State Tactical, LLC*, No. 1:22-cv-00246 (D.R.I. Oct. 14, 2022) (ECF No. 19-2).

B. Modern Firearms Capable of Firing Repeatedly Without Reloading Are Fundamentally Different from Historical Antecedents.

Modern firearms capable of firing repeatedly without reloading bear no resemblance to their historical predecessors. Unlike the typical Revolutionary-era musket, a typical modern AR-15 (i) holds 30 rounds (30 times more than a typical musket at the time of the Founding), (ii) fires approximately 45 rounds per minute (15 times more), (iii) shoots accurately from approximately 600 yards (11 times further), (iv) attains a muzzle velocity of over 3,000 feet per second (3 times faster), and (v) can be stored loaded and immediately fired (unlike Founding-era muskets, which were stored empty because of gunpowder degradation).[25] Modern firearms

[25] Christopher Ingraham, *What 'Arms' Looked Like When the 2nd Amendment Was Written*, Wash. Post (June 13, 2016), https://perma.cc/H6X5-C2NL; *see also*

also incorporate advanced ballistics that make rounds far more lethal than their historical predecessors.[26]

Even the most advanced firearms of the Civil War era were a far cry from the modern AR-15. For example, the 1866 Winchester rifle had a maximum effective range of approximately 100 yards (about one-sixth of an AR-15) and a muzzle velocity of just 1,100 feet per second (roughly one-third of an AR-15).[27]

These dramatic technological changes have made the modern repeating firearm "a significantly different weapon than it was at the time of the founding of the republic" and in a "distinctly different class of lethality." *See* Declaration of Roger Pauly ¶¶ 100-03, *Oregon Firearms Federation, Inc.*, 2:22-cv-01815 (D. Or. Feb. 6, 2023) (ECF No. 120).

Firearms History and the Technology of Gun Violence, UC Davis Library, https://perma.cc/YHZ6-8QPG (describing the "complicated process" of loading muskets used by soldiers during the Civil War).

[26] *See*, *e.g.*, Ethan Siegel, *The Physics Behind Why Firing a Gun Into the Air Can Kill Someone*, Forbes (Feb. 15, 2017), https://perma.cc/YR7L-PWPS (AK-47 rounds have "a tiny surface area at the bullet tip, [so that] it can easily break through your skin … ripping a hole through blood vessels, muscle, and potentially vital organs.").

[27] Dan Alex, *Winchester Model 1866 Lever-Action Repeating Rifle*, Military Factory (Mar. 12, 2019), https://perma.cc/4ZJA-5V4M.

C. *Bruen* Requires a "More Nuanced Approach" Where Firearms Capable of Firing Repeatedly Without Reloading Were Not Widely Available Until the 20th Century.

Bruen held that courts must adopt a "more nuanced approach" when faced with "dramatic technological changes" in firearms. *See* 142 S. Ct. at 2132 ("The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868."). Modern LCMs represent precisely the kind of dramatic technological change that *Bruen* held requires a "more nuanced approach" to evaluating historical analogues. *See* Part III.A-.B, *supra*.

Under this more nuanced approach, the relevant historical analogues date to the period in which these weapons became widely available to civilians and the subject of regulatory concern. Ocean State Tactical's assertion that laws passed during the early 20th century "come too late to provide insight into the meaning of" the Second Amendment is wrong. Br. 32 (quotation and citations omitted). The lack of any pre-20th century "historical tradition" of regulating firearms that ***did not exist*** when the Second and Fourteenth Amendments were enacted is meaningless.

Bruen itself held that historical evidence through the 20th century could be probative if it did not "contradict[] earlier evidence," 142 S. Ct. at 2154 n.28, and explicitly instructed courts to employ a more "nuanced approach" when faced with dramatic technological change, *id*. at 2132; *see also Hanson*, 2023 WL 3019777,

*16 ("apply[ing] 20th century history to the regulation at issue … [because it] do[es] not contradict any earlier evidence"); *Delaware State Sportsmen's Ass'n*, 2023 WL 2655150, *12 (same).

Courts that have considered the issue since *Bruen* have overwhelmingly held that modern LCMs reflect the sort of "dramatic technological change" that requires a more "nuanced approach" to historical analogues. *See Delaware State Sportsmen's Ass'n*, 2023 WL 2655150, *10-11 ("[A]ssault long guns and LCMs implicate dramatic technological change and unprecedented societal concerns for public safety" because "[i]t was only after World War I when semi-automatic and fully automatic long guns began to circulate appreciably in society." (quotation and citation omitted)); *Oregon Firearms Fed'n, Inc.*, 2022 WL 17454829, *12-13 ("semi-automatic weapons did not become feasible and available until the beginning of the twentieth century" (quotations omitted)); *Hanson*, 2023 WL 3019777, *12-13 ("LCMs are the object of 'dramatic technological changes' and implicate 'unprecedented societal concerns,' and thus its ban requires 'nuanced' consideration." (citations omitted)).

D. The Challenged Law Is "Relevantly Similar" to Early 20th Century Laws Restricting Weapons Capable of Firing Repeatedly Without Reloading.

Contrary to Ocean State Tactical's claim (Br. 32) that only a "few, late-breaking state[s]" regulated firearms capable of firing repeatedly without reloading, Congress and most states responded to the dramatic technological changes in these firearms by regulating such weapons once they began to circulate widely among civilians in the early 20th century. *See generally* Spitzer Decl. ¶¶ 35-37. For example, in 1923, Vermont prohibited persons engaged in hunting from possessing "an automatic rifle of military type with a magazine capacity of over six cartridges."[28] In 1927, Rhode Island passed a law prohibiting "any weapon which shoots automatically and any weapon which shoots more than twelve shots semi-automatically without reloading."[29] That same year, Michigan prohibited any firearm that fired more than sixteen times without reloading.[30]

[28] Act of Mar. 22, 1923, no. 130, 1923 Vt. Acts & Resolves 130.

[29] Act of Apr. 22, 1927, ch. 1052, 1927 R.I. Pub. Laws 256, §§ 1, 4.

[30] Act of June 2, 1927, no. 372, 1927 Mich. Pub. Acts 887, 888, § 3.

In 1932, Congress passed a law prohibiting "any firearm" in the District of Columbia "which shoots automatically or semiautomatically more than twelve shots without reloading"—a prohibition that has existed in some regulatory form ever since.[31] In 1933, Ohio outlawed any firearm that "shoots automatically, or any firearm which shoots more than eighteen shots semi-automatically without reloading," and South Dakota banned firearms "from which more than five shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine."[32]

In total, between 1925 and 1934, at least 31 states and the District of Columbia restricted access to certain weapons capable of firing repeatedly without reloading,[33] and at least 22 states plus the District of Columbia restricted ammunition magazines or similar feeding devices, and/or had round capacity limits.[34]

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[31] Act of July 8, 1932, Pub. L. No. 72-275, §§ 1, 8, 47 Stat. 650, 650, 652; *see also Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1248 (D.C. Cir. 2011), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111.

[32] Act of Apr. 8, 1933, no. 64, 1933 Ohio Laws 189, 189, § 12819-3; Act of Feb. 28, 1933, ch. 206, 1933 S.D. Sess. Laws 245, 245, § 1.

[33] *See* Spitzer Decl. ¶ 23. Although most of these laws restricted access to fully automatic weapons, at least seven and as many as ten states, plus the District of Columbia, restricted semi-automatic weapons. *Id*. ¶ 10.

[34] *See id*. ¶ 14 ("Regulations concerning removable magazines and magazine capacity were in fact common as early as the 1920s … [they] were adopted by nearly half of all states, representing approximately 58% of the American population at that time.").

Rhode Island's LCM regulation is "relevantly similar," *Bruen*, 142 S. Ct. at 2132-33, to these early 20th century laws (as it is to historic 19th century laws, *see* Part II, *supra*) because it too imposes little or no burden on the right of armed self-defense. *See Hanson*, 2023 WL 3019777, *15 ("The District's LCM ban is similar to the Prohibition-era regulations [of firearms capable of firing repeatedly without reloading] in that the burden it places on an individual's right of self-defense is relatively light."); *Delaware State Sportsmen's Ass'n*, 2023 WL 2655150, *12-14 (holding that any burden imposed by Delaware's LCM ban "is slight" and "comparable" to that imposed by historical laws, including 20th century restrictions on firearms capable of firing repeatedly without reloading); *Bevis*, 2023 WL 2077392, *12-14 (noting that "[t]wenty-three states imposed some limitation on ammunition magazine capacity" in the early 20th century, and upholding Illinois' LCM ban because it was consistent with that "history of firearm regulation").

The Challenged Law also has a "comparabl[e] justifi[cation]" to these early 20th century laws, *Bruen*, 142 S. Ct. at 2132-33, because both address the growing threat of mass violence using firearms. An individual bearing arms in 1791 or 1868 was, as a technological matter, unable to commit mass murder with a gun in a matter of seconds. That situation radically changed only relatively recently. Modern LCMs, coupled with advances in firearm technology, pose a risk of far greater carnage than was imaginable during the Founding or Antebellum Eras. As a result,

the frequency of mass shootings and fatalities caused by mass shootings has surged in modern times. *See* Roth Decl. ¶¶ 54-60. As of July 2020, LCMs were used in the ten deadliest mass shootings of the past decade, and mass shootings from 1990 to 2017 involving LCMs resulted in a 62% higher death toll than those not involving LCMs.[35] The district court in this litigation recognized the point, finding a "direct connection between employment of LCMs and increased injuries, both in number and seriousness." *Ocean State Tactical, LLC*, 2022 WL 17721175, *20.

The Challenged Law is therefore "comparably justified" vis-à-vis early 20th century laws regulating weapons capable of firing repeatedly without reloading. *See*, *e.g.*, *Hanson*, 2023 WL 3019777, *15 ("Just as states and the District enacted sweeping laws restricting possession of high-capacity weapons in an attempt to reduce violence during the Prohibition era, so can the District now."); *Delaware State Sportsmen's Ass'n*, 2023 WL 2655150, *13 ("The modern regulations at issue, like the historical regulations discussed by Defendants, were enacted in response to … a recent rise in mass shooting incidents, the connection between those incidents and assault weapons and LCMs, and the destructive nature of those weapons."); *Oregon Firearms Fed'n, Inc.*, 2022 WL 17454829, *14.

[35] Giffords Law Center, *Large Capacity Magazines*, Giffords (last accessed June 25, 2023), https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/.

In short, unlike the handgun regulations addressed in *Bruen* and *Heller*, for which the Supreme Court focused on historical antecedents predating the Fourteenth Amendment, a "more nuanced approach" is required when evaluating restrictions on firearms that did not exist before 1791 or 1868. 142 S. Ct. at 2132. Applying that "more nuanced approach," these early 20th century laws demonstrate a clear history and tradition of regulating firearms that can fire repeatedly without reloading. And they reflect a recognition that such regulations do not impinge on any legitimate needs for armed self-defense, but instead are intended to reduce the carnage that can result when many rounds can be fired without reloading.

CONCLUSION

The Challenged Law does not violate the Second Amendment because (1) applying the standards of *Bruen* and *Heller*, the Challenged Law does not burden the right to "armed self-defense" (and Ocean State Tactical makes no showing of any such burden), (2) the Challenged Law is "relevantly similar" to historical laws that imposed restrictions on firearms without burdening "the right of armed self-defense," *Bruen*, 142 S. Ct. at 2132-33, and (3) the Challenged Law is "relevantly similar" to early 20th century laws regulating firearms that can fire repeatedly without reloading, and such historical laws are proper analogues because LCMs reflect "dramatic technological changes" in firearms.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,429 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in Times New Roman and 14-point font.

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2023, an electronic copy of the foregoing *Amicus Curiae* Brief was filed with the Clerk of Court for the United States Court of Appeals for the First Circuit using the Court's *CM-ECF* system and was served electronically by the Notice of Docket Activity upon registered *CM-ECF* participants.

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