App. 1

United States Court of Appeals
For the First Circuit

No. 18-1545

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

Plaintiffs, Appellants,

v.

MAURA T. 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.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

App. 2

Before

Barron, Circuit Judge,
Souter,* Associate Justice,
and Selya, Circuit Judge.

John Parker Sweeney, with whom James Michael Campbell, Richard Paul Campbell, Campbell Campbell Edwards & Conroy PC, T. Sky Woodward, James W. Porter, III, Marc A. Nardone, and Bradley Arant Boult Cummings LLP, were on brief, for appellants.

Ilya Shapiro, Trevor Burrus, Matthew Larosiere, Joseph G.S. Greenlee, and David B. Kopel on brief for Professors of Second Amendment Law, Cato Institute, Second Amendment Foundation, Citizens Committee for the Right to Keep and Bear Arms, Jews for the Preservation of Firearms Ownership, Millennial Policy Center, and Independence Institute, amici curiae.

Dan M. Peterson, Dan M. Peterson PLLC, C. D. Michel, Sean A. Brady, Anna M. Barvir, and Michel & Associates, P.C., on brief for Western States Sheriffs' Association, Law Enforcement Legal Defense Fund, Law Enforcement Action Network, International Association of Law Enforcement Firearms Instructors, CRPA Foundation, International Law Enforcement Educators and Trainers Association, and Law Enforcement Alliance of America, amici curiae.

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* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

David H. Thompson, Peter A. Patterson, John D. Ohlendorf, and Cooper & Kirk, PLLC, on brief for National Rifle Association of America, Inc., amicus curiae.

Julia E. Kobick, Assistant Attorney General, with whom Maura Healey, Attorney General, William W. Porter and Elizabeth Kaplan, Assistant Attorneys General, and Gary Klein, Special Assistant Attorney General, were on brief, for appellees.

Jonathan K. Baum, Mark T. Ciani, Katten Muchin Rosenman LLP, J. Adams Skaggs, and Hannah Shearer on brief for Giffords Law Center to Prevent Gun Violence, amicus curiae.

Mariel Goetz, Kimberly A. Mottley, Laura Stafford, and Proskauer Rose LLP, on brief for Brady Center to Prevent Gun Violence, amicus curiae.

Edward Notis-McConarty, M. Patrick Moore, Jr., Vanessa A. Arslanian, and Hemenway & Barnes LLP on brief for Massachusetts Chiefs of Police Association and Massachusetts Major City Chiefs of Police Association, amici curiae.

Gurbir S. Grewal, Attorney General of New Jersey, Andrew J. Bruck, Executive Assistant Attorney General, Jeremy M. Feigenbaum and Glenn Moramarco, Assistant Attorneys General, Melissa Medoway, Deputy Attorney General, Xavier Becerra, Attorney General of California, George Jepsen, Attorney General of Connecticut, Matthew P. Denn, Attorney General of Delaware, Russell A. Suzuki, Attorney General of Hawai'i, Tom Miller, Attorney General of Iowa, Brian E.

Frosh, Attorney General of Maryland, Ellen F. Rosenblum, Attorney General of Oregon, Josh Shapiro, Attorney General of Pennsylvania, Peter F. Kilmartin, Attorney General of Rhode Island, Mark R. Herring, Attorney General of Virginia, Thomas J. Donovan, Jr., Attorney General of Vermont, Robert W. Ferguson, Attorney General of Washington, Karl A. Racine, Attorney General for the District of Columbia, on brief for states of New Jersey, California, Connecticut, Delaware, Hawai'i, Iowa, Maryland, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia, amici curiae.

Eric Tirschwell, William J. Taylor, Jr., Mark Anthony Frassetto, Deepak Gupta, Jonathan E. Taylor, and Gupta Wessler PLLC, on brief for Everytown for Gun Safety, amicus curiae.

Albert W. Wallis, Elizabeth A. Ritvo, Tristan G. Axelrod, Brown Rudnick LLP, Kenneth A. Sweder, and Sweder & Ross LLP, on brief for Jewish Alliance for Law and Social Action, Greater Boston Interfaith Organization, Episcopal Diocese of Massachusetts, Episcopal Diocese of Western Massachusetts, Islamic Society of Boston, Massachusetts Council of Churches, Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, and Men of Reform Judaism, amici curiae.

Ben T. Clements and Clements & Pineault, LLP, on brief for Stop Handgun Violence, MA Coalition to Prevent Gun Violence, and Massachusetts General

Hospital Gun Violence Prevention Coalition, amici curiae.

James Murray, pro se, on brief for James Murray, amicus curiae.

April 26, 2019

SELYA, Circuit Judge. This high-profile case involves a constitutional challenge to a Massachusetts law proscribing the sale, transfer, and possession of certain semiautomatic assault weapons and large-capacity magazines (LCMs). See Mass. Gen. Laws ch. 140, §§ 121, 131M (the Act). The plaintiffs assert that they have an unfettered Second Amendment right to possess the proscribed assault weapons and LCMs in their homes for self-defense.[1] The district court granted summary judgment in favor of the defendants (a phalanx of state officials). See Worman v. Healey, 293 F. Supp. 3d 251, 271 (D. Mass. 2018). Although our reasoning differs in certain respects from that of the court below, we affirm.

We assume, without deciding, that the proscribed weapons have some degree of protection under the Second Amendment. We further assume, again without deciding, that the Act implicates the core Second

[1] Throughout this opinion, we use the terms "proscribed assault weapons and LCMs" and "proscribed weapons" interchangeably to describe the semiautomatic assault weapons and LCMs targeted by the Act.

Amendment right of self-defense in the home by law-abiding, responsible individuals. We hold, however, that the Act's burden on that core right is minimal and, thus, the Act need only withstand intermediate scrutiny – which it does.

I. BACKGROUND

We start by rehearsing the background and travel of the case. The Massachusetts legislature modeled the Act on the 1994 federal Public Safety and Recreational Firearms Use Protection Act (the federal regulation), Pub. L. No. 103-322, §§ 110101-06, 108 Stat. 1796, 1996-2010 (1994), which is no longer in effect. The federal regulation prohibited the manufacture, transfer, and possession of "semiautomatic assault weapons" and the transfer and possession of "large capacity ammunition feeding devices." Id. §§ 110102-03, 108 Stat. at 1996-2000. For purposes of the federal regulation, the term "semiautomatic assault weapon" was defined to include nineteen specific models, as well as any semiautomatic rifle, pistol, or shotgun with two or more combat-style features or the ability to accept a detachable magazine. Id. § 110102(b), 108 Stat. at 1997-98. The term "large capacity ammunition feeding device" encompassed any magazine or other feeding device that could accept more than ten rounds of ammunition. Id. § 110103(b), 108 Stat. at 1999. The federal regulation specifically exempted, inter alia, assault weapons that were lawfully possessed on the date of its enactment (September 13, 1994), semiautomatic rifles that could not hold more than five rounds of ammunition or

accept a detachable magazine holding more than five rounds of ammunition, and a specific list of "long guns most commonly used in hunting and recreational sports." H.R. Rep. No. 103-489, at 20 (1994); see Pub. L. No. 103-322, § 110102(a), 108 Stat. at 1996-97. In explicating the purpose of the federal regulation, Congress stated that semiautomatic assault weapons have "a capability for lethality – more wounds, more serious, in more victims – far beyond that of other firearms in general, including other semiautomatic guns." H.R. Rep. No. 103-489, at 19-20.

Four years after Congress enacted the federal regulation, the Massachusetts legislature passed a counterpart statute, which made it a crime to sell, transfer, or possess semiautomatic assault weapons as defined by the federal regulation, copies or duplicates of those weapons, and LCMs capable of holding more than ten rounds of ammunition. See Mass. Gen. Laws ch. 140, §§ 121, 131M. The Act contained the same exceptions as the federal regulation, including free passes for weapons lawfully owned on September 13, 1994, and for sundry automatic rifles commonly used for hunting and sport. See id.

Congress allowed the federal regulation to expire in 2004, but the Massachusetts legislature struck out in a different direction and made the Massachusetts assault weapons regulation permanent that year. In signing the bill into law, then-Governor Romney declared that semiautomatic assault weapons and LCMs "are not made for recreation or self-defense. They are

instruments of destruction with the sole purpose of hunting down and killing people."

We fast-forward to 2016 when the Massachusetts Attorney General, Maura Healey, issued a public enforcement notice designed to "provide[] guidance on the identification of weapons that are 'copies' or 'duplicates' of the enumerated Assault weapons that are banned under Massachusetts law." Approximately six months later, the plaintiffs – a diverse group consisting of Massachusetts firearm owners, prospective firearm owners, firearm dealers, and a firearm advocacy association – brought suit in the federal district court, alleging constitutional violations and seeking declaratory and injunctive relief. They named an array of defendants including (as relevant here) various state officials in their representative capacities; claimed that the Act, as interpreted and enforced by those officials, abridged both the Second Amendment and the Due Process Clause; and prayed for declaratory and injunctive relief.

After some procedural skirmishing, not relevant here, the parties cross-moved for summary judgment. The district court heard arguments of counsel and reserved decision. The court subsequently handed down a rescript in which it rejected the plaintiffs' challenges and explained why it was granting the defendants' summary judgment motion. See Worman, 293 F. Supp. 3d at 258-71. This timely appeal ensued. In it, the plaintiffs challenge only the district court's rejection of their Second Amendment claims.

II. ANALYSIS

We review the grant of a motion for summary judgment de novo, taking the facts and all reasonable inferences therefrom to the behoof of the non-moving parties (here, the plaintiffs). See Hightower v. City of Boston, 693 F.3d 61, 70 (1st Cir. 2012); Houlton Citizens' Coal. v. Town of Houlton, 175 F.3d 178, 184 (1st Cir. 1999). "We will affirm only if the record reveals 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Avery v. Hughes, 661 F.3d 690, 693 (1st Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). This standard applies unabated to appeals – like this one – arising out of a district court's disposition of cross-motions for summary judgment. See Blackie v. Maine, 75 F.3d 716, 720-21 (1st Cir. 1996). In applying the standard here, we have the benefit not only of able briefing by the parties but also of a myriad of thoughtful amicus briefs (for which we are grateful).

A. The Legal Framework.

The Second Amendment states that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In a seminal decision, the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms (unconnected to service in the militia). See District of Columbia v. Heller, 554 U.S. 570, 592 (2008). Two years later, the Court made pellucid that the

Second Amendment applies to the states through the Fourteenth Amendment. See McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

The law challenged in Heller constituted an "absolute prohibition of handguns held and used for self-defense in the home," which (the Court ruled) transgressed the Second Amendment.[2] 554 U.S. at 635-36. Although the Court did not have occasion to examine "the full scope of the Second Amendment" right, it cautioned that the right "is not unlimited." Id. at 626. In furtherance of this cautionary language, the Court admonished that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Id. at 626-27. The Court added that the Second Amendment does not confer "a right to keep and carry any weapon whatsoever in any

[2] Although the present plaintiffs attempt to characterize the Act as an "absolute prohibition" on an entire class of firearms, that characterization is inapt. The Act applies only to a set of enumerated semiautomatic assault weapons, to semiautomatic assault weapons with particular features, and to magazines of a specific capacity. Seen in this light, the plaintiffs' "absolute prohibition" argument is circular: essentially, it amounts to a suggestion that whatever group of weapons a regulation prohibits may be deemed a "class." By this logic – which we squarely reject – virtually any regulation could be considered an "absolute prohibition" of a class of weapons.

manner whatsoever and for whatever purpose." Id. at 626.

We glean from the teachings of Heller that four data points determine the level of protection, if any, that the Second Amendment provides. The first data point involves the person who is asserting the right; the second data point involves the purpose for which the right is being asserted; the third data point involves the place where the right is being asserted; and the fourth data point involves the type of weapon. Heller's most meaningful message touches all four data points. Refined to bare essence, its message is that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at 635.

As applied here, this message checks off the first three data points. It is undisputed that the individual plaintiffs are not prohibited persons but, rather, law-abiding, responsible citizens. Similarly, it is undisputed that they seek to use the proscribed assault weapons and LCMs for self-defense. And, finally, it is undisputed that they seek to effectuate this usage in their homes. We are, therefore, left to focus on the fourth data point: the arms proscribed and the extent (if at all) that those arms are protected by the Second Amendment.

In conducting this inquiry, we do not write on an entirely pristine page. Our recent decision in Gould v. Morgan mapped out a two-step approach for analyzing Second Amendment challenges. See 907 F.3d 659,

668-69 (1st Cir. 2018), petition for cert. filed, ___ U.S.L.W. ___ (U.S. April 1, 2019) (No. 18-1272). Under this approach, we first ask whether the challenged law burdens conduct that is protected by the Second Amendment. See id. This inquiry is "backward-looking" and "seeks to determine whether the regulated conduct 'was understood to be within the scope of the right at the time of ratification.'" Id. at 669 (quoting United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)). If that step is successfully negotiated so we can say that the challenged law "burdens conduct falling within the scope of the Second Amendment, [we] then must determine what level of scrutiny is appropriate and must proceed to decide whether the challenged law survives that level of scrutiny." Id. We follow this approach in determining whether the Act withstands the plaintiffs' Second Amendment onslaught.

B. The Scope of the Second Amendment Right.

This brings us to the question of whether the conduct restricted by the Act falls under the protective carapace of the Second Amendment. To answer this question, we must determine whether possession of the proscribed assault weapons and LCMs in the home for self-defense is safeguarded by the Second Amendment.[3]

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[3] One of the amici advances the clever argument that LCMs, like other magazines, are not "arms" at all because they are not themselves "[w]eapons of offense, or armour of defence." Heller, 554 U.S. at 581 (alteration in original) (quoting 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). The

Our first task is to consider whether the proscribed weapons are the type of arms "understood to be within the scope of the [Second Amendment] right at the time of ratification." Id. (quoting Chester, 628 F.3d at 680). Heller is the beacon by which we must steer. There, the Court explained that "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." 554 U.S. at 624 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).[4] The Court's earlier decision in Miller (which held that a short-barreled shotgun was not protected by the Second Amendment) furnishes further context. See 307 U.S. at 175-83. There, the Court surveyed state laws regulating militias at the time of the founding and explained that

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defendants, though, have not proffered such an argument. We ordinarily refuse to entertain arguments advanced by amici but not by the parties, see, e.g., In re Sony BMG Music Entm't, 564 F.3d 1, 3 (1st Cir. 2009); Lane v. First Nat'l Bank of Bos., 871 F.2d 166, 175 (1st Cir. 1989), and we see no reason to depart from that prudential principle here. We note, moreover, that the parties do not argue that the Second Amendment analysis differs with respect to LCMs as opposed to semiautomatic assault weapons, and so we consider both objects of the Act together.

[4] Here, however, there is a wrinkle. Because the plaintiffs' challenge is directed at a state statute, Gould points to 1868 (when the Fourteenth Amendment was ratified) as the date for any necessary historical inquiry. See 907 F.3d at 669. Heller, in contrast, does not deal with a state law and thus locates the benchmark at 1791 (the date of ratification of the Constitution itself). Since no party here has argued that this distinction is either material or sufficient to render Heller's analysis inoperative, we need not parse this distinction as "our conclusion with respect to the historical record would be the same regardless of which ratification date was used." Id. at 669 n.3.

many states, including Massachusetts, had specified the types of weapons that citizens were required to bring to militia service. See id. at 180-82. The Court concluded that although "[m]ost if not all of the States have adopted provisions touching the right to keep and bear arms," id. at 182, none has suggested that a short-barreled shotgun was the type of weapon that "could contribute to the common defense," id. at 178. With this historical background in place, the Heller Court determined that the Second Amendment "extends only to certain types of weapons." 554 U.S. at 623. One corollary of this determination is that an "important limitation on the right to keep and carry arms" is that "the sorts of weapons protected were those 'in common use at the time.'" Id. at 627 (quoting Miller, 307 U.S. at 179). The Court added that such a "limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" Id. (citing 4 William Blackstone, Commentaries on the Laws of England 148-49 (1769)); see id. at 623 (referencing "the prohibition on terrorizing people with dangerous or unusual weapons").

That the proscribed weapons were not in existence, let alone in common use, at the time of ratification, does not end the matter. Heller left no doubt that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." Id. at 582. The Court reaffirmed this principle some eight years later, when it reversed a decision of the Massachusetts Supreme Judicial Court (SJC), which

had held that stun guns were not protected by the Second Amendment. See Caetano v. Massachusetts, 136 S. Ct. 1027, 1027-28 (2016) (per curiam). Pertinently, the Caetano Court debunked the notion that stun guns were unprotected because they "were not in common use at the time of the Second Amendment's enactment," id. at 1027 (quoting Commonwealth v. Caetano, 26 N.E.3d 688, 693 (Mass. 2015)), finding that notion "inconsistent with Heller's clear statement that the Second Amendment 'extends . . . to . . . arms that were not in existence at the time of the founding,'" id. at 1028 (alteration in original) (quoting Heller, 554 U.S. at 582); see id. (rejecting conclusion "that stun guns are 'unusual' because they are 'a thoroughly modern invention'" (quoting Caetano, 26 N.E.3d at 693-94)).

Relatedly, the Heller Court acknowledged that "if weapons that are most useful in military service – M-16 rifles and the like – may be banned," it might be argued that "the Second Amendment right is completely detached from the prefatory clause." 554 U.S. at 627. After all, militias today "require sophisticated arms that are highly unusual in society at large." Id. But the Court pointed out that "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty." Id. Thus, "the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change [judicial] interpretation of the right." Id. at 627-28.

Viewed against this backdrop, the relevant question is neither whether the proscribed weapons were commonly used at the time of ratification nor whether they are among the types of weapons used by today's militias. Instead, the question is whether the proscribed weapons are in common use for lawful purposes like self-defense.

As to this question, Heller provides only meager guidance. Heller made plain that handguns, which the Court described as "the most popular weapon chosen by Americans for self-defense in the home," are protected. Id. at 629. Conversely, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." Id. at 625. But as to the middle ground – and particularly, as to how to plot the dividing line between common and uncommon use – the Court was silent.[5]

The parties strive mightily to fill this void. On the one hand, the plaintiffs have shown that, as of 2013, nearly 5,000,000 people owned at least one semiautomatic assault weapon. They also have shown that

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[5] We agree with the Seventh Circuit that measuring "common use" by the sheer number of weapons lawfully owned is somewhat illogical. See Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015) ("Machine guns aren't commonly owned for lawful purposes today because they are illegal; semi-automatic weapons with large-capacity magazines are owned more commonly because, until recently (in some jurisdictions), they have been legal. Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned.").

between 1990 and 2015, Americans owned approximately 115,000,000 LCMs. On the other hand, the defendants have shown that only three percent of guns in the United States are assault weapons and only one percent of Americans own such a weapon. In all events, the record evidence is sparse as to actual use of any of the proscribed weapons or LCMs for self-defense in the home.

The district court avoided this question entirely. It abjured the "in common use" test, concluding that "Heller . . . presents us with a dispositive and relatively easy inquiry: Are the banned assault weapons and large-capacity magazines 'like' 'M-16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?" Worman, 293 F. Supp. 3d at 264 (quoting Kolbe v. Hogan, 849 F.3d 114, 136 (4th Cir.) (en banc), cert. denied, 138 S. Ct. 469 (2017)). The court went on to find that the proscribed weapons fit within this taxonomy, noting by way of example that one of the proscribed weapons (the Colt AR-15) is virtually identical to the M-16 (save for the fact that the AR-15 does not allow for fully automatic fire). See id. at 264-66. The plaintiffs argue that this approach is doubly flawed: they calumnize both the district court's conclusion that "weapons that are most useful in military service" are excepted from Second Amendment coverage and its determination that the proscribed weapons are "like" "M-16 rifles."

Mindful that "[d]iscretion is often the better part of valor," United States v. Gonzalez, 736 F.3d 40, 40 (1st Cir. 2013), we are reluctant to plunge into this

factbound morass. In the end, "courts should not rush to decide unsettled issues when the exigencies of a particular case do not require such definitive measures." Privitera v. Curran (In re Curran), 855 F.3d 19, 22 (1st Cir. 2017). For present purposes, we simply assume, albeit without deciding, that the Act burdens conduct that falls somewhere within the compass of the Second Amendment.

C. The Level of Scrutiny.

The next phase of our inquiry "requires us to evaluate the [Act] under an appropriate level of scrutiny." Gould, 907 F.3d at 670. The appropriate level of scrutiny "turn[s] on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right." Id. at 670-71. We previously established "that the core Second Amendment right is limited to self-defense in the home" on the part of "responsible, law-abiding individuals." Id. at 671. Given this understanding, we concluded that the law challenged in Gould (which concerned public carriage of firearms) fell outside the core of the Second Amendment right. See id. at 672. In contrast to the plaintiffs in Gould, the present plaintiffs contend that the Act affects their ability to defend themselves in their homes. Assuming (favorably to the plaintiffs) that the Act implicates the core of the Second Amendment right, we must train the lens of our inquiry on "how heavily it burdens that right." Id. at 671.

As is true in many Second Amendment inquiries, our starting point is Heller. There, the Court unequivocally rebuffed the argument "that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." 554 U.S. at 629. The Court's rationale was based on the premise that "the American people have considered the handgun to be the quintessential self-defense weapon." Id. In fashioning this rationale, the Court repeatedly emphasized the unique popularity of the handgun as a means of self-defense. See id. at 628 (calling handguns a "class of 'arms' . . . overwhelmingly chosen by American society for [self-defense]"); id. at 628-29 (identifying the handgun as "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family"); id. at 629 (declaring that "handguns are the most popular weapon chosen by Americans for self-defense in the home"). Building on this foundation, the Court made clear that banning this quintessential self-defense weapon would heavily burden the core right of self-defense in the home. See id. at 629; see also id. at 632 (describing eighteenth-century gunpowder storage laws and noting that such laws did "not remotely burden the right of self-defense as much as an absolute ban on handguns").

This same logic leads us to conclude that the Act's restriction on semiautomatic assault weapons and LCMs does not heavily burden the core right of self-defense in the home. As an initial matter, the Act does not ban all semiautomatic weapons and magazines. Instead, it proscribes only a set of specifically

enumerated semiautomatic assault weapons, magazines of a particular capacity, and semiautomatic assault weapons that have certain combat-style features. Furthermore, the record shows that semiautomatic assault weapons do not share the features that make handguns well-suited to self-defense in the home. Cf. id. at 629 (explaining that "a citizen may prefer a handgun for home defense" because, inter alia, "[i]t is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police"). Equally as important is what the record does not show: it offers no indication that the proscribed weapons have commonly been used for home self-defense purposes. In fact, when asked directly, not one of the plaintiffs or their six experts could identify even a single example of the use of an assault weapon for home self-defense, nor could they identify even a single example of a self-defense episode in which ten or more shots were fired. Viewed as a whole, the record suggests that wielding the proscribed weapons for self-defense within the home is tantamount to using a sledgehammer to crack open the shell of a peanut. Thus, we conclude that the Act does not heavily burden the core Second Amendment right of self-defense within the home.

This conclusion fits seamlessly with our decision in Hightower. Although that opinion did not directly address what restrictions may be deemed to heavily

burden the core Second Amendment right, we stated that the fact that the plaintiff sought a license that "allowed carrying of large capacity weapons weaken[ed] the Second Amendment claim, as [Heller] was concerned with weapons of the type characteristically used to protect the home." Hightower, 693 F.3d at 71 (holding that revocation of license to carry concealed, large-capacity firearm based on false statements in renewal application did not violate Second Amendment). So, too, our conclusion is reinforced by the fact that – unlike the use of handguns – the use of semiautomatic assault weapons, even in the home, does not "implicate[ ] the safety only of those who live or visit there." Gould, 907 F.3d at 672. Rather, the use of semiautomatic assault weapons implicates the safety of the public at large. After all, such weapons can fire through walls, risking the lives of those in nearby apartments or on the street. Cf. Kolbe, 849 F.3d at 127 (observing that "rounds from assault weapons have the ability to easily penetrate most materials used in standard home construction, car doors, and similar materials").

We have yet to consider what level of scrutiny applies to a law that implicates the core of the Second Amendment right, but does not "heavily . . . burden[ ] that right." Gould, 907 F.3d at 671. Heller does state that a handgun ban would "fail constitutional muster" under "any of the standards of scrutiny that [the Court has] applied to enumerated constitutional rights." 554 U.S. at 628-29. But we do not read Heller to suggest that a regulation of arms that only modestly burdens the core Second Amendment right must be subject to

the strictest form of constitutional review. See Gould, 907 F.3d at 673 ("The Heller Court . . . implie[d] that there is a role for some level of scrutiny less rigorous than strict scrutiny."); see also Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011) ("[A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. . . . [L]aws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified.").

In our view, intermediate scrutiny is appropriate as long as a challenged regulation either fails to implicate the core Second Amendment right or fails to impose a substantial burden on that right. See Fyock v. Sunnyvale, 779 F.3d 991, 998-99 (9th Cir. 2015). It follows that intermediate scrutiny is the appropriate level of scrutiny for evaluating a law – like the Act – that arguably implicates the core Second Amendment right to self-defense in the home but places only a modest burden on that right. This holding aligns us with a number of our sister circuits, which have applied intermediate scrutiny to laws restricting semiautomatic assault weapons and LCMs. See, e.g., Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J., 910 F.3d 106, 117 (3d Cir. 2018) (applying intermediate scrutiny because "[t]he Act here does not severely burden the core Second Amendment right to self-defense in the home"); Kolbe, 849 F.3d at 134 (applying intermediate scrutiny because challenged law did "not seriously impact a person's ability to defend himself in the home" (internal

quotation marks omitted)); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 260 (2d Cir. 2015) (applying intermediate scrutiny because "[t]he burden imposed by the challenged legislation is real, but . . . not 'severe' "); Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1262 (D.C. Cir. 2011) (applying intermediate scrutiny because challenged prohibition did not "substantially affect" individuals' right of self-defense).[6] Consequently, we proceed to apply intermediate scrutiny to determine whether the Act passes constitutional muster.

D. Applying Intermediate Scrutiny.

To survive intermediate scrutiny, a statute "must be substantially related to an important governmental objective." Gould, 907 F.3d at 672 (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)). To achieve this substantial relationship, there must be a "reasonable fit" between the restrictions imposed by the law and the government's valid objectives, "such that the law does

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[6] After we heard oral argument in this case, the Illinois Supreme Court held that a law prohibiting the carrying of tasers and stun guns was a "categorical ban" and, thus, was "facially unconstitutional under the [S]econd [A]mendment." Illinois v. Webb, ___ N.E. 3d ___, ___ (Ill. 2019) [2019 WL 1291586 at *5]. The plaintiffs notified us of this decision pursuant to Federal Rule of Appellate Procedure 28(j), asserting that it "provides further support for [their] argument that a categorical ban on bearable arms that are commonly kept for lawful purposes is per se unconstitutional." We reject the plaintiffs' premise that the Act is a categorical ban, see supra note 2, and disagree with the Illinois Supreme Court's conclusion that any law that restricts a certain type of arms is per se unconstitutional.

not burden more conduct than is reasonably necessary." Id. at 674 (quoting Drake v. Filko, 724 F.3d 426, 436 (3d Cir. 2013)).

The law that the plaintiffs challenge here – the Act – restricts the sale, transfer, and possession of certain semiautomatic assault weapons and LCMs. See Mass. Gen. Laws ch. 140, §§ 121, 131M. It does not ban the sale, transfer, or possession of all semiautomatic weapons, nor does it impose any restrictions on magazines that are designed to hold ten rounds or fewer. The Act's manifest purpose is to "help keep the streets and neighborhoods of Massachusetts safe" by "mak[ing] it harder for criminals to get their hands on these dangerous guns."

We have said before, and today reaffirm, that "few interests are more central to a state government than protecting the safety and well-being of its citizens." Gould, 907 F.3d at 673. Since Massachusetts indubitably "has compelling governmental interests in both public safety and crime prevention," id., the only question that remains is whether the Act is substantially related to those interests. The answer to this question depends on whether the fit between those interests and the Act is reasonable. See id. at 674.

In our view, the Act survives under intermediate scrutiny. This view comports with the unanimous weight of circuit-court authority analyzing Second Amendment challenges to similar laws. See, e.g., Ass'n of N.J. Rifle & Pistol Clubs, 910 F.3d at 122; Kolbe, 849

F.3d at 139; N.Y. State Rifle & Pistol Ass'n, 804 F.3d at 261; Heller II, 670 F.3d at 1262.

The record contains ample evidence of the unique dangers posed by the proscribed weapons. Semiautomatic assault weapons permit a shooter to fire multiple rounds very quickly, allowing him to hit more victims in a shorter period of time. LCMs exacerbate this danger, allowing the shooter to fire more bullets without stopping to reload. Cf. Heller II, 670 F.3d at 1264 (noting that "the 2 or 3 second pause during which a criminal reloads his firearm can be of critical benefit to law enforcement" (internal quotation marks omitted)). It is, therefore, not surprising that AR-15s equipped with LCMs have been the weapons of choice in many of the deadliest mass shootings in recent history, including horrific events in Pittsburgh (2018), Parkland (2018), Las Vegas (2017), Sutherland Springs (2017), Orlando (2016), Newtown (2012), and Aurora (2012).

The record also contains the affidavit of a seasoned trauma surgeon, who has treated victims of several mass shootings. This affidavit confirms what common sense suggests: semiautomatic assault weapons cause wounds that "tend to be higher in complexity with higher complication rates than those injuries from non-assault weapons. They tend to cause far greater damage to the muscles, bones, soft tissue, and vital organs." Cf. Panagiotis K. Stefanopoulos, et al., Gunshot Wounds: A Review of Ballistics Related to Penetrating Trauma, 3 J. Acute Disease 178, 181-82 (2014). A number of articles, written by physicians who have cared

for assault-weapon victims, substantiate the extreme damage that such weapons are prone to cause. See, e.g., Gina Kolata & C.J. Chivers, Wounds from Military-Style Rifles? 'A Ghastly Thing to See', N.Y. Times (Mar. 4, 2018), https://www.nytimes.com/2018/03/04/health/parkland-shooting-victims-ar15.html ("The tissue destruction is almost unimaginable. Bones are exploded, soft tissue is absolutely destroyed. The injuries to the chest or abdomen – it's like a bomb went off."); Tim Craig et al., As the Wounded Kept Coming, Hospitals Dealt with Injuries Rarely Seen in U.S., Wash. Post (Oct. 3, 2017), https://www.washingtonpost.com/national/health-science/as-the-wounded-kept-coming-hospitals-dealt-with-injuries-rarely-seen-in-the-us/2017/10/03/06210b86-a883-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.5a659eec267b ("If a 9mm bullet strikes someone in the liver . . . that person might suffer a wound perhaps an inch wide, . . . [b]ut if you're struck in the liver with an AR-15, it would be like dropping a watermelon onto the cement. It just is disintegrated." (internal quotation marks omitted)).

The defendants proffered evidence that the majority of individuals who have perpetrated mass shootings obtain their semiautomatic assault weapons legally. See, e.g., Larry Buchanan et al., How They Got Their Guns, N.Y. Times (updated Feb. 16, 2018), https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html; Mayors Against Illegal Guns, Analysis of Recent Mass Shootings (2013). This evidence lends support to the legislature's conclusion that a law proscribing semiautomatic

assault weapons and LCMs – like the Act – will help curtail outbreaks of mass violence.

The plaintiffs do not dispute the extensive evidence regarding the lethality of the proscribed weapons and the frequency of their use in mass shootings. Instead, they argue that "[e]ven assuming the [Act] may curb criminal misuse of the Banned Firearms and Magazines," the Act fails intermediate scrutiny because it "make[s] no exception for law-abiding, responsible citizens to keep these arms for lawful purposes like self-defense in the home." According to the plaintiffs, the forbidden assault weapons and LCMs are "ideal" for domestic self-defense for many of the same reasons that such weapons are ideal for mass shootings – they are easier to hold and shoot, require less user accuracy, and allow a shooter to fire many times without reloading. Thus, the plaintiffs assert, any regulation prohibiting law-abiding, responsible citizens from possessing such weapons sweeps too broadly.

This assertion is too facile by half, and we reject it. Although we acknowledge that "[i]n dealing with a complex societal problem like gun violence, there will almost always be room for reasonable minds to differ about the optimal solution," Gould, 907 F.3d at 676, the plaintiffs give unduly short shrift to "the legislature's prerogative . . . to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments," id. The role of a reviewing court is limited to ensuring "that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence," id. (alteration in original)

(quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994) (opinion of Kennedy, J.)), and that "the fit between the asserted governmental interests and the means chosen to advance them is close enough to pass intermediate scrutiny," id. at 674.

Here, the Massachusetts legislature's conclusion that the Commonwealth's legitimate interests are best served by proscribing semiautomatic assault weapons and LCMs rests on substantial (although not incontrovertible) evidence regarding the inordinate dangers associated with the proscribed weapons. What is more, it strains credulity to argue that the fit between the Act and the asserted governmental interest is unreasonable. As we have said, the Act does not outlaw all semiautomatic firearms and magazines. Nor does it circumscribe in any way the fundamental right of law-abiding, responsible citizens to possess handguns in their homes for self-defense. Accordingly, we hold that although the Act may well "touch[] the right to keep and bear arms," Miller, 307 U.S. at 182, it does not impermissibly intrude upon that right because it withstands intermediate scrutiny.

III. CONCLUSION

This case concerns an issue of paramount importance. In the wake of increasingly frequent acts of mass violence committed with semiautomatic assault weapons and LCMs, the interests of state and local governments in regulating the possession and use of such weapons are entitled to great weight. Even so, we

recognize that such interests must be balanced against the time-honored right of individuals to bear arms in self-defense – a right that is protected in varying degrees by the Second Amendment.

Holding this delicate balance steady and true is difficult but necessary work. Here, we find that even if the Act implicates the core of the Second Amendment right, it (at most) minimally burdens that right. Consequently, we are obliged to cede some degree of deference to the decision of the Massachusetts legislature about how best to regulate the possession and use of the proscribed weapons.

In this instance, that decision rests on a web of compelling governmental interests, and the fit between those interests and the restrictions imposed by the Act is both close and reasonable. It follows that the Act withstands intermediate scrutiny – and no more is exigible to blunt the plaintiffs' Second Amendment challenge.

We need go no further. For the reasons elucidated above, the judgment of the district court is

Affirmed.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

DAVID SETH WORMAN, ANTHONY LINDEN, JASON WILLIAM SAWYER, PAUL NELSON CHAMBERLAIN, GUN OWNERS' ACTION LEAGUE, INC., ON TARGET TRAINING, INC., and OVERWATCH OUTPOST, Plaintiffs, 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; and Colonel Kerry Gilpin, in her official capacity as Superintendent of the Massachusetts State Police, Defendants.	CIVIL ACTION NO. 1:17-10107-WGY

YOUNG D.J. April 5, 2018

MEMORANDUM AND ORDER

SECOND AMENDMENT, U.S CONSTITUTION

A well regulated Militia, being necessary to the security of a free State, the right

of the people to keep and bear Arms, shall not be infringed.

I. THE CONTROLLING LAW

For most of our history, mainstream scholarship considered the Second Amendment as nothing more than a guarantee that the several states can maintain "well regulated" militias. See, e.g., Lawrence H. Tribe, American Constitutional Law 226 n.6 (1978); Peter Buck Feller & Karl L. Gotting, The Second Amendment: A Second Look, 61 Nw. U. L. Rev. 46, 62 (1966); John Levin, The Right to Bear Arms: The Development of the American Experience, 48 Chi.-Kent L. Rev. 148, 159 (1971).

Then, in 1999, a United States District Judge held that, in fact, the Second Amendment conferred upon our citizens an individual right to bear arms. See United States v. Emerson, 46 F. Supp. 2d 598, 602 (N.D. Tex. 1999) (Cummings, J.), rev'd and remanded on other grounds, 270 F.3d 203 (5th Cir. 2001). This determination was upheld. See United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001).

Eventually, the issue found its way to the Supreme Court. In District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court struck down a District of Columbia provision that made it illegal to possess handguns in the home, holding that the core right guaranteed by the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at 635. Justice Scalia wrote for the five-member majority and his opinion is

a tour de force example of his "original meaning" jurisprudence.[1] The Second Amendment, he explained, is comprised of a prefatory clause, "[a] well regulated Militia, being necessary to the security of a free State, . . . " and an operative clause, " . . . the right of the people to keep and bear Arms, shall not be infringed." Speaking for the Supreme Court, he went on to offer extensive historical grounding for this interpretation. Id. at 579-600.

Well aware that he was writing more than two centuries after the words the Supreme Court was interpreting had been adopted as part of our Constitution, Justice Scalia carefully defined the words "bear" and "arms," giving them the meaning those words bore at the time of the Second Amendment's adoption. Id. at 581-92.

Speaking for the Supreme Court and focusing on the word "arms," he clarified that "the right secured by the Second Amendment is not unlimited." Id. at 626. It is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id. For example, it is constitutional to prohibit "the possession of firearms by felons and the mentally ill." Id. "[L]aws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on

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[1] Indeed, Brandon J. Murrill, the Legislative Attorney for the Congressional Research Service, cites Heller as the paradigmatic example of original meaning jurisprudence. See Brandon J. Murrill, Modes of Constitutional Interpretation, Cong. Res. Service 8 (Mar. 15, 2018), https://fas.org/sgp/crs/misc/R45129.pdf.

the commercial sale of arms" are also presumptively proper under the Second Amendment. Id. at 626-27 & n.26. Another important limitation articulated by the Supreme Court is that the weapons protected under the Second Amendment "were those 'in common use at the time.'" Id. at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)). More specifically, Justice Scalia explained that "weapons that are most useful in military service – M-16 rifles and the like" are not protected under the Second Amendment and "may be banned." Id.

Justice Scalia well recognized that interpreting the Second Amendment such that military style weapons fell beyond its sweep could lead to arguments that "the Second Amendment right is completely detached from the prefatory clause." Id. He explained, however, that the Supreme Court's interpretation did not belie the prefatory clause because the consonance of the two clauses must be assessed "at the time of the Second Amendment's ratification," when "the conception of the militia . . . was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty." Id. "Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks." Id. Yet the Supreme Court ruled that "the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right" could not "change [its] interpretation of the right." Id. at 627-28.

When looking at the prohibition against possession of handguns in the home in Heller, the Supreme Court ruled it unconstitutional because the ban extended "to the home, where the need for self, family, and property is most acute." Id. at 628. The ban also troubled the Supreme Court because "[t]he handgun ban amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." Id. Accordingly, "[u]nder any of the standards of scrutiny that [the Supreme Court has] applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster." Id. at 628-29 (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).

Following Heller, the Supreme Court decided two other landmark Second Amendment cases. In McDonald v. City of Chicago, 561 U.S. 742 (2010), the Supreme Court extended the reach of the Second Amendment and stated that "the Second Amendment right is fully applicable to the States" via the Due Process Clause of the Fourteenth Amendment. Id. at 744. In Caetano v. Massachusetts, 136 S. Ct. 1027 (2016) (per curiam), the Supreme Court reaffirmed its holding in Heller, reiterating that the Second Amendment "extends . . . to . . . arms . . . that were not in existence at the time of the founding" and does not protect only "those weapons useful in warfare." Id. at 1028 (quoting Heller, 554 U.S. at 582, 624).

Since Heller, circuit courts have wrestled with the proper standard of review to apply to Second Amendment claims. Most circuit courts apply a two-part approach. See, e.g., Kolbe v. Hogan, 849 F.3d 114, 138-47 (4th Cir. 2017) (en banc); New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015); GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1322 (11th Cir. 2015); Jackson v. City and Cty. of San Francisco, 746 F.3d 953, 962-63 (9th Cir. 2014); United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013); Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 874-75 (4th Cir. 2013); National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 701-04 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800-01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

Under the two-part approach, courts first consider whether the law "imposes a burden on conduct that falls within the scope" of the Second Amendment. Powell v. Tompkins, 783 F.3d 332, 347 n.9 (1st Cir. 2015); see Kolbe, 849 F.3d at 133. If the answer is no, the analysis ends. If the answer is yes, the next step is to "determine the appropriate form of judicial scrutiny to apply (typically, some form of either intermediate scrutiny or strict scrutiny)" to test the constitutionality of

the law. Powell, 783 F.3d at 347 n.9. Under strict scrutiny, "the government must prove that the challenged law is 'narrowly tailored to achieve a compelling governmental interest.'" Kolbe, 849 F.3d at 133 (quoting Abrams v. Johnson, 521 U.S. 74, 82 (1997)). Under intermediate scrutiny, the government must "show that the challenged law 'is reasonably adapted to a substantial governmental interest'" Id. (quoting United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011)).

II. THE CASE AT BAR

In 1998, four years after the passage of the federal statute banning assault weapons, Massachusetts enacted "An Act Relative to Gun Control in the Commonwealth." 1998 Mass. Acts ch. 180, §§ 1-80 (codified in Mass. Gen. Laws ch. 140 et seq.) (the "Act"). Among other restrictions, the Act proscribes the transfer or possession of assault weapons and large capacity magazines ("LCMs"). Mass. Gen. Laws Ann. ch. 140, § 131M (2018). Though the Act largely was styled after the federal assault weapons ban and initially echoed the federal ban's 2004 expiration date, the Massachusetts Legislature declined to let the Act expire and instead made it permanent in that year.

On January 23, 2017, a group comprised of Massachusetts firearm owners, prospective firearm owners, firearm dealers, and a firearm advocacy association (collectively, the "Plaintiffs") filed suit against Charles Baker, the Governor of the Commonwealth of Massachusetts; Maura Healey, the Attorney General of the

Commonwealth of Massachusetts (the "Attorney General"); Daniel Bennett, the Secretary of the Executive Office of Public Safety and Security; Colonel Richard McKeon, the Superintendent of the Massachusetts State Police; and the Massachusetts State Police (collectively, the "Defendants").[2]

The Plaintiffs filed this action against the Defendants alleging violations of their constitutional rights and seeking declaratory and injunctive relief. Compl. Decl. & Inj. Relief ("Compl."), ECF No. 1. Specifically, the Plaintiffs claim that the Act infringes their Second Amendment rights and violates their rights to due process afforded to them through the Fourteenth Amendment. Id. ¶¶ 72-107.

On December 15, 2017, both parties cross-moved for summary judgment on all counts. Pls.' Mot. Summ. J. ("Pls.' Mot."), ECF No. 57; Pls.' Mem. Supp. Mot. Summ. J. ("Pls.' Mem."), ECF No. 58; Pls.' Statement of Undisputed Material Facts ("Pls.' Statement of Facts"), ECF No. 59; Defs.' Mot. Summ. J. ("Defs.' Mot."), ECF No. 61; Mem. Supp. Defs.' Mot. Summ. J. ("Defs.' Mem."), ECF No. 62; Defs.' Statement Material Facts ("Defs.' Statement of Facts"), ECF No. 63. The Plaintiffs also moved to strike certain witness declarations and expert opinions proffered by the Defendants. See

[2] The parties have since stipulated to the dismissal of the defendants Charles Baker and the Massachusetts State Police. Stip. Dismissal, ECF No. 39. Per Rule 25(d) of the Federal Rules of Civil Procedure, Colonel Kerry Gilpin, who is the current Superintendent of the Massachusetts State Police, has been automatically substituted for Colonel Richard McKeon.

Pls.' Mot. Strike Undisclosed Witness Decls., ECF No. 68; Pls.' Mot. Strike Ops. Defs.' Experts, ECF No. 75. On January 22, 2017, the Court allowed in part the motion to strike the witness declarations, ruling that the Defendants cannot rely on them in pressing their motion for summary judgment, but denied the motion as to all other purposes. See Elec. Order, ECF No. 85. The Court denied the motion to strike the challenged expert opinions "insofar as [they] are proffered in opposition to the Plaintiffs' motion for summary judgment," expressing no opinion on whether the challenged affidavits may be considered in support of the Defendants' motion for summary judgment. Elec. Order, ECF No. 84.

On February 9, 2018, this Court heard oral argument on the cross-motions for summary judgment and took the matter under advisement. See ECF No. 89.

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For a movant to prevail, it "bears the initial responsibility" of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden then "shifts to the nonmoving party, who must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1, 5 (1st Cir. 2010). "An issue is 'genuine' if the

evidence of record permits a rational factfinder to resolve it in favor of either party." Id. at 4.

In evaluating a motion for summary judgment, the Court must consider "all of the record materials on file, including the pleadings, depositions, and affidavits," but it is not permitted to "evaluate the credibility of witnesses nor weigh the evidence." Ahmed v. Johnson, 752 F.3d 490, 495 (1st Cir. 2014). All inferences, however, are to be drawn in favor of the nonmoving party. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

III. THE UNDISPUTED FACTS[3]

A. The Development of the AR-15 Rifle

In 1957, after the United States Army had adopted the M14, a select fire full-auto military rifle, it "began searching for a .22 (centerfire) caliber lightweight select fire rifle" to best meet the needs of the military. Pls.' Statement of Facts, Ex. 13 at A-15, ECF No. 59-12. "Since the mid-1950's Armalite [a gun manufacturer] had been developing gas-operated rifles that differed substantially from traditional wood stock designs in the use of modern materials and ergonomics." Id. The Armalite Rifle ("AR")-10 was developed in 1956 for a 7.62×51 mm cartridge. Id. A smaller version designed for the military, with its specifications in mind, was developed and named the AR-15. The AR-15 was a scaled

[3] In light of the ultimate disposition, this Court relies only on legislative materials that are undisputed and the Plaintiffs' own recitation of facts. All inferences are drawn in the Plaintiffs' favor.

down version of the AR-10, with a .223 Remington (5.56×45mm) cartridge. Id. In 1964, the Army adopted the AR-15 and renamed it the M16. Id. Colt manufactured the M16 and also created a semi-automatic version of the weapon and named it the AR-15. Id.

B. The Federal Ban and the Act

In 1994, Congress enacted the Public Safety and Recreational Firearms Use Protection Act to decrease the spread of assault weapons similar to military weapons. Pub. L. No. 103-322, §§ 110101-06, 108 Stat. 1796, 1996-2010 (1994). While in effect from 1994 to 2004, the federal statute banned the manufacture, transfer and possession of nineteen models of semiautomatic weapons, and copies or duplicates of those firearms. §§ 110102-06, 108 Stat. at 1996-2010. It also banned any semiautomatic rifle, pistol, or shot gun that had two or more combat-style features, and rifles and pistols that had the ability to accept a detachable magazine, as well as LCMs that could hold more than ten rounds of ammunition. Id. The ban exempted assault weapons that were possessed lawfully on September 13, 1994, the date of its enactment, as well as hundreds of rifles and shotguns commonly used for hunting and target practice. Id.

Four years later, Massachusetts enacted the Act, which tracked the language of the federal ban and adopted the same definition of "assault weapon." Mass. Gen. Laws ch. 140, § 121. The Act makes it a crime to sell or possess a number of assault weapons, including

Colt AR-15s, and copies and duplicates of those weapons. Id. § 131M. It also makes it a crime to sell or possess a fixed or detachable large capacity magazine that is capable of holding more than ten rounds of ammunition. Id.; see id. § 121. The Act makes an exception for weapons otherwise lawfully owned on September 13, 1994. Id. § 131M.

On July 20, 2016, the Attorney General issued an "Enforcement Notice" to the public to "provide a framework to gun sellers and others for understanding the definition of 'Assault weapon' contained in [the Act]." Pls.' Statement of Facts, Ex. 25 ("Enforcement Notice") at 1. The Enforcement Notice explained that a weapon is a "copy" or "duplicate" of an Enumerated Weapon if (i) the weapon's "internal functional components are substantially similar in construction and configuration to those of an Enumerated Weapon," or (ii) the weapon "has a receiver that is the same as or interchangeable with the receiver of an Enumerated Weapon." Id. at 3-4.

The Enforcement Notice declared that with respect to individuals, its guidance "will not be applied to possession, ownership or transfer of an Assault weapon obtained prior to July 20, 2016." Id. at 4. Proceeding to address firearms dealers, it stated that its guidance "will not be applied to future possession, ownership or transfer of Assault weapons by dealers, provided that the dealer has written evidence that the weapons were transferred to the dealer in the Commonwealth prior to July 20, 2016, and provided further that a transfer made after July 20, 2016, if any, is made

to persons or businesses in states where such weapons are legal." Id.

IV. APPLYING THE LAW TO THE FACTS

This Court begins with a description of the Plaintiffs' claims, which provides helpful context for its analysis. The Plaintiffs make three challenges to the Act. In Count One, they bring a Second Amendment challenge to the Act. Arguing that the Act "prohibits an entire class of firearms . . . commonly kept by law-abiding, responsible citizens for lawful purposes," Compl. ¶ 74, the Plaintiffs allege that this prohibition "extend[s] into the home[ ]," where Second Amendment protections are "at their zenith," id. ¶ 76, and that the Act thus unconstitutionally infringes on their Second Amendment right to bear arms, id. ¶ 77.

Count Two alleges that the Notice of Enforcement unforeseeably and "retroactively criminalizes the transfers of tens of thousands of Massachusetts Compliant Firearms," id. ¶ 4, "retroactively expos[ing] . . . Plaintiffs[ ] to criminal penalty" and violating their right to due process, id. ¶ 70. The Plaintiffs acknowledge the Enforcement Notice's limitation on retroactive application to individuals, but they maintain that it "provides no exception to its application to dealers for transfers made before July 20, 2016." Id. ¶ 64. Consequently, they assert, the Enforcement Notice's novel interpretation of the Act constitutes an unconstitutional retroactive enlargement of the Act's scope, similar to "an Ex Post Facto law passed by a legislature or

a retroactive decision issued by a state supreme court." Id. ¶ 96.

Lastly, in Count Three, the Plaintiffs challenge the Act as unconstitutionally vague, thereby violating their right to due process of law. Specifically, they allege that the phrase "copies or duplicates" is nowhere defined in the Act or in any Massachusetts law, and the Enforcement Notice's "unprecedented" definition of that phrase provides insufficient guidance as to what constitutes a "copy or duplicate." Id. ¶¶ 99-104. The term's resulting vagueness, the Plaintiffs allege, "chills exercise of Second Amendment rights" and fails to warn ordinary citizens of the conduct the Act prohibits. Id. ¶¶ 106-07.

A. Ripeness

Though the Defendants have not raised the issue of ripeness, this Court sees fit to do so. Ripeness "may be considered on a court's own motion." National Park Hosp. Ass'n v. Department of Interior, 538 U.S. 803, 808 (2003). Because ripeness implicates "the question of whether this court has jurisdiction to hear the case," Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 89 (1st Cir. 2013), the Court addresses it first.

1. Legal Standard

"[T]he doctrine of ripeness has roots in both the Article III case or controversy requirement and in

prudential considerations." Id. (quoting Mangual v. Rotger-Sabat, 317 F.3d 45, 59 (1st Cir. 2003)). It "seeks to prevent the adjudication of claims relating to 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Reddy v. Foster, 845 F.3d 493, 500 (1st Cir. 2017) (quoting Texas v. United States, 523 U.S. 296, 300 (1998)). "The requirement of ripeness is 'particularly relevant in the context of actions for preenforcement review of statutes,' because it 'focuses on the timing of the action.'" Gun Owners' Action League, Inc. v. Swift, 284 F.3d 198, 205 (1st Cir. 2002) (quoting Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997)). In determining whether an issue is ripe, the Court ought consider "both the fitness of the issue[] for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), abrogated on other grounds by Califano v. Sanders, 430 U.S. 99 (1977). Typically, "both factors must be present." Doe v. Bush, 323 F.3d 133, 138 (1st Cir. 2003).

The fitness determination "typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." Gun Owners' Action League, 284 F.3d at 206 (quoting Rhode Island Ass'n of Realtors, Inc., v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999)). "The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." McInnis-Misenor

v. Maine Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003) (quoting Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 536 (1st Cir. 1995)). Cases that are "largely hypothetical . . . are seldom fit for federal judicial review." Ernst & Young, 45 F.3d at 538.

The hardship inquiry asks "whether the challenged action creates a direct and immediate dilemma for the parties." Gun Owners' Action League, 284 F.3d at 206 (quoting Rhode Island Ass'n of Realtors, 199 F.3d at 33). To demonstrate that this hardship exists, a party must show that it is put "between a rock and a hard place" without pre-enforcement review, forced either to "forego possibly lawful activity because of her well-founded fear of prosecution" or intentionally to commit a violation, "thereby subjecting herself to criminal prosecution and punishment." Navegar, 103 F.3d at 998 (citing Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298-99 (1979)). "The greater the hardship, the more likely a court will be to find ripeness." McInnis-Misenor, 319 F.3d at 70.

2. Analysis

Whereas Counts One and Three challenge the constitutionality of the Act itself, Compl. ¶¶ 72-77, 97-107, Count Two alleges that the **Enforcement Notice** is unconstitutional, Compl. ¶ 96. It further alleges that the Plaintiffs' due process rights are violated from **retroactive application** of the Enforcement Notice, rather than through the possibility of prospective enforcement (Counts One and Three). These two

distinctions underpin the conclusion that unlike Counts One and Three, Count Two is not ripe for adjudication.

Several factors weigh against the fitness of Count Two for judicial resolution. To start, the Enforcement Notice lacks the binding effect and force of law and does not constitute a "final" agency action. The First Circuit has explained that "[a]n agency action . . . is not 'final' or ripe for review if it makes no change in the status quo itself, but rather requires 'further administrative action other than the possible imposition of sanctions,' before rights, obligations or duties arise." Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1034, 1040 (1st Cir. 1982) (quoting Northeast Airlines, Inc. v. C.A.B., 345 F.2d 662, 664 (1st Cir. 1965)). An action that "merely explains how the agency will enforce a statute or regulation" is not generally subject to pre-enforcement judicial review, National Min. Ass'n v. McCarthy, 758 F.3d 243, 252 (D.C. Cir. 2014); the agency must have "rendered its last word on the matter," Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 46 (1st Cir. 2009) (quoting Harrison v. PPG Indus., Inc., 446 U.S. 578, 586 (1980)).

Here, the agency action is, as the Defendants describe, "a prosecutor's advisory to the public of her interpretation of a criminal law committed to her enforcement."[4] Defs.' Mem. 14. The mere existence of the

[4] That the agency in question here is a prosecuting authority weighs against fitness more so than it might in the context of most other administrative agencies, because "the decision to prosecute is particularly ill-suited to judicial review." Wayte v. United States, 470 U.S. 598, 607 (1985). Rather than issue the Enforcement

Enforcement Notice, which was not directed at any particular individual or entity and contemplates that it may be "alter[ed] or amend[ed]," Enforcement Notice at 4, does not bring about a change in rights or obligations. Rather, it is the decision to initiate enforcement actions under this guidance that would constitute the Attorney General's "last word on the matter" and give rise to any real effect on the Plaintiffs' rights and obligations.[5] See Roosevelt Campobello Int'l Park Comm'n, 684 F.2d at 1039-40 (holding that agency actions were not "sufficiently 'final' to call for judicial review" where they did not confer rights until another agency action, which had been proposed but not executed, took place); Kemler v. Poston, 108 F. Supp. 2d 529, 542 (E.D. Va.

Notice, the Attorney General could have decided simply to initiate a prosecution under her interpretation of the Act. Absent a showing of discriminatory or arbitrary enforcement, that exercise of prosecutorial discretion would be "shielded from intense judicial review" in both federal and Massachusetts courts. United States v. Bernal-Rojas, 933 F.2d 97, 99 (1st Cir. 1991); see Commonwealth v. Latimore, 423 Mass. 129, 136 (1996). Thus, reviewing a manifestation of that discretion here might well upset the traditional principle that "[i]n our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." Wayte, 470 U.S. at 607 (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982)); see Commonwealth v. Taylor, 428 Mass. 623, 629 (1999) ("[O]ur decisions uniformly uphold a prosecutor's wide discretion in deciding whether to prosecute a particular defendant.").

[5] This Court notes, however, that another Judge of this Court, addressing a similar challenge, has recently disagreed, ruling that the Enforcement Notice itself has the effect of a regulation and is reviewable. See Pullman Arms Inc. v. Healey, No. 16-CV-40136-TSH, 2018 WL 1319001, at *2 (D. Mass. Mar. 14, 2018) (Hillman, J.).

2000) (concluding that challenge to state ethics committee's advisory opinion was not fit for review where the opinion could have "[n]o concrete effect" until enforced by the appropriate state commission or court); cf. Northeast Airlines, 345 F.2d at 664 (explaining that judicial review is appropriate where agency "determination is not a mere advisory or interpretive opinion"), To conclude otherwise would be to exalt form over substance and discourage a desirable practice: If any comment on a law's interpretation by the Attorney General could be considered to have binding effect just because citizens may accord it considerable weight, the Attorney General would forever remain silent, providing citizens with **less** notice and creating a higher risk that their rights to due process may someday be violated.

Further, the actual threat of an enforcement action to activate those rights is minimal. In contrast to Counts One and Three, which anticipate the possibility of enforcement for prospective transactions, Count Two's alleged deprivation of due process rests on the notion that the Enforcement Notice "retroactively criminalizes" prior conduct. Compl. ¶ 4. Yet the Attorney General declared in the Enforcement Notice itself that her interpretation of the Act would **not** be enforced retroactively against individuals. Enforcement Notice at 4. While her language concerning dealers is arguably more ambiguous, it implies that the same principle applies to dealers, and the Attorney General's office has since confirmed that it does. See Defs.' Mem. 14; Dec. Supp. Defs.' Mot. Summ. J., Ex. 1 at 162:5-10, 163:17-23, ECF No. 65-1. Thus, the Plaintiffs' claim of

lack of due process due to retroactive enforcement of the Enforcement Notice is "largely hypothetical," weighing against a determination that the issue is fit for review.[6] Ernst & Young, 45 F.3d at 538; see McInnis-Misenor, 319 F.3d at 72 ("[T]hat the future event may never come to pass augurs against a finding of fitness.").

Even if the Attorney General were to decide to enforce the Act under the Enforcement Notice's interpretation with respect to transactions occurring prior to July 20, 2016, she may exercise her discretion to revise her understanding as laid out in the Enforcement Notice, or to bring prosecutions under a different theory of liability. Review at this point thus may deprive her "of the opportunity to refine, revise or clarify the particular rule or other matter at issue" or "of the opportunity to resolve the underlying controversy on other grounds." Roosevelt Campobello Int'l Park Comm'n, 684 F.2d at 1040. Alternatively, a court may choose not

[6] The Plaintiffs allege that in addition to the threat of state prosecution, because federal law criminalizes the sale of firearms in any state prohibiting the purchase or possession of such a firearm, the Enforcement Notice also causes them to face a credible threat of federal prosecution for these previous transactions. Compl. ¶ 92. While there has been no similar disavowal by federal prosecutors, the Plaintiffs have not pointed to the initiation of any such prosecutions and have failed to demonstrate beyond a hypothetical possibility that federal prosecutors will now bind themselves to the Enforcement Notice's guidance, yet reject its limits on retroactive enforcement. Further, as explained infra, this threat – like the threat of state prosecution – does not create a sufficiently "direct and immediate dilemma" to demonstrate hardship. Gun Owners' Action League, 284 F.3d at 206 (quoting Rhode Island Ass'n of Realtors, 199 F.3d at 33).

to give effect to the Enforcement Notice's interpretation. See Matamoros v. Starbucks Corp., 699 F.3d 129, 135 (1st Cir. 2012) (explaining that while the Massachusetts Attorney General's interpretation of a law that she is charged with enforcing is "entitled to 'substantial deference' " by a court interpreting that law, it also must be "reasonable" (quoting DiFiore v. American Airlines, Inc., 454 Mass. 486, 910 N.E.2d 889, 897 n.11 (2009))). Consequently, allowing adjudication of Count Two at this time would "be setting in motion a constitutional adjudication that not only could have a thunderous impact on important state interests but that might well prove to be completely unnecessary." Ernst & Young, 45 F.3d at 538.

Nor have the Plaintiffs demonstrated sufficient hardship[7] with respect to Count Two. Courts have consistently pointed to the government's express intent to prosecute or express disavowal of that intent as a major factor in the determination of whether a credible threat of prosecution exists. See Poe v. Ullman, 367 U.S. 497, 507 (1961) (plurality opinion) ("If the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here."); SOB, Inc. v. County of Benton, 317 F.3d 856, 865-66, (8th Cir. 2003) (determining fear of prosecution to be unrealistic where alleged fear was based on unreasonable interpretation of ordinance and county attorney had publicly declared

[7] Even where a fitness showing is minimal, the Court considers whether the hardship is so great so as to compensate for lack of fitness. See McInnis-Misenor, 319 F.3d at 73.

that ordinance did not prohibit activity in question); cf. Babbitt, 442 U.S. at 302 (concluding that reasonable fear of prosecution was shown where statute's criminal prohibition was clear and the state had not "disavowed any intention" of invoking it against the plaintiffs); Presbytery of N.J. of Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1468 (3d Cir. 1994) (observing that state's pointed refusal to forswear future prosecution "indicates . . . a real threat of prosecution"). As discussed supra, the Attorney General expressly disavowed her intention to enforce the Enforcement Notice's interpretation as to transactions that took place before the Enforcement Notice was issued.[8] That fact,

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[8] By contrast, the Attorney General has not made any such promise with respect to prospective transactions prohibited by the statute. With respect to Counts One and Three, then, the Plaintiffs face the immediate dilemma of buying a prohibited firearm and risking prosecution, or forgoing such a transaction, resulting in a potential deprivation of rights. See, e.g., New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 990 F. Supp. 2d 349, 358-59 (W.D.N.Y. 2013) (holding credible threat to exist where plaintiffs testified that but for the statute, they would acquire weapons rendered illegal by the statute), rev'd in part on other grounds, 804 F.3d 242; Ezell v. City of Chicago, 651 F.3d 684, 695 (7th Cir. 2011) ("The very 'existence of a statute implies a threat to prosecute, so pre-enforcement challenges are proper. . . .'" quoting Bauer v. Shepard, 620 F.3d 704, 708 (7th Cir. 2010)); Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522, 529 (6th Cir. 1998) (explaining that case is ripe where plaintiffs "face a clear Hobson's choice" between risking prosecution or depriving themselves of use of weapons, and the government "clearly state[d]" its intent to prosecute); cf. Gun Owners' Action League, 284 F.3d at 207 (concluding that there was no hardship where the statute's licensing scheme "provide[d] a process for resolving uncertainty about the scope of the regulation," but observing that

together with the Plaintiffs' failure to provide this Court with any other reason to believe that they face imminent prosecution for these past transactions, weighs heavily against concluding that there is a credible threat of prosecution. See Fortuna Enterprises, L.P. v. City of Los Angeles, 673 F. Supp. 2d 1000, 1015 (CD. Cal. 2008) (dismissing as not ripe claim seeking declaration that ordinance cannot be applied retroactively, where there was "no reason to believe that the Ordinance will be applied retroactively").

Further, the Plaintiffs do not face the same kind of dilemma with respect to this retroactivity claim as they do with respect to their other claims, because they cannot retroactively forgo lawful activity. Whereas the threat of prosecution for future transactions may pressure them not to engage in those future transactions, the threat of prosecution for past transactions has no reasonable bearing on their future activity. The Plaintiffs thus suffer from no coercive effect of the remote threat of prosecution for these past transactions. See Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 507 (1972) (noting the Poe plurality's observation that "a justiciable controversy does not exist where 'compliance with (challenged) statutes is uncoerced by the risk of their enforcement'" (quoting Poe, 367 U.S. at 508)); Marine Equip. Mgmt. Co. v. United States, 4 F.3d 643, 647 (8th Cir. 1993) ("To present an actual controversy . . . the threat of enforcement must have some sort of immediate coercive consequences."). The Plaintiffs

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the argument for hardship "might have some force if the Act banned [the weapons] outright instead of licensing them").

may fear prosecution for these past transactions, but given that this fear is unreasonable and does not produce a coercive effect, there is little "hardship to the parties of withholding court consideration," Abbott Labs., 387 U.S. at 149.

Because the potential deprivation of due process asserted in Count Two depends entirely on "uncertain and contingent events that may not occur as anticipated, or indeed may not occur at all," W.R. Grace & Co. v. Environmental Protection Agency, 959 F.2d 360, 364 (1st Cir. 1992) (quoting Lincoln House, Inc. v. Dupre, 903 F.2d 845, 847 (1st Cir. 1990)), and the Plaintiffs do not face a "direct and immediate dilemma" with respect to Count Two, Count Two is not ripe for adjudication. The Court therefore DISMISSES that claim for lack of subject matter jurisdiction.

B. The Scope of the Second Amendment

In Count One, the Plaintiffs allege that the Act infringes their Second Amendment rights. They claim that this Court ought grant summary judgment in their favor because the assault weapons and LCMs banned by the Act are within the scope of the Second Amendment right to bear arms. This Court disagrees. Assault weapons and LCMs – the types banned by the Act – are not within the scope of the personal right to "bear Arms" under the Second Amendment.

The Act in this case makes it a crime to possess assault weapons or LCMs after September 13, 1994.

Mass. Gen. Laws ch. 140, § 131M. Assault weapons include:

> (i) Avtomat Kalashnikov (AK) (all models); (ii) Action Arms Israeli Military Industries UZI and Galil; (iii) Beretta Ar70 (SC-70); (iv) Colt AR-15; (v) Fabrique National FN/FAL, FN/LAR and FNC; (vi) SWD M-10, M-ll, M-11/9 and M-12; (vi) Steyr AUG; (vii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and (viii) revolving cylinder shotguns, such as, or similar to, the Street Sweeper and Striker 12.

Id. § 121.

As noted supra, the Supreme Court explained in Caetano that "Heller rejected the proposition 'that only those weapons useful in warfare are protected.' " Caetano, 136 S. Ct. at 1028 (quoting Heller, 554 U.S. at 624). Heller did not make such a rejection, however, in order to conclude that **all** weapons useful in warfare are protected. On the contrary, Heller rejected that premise because it would lead to the "startling" conclusion that "the National Firearms Act's restrictions on machineguns . . . might be unconstitutional, machine guns being useful in warfare in 1939." Heller, 554 U.S. at 624. Thus, as Heller concluded, it cannot be that "only those weapons useful in warfare are protected," because some of those weapons are not protected. Id. Weapons that are most useful in military service, as Justice Scalia later observed, fall outside the scope of the Second Amendment and may be banned. Id. at 627.

Consequently, "Heller . . . presents us with a dispositive and relatively easy inquiry: Are the banned assault weapons and large-capacity magazines 'like' 'M-16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?" Kolbe, 849 F.3d at 136 (quoting Heller, 554 U.S. at 627). The undisputed facts in this record convincingly demonstrate that the AR-15 and LCMs banned by the Act are "weapons that are most useful in military service."[9] As matter of law, these weapons and LCMs thus fall outside the scope of the Second Amendment and may be banned.

The Plaintiffs argue that the AR-15 is the civilian version of the M16 because it cannot fire in fully automatic mode like the M16 and therefore cannot be considered a military weapon. As the Plaintiffs also point out in their undisputed facts, however, "[i]mprovements in firearms technology tend to be adopted for both military and civilian use" and so "[f]irearms designers and manufacturers have historically marketed new developments for both military and civilian uses." Pls.' Statement of Facts Ex. 13, ¶ 9. As a result, the AR-15 design is versatile and adaptable "for **military**, law enforcement, civilian self-defense, hunting, target shooting, and other sporting purposes." Pls.' Statement of Facts, Ex. 11 at A-9 (emphasis added); see Ex. 13 at

[9] While the Act defines an array of weapons banned by the Act, both parties focus their analysis on the AR-15 and whether a ban of it is unconstitutional. This Court will do the same.

A-18. The AR-15 design is almost identical to the M16, except for the mode of firing.

By 1956, Armalite had designed the AR-10, a lightweight select fire rifle for the United States Army. Ex. 13 at A-15. "In response to the military specifications, a similar scaled down AR-15 select fire rifle for the .223 Remington (5.56×45mm) cartridge was developed." Id. The Air Force adopted the AR-15 in 1962. Id. The Army followed soon after in 1964, renaming it the M16. Id. Colt, the manufacturer of the Army's M16, reused the name "AR-15" for its semiautomatic version of the rifle. Id. The AR-15 became well known among civilians following the Vietnam War when veterans brought the "AR pattern rifles" home with them for civilian use. Id. at A-16. "Soldiers who become familiar with a particular type of handgun or rifle in the service tend to seek out similar type[s of] firearms for personal use after leaving the military." Id.

AR-15s are "weapons that are based on designs of weapons that were first manufactured for military purposes" and "ha[ve] most of the features[,] other than [the automatic mode], of the military weapon." Pls.' Statement of Facts, Ex. 17 at 153:20-154:4. Some characteristics of a military weapon include: (1) the "ability to accept a large detachable magazine," (2) "folding/telescoping stocks," advantageous for military purposes, (3) pistol grips designed to allow the shooter to fire and hold the weapon, or "aid in one-handed firing

of the weapon in a combat situation,"[10] (4) flash suppressors, (5) bipods, (6) grenade launchers, (7) night sights, (8) the ability for selective fire, and (9) the ability to accept a centerfire cartridge case of 2.25 inches or less. Pls.' Statement of Facts, Ex. 28 at 6-8. Like the M16, the AR-15 is "available with a telescoping/adjustable stock," a "vertical pistol grip" that allows for the weapon to be "fired with one hand," and "utilize[s] magazines with a standard capacity of 20 or 30 rounds." Pls.' Statement of Facts ¶ 42. The AR-15 is also lightweight, a characteristic important for the military. See Pls.' Statement of Facts Ex. 12, at A-10; Ex. 8, ¶¶ 7-8. Other similarities between the M16 and the AR-15 include "the ammunition," "[t]he way in which it is fired and the availability of sighting mechanisms, . . . [t]he penetrating capacity, . . . [and] [t]he velocity of the ammunition as it leaves the weapon." Pls.' Statement of Facts, Ex. 17 at 154:17-23.

The design of the AR-15 is common and well known in the military. "[O]ver 25 million American veterans . . . have been taught how to properly use an AR-15 type rifle through their military training." Pls.' Statement of Facts, Ex. 11 at ¶ 8. The AR-15 offers "similar ergonomics and operating controls" as the M16s used in military service. Pls.' Statement of Facts, Ex. 11 at A-9.

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[10] "[T]he vast majority of sporting firearms employ a more traditional pistol grip built into the wrist of the stock of the firearm since one-handed shooting is not usually employed in hunting or competitive target competitions." Pls.' Statement of Facts, Ex. 28 at 6.

LCMs are also "indicative of military firearms" and fall outside the scope of the Second Amendment. Pls.' Statement of Facts, Ex. 28 at 6. "That a firearm is designed and sold with a large capacity magazine, e.g., 20 or 30 rounds, is a factor to be considered in determining whether a firearm is a semiautomatic assault rifle." Id.

"Simply put, AR-15-type rifles are 'like' M16 rifles," and fall outside the scope of the Second Amendment. Kolbe, 849 F.3d at 136. The features of a military style rifle are "designed and intended to be particularly suitable for combat rather than sporting applications." Pls.' Statement of Facts, Ex. 28 at 12. The AR-15 and the M16 were designed and manufactured simultaneously for the military and share very similar features and functions. Therefore, because the undisputed facts convincingly demonstrate that AR-15s and LCMs are most useful in military service, they are beyond the scope of the Second Amendment. But see New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 257 (2nd Cir. 2015) (proceeding "on the assumption" that laws banning the AR-15 are subject to scrutiny under the Second Amendment); Friedman v. City of Highland Park, 784 F.3d 406, 416 (7th Cir. 2015) (concluding that because AR-15s are "commonly used and are not unusual . . . they are covered by the Second Amendment"); Fyock v. Sunnyvale, 779 F.3d 991, 998 (9th Cir. 2015) (holding that "a regulation restricting possession of certain types of magazines burdens conduct falling within the scope of the Second Amendment"). The Defendants are entitled to summary

judgment on Count One – the Act is constitutional on Second Amendment grounds.

But wait, argue the Plaintiffs, the AR-15 is an extraordinarily popular firearm. Indeed, the data they proffer as to its popularity appears unchallenged by the Defendants. Pls.' Mem. at 6-7, 10; Pls.' Statement of Facts ¶¶ 30-32, 35-37; Defs.' Statement of Facts ¶ 61; see Ali Watkins, John Ismay, & Thomas Gibbons-Neffmarch, Once Banned, Now Loved and Loathed: How the AR-15 Became 'America's Rifle', N.Y. Times (Mar. 3, 2018), https://nyti.ms/2CWFS9m. They thus argue that the Act must fall as unconstitutional as it "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [a] lawful purpose." Heller, 554 U.S. at 628.

Yet the AR-15's present day popularity is not constitutionally material. See Kolbe, 849 F.3d at 141-42. But see Friedman, 784 F.3d at 416. This is because the words of our Constitution are not mutable. They mean the same today as they did 227 years ago when the Second Amendment was adopted. The test is not the AR-15's present day popularity but whether it is a weapon "most useful in military service." Heller, 554 U.S. at 627. Indeed as Justice Scalia was most fond of reminding his audiences:

> Our attitude today is that if something *ought* to be so, why then the Constitution, that embodiment of all that is good and true and beautiful, *requires* it. And we fight out these battles about what ought to be . . . not in the democratic forum but in the law courts. The

> major issues that shape our society are to be decided for the whole nation by a committee of nine lawyers. . . . There is a certain irony in the fact that the society which takes all these issues out of the democratic process, and require them to be decided as constitutional absolutes, prides itself upon (of all things) its *toleration*. It is willing to tolerate anything, apparently, except disagreement and divergence and hence the need for continuing democratic debate and democratic decision-making, on an ever-increasing list of social issues.

Antonin Scalia, Interpreting the Constitution, in Scalia Speaks: Reflections on Law, Faith, and Life Well Lived 188, 199 (Christopher J. Scalia & Edward Whelan eds., 2017).

> I urge you not to embrace the living Constitution – for a number of reasons. The most important one is that only the traditional view that the meaning of the Constitution does not change places any real constraints upon the decisions of future members of Congress or future judges. Since I accept that view, I am hand-cuffed. Show me what the original understanding was, and you got me. . . . There is no other criterion that is not infinitely manipulable. Unless you conduct a national opinion poll, the "evolving standards of decency . . . of a maturing society" tend to be whatever you (or I) care passionately about. . . . To leave that visceral call to the unelected Supreme Court is to frustrate democratic self-government; and to leave it to the current Congress is to make the Constitution superfluous. We do not

> need a Constitution to change according to the desires of current society; all we need is a legislature and a ballot box. The whole function of a Constitution is to prevent future majorities from doing certain things, and if you turn over the identification of those things to the future majorities themselves, you have accomplished nothing.

Antonin Scalia, Congressional Power, in Scalia Speaks, supra, 213, 221-22.

C. Vagueness

The Plaintiffs next challenge the phrase "copies or duplicates" within the Act's definition of "assault weapon" as rendering the Act unconstitutionally vague, violating their right to fair notice and denying them due process of law. Compl. ¶¶ 97-107. The Court first considers the propriety of such a claim.

"[F]acial challenges are typically disfavored because they 'often rest on speculation,' which lead to the risk of premature interpretation of statutes and regulations." Draper v. Healey, 98 F. Supp. 3d 77, 82 (D. Mass. 2015) (Gorton, J.) (quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450 (2008)). Even more unfortunate for the Plaintiffs here, however, are the Supreme Court's suggestions that facial vagueness challenges to statutes not implicating First Amendment rights are **never** appropriate. See Maynard v. Cartwright, 486 U.S. 356, 361 (1988) ("Vagueness challenges to statutes not threatening First Amendment interests are examined in

light of the facts of the case at hand; the statute is judged on an as-applied basis."); United States v. Mazurie, 419 U.S. 544, 550 (1975) (observing that vagueness challenges that "do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand").

The First Circuit has similarly recognized that even "where an enactment is alleged to be 'impermissibly vague in all of its applications,' . . . it is clear that such an allegation must first be considered in light of the facts of the case – i.e., on an as-applied basis." Love v. Butler, 952 F.2d 10, 13 (1st Cir. 1991) (quoting Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)); Draper v. Healey, 827 F.3d 1, 3 (1st Cir. 2016) ("We now turn to the dealers' claim that the load indicator requirement is vague in violation of due process, a constitutional claim eligible only for as-applied, not facial, review."). In Love, the First Circuit noted that "a facial challenge was inappropriate" where the petitioner, who was convicted under the challenged statute, conceded that the statute was not vague as applied to him but "instead insist[ed] only that it is facially vague." Love, 952 F.2d at 13.

At the same time, it appears that the First Circuit has tended not to dismiss these challenges out of hand, instead opting to base its ruling on an as-applied analysis. See, e.g., id. (noting that facial challenge was "inappropriate" yet needed not be addressed because the statute was not unconstitutionally vague as applied); Draper, 827 F.3d at 3 (addressing only the plaintiffs' as-applied challenge). In both of these cases, however,

there was reason to conduct an as-applied analysis: in Love, the petitioner had been convicted under the statute, and in Draper, the plaintiffs challenged the regulation on both a facial and as-applied basis. Here, the Plaintiffs do not claim that the Act is unconstitutionally vague as applied, and because this is a pre-enforcement challenge, such a claim would indeed be inappropriate.[11]

Two courts faced with circumstances more similar to these, where the plaintiffs have not made any as-applied challenge, have, however, addressed a facial vagueness challenge on the merits. In Kolbe v. Hogan, the en banc Fourth Circuit addressed a challenge to Maryland's assault weapons ban on the basis of unconstitutional vagueness (among other grounds). Kolbe, 849 F.3d at 148. The plaintiffs in that case brought only a facial challenge to the statute, and the district court had noted that whether such a challenge was available was unclear. See Kolbe v. O'Malley, 42 F. Supp. 3d 768, 799 n.40 (D. Md. 2014) (Blake, J.), aff'd en banc sub nom. Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017). The district court concluded that it need not decide whether such a challenge was appropriate because in any event the statute was not unconstitutionally vague, and both the Fourth Circuit panel and the Fourth Circuit en banc seemed to endorse that approach, analyzing the claim on the merits and affirming the district court's

[11] Though Draper was also a pre-enforcement action, the plaintiffs in that case had received letters from the Attorney General responding to their specific inquiries regarding violations of the regulation at issue. Draper, 98 F. Supp. 3d at 79-80.

holding that the statute in question was not unconstitutionally vague.[12] See id. at 148-149.

The Second Circuit also allowed a facial challenge to laws banning assault weapons in New York State Rifle & Pistol Ass'n, Inc. v. Cuomo. It noted that "[b]ecause plaintiffs pursue this 'pre-enforcement' appeal before they have been charged with any violation of law, it constitutes a 'facial,' rather than 'as-applied,' challenge," but it nevertheless went on to address the challenge on the merits, ultimately concluding that the laws were not unconstitutionally vague. New York State Rifle & Pistol Ass'n, 804 F.3d at 265.

Though neither precedent is binding on this Court, the approach taken by Judge Blake in the District of Maryland commends itself to this Court. Accordingly, the Court declines to determine whether this facial vagueness claim is allowable because, even if it is, the claim fails on its merits.

"The prohibition of vagueness in criminal statutes 'is a well-recognized requirement . . . ' and a statute that flouts it 'violates the first essential of due process.' " Johnson v. United States, 135 S. Ct. 2551, 2556-57 (2015) (quoting Connally v. General Constr. Co., 269

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[12] The Fourth Circuit panel did note, however, that the statute had not been enforced against the plaintiffs, and that the plaintiffs had not claimed that they were "forced to forego their Second Amendment rights because they were uncertain whether weapons they wished to acquire were prohibited." Kolbe v. Hogan, 813 F.3d 160, 190 (4th Cir. 2016). Despite this implication that the challenge may not have been proper, the panel continued on to the merits of the vagueness inquiry.

U.S. 385, 391 (1926)). For a long time, it appeared to be settled that to succeed in a facial challenge to a statute, "the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Recently, however, in Johnson, the Supreme Court clarified that a vague law is not constitutional "merely because there is some conduct that clearly falls within the provision's grasp." Johnson, 135 S. Ct. at 2561. Nonetheless, the "threshold for declaring a law void for vagueness is high." Id. at 2576. A statute will be held unconstitutionally vague "only if it wholly 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" Id. (quoting United States v. Williams, 553 U.S. 285, 304 (2008)).

As the Defendants point out, another session of this Court has already rejected a vagueness challenge to the Act's definition of "assault weapon" (within which the phrase "copies or duplicates" is found).[13] See Defs.' Mem. 18-19; Decl. Supp. Defs.' Mot. Summ. J., Exs. 19-20. In an order granting the defendants' motion to dismiss, Judge O'Toole concluded that "it is patently apparent that the definitions, even if they might

[13] In a footnote, the Defendants note that because one of the Plaintiffs here was a plaintiff in that prior case, the vagueness claim as asserted by that plaintiff is "plainly barred by claim and issue preclusion." Defs.' Mem. 19 n.52. Because the Defendants have not pursued this as a formal defense, however, and because in any event the Court rules that the phrase is not impermissibly vague, the Court need not address this assertion.

be unclear at the margins, are not impermissibly vague in all applications, especially in light of the amendments to the Act which addressed some of the potential uncertainty." Mem. & Order, Gun Owner's Action League, Inc. v. Cellucci, No. 98-12125-GAO, slip op. at 2 (D. Mass. Sept. 28, 2000) (O'Toole, J.). Though Judge O'Toole's assessment employed the higher pre-Johnson standard, this Court agrees with his reasoning and concludes that the phrase "copies or duplicates" is not impermissibly vague even by the lower Johnson standard.

Though the Act does not define "copies or duplicates," the phrase's plain meaning provides a person of ordinary intelligence fair notice as to what is prohibited under the Act. The commonly understood meaning of "copy," as described by the Merriam-Webster dictionary, is "an imitation, transcript, or reproduction of an original work." Copy, Merriam-Webster, https://www.merriam-webster.com/dictionary/copy (last updated Mar. 21, 2018). A "duplicate" is "either of two things exactly alike and usually produced at the same time or by the same process." Duplicate, Merriam-Webster, https://www.merriam-webster.com/dictionary/duplicate (last updated Mar. 17, 2018). The combined term "copies and duplicates," in the context of the list of enumerated firearms, thus plainly refers to exact replicas of the enumerated firearms as well as firearms that may not be identical to the enumerated firearms but are nevertheless "imitations." While citizens may need to apply their own interpretation of this language "at the margins," this obligation does not render the language

impermissibly vague because "'[f]air' notice is understood as notice short of semantic certainty." Draper, 827 F.3d at 4.

Further, both the Second and Fourth Circuits have rejected vagueness challenges to similar or identical language. In New York State Rifle & Pistol Ass'n, the Second Circuit held the phrase "copies or duplicates" within the context of an assault weapons ban not to be unconstitutionally vague because the statute "provided not only an itemized list of prohibited models but also [a] military-style features test," therefore providing citizens with another reference point for what may constitute a "copy or duplicate." New York State Rifle & Pistol Ass'n, 804 F.3d at 267. The Fourth Circuit upheld a statute's ban on "copies" of enumerated assault weapons in Maryland's assault weapons ban, relying heavily on the fact that notices issued by the Maryland Attorney General and the Maryland State Police "explain how to determine whether a particular firearm is a copy of an identified assault weapon." Kolbe, 849 F.3d at 149. The Sixth Circuit sustained a vagueness challenge to an ordinance banning certain firearms, but emphasized that the ordinance "outlaws assault weapons only by outlawing certain brand names without including within the prohibition similar assault weapons of the same type, function or capability," "permits the sale and possession of weapons which are virtually identical to those listed if they are produced by a manufacturer that is not listed," and defines "assault weapon" by naming various individual models and then adding "other models . . . that have slight modifications or

enhancements of firearms listed." Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 252 (6th Cir. 1994). In reasoning that the statute could easily be corrected, the Sixth Circuit noted that "[o]ther gun control laws which seek to outlaw assault weapons provide a general definition of the type of weapon banned." Id. at 253.

Though the Second, Fourth, and Sixth Circuits do not set controlling precedent for this Court, this Court is persuaded by their analyses, all of which bolster the conclusion that the phrase "copies or duplicates" is sufficiently clear. Here, the Act lists certain individual models that qualify as "assault weapons" but also incorporates the now-expired federal ban's general definition of "semiautomatic assault weapon." See Mass. Gen. Laws ch. 140, § 121; 18 U.S.C. § 921(a)(30) (1994) repealed by Pub. L. No. 103-322, § 110105(2), 108 Stat. 1796, 2000 (1994). This general definition contains both a list of enumerated weapons and several features-style tests that citizens may use as a second data point if they are uncertain as to what constitutes a "copy or duplicate." See 18 U.S.C. § 921(a)(30). The Attorney General also issued a notice to the public (the Enforcement Notice) providing further guidance on how to determine whether a firearm is a "copy or duplicate" and thus prohibited. All of these characteristics conform with those of the statutes upheld in New York State Rifle & Pistol Ass'n and Kolbe, and with the characteristics that the Sixth Circuit indicated would have saved the ordinance in Springfield Armory.

The Plaintiffs argue that the Act is nevertheless vague because the Enforcement Notice does not articulate every test that may be applied to determine whether a weapon is a copy or duplicate, and because the two tests it does set forth are not sufficiently clear to permit citizens to determine which weapons are prohibited. Pls.' Mem. at 18. While the Enforcement Notice states that a manufacturer's advertising of a weapon is "relevant" to whether that weapon is a "copy or duplicate," the Plaintiffs contend that it "provides no explanation as to how to apply such a standard." Id. They further claim that because the Enforcement Notice provides that a firearm meeting either test remains a "copy or duplicate" even if it is altered to look like it does not meet the test, unknowing citizens could be subject to criminal liability. Id.

These arguments, which center on the Enforcement Notice, have no merit. As the Defendants note, the First Circuit "has already rejected an attempt to invoke a prosecutor's interpretation of a criminal statute in support of a facial attack on that statute." Mem. Opp'n Pls.' Mot. Summ. J. 19, ECF No. 72. In McGuire v. Reilly, 386 F.3d 45 (1st Cir. 2004), the First Circuit addressed an argument that an interpretation of law issued by the Massachusetts Attorney General (then Thomas Reilly) "set up a new ground for facial unconstitutionality." Id. at 58. The First Circuit roundly rejected this argument, explaining that while a federal court evaluating a challenge to state law must "consider any limiting construction that a state court or enforcement agency has proffered," this rule is intended

to help "save a statute that would otherwise be facially unconstitutional." Id. (first quoting Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989)). The court concluded that "[l]ogically, there is no way . . . that an authority's non-binding and non-authoritative interpretation of a facially valid statute can make it more facially constitutionally vulnerable than it would be otherwise." Id. (footnote omitted). Though this statement is dicta, its reasoning is persuasive. Here too, the Act is facially valid, and the Enforcement Notice's interpretation – even if it were construed as expanding the Act's scope – cannot render it unconstitutionally vague. See McCullen v. Coakley, 571 F.3d 167, 183 (1st Cir. 2009) ("It is difficult to understand . . . how or why a challenger can mount a facial attack on a statute that is itself not vague simply because an enforcement official has offered an interpretation of the statute that may pose problems down the road. As a matter of logic, we do not believe that an official's interpretation can render clear statutory language vague so as to make the statute vulnerable to a facial (as opposed to an as-applied) attack." (citations omitted)), overruled on other grounds, 134 S. Ct. 2518 (2014); Cutting v. City of Portland, Maine, 802 F.3d 79, 84 (1st Cir. 2015).

Finally, the Plaintiffs argue that the phrase "copies or duplicates" is unconstitutionally vague because it allows for the possibility of "arbitrary and subjective enforcement." Pls.' Mem. 19. The Plaintiffs provide no further detail or evidence as to how the Act has been or can be enforced on a discriminatory basis. Courts consistently reject pre-enforcement, facial vagueness

challenges where "no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner." Village of Hoffman Estates, 455 U.S. at 503 (1982); see also Gonzales v. Carhart, 550 U.S. 124, 150 (2007) (rejecting pre-enforcement challenge based on claim of arbitrary or discriminatory enforcement, noting that the arguments "are somewhat speculative"); Richmond Boro Gun Club, Inc. v. City of New York, 97 F.3d 681, 686 (2d Cir. 1996) (declining to entertain "premature" pre-enforcement vagueness challenge based on "speculative threat of arbitrary enforcement," in part because the government "may choose to limit enforcement . . . to weapons clearly proscribed by the law"); cf. New York State Rifle & Pistol Ass'n, 804 F.3d at 266 ("Should such [an unfair] prosecution ever occur, the defendant could bring an 'as applied' vagueness challenge. . . . That improbable scenario cannot, however, adequately support the facial challenge plaintiffs attempt to bring here."). The Plaintiffs offer no reason to believe that the threat of arbitrary enforcement is not purely speculative. As a result, the Court remains convinced that the phrase "copies or duplicates" as used in the Act is not impermissibly vague.

V. CONCLUSION

For the foregoing reasons, the Court DISMISSES Count Two of the Plaintiffs' complaint and GRANTS summary judgment for the Defendants on Counts One and Three. The Plaintiffs' motion for summary judgment on those counts is DENIED.

SO ORDERED.

The AR-15 and its analogs, along with large capacity magazines, are simply not weapons within the original meaning of the individual constitutional right to "bear Arms."

Both their general acceptance and their regulation, if any, are policy matters not for courts, but left to the people directly through their elected representatives. In the absence of federal legislation, Massachusetts is free to ban these weapons and large capacity magazines. Other states are equally free to leave them unregulated and available to their law-abiding citizens. These policy matters are simply not of constitutional moment. Americans are not afraid of bumptious, raucous, and robust debate about these matters. We call it democracy.

Justice Scalia would be proud.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

David Seth Worman et al
Plaintiff

Maura Healey et al
Defendant

CIVIL ACTION
NO. 17cv10107-WGY

JUDGMENT

YOUNG, D. J.

In accordance with the Court's MEMORANDUM AND ORDER entered on April 5, 2018, it is hereby ORDERED:

Judgment for the DEFENDANTS.

By the Court,

April 6, 2018
Date

/s/Matthew A. Paine
Deputy Clerk

STATUTES INVOLVED

Massachusetts General Law Chapter 140 § 121 Firearms sales; definitions; antique firearms; application of law; exceptions

As used in sections 122 to 131Y, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings: –

"Ammunition", cartridges or cartridge cases, primers (igniter), bullets or propellant powder designed for use in any firearm, rifle or shotgun. The term "ammunition" shall also mean tear gas cartridges.

"Assault weapon", shall have the same meaning as a semiautomatic assault weapon as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921(a)(30) as appearing in such section on September 13, 1994, and shall include, but not be limited to, any of the weapons, or copies or duplicates of the weapons, of any caliber, known as: (i) Avtomat Kalashnikov (AK) (all models); (ii) Action Arms Israeli Military Industries UZI and Galil; (iii) Beretta Ar70 (SC-70); (iv) Colt AR-15; (v) Fabrique National FN/FAL, FN/LAR and FNC; (vi) SWD M-10, M-11, M-11/9 and M-12; (vi) Steyr AUG; (vii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and (viii) revolving cylinder shotguns, such as, or similar to, the Street Sweeper and Striker 12; provided, however, that the term assault weapon shall not include: (i) any of the weapons, or replicas or duplicates of such weapons, specified in appendix A to 18 U.S.C. section 922 as appearing in such appendix on September 13, 1994, as

such weapons were manufactured on October 1, 1993; (ii) any weapon that is operated by manual bolt, pump, lever or slide action; (iii) any weapon that has been rendered permanently inoperable or otherwise rendered permanently unable to be designated a semiautomatic assault weapon; (iv) any weapon that was manufactured prior to the year 1899; (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable assault weapon; (vi) any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition; or (vii) any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine.

<[Definition of "Bump stock" in first paragraph applicable as provided by 2017, 110, Sec. 53.]>

"Bump stock", any device for a weapon that increases the rate of fire achievable with such weapon by using energy from the recoil of the weapon to generate a reciprocating action that facilitates repeated activation of the trigger.

"Conviction", a finding or verdict of guilt or a plea of guilty, whether or not final sentence is imposed.

"Court", as used in sections 131R to 131Y, inclusive, the division of the district court department or the Boston municipal court department of the trial court having

jurisdiction in the city or town in which the respondent resides.

"Deceptive weapon device", any device that is intended to convey the presence of a rifle, shotgun or firearm that is used in the commission of a violent crime, as defined in this section, and which presents an objective threat of immediate death or serious bodily harm to a person of reasonable and average sensibility.

"Extreme risk protection order", an order by the court ordering the immediate suspension and surrender of any license to carry firearms or firearm identification card which the respondent may hold and ordering the respondent to surrender all firearms, rifles, shotguns, machine guns, weapons or ammunition which the respondent then controls, owns or possesses; provided, however, that an extreme risk protection order shall be in effect for up to 1 year from the date of issuance and may be renewed upon petition.

"Family or household member", a person who: (i) is or was married to the respondent; (ii) is or was residing with the respondent in the same household; (iii) is or was related by blood or marriage to the respondent; (iv) has or is having a child in common with the respondent, regardless of whether they have ever married or lived together; (v) is or has been in a substantive dating relationship with the respondent; or (vi) is or has been engaged to the respondent.

"Firearm", a stun gun or a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which

the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun as originally manufactured; provided, however, that the term firearm shall not include any weapon that is: (i) constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to, covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette-packages; or (ii) not detectable as a weapon or potential weapon by x-ray machines commonly used at airports or walk-through metal detectors.

"Gunsmith", any person who engages in the business of repairing, altering, cleaning, polishing, engraving, blueing or performing any mechanical operation on any firearm, rifle, shotgun or machine gun.

"Imitation firearm", any weapon which is designed, manufactured or altered in such a way as to render it incapable of discharging a shot or bullet.

"Large capacity feeding device", (i) 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 or more than five shotgun shells; or (ii) a large capacity ammunition feeding device as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921(a)(31) as appearing in such section on September 13, 1994. The term "large capacity feeding device" shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber ammunition.

"Large capacity weapon", any firearm, rifle or shotgun: (i) that is semiautomatic with a fixed large capacity feeding device; (ii) that is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device; (iii) that employs a rotating cylinder capable of accepting more than ten rounds of ammunition in a rifle or firearm and more than five shotgun shells in the case of a shotgun or firearm; or (iv) that is an assault weapon. The term "large capacity weapon" shall be a secondary designation and shall apply to a weapon in addition to its primary designation as a firearm, rifle or shotgun and shall not include: (i) any weapon that was manufactured in or prior to the year 1899; (ii) any weapon that operates by manual bolt, pump, lever or slide action; (iii) any weapon that is a single-shot weapon; (iv) any weapon that has been modified so as to render it permanently inoperable or otherwise rendered permanently unable to be designated a large capacity weapon; or (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable large capacity weapon.

"Length of barrel" or "barrel length", that portion of a firearm, rifle, shotgun or machine gun through which a shot or bullet is driven, guided or stabilized and shall include the chamber.

"Licensing authority", the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them.

<[Definition of "Machine gun" in first paragraph applicable as provided by 2017, 110, Sec. 53.]>

"Machine gun", a weapon of any description, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged by one continuous activation of the trigger, including a submachine gun; provided, however, that "machine gun" shall include bump stocks and trigger cranks.

"Petition", a request filed with the court by a petitioner for the issuance or renewal of an extreme risk protection order.

"Petitioner", the family or household member, or the licensing authority of the municipality where the respondent resides, filing a petition.

"Purchase" and "sale" shall include exchange; the word "purchaser" shall include exchanger; and the verbs "sell" and "purchase", in their different forms and tenses, shall include the verb exchange in its appropriate form and tense.

"Respondent", the person identified as the respondent in a petition against whom an extreme risk protection order is sought.

"Rifle", a weapon having a rifled bore with a barrel length equal to or greater than 16 inches and capable of discharging a shot or bullet for each pull of the trigger.

"Sawed-off shotgun", any weapon made from a shotgun, whether by alteration, modification or otherwise, if such weapon as modified has one or more barrels less than 18 inches in length or as modified has an overall length of less than 26 inches.

"Semiautomatic", capable of utilizing a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and requiring a separate pull of the trigger to fire each cartridge.

"Shotgun", a weapon having a smooth bore with a barrel length equal to or greater than 18 inches with an overall length equal to or greater than 26 inches, and capable of discharging a shot or bullet for each pull of the trigger.

"Stun gun", a portable device or weapon, regardless of whether it passes an electrical shock by means of a dart or projectile via a wire lead, from which an electrical current, impulse, wave or beam that is designed to incapacitate temporarily, injure or kill may be directed.

"Substantive dating relationship", a relationship as determined by the court after consideration of the following factors: (i) the length of time of the relationship; (ii) the type of relationship; (iii) the frequency of interaction between the parties; and (iv) if the relationship

has been terminated by either person, the length of time elapsed since the termination of the relationship.

> <[Definition of "Trigger crank" in first paragraph applicable as provided by 2017, 110, Sec. 53.]>

"Trigger crank", any device to be attached to a weapon that repeatedly activates the trigger of the weapon through the use of a lever or other part that is turned in a circular motion; provided, however, that "trigger crank" shall not include any weapon initially designed and manufactured to fire through the use of a crank or lever.

"Violent crime", shall mean any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult, that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or otherwise involves conduct that presents a serious risk of physical injury to another.

"Weapon", any rifle, shotgun or firearm.

Where the local licensing authority has the power to issue licenses or cards under this chapter, but no such licensing authority exists, any resident or applicant may apply for such license or firearm identification

card directly to the colonel of state police and said colonel shall for this purpose be the licensing authority.

The provisions of sections 122 to 129D, inclusive, and sections 131, 131A, 131B and 131E shall not apply to:

(A) any firearm, rifle or shotgun manufactured in or prior to the year 1899;

(B) any replica of any firearm, rifle or shotgun described in clause (A) if such replica: (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition; or (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; and

(C) manufacturers or wholesalers of firearms, rifles, shotguns or machine guns.

Massachusetts General Law Chapter 140 § 131M Assault weapon or large capacity feeding device not lawfully possessed on September 13, 1994; sale, transfer or possession; punishment

No person shall sell, offer for sale, transfer or possess an assault weapon or a large capacity feeding device that was not otherwise lawfully possessed on September 13, 1994. Whoever not being licensed under the provisions of section 122 violates the provisions of this section shall be punished, for a first offense, by a fine of not less than $1,000 nor more than $10,000 or by

imprisonment for not less than one year nor more than ten years, or by both such fine and imprisonment, and for a second offense, by a fine of not less than $5,000 nor more than $15,000 or by imprisonment for not less than five years nor more than 15 years, or by both such fine and imprisonment.

The provisions of this section shall not apply to: (i) the possession by a law enforcement officer; or (ii) the possession by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving such a weapon or feeding device from such agency upon retirement.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

DAVID SETH WORMAN, et al.,	)	
Plaintiffs,	)	**Case No.: 1-17-CV-10107-WGY**
v.	)	
MAURA HEALEY, et al.,	)	
Defendants.	)	

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs David Seth Worman, Anthony Linden, Jason William Sawyer, Paul Nelson Chamberlain, Gun Owners' Action League, Inc., On Target Training, Inc., and Overwatch Outpost (collectively, "Plaintiffs"), by and through their undersigned counsel, and pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, hereby submit this Statement of Undisputed Facts in Support of Their Motion for Summary Judgment.

A. Massachusetts' 1998 Ban of "Assault Weapons" and "Large Capacity Feeding Devices" and the Attorney General's 2016 Notice of Enforcement.

1. Massachusetts' statutory ban prohibiting firearms, G. L. c. 140, §§ 121–131P, replicates the now-repealed federal prohibition against "assault

weapons" and "large capacity feeding devices." *See* Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. § 921(a)(30) (1994) (the "Federal Ban").

2. Massachusetts law defines the term "assault weapon" to have the same meaning as the term "semi-automatic assault weapon" as defined in the Federal Ban, and prohibits by name some of the most popular rifles and firearms in the country, including:

(i) Avtomat Kalashnikov (AK) (all models);

(ii) Action Arms Israeli Military Industries UZI and Galil;

(iii) Beretta Ar70 (SC-70);

(iv) Colt AR-15;

(v) Fabrique National FN/FAL, FN/LAR, and FNC;

(vi) SWD M-10, M-11, M-11/9, and M-12;

(vii) Steyr AUG;

(viii) INTATEC TEC-9, TEC-10, TEC-DC9, and TEC-22; and

(ix) revolving cylinder shotguns, such as, or similar to, the Street Sweeper and Striker 12.

(the "Enumerated Banned Firearms"), as well as their "copies or duplicates" that have two or more specified features (collectively, the "Banned Firearms"). G. L. c. 140 § 121; *see also* Klein Dep., Ex. 17 at 31:17–21.

3. The phrase "copies or duplicates" is not defined in the Challenged Laws, nor is it defined elsewhere in Massachusetts law. *See* G. L. c. 140 § 121. The phrase also was included in the Federal Ban but was not defined under federal law either. *See* 18 U.S.C. § 921(a)(30) (1994).

4. As the Federal Ban was debated, however, Senator Joseph Biden of Delaware made clear that the term "copy" did not refer to any similarity of the firearm's operating system but to selling a named banned rifle under another name: "To avoid the so-called copycat problem – where manufacturers simply rename guns to avoid State assault weapon legislation – the amendment makes clear that replicas and duplicates of the listed firearms are covered as well." 139 Cong. Rec. S15459, Ex. 22. "Senator Biden stated further that 'to make clear that this ban applies only to military style assault weapons, this ban would apply only to semiautomatic rifles and pistols that can attach detachable magazines that have at least two of the following characteristics: A grenade launcher; a flash suppressor; a bayonet mount; a folding stock; or a pistol grip.'" *Id.* This "features test" thus qualified what was prohibited either as an Enumerated Banned Firearm or as a copy or duplicate of an Enumerated Banned Firearm.

5. A "large capacity feeding device" is defined by Massachusetts law as "a fixed or detachable magazine . . . capable of accepting, or that can be readily converted to accept, more than ten rounds of ammunition. . . ." G. L. c. 140 § 121 (the "Banned Magazines").

6. The Massachusetts law prohibits possession and transfer of the Banned Firearms and Magazines, and imposes severe penalties for any violation:

> No person shall sell, offer for sale, transfer or possess an assault weapon or large capacity feeding device that was not otherwise lawfully possessed on September 13, 1994. Whoever not being licensed under the provisions of section 122 violates the provisions of this section shall be punished, for a first offense, by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than ten years, or by both such fine and imprisonment, and for a second offense, by a fine of not less than $5,000 nor more than $15,000 or by imprisonment for not less than five years nor more than 15 years, or by both such fine and imprisonment.

G. L. c. 140 § 131M. Collectively, Massachusetts General Laws, chapter 140, sections 121 and 131M, shall be referred to herein as the "Challenged Laws." The Challenged Laws do not ban the sale, transfer, or possession of Banned Firearms and Magazines lawfully possessed prior to September 13, 1994. *See* G. L. c. 140 § 131M.

7. After the enactment of the Challenged Laws, and for a period of 18 years, Defendants approved the transfer of tens of thousands of firearms as compliant under Massachusetts law ("Massachusetts Compliant Firearms"). *See* Press Release, AG Healey Announces Enforcement of Ban on Copycat Assault Weapons (July 20, 2016), available at http://www.mass.gov/ago/news-

and-updates/press-releases/2016/2016-07-20-assault-weapons-enforcement.html, Ex. 23 at p. 1. ("Despite the law, an estimated 10,000 [Banned Firearms] were sold in Massachusetts last year alone."); *see also* Deposition of Alan Zani, Commander, Massachusetts State Police Crime Gun Unit, Ex. 20 at 11:10–14, 11:16–19 (defining the term "Massachusetts Compliant Firearm" as a "firearm that was compliant to the Massachusetts General Laws prior to July 20, 2016"), 11:21–24, 12:1–2, 4 (confirming transfers of Massachusetts Compliant Firearms "were considered lawful").

8. Nearly twenty years after the enactment of the Challenged Laws, Defendant Attorney General Maura Healey issued the Notice of Enforcement, which became effective as of July 20, 2016. *See* Notice of Enforcement, available at http://www.mass.gov/ago/public-safety/assault-weapons-enforcement-notice.pdf (last visited Dec. 14, 2017), Ex. 25 at p. 1.

9. The Notice of Enforcement purports to provide "guidance on the identification of weapons that are 'copies' or 'duplicates' of the enumerated Assault weapons that are banned under Massachusetts law." *Id.* at p. 1.

10. The Notice of Enforcement expands the firearms prohibition established in the Challenged Laws to also forbid the ownership and transfer of Massachusetts Compliant Firearms, as well as other popular firearms commonly kept for lawful purposes. *See id.* at p. 1–4. Because nearly all semiautomatic firearms employ a similar operating system, *See* Declaration of

James Supica, Director of the NRA Firearms Museum and firearms historian, Ex. 13 at p. 1, ¶ 2 Att. A at p. 24, there is a wholesale ban of nearly all semiautomatic firearms in the Commonwealth of Massachusetts.

11. To determine if a firearm is a "copy or duplicate," the Notice of Enforcement establishes two tests: a "Similarity Test" and an "Interchangeability Test." *See* Notice of Enforcement, Ex. 25 at pp. 3–4. These tests provide that a firearm is a copy or duplicate of a Banned Firearm if

i. "its internal functional components are substantially similar in construction and configuration to those of an [Enumerated Banned Firearm]. Under this test, a weapon is a Copy or Duplicate, for example, if the operating system and firing mechanism of the weapon are based on or otherwise substantially similar to one of the [Enumerated Banned Firearm]"; or

ii. "it has a receiver that is the same as or interchangeable with the receiver of an [Enumerated Banned Firearm.] A receiver will be treated as the same as or interchangeable with the receiver on an [Enumerated Banned Firearm] if it includes or accepts two or more operating components that are the same as or interchangeable with those of an [Enumerated Banned Firearm]. Such operating components may include, but are not limited to: 1) the trigger assembly; 2) the bolt carrier or bolt carrier group; (3) the charging handle; (4) the

> extractor or extractor assembly; or (5) the magazine port."

See id.

12. The Notice of Enforcement also states that a firearm that qualifies as "copy or duplicate" under one of these two tests will remain a "copy or duplicate," even if it is altered to no longer meet those tests. *Id.* at p. 4.

13. In addition, the Notice of Enforcement provides that a manufacturer's advertising of a firearm is "relevant" in determining whether a firearm is a "copy or duplicate" of an assault weapon. *Id.*

14. The Notice of Enforcement provides a prospective limitation for "dealers licensed under G. L. c. 140, § 122":

> The Guidance will not be applied to future possession, ownership or transfer of Assault weapons by dealers, provided that the dealer has written evidence that the weapons were transferred to the dealer in the Commonwealth prior to July 20, 2016, and provided further that a transfer made after July 20, 2016, if any, is made to persons or businesses in states where such weapons are legal.

Id.

15. The Notice of Enforcement provides no exception to its application to dealers for transfers made *before* July 20, 2016. *See id.*

16. For "individual gun owners," by contrast, the Notice of Enforcement provides both retroactive and prospective limitation: "The Guidance will not be applied to possession, ownership, or transfer of an Assault weapon obtained prior to July 20, 2016." *Id.*

17. The Notice of Enforcement explicitly states that "[t]he [Attorney General's Office] reserves the right to alter or amend this guidance," leaving open the scope of the Challenged Laws as well as the resulting criminal liability. *Id.*

18. Neither the Challenged Laws nor the Notice of Enforcement provides a safe harbor or exception for the transfer and possession of Banned Firearms and Magazines by responsible, law-abiding citizens for self-defense. *See id.*

B. The Plaintiffs.

19. David Seth Worman, a licensed orthopedic surgeon, is a responsible, law-abiding citizen and resident of Massachusetts. *See* Worman Decl., Ex. 1 at p. 1, ¶ 2. After the enactment of the Challenged Laws but before the issuance of the Notice of Enforcement, Dr. Worman purchased firearms which may be classified as a "copy or duplicate" of an "assault weapon" under the tests set forth in the Notice of Enforcement. *Id.* at p. 1, ¶ 3. As such, his weapons may now be prohibited. *Id.* Dr. Worman also owns several pistols that are designed for, and come standard with, detachable magazines that hold in excess of ten rounds, and he lawfully owns multiple detachable magazines which hold in

excess of ten rounds. *Id.* He primarily owns these firearms and magazines for defense of his home and family, and he also keeps them for recreational target shooting and as collector's items. *Id.* at pp. 1–2, ¶ 4. Dr. Worman is a responsible firearms owner, having taken numerous safety and training courses, including training focused on self-defense, and he secures his firearms in a locked safe in his home. *Id.* at p. 2, ¶ 6. Dr. Worman would like to purchase additional semiautomatic firearms with standard detachable magazines holding in excess of ten rounds, if the law permitted him to do so. *Id.* at p. 2, ¶ 5. He cannot, however, currently determine if the firearms he wishes to purchase are "copies or duplicates" of an "assault weapon." *Id.* He cannot make this determination because of the vague and confusing manner in which "copies or duplicates" is defined in the Notice of Enforcement, and because of the uncertainty of how Defendants will interpret the phrase "copies or duplicates." *Id.* at p. 2, ¶¶ 5,7. Because the Office of the Attorney General "reserves the right to amend th[e] guidance" in the Notice of Enforcement, Dr. Worman lives in fear that his possession of firearms will become criminalized. *Id.* at p. 2, ¶ 7. He believes that the Challenged Laws and Notice of Enforcement violate his civil rights. *Id.*

20. Jason William Sawyer served five years of active duty and an additional three years of inactive reserves in the Marine Corps. *See* Sawyer Decl., Ex. 3 at p. 1, ¶ 2. He achieved the rank of Corporal (E-4) during his service. *Id.* He now works in the software industry as an engineer and is a responsible, law-abiding citizen

and resident of Massachusetts. *Id.* at p. 2, ¶¶ 6–7. While serving, Mr. Sawyer was issued an M-16A2 and an M9 service pistol and received extensive training with various firearms. *Id.* at p. 1, ¶ 2. Since leaving the military, Mr. Sawyer has taken numerous firearms courses, has become a certified NRA instructor and a certified Massachusetts State Police instructor, and is well-versed on how to safely and properly own and use firearms. *Id.* at pp. 1–2, ¶¶ 2,7. He keeps his firearms in a locked safe in his home. *Id.* at p. 2, ¶ 7. Mr. Sawyer, a nationally ranked competitive shooter, uses AR-15 platform rifles in competitive shooting events – firearms which may be banned as "copies or duplicates" under the tests set forth in the Notice of Enforcement. *Id.* at pp. 1–2, ¶ 4. Mr. Sawyer also possesses these firearms for self-defense and defense of his home. *Id.* at p. 2, ¶ 5. Mr. Sawyer purchased these firearms after the enactment of the Challenged Laws but before Defendant Healey issued the Notice of Enforcement. *Id.* at pp. 12, ¶ 4. He also owns several pistols that are designed for, and come standard with, detachable magazines which hold in excess of ten rounds and lawfully owns several detachable magazines which hold in excess of ten rounds. *Id.* at p. 2, ¶ 4. Mr. Sawyer would like to purchase certain additional firearms that may be classified as "copies or duplicates" of Enumerated Banned Firearms but cannot do so because of the uncertainty of how Defendants will interpret the phrase "copies or duplicates." *Id.*

21. Anthony Linden has polyarthritis, a type of arthritis that involves five or more joints

simultaneously. *See* Linden Decl., Ex. 2 at p. 1, ¶ 4. As a result of this disease, it is difficult for him to operate certain firearms quickly and effectively. *Id.* AR-15 platform rifles and full-capacity magazines allow him to fully utilize his firearms at the practice range and while hunting, and they ensure his ability to defend himself in his home, if necessary. *Id.* Accordingly, Mr. Linden owns an AR-15 platform firearm that he built himself. *Id.* at p. 1, ¶ 3. He purchased the parts for this firearm and assembled it after the enactment of the Challenged Laws but before Defendant Healey issued the Notice of Enforcement. *Id.* This firearm was designed for detachable magazines which hold in excess of ten rounds, and he in fact lawfully owns several detachable magazines which hold in excess of ten rounds. *Id.* Mr. Linden plans to purchase additional full-sized semiautomatic firearms with standard detachable magazines holding in excess of ten rounds in the future, if he is permitted to do so by law. *Id.* at p. 1, ¶ 5. Mr. Linden is a responsible, law-abiding citizen and resident of Massachusetts and has taken numerous safety and training courses; he also secures his firearms in locked safes in his home. *Id.* at pp. 1–2, ¶¶ 2, 7.

22. Paul Chamberlain, also a responsible, law-abiding citizen and resident of Massachusetts, does not currently own any Banned Firearms. *See* Chamberlain Decl., Ex. 4 at ¶¶ 2, 5. He does, however, lawfully own several detachable magazines which hold in excess of ten rounds, which he keeps, along with his firearms, in a safe in his home. *Id.* at ¶ 5. Mr. Chamberlain wishes

to purchase firearms that are banned under the Challenged Laws and Notice of Enforcement for self-defense in his home, and would do so, but for the prohibition. *Id.* Even though Mr. Chamberlain has experience interpreting complex regulations due to his career as a safety manager, Mr. Chamberlain cannot determine whether the firearms he wishes to purchase are prohibited by the Notice of Enforcement. *Id.* at ¶¶ 3–4. He believes the Notice of Enforcement is vague and is uncertain how Defendants will interpret "copies or duplicates." *Id.* at ¶ 4.

23. Gun Owners' Action League, Inc. ("GOAL") is a non-profit corporation dedicated to promoting safe and responsible firearms ownership, marksmanship competition, and hunter safety throughout Massachusetts. *See* Wallace Decl., Ex. 5 at p. 1, ¶ 3. For over 40 years, GOAL has helped protect and preserve Massachusetts citizens' Second Amendment rights. *Id.* It is the leading advocate in Massachusetts for its more than 15,000 members, which include current and future gun owners, hunters, conservationists, as well as firearm and marksmanship clubs. *Id.* GOAL possesses a number of firearms-related licenses, including a federal firearms license and a Massachusetts License to Sell Ammunition. *Id.* at p. 1, ¶ 5. To aid in its firearms safety classes, GOAL keeps firearms, which may now be classified as a "copy or duplicate" of an "assault weapon" under the tests set forth in the Notice of Enforcement. *Id.* at p. 1, ¶ 4. GOAL also owns pistols that are designed for, and come standard with, detachable magazines which hold in excess of ten rounds, and in

fact lawfully possesses multiple magazines holding in excess of ten rounds. *Id.* As a licensed dealer, GOAL lawfully owns and, after the enactment of the Challenged Laws but before the Notice of Enforcement was issued, sold firearms which may be classified as a "copy or duplicate" of an "assault weapon" under the tests set forth in the Notice of Enforcement. *Id.* at pp. 1–2, ¶ 5. GOAL and its membership are harmed by the combination of the Notice of Enforcement and the Challenged Laws because they cannot acquire the most popular semiautomatic rifles and standard capacity magazines sold today. *Id.* at p. 2, ¶ 6. Additionally, the Notice of Enforcement asserts that what had been accepted, lawful behavior was in fact illegal. *Id.*

24. On Target Training, Inc. ("On Target") is a family-owned retail gun store and training facility. *See* O'Leary Decl., Ex. 6 at p. 1, ¶ 3. On Target is a federal firearms licensed dealer, and is also licensed in Massachusetts to perform services as a gunsmith; to sell, rent or lease firearms, rifles, shotguns, or machine guns; and to sell ammunition. *Id.* Until the effective date of the Notice of Enforcement, On Target sold firearms that may now be banned under the tests set forth in the Notice of Enforcement. *Id.* at pp. 1–2, ¶ 4. Before Attorney General Healey issued the Notice of Enforcement, On Target was never informed that its transfers were or may have been illegal. *Id.* At no time was any action taken against it by any law enforcement agency to halt or prevent these transactions; Defendants instead approved them. *Id.* On Target relied upon this approval and believed it was engaging in legal activity.

Id. On Target believes that these prior transactions made before the issuance of the Notice of Enforcement have been retroactively deemed illegal by Defendants, particularly given the fact that the Notice of Enforcement provides no guarantee that such transactions are in fact legal and Attorney General Healey's remarks make clear that she believes "these weapons are illegal." *Id.* at p. 2, ¶ 6; *see also* Remarks of Attorney General Maura Healey, available at_http://www.mass.gov/ago/public-safety/remarks-from-assault-weapons-press-conference.pdf (July 20, 2016), Ex. 24 at p. 3. If these transactions are construed as illegal, On Target could be in violation of federal law and lose its federal firearms license and other firearm-related licenses. *See* O'Leary Decl., Ex. 6 at p. 2, ¶ 6. On Target is also being harmed because, as a result of the Notice of Enforcement, it is losing money. *Id.* at p. 2, ¶ 5. Rifle sales have almost completely ceased, sales of pre-1994 large capacity magazines are down about 50%, and ammunition sales are also down significantly. *Id.* On Target suffers ongoing economic harm because it can no longer sell the firearms and magazines banned under the Notice of Enforcement. *Id.* On Target also suffers harm because of the vagueness of the Notice of Enforcement, which prevents it from knowing which firearms it can and cannot lawfully sell. *Id.* If not for the credible threat of prosecution under the Challenged Laws and Notice of Enforcement, On Target would continue to sell these firearms and magazines. *Id.* at pp. 1–2, ¶ 4.

25. Overwatch Outpost ("Overwatch") is a federal firearms licensed dealer, and is also licensed in Massachusetts to perform services as a gunsmith; to sell, rent, or lease firearms, rifles, shotguns, or machine guns; and to sell ammunition. *See* Ricko Decl., Ex. 7 at p. 1, ¶ 3. Approximately 70% of Overwatch's revenue comes from firearms sales. *Id.* Until the effective date of the Notice of Enforcement, Overwatch sold certain firearms that may now be banned under the Notice of Enforcement. *Id.* at pp. 1–2, ¶¶ 3, 4. Prior to the Notice of Enforcement, no law enforcement agency informed Overwatch that its transfers were or may be illegal. *Id.* Instead, Defendants approved them. *Id.* Overwatch Outpost relied upon this approval and believed it was engaging in legal activity. *Id.* at pp. 1–2, ¶¶ 3, 4. Overwatch fears that the hundreds if not thousands of presumptively-legal and then-accepted transactions have now been declared retroactively to be in violation of Massachusetts law at the time these transactions occurred. *Id.* If these transactions are construed as illegal, Overwatch could be in violation of federal law and lose its federal firearms license and other firearm-related licenses. *Id.* at p. 2, ¶ 4. Overwatch continues to suffer economic harm because it cannot sell these firearms and magazines, and also because of the vagueness of the Notice of Enforcement, which prevents Overwatch from what knowing which firearms it can and cannot lawfully sell. *Id.* at p. 2, ¶ 5. Overwatch would continue to sell these firearms and magazines, if not for the credible threat of prosecution under the Challenged Laws and Enforcement Notice. *Id.*

C. The Banned Firearms and Magazines Are Commonly Possessed.

26. The Challenged Laws and Notice of Enforcement target firearms that are semiautomatic, meaning that they fire only once with each pull of the trigger, no matter how long the trigger is held. *See* Supica Decl. Ex. 13, at p. 4, ¶¶ 10–11; *see also* Deposition of Gary Klein, representative witness for the Office of the Attorney General, Ex. 17 at 31:17-21.

27. The Banned Firearms and Magazines are commonly possessed. *See* Declaration of James Curcuruto, Director of Marketing and Research at the National Shooting Sports Foundation, Ex. 9 at pp. 2–4, ¶¶ 5–10.

28. Firearms with a capacity of more than 10 rounds have been owned by civilians for centuries. *See* Supica Decl., Ex. 13 at p. 2, ¶ 6. Throughout the 17th and 18th centuries, many commercially available firearms had a capacity of more than 10 rounds, including the Kalthoff repeater which had up to a 30 shot capacity and the Belton repeating flintlock which had a 16 or 20 shot capacity. *Id.* The Founders were familiar with multiple shot repeating firearms at the time the Second Amendment was drafted. *Id.* Semiautomatic firearms with detachable magazines have been used by the civilian population for over a century, and there is no evidence demonstrating a historic prohibition on their ownership. *Id.* at p. 3, ¶ 8.

29. The Banned Firearms include some of the most popular and commonly owned firearms today: AR- and AK-platform rifles. *See* Curcuruto Decl., Ex. 9 at p. 2, ¶ 6.

30. Between 1990 and 2015, approximately 13.7 million rifles based on these platforms were manufactured or imported into the United States. *See id.* at pp. 2–4, ¶¶ 6–9. Because AR- and AK-platform rifles have been sold to civilians in the U.S. since the late 1950s, even more of these rifles were manufactured in or imported to the U.S. before 1990. *See id.* at pp. 2–3, 116.

31. Modern Sporting Rifles (a term used in the industry to describe modern semiautomatic rifles such as the AR-15, *see* Declaration of Buford Boone, former Director of the FBI Ballistics Laboratory, Ex. 8 at p. 1, ¶ 2 Att. A, p. 5; Curcuruto Decl., Ex. 9 at p. 1, ¶ 2 Att. A, p. 3; *see also* Supica Decl., Ex. 13 at p. 1 ¶ 2 Att. A at p. 21) are growing in popularity. *See* Curcuruto Decl., Ex. 9 at p. 3, ¶ 7. As of 2013, more than 4,800,000 people, most of whom are married with some college education and a household income greater than $75,000, own at least one Modern Sporting Rifle. *Id.* at p. 3, ¶ 8. Even more people use these firearms: according to a 2016 report published by the National Shooting Sports Foundation (NSSF) about Sport Shooting Participation in the United States, approximately 14,000,000 people participated in target shooting with a modern sporting rifle in 2016, a 57% increase from 2009. *Id.* at p. 4, ¶ 9.

32. In 2015 alone, more than 1,500,000 Modern Sporting Rifles were manufactured in or imported into the United States. *Id.* at p. 3, ¶ 7. By way of comparison, in 2015, the number of Modern Sporting Rifles manufactured in or imported to the U.S. was nearly double the number of the most commonly sold vehicle in the United States (the Ford F-series pick-up trucks (including F-150, F-250, F-350, F-450 and F-550), of which a total of 780,354 were sold). *Id.*

33. Modern Sporting Rifles – not shotguns, or traditionally styled rifles – are the most frequently-sold long gun in America. *Id.* at p. 3, ¶ 8. According to a 2017 survey of 324 firearm retailers across the United States, these firearms accounted for 17.9% of all firearm sales, whereas shotguns and traditionally-styled rifles accounted for only 11.5% and 11.3% of all firearm sales, respectively. *Id.*

34. The Banned Firearms include the most popular rifles in the United States. *Id.* at pp. 3–4, ¶¶ 7–9.

35. Magazines capable of holding more than 10 rounds of ammunition are likewise commonly possessed. *Id.* at p. 4, ¶ 10. Tens of millions of people across the country possess magazines capable of holding more than 10 rounds of ammunition. *Id.* Between 1990 and 2015, Americans owned approximately 114,700,000 of these magazines, accounting for approximately 50% of all magazines owned during this time (approximately 230,000,000). *Id.*

36. It is reasonable to assume that many more such magazines were purchased in the United States

prior to 1990 and that even more people possess a magazine capable of holding more than 10 rounds of ammunition. *Id.* This is particularly likely given the fact that these Banned Magazines are provided as standard equipment for many semiautomatic rifles and pistols sold in the United States. *Id.*

D. The Banned Firearms and Magazines Are Possessed for Lawful Purposes and Are Rarely Used in Crime.

37. The Banned Firearms and Magazines are owned and used for a variety of lawful purposes, including recreational and competitive target shooting, home defense, hunting, and collecting. *See* Curcuruto Decl., Ex. 9 at p. 2, ¶ 6.

38. Purchasers of the Banned Firearms report that one of the most important reasons for their purchase of such firearms is self-defense. *See id.* at p. 3, ¶ 8.

39. The Bureau of Alcohol, Tobacco, and Firearms ("ATF") confirmed over twenty-five years ago that the Banned Firearms were useful in self-defense. *See* Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles, at 11–12 (July 6, 1989), Ex. 28.

40. There are several reasons why an individual would choose a Banned Firearm for self-defense. *See* Declaration of Gary Roberts, dental surgeon and law

enforcement Wound Ballistics Instructor, Ex. 11 at pp. 3–5, ¶¶ 8–14; Boone Decl., Ex. 8 at pp. 3–6, ¶¶ 5–11.

41. First, Banned Firearms based on the AR-15 platform are the most ergonomic, safe, readily available, and effective firearms for civilian defensive shooting. *See* Roberts Decl., Ex. 11 at p. 3, ¶ 8; *see also* Boone Decl., Ex. 8 at pp. 3–5, ¶¶ 5–8. Effective defensive shooting requires stopping the human aggressor as quickly as possible, *see* Boone Decl., Ex. 8 at p. 4, ¶ 6, and semiautomatic rifles like the Banned Firearms offer superior accuracy, less recoil, greater effective range, faster reloading, potentially reduced downrange hazard, better ergonomics, and a larger ammunition capacity than other types of firearms, such as handguns and shotguns, *see* Roberts Decl., Ex. 11 at p. 3, ¶ 8.

42. These firearms are also relatively lightweight, are available with a telescoping/adjustable stock, have a vertical pistol grip, can be fired with one hand, are chambered for .223/5.56 cartridges that can be effective while having relatively mild recoil, and utilize magazines with a standard capacity of 20 or 30 rounds. *See* Boone Decl., Ex. 8 at pp. 4–5, ¶¶ 7–8. These characteristics make Banned Firearms such as the AR-15 and its copies appropriate for close-quarter encounters, and are among the easiest to shoot accurately. *Id.* at p. 4, ¶ 7. They are also generally easier to operate one-handed, in case of injury, compared to other shoulder fired weapons. *See* Roberts Decl., Ex. 11 at p. 3, ¶ 8.

43. The ammunition typically used by the Banned Firearms, specifically the .223 Remington or the very similar 5.56mm, is also more effective and reliable at stopping human attackers, and is more humane to those attackers, than typical handgun ammunition. *Id.* at p. 4, ¶ 10; *see also* Boone Decl., Ex. 8 at p. 4, ¶ 6. .223 Remington rounds penetrate human tissue at the depth in which the FBI determined to be most desirable – between 12 and 18 inches. *See* Roberts Decl., Ex. 11 at p. 4, ¶¶ 9–10; Boone Decl., Ex. 8 at p. 4, ¶ 6. This is important because under-penetration or over-penetration of human tissue reduces the ammunition's effectiveness at stopping an attacking individual. *See* Roberts Decl., Ex. 11 at p. 4, ¶¶ 10–11. In comparison, effective shotgun ammunition's penetration range is unnecessarily deep, practically guaranteeing pass-thru shots that pose considerable danger to others in the area. *See* Boone Decl., Ex. 8 at p. 6, ¶ 11.

44. Accurate and effective munitions also reduce the need for multiple shots, decreasing the chance of shots missing the intended hostile aggressor and striking innocent bystanders. *See* Roberts Decl., Ex. 11 at p. 4, ¶ 11. In addition, .223 Remington rounds cause smaller and fewer wounds as compared to ammunition fired from other less effective firearms, such as handguns or shotguns, reducing the scope of medical care needed. *Id.* at pp. 4–5, ¶¶ 12–13.

45. In contrast, handguns are much more difficult to fire accurately than semiautomatic rifles because they are more difficult to steady, absorb less

recoil, and are more sensitive to shooter technique. *See* Boone Decl., Ex. 8 at p. 5, ¶10; Rossi Decl., Ex. 12 at p. 1, ¶ 2 Att. A at p. 12. These factors combine to make handguns substantially more difficult to fire accurately, especially under stress. *See* Declaration of Guy Rossi, self-defense instructor and former law enforcement agent, Ex. 12 at p. 1, at ¶ 2 Att. A at p. 12.

46. Shotguns also have significantly more recoil than semiautomatic rifles, and it is more difficult to fire repeat shots accurately with a shotgun. *See* Boone Decl., Ex. 8 at pp. 5–6, ¶ 11. A common misunderstanding is that the "spread" of shotgun pellets make accuracy less critical when using a shotgun. *Id.* This is not the case, as the most common defensive shotgun rounds, for instance a 00 buckshot used in a 2 3/4" 12 gauge shotgun, typically spread beyond the scoring area of the FBI target, which is based on the size of a human torso, even when fired from a distance of only 21 feet. *Id.* This means that the increase in hit probability is accompanied by the likelihood that some projectiles will miss. This only increases the risk to unintended targets (namely, innocent people). *Id.*

47. The suitability of the Banned Firearms for defensive use is highlighted by the fact that they are the most commonly used and recommended rifles by law enforcement, including the FBI, who may only discharge their firearms for defensive purposes. *See* Roberts Decl., Ex. 11 at p. 5, ¶ 14; Boone Decl., Ex. 8 at pp. 5–6, ¶¶ 9, 12; *see also* Klein Dep., Ex. 17 at 153:14-18 (noting that law enforcement officers "are armed with AR-15s in most cases"). Across the country, over one

million law enforcement personnel have qualified on the AR-15. *See* Roberts Decl., Ex. 11 at p. 5, ¶ 14.

48. The Banned Firearms and Magazines, which Plaintiffs seek to own and use for defensive purposes, are used by Massachusetts law enforcement officers. *See* Klein Dep., Ex. 17 at 53:4-7, 53:8-10, 153:17-18, 173:9-10. As Dr. Gary Roberts explained, "private citizens who wish to own a firearm for self- and home defense should use a semiautomatic rifle – most likely the same firearm and ammunition chosen by police in their community." *See* Roberts Decl., Ex. 11 at p. 5, ¶ 14. This is because the degree of force required to stop a violent felon does not change whether confronted by a law enforcement officer or a private citizen. *Id.* The violent felon's anatomy, physiology, and incapacitation potential does not change depending on the intended victim's profession. *Id.*

49. Many semiautomatic firearms, including the Banned Firearms that the Notice of Enforcement purports to criminalize, are manufactured to accept magazines with standard capacities greater than ten rounds. *See* Rossi Decl., Ex. 12 at p. 1, ¶ 2 Att. A, p. 3; Curcuruto Decl., Ex. 9 at p. 1, ¶ 2 Att. A; *id.* at pp. 4–5; ¶ 4; Roberts Decl., Ex. 11 at p. 6, ¶ 16; *id.* at p. 1, ¶ 2 Att. A, p. 4.

50. These magazines are necessary for effective self-defense, particularly in situations where more than 10 shots are needed to stop a threat, which is often the case. *See* Rossi Decl., Ex. 12 at pp. 3–4, ¶ 8; Roberts Decl., Ex. 11 at pp. 3, 5–6, ¶¶ 7, 15; Supica Decl.,

Ex. 13 at p. 1, ¶ 2 Att. A, p. 19; Declaration of Gary Kleck, Professor of Criminology and researcher of firearms bans, Ex. 10 at p. 1, ¶ 2 Att. A, pp. 4–5. Very few, if any, instances in which the use of a firearm is necessary for self-defense afford the time necessary to reload. *See* Rossi Decl., Ex. 12 at p. 5, ¶ 10. For instance, in the well-known Tueller Drill used in police training, it is emphasized that an attacker who is 21 feet away can close the entire distance between himself and the victim in only 1.5 seconds. *Id.*

51. The most recently released New York Police Department (NYPD) "Annual Firearms Discharge Report," which includes data from 2015, states that, in 35% of NYPD Intentional Discharge-Adversarial Conflict cases, officers needed to fire more than 5 shots to stop the threat, and in 17% of the cases, officers needed more than 10 shots to end the violent encounter – including one case where 84 shots were required. *See* Roberts Decl., Ex. 11 at p. 5–6, ¶ 15; *see also* Rossi Decl., Ex. 12 at pp. 3–4, ¶ 8.

52. Because trained law enforcement officers often require more than 10 rounds of ammunition for defensive shooting (*i.e.*, "shooting to stop"), *see* Roberts Decl., Ex. 11 at pp. 5–6, ¶ 15; *see also* Rossi Decl., Ex. 12 at pp. 3–4, ¶ 8; *see also* Boone Decl., Ex. 8 at pp. 6–7, ¶ 12, nearly all law enforcement agencies, including the FBI, issue their officers magazines capable of holding more than 10 rounds of ammunition, with 30 round magazines being the norm for rifles. *See* Boone Decl., Ex. 8 at pp. 5, 6–7, ¶ 9, 12. Mr. Boone, a retired Supervisory Special Agent of the FBI, firearms instructor,

and ballistic laboratory director, is unaware of any law enforcement agency that issues pistol magazines that are restricted below standard capacity "to some arbitrary limit like 10." *Id.* at pp. 1–3, 7, ¶¶ 3, 12.

53. This is because reloading a semiautomatic firearm with a detachable magazine – a 12-step process – is time-consuming, even under ideal circumstances. Rossi Decl., Ex. 12 at p. 4, ¶ 9. When considering factors such as distractions, noise, multiple assailants, lighting conditions, nervousness, and fatigue, the time to reload decelerates. *Id.* Reloading is especially time consuming if the victim is handicapped, disabled, or injured. *Id.* at pp. 3, 5–6, ¶¶ 7, 12.

54. Reloading a firearm is also physically and mentally demanding. *Id.* at p. 5, ¶ 11. It requires two hands (one to hold the firearm and one to load the magazine), limiting a victim's ability to escape, fend off an attacker, call 911, or give physical aid or direction to others. *Id.* Reloading a firearm requires focus and therefore distracts the victim from the assailant and her surroundings. *Id.* This distraction increases the likelihood of a missed shot. *Id.*

55. Greater magazine capacity reduces the need to reload in situations requiring more than 10 rounds of ammunition to stop an attacker. *Id.* at p. 3, ¶ 7. As a result, higher capacity magazines allow individuals to better protect themselves. *Id.*

56. A limit on a magazine's capacity may hinder law-abiding citizens' ability to defend themselves, others, and their homes. *See* Roberts Decl., Ex. 11 at pp.

5–6, ¶ 15; Kleck Decl., Ex. 10 at pp. 3–4, ¶ 8; Rossi Decl., Ex. 12 at pp. 3, 6, ¶¶ 7, 13.

57. The prohibition of the Banned Magazines can be the difference in surviving or not surviving a self-defense situation. *See* Roberts Decl., Ex. 11 at pp. 5–6, ¶ 15; *see also* Rossi Decl., Ex. 12 at pp. 4, 6, ¶¶ 8, 13. Civilians, unlike police officers, likely have no body armor, no radio, no partner, no cover units, and no duty belt with extra magazines. *See* Roberts Decl., Ex. 11 at pp. 5–6, ¶ 15. Yet, civilians can be targets of opportunity for criminals and are confronted by the same violent felons as are the police. *Id.* Because highly trained and experienced police officers require the use of at least 11 rounds in 17% of their close range encounters to subdue an aggressive assailant, it follows that an untrained civilian gun owner would need at least that many rounds. *See* Rossi Decl., Ex. 12 at pp. 3–4, 6, ¶¶ 8, 13.

58. The desire to have more rounds of ammunition available without reloading is not new; it has driven firearm design and development for centuries. *See* Supica Decl., Ex. 13 p. 1, ¶ 2 Att. A, p. 3. An early firearm with a capacity of more than 10 rounds was available around 1580, and throughout the 17th and 18th centuries, many commercially available firearms had a capacity of more than 10 rounds. Supica Decl., Ex. 13 at p. 2, ¶ 6. Commercially available firearms with a capacity of more than 10 rounds became even more widespread after the Second Amendment was ratified. *Id.* at pp. 2–3, ¶ 7.

59. Likewise, semiautomatic firearms with detachable magazines have been available and in wide use for well over a century. *Id.* at p. 3, ¶ 8. The magazines most commonly possessed by civilians hold more than 10 rounds of ammunition. *See* Roberts Decl., Ex. 11 at p. 6, ¶ 16; Curcuruto Decl., Ex. 9 at p. 4, ¶ 10. By "limiting magazine capacity to 10 rounds or less," Plaintiffs are "denie[d] . . . the benefits of modern technology and force[d] . . . to use defensive tools from a bygone era." *See* Roberts Decl., Ex. 11 at p. 7, ¶ 16.

60. The Banned Firearms, being semiautomatic, are distinct from military weapons, which are fully automatic. *See* Supica Decl., Ex. 13 at p. 4, ¶ 10; Roberts Decl., Ex. 11 at P. 1, ¶ 2 An. A, pp. 6–8. The semiautomatic AR-15, for example, is acknowledged even by Defendants to be the "civilian version" of the military's M-16 rifle. *See* Klein Dep., Ex. 17 at 153:24-154:4.[1]

61. Unlike automatic firearms, semiautomatic firearms will fire only one round with a single trigger pull, the same as a single shot, double barrel, bolt action, pump action, lever action, or revolving firearm.

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[1] For most of American history, civilians owned the same firearms that were used by the military. Supica Decl., Ex. 13 at pp. 4–5, ¶ 12. For instance, from the Revolutionary War through World War I, Americans owned the same muskets, flint-lock rifles, six-shooters, and bolt action rifles that were used or issued by the military. *Id.* It was the development of the automatic firearm that changed this, with automatic weapons being largely reserved for the military, and their semiautomatic versions being used by civilians. *Id.*; *see also Staples v. US.*, 511 U.S. 600, 602 (1994) ("The AR-15 is the civilian version of the military's M-16 rifle, and is, unless modified, a semiautomatic weapon.").

See Supica Decl., Ex. 13 at p. 4, ¶¶ 10–11. To fire a subsequent round, the trigger must be released and pulled again. *Id.* at p. 4, ¶ 11. Although many semiautomatic rifles may bear a cosmetic appearance to fully automatic rifles,[2] they are dissimilar in their basic modes of operation. *Id.* Rather, the Banned Firearms are functionally identical to other, more traditional looking commercial semiautomatic rifles. *Id.* Assuming similar launch velocity and barrel twist rate, a projectile launched by an AR-15 rifle is no more or less injurious than if launched by a bolt, pump, lever action, or single-shot rifle. Boone Decl., Ex. 8 at p. 7, ¶ 13. Because semiautomatic firearms shoot only as quickly as the operator can pull the trigger, the Banned Firearms shoot no more quickly than any other semiautomatic firearm, including those explicitly exempted from the Challenged Laws. Some common firearms that are not prohibited by the Challenged Laws fire a greater number of lethal projectiles faster than the Banned Firearms. *See* Supica Decl., Ex. 13 at p. 1 ¶ 2, Att. A at p. 23.

62. Historical evidence shows that the Challenged Laws will have virtually no effect in combatting

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[2] Throughout history, advances in the development of individual firearms for military use and those for civilian use have, for the most part, been the same, causing firearms in the separate sectors to bear some similarities. *See* Supica Decl., Ex. 13 at ¶ 9. For example, improvements in firearm technology tend to be adopted for both military and civilian use. *Id.* As a result, soldiers who become familiar with a particular type of firearm in the service tend to seek out similar type firearms for personal use after leaving the military. *Id.*

crime in Massachusetts. *See* Kleck Decl., Ex. 10 at p. 5, ¶ 10. Homicides committed using a rifle of any kind (much less a Banned Firearm) are extremely rare in Massachusetts and nationally. *See id.*

63. FBI Uniform Crime Reporting data indicates that no murders were committed using a rifle in Massachusetts in 2010, 2011, 2012, and 2014. *Id.* Only one murder was committed using a rifle of any kind in 2005, 2007, and 2015, and only two murders were committed using any rifle in 2006, 2008, and 2013. *Id.* In some years (2006, for instance) more than twice as many people were murdered with "hands and feet." *Id.* In sum, a total of eleven individuals were killed with a rifle of any kind from 2005 through 2015 in Massachusetts. *Id.; see also* Deposition of David Solet, representative of the Executive Office of Public Safety and Security, Ex. 18 at 51:9-57:7, Ex. 26 (FBI Uniform Crime Reporting data on homicides from 2005 to 2015); *see also* Klein Dep., Ex. 17 at 17:5-8, 49:3-24, 50:1-6, 170:19-21; *see also* Deposition of Michael Halpin, General Counsel for the Massachusetts State Police, Ex. 16 at 49:14-24, 45:24-47:8, Ex. 27 at 5 (Massachusetts State Police statistical data showing that, in 2016, Banned Firearms comprised only 1.5% of total crime guns seized; and in 2015, Banned Firearms comprised only .75% of total crime guns seized); Zani Dep., Ex. 20 at 21:17–22:12.

64. Defendants acknowledge that they have no comprehensive police data or records system that reflects a link between the Banned Firearms and Magazines and crime, *see* Halpin Dep., Ex. 16 at

12:20–13:10, nor do they have proof that the Banned Magazines are used to commit violent crimes in Massachusetts. *See* Klein Dep., Ex. 17 at 52:7-14. Defendants have not identified any reported incidents where Banned Firearms and Magazines have been used in assaults or shootings directed at law enforcement in Massachusetts. *See* Klein Dep., Ex. 17 at 86:23-24; 171:20–21.

65. A ban on standard capacity magazines holding more than ten rounds will not reduce the number of homicides and violent crimes committed in Massachusetts. *See* Kleck Decl., Ex. 10 at p. 2, ¶ 5 ("My research has found no link between a limit on magazine capacity and the number of homicides or violent crimes, and no such link can be found in the literature."). Nor will such a ban cause any significant reduction in the number of gun-violence victims. *Id.* at p. 2, ¶ 6.

66. This is because criminals rarely actually discharge their firearm but rather use the gun only to threaten the victim. *Id.* When criminals do fire their weapons, they usually fire very few rounds. *Id.* at p. 3, ¶ 7. For instance, in a sample of Philadelphia gun homicides, the average number of rounds fired was 2.7 for attacks committed with semiautomatic pistols, and 2.1 for those with revolvers. *Id.* Thus, in the vast majority of instances in which an attacker fires his weapon, the unavailability of magazines with capacities greater than ten rounds would be inconsequential to the number of shots fired by the attacker and also to the number of victims. *Id.*

67. As a result, "the Challenged Laws aim to fix a small (perhaps non-existent problem) by hindering the self-defense capabilities and endangering the lives of every law-abiding Massachusetts citizen." *Id.* at p. 5, ¶ 10.

E. The Notice of Enforcement Broadens the Ban to Apply to Prior Transactions of Firearms That Were Lawful at the Time They Occurred.

68. Massachusetts law requires Defendants to inspect records of all firearm transfers each year for violations of law. G. L. c. 140, § 123.

69. Until the issuance of the Notice of Enforcement, transfers of Massachusetts Compliant Firearms, which were "compliant to the Massachusetts General Laws prior to July 20, 2016," were "considered lawful" by Defendants. *See* Zani Dep., Ex. 20 at 11:10–14, 16–19, 2124, 12:1–4. Before the Notice of Enforcement was issued, neither Defendants nor any other law enforcement agency took action to halt the transfers of Massachusetts Compliant Firearms. *See* Zani Dep., Ex. 20 at 13:19–14:6; *see also* O'Leary Decl., Ex. 6 at pp. 1–2, ¶ 4; Ricko Decl., Ex. 7 at p. 1, ¶ 3. In fact, between 7,000 and 12,000 "copies or duplicates" were sold in Massachusetts in 2015, Klein Dep., Ex. 17 at 62:8–16, without legal repercussions, *see* Deposition of David Bolcome, Senior Investigatory for the Office of the Attorney General, Ex. 14 at 22:9–17. Similar sales occurred in 2013 and 2014. *Id.* at 25:7–9, 16–14; 37:14–

17; 38:15–16. At the time, the Notice of Enforcement had not yet been issued. *See* Klein Dep., Ex. 17 at 72:3–9.

70. Prior to issuance of the Notice of Enforcement, Plaintiffs were never informed that the purchase or sale of Massachusetts Compliant Firearms was illegal, and at no time was any action taken against Plaintiffs by Defendants or any law enforcement agency despite the mandated records inspection. *See* O'Leary Decl., Ex. 6 at pp. 1–2, ¶ 4; Ricko Decl., Ex. 7 at pp. 1–2, ¶ 3; Wallace Decl., Ex. 5 at p. 1–2, ¶ 5. Instead, Plaintiffs' transactions of Massachusetts Compliant Firearms were repeatedly approved. *See* O'Leary Decl., Ex. 6 at pp. 1–2, ¶ 4; Ricko Decl., Ex. 7 at pp. 1–2, ¶ 3; Wallace Decl., Ex. 5 at pp. 1–2, 115.

71. Plaintiffs relied upon Defendants' repeated confirmation to ensure that the firearms they bought and sold were compliant with Massachusetts law. *See* O'Leary Decl., Ex. 6 at pp. 12, ¶ 4; Ricko Decl., Ex. 7 at pp. 1–2, ¶ 3; Wallace Decl., Ex. 5 at pp. 1–2, 115. Plaintiffs believed they were engaging in legal transactions. *See* O'Leary Decl., Ex. 6 at pp. 1–2, ¶ 4; Ricko Decl., Ex. 7 at pp. 1–2, ¶ 3; Wallace Decl., Ex. 5 at pp. 1–2, 115.

72. Plaintiffs' prior transactions of Massachusetts Compliant Firearms consummated before the effective date of the Notice of Enforcement were in good faith compliance with all Massachusetts laws and were processed with Defendants' approval at the time they occurred. Klein Dep., Ex. 17 at 161:16–162:4.

73. The Notice of Enforcement provides no exception to its application to dealers for transfers made before July 20, 2016. *See* Notice of Enforcement, Ex. 25 at p. 4.

74. As a result, all previous transactions consummated by GOAL, On Target, and Overwatch involving Massachusetts Compliant Firearms now banned under the Notice of Enforcement could be found to have been illegal sales of firearms under Massachusetts law, as well as federal law that criminalizes sales of firearms not in compliance with state law. *See* 18 U.S.C. § 922(b)(2).

75. The Notice of Enforcement does not declare that individual owners or licensed dealers who engaged in these transactions were complying with the law at the time they sold Massachusetts Compliant Firearms, nor does it declare that dealers are immune from prosecution or loss of license for selling those firearms. *See* Notice of Enforcement, Ex. 25 at p.4 (stating only that "[t]he Guidance will not be applied to future possession, ownership, or transfer of Assault weapons by dealers, provided that the dealer has written evidence that the weapons were transferred to the dealer in the Commonwealth prior to July 20, 2016" and that "[t]he Guidance will not be applied to possession, ownership or transfer of an Assault weapon obtained prior to July 20, 2016.").

76. Plaintiffs fear they will be subject to criminal prosecution for their possession and transfer of the Massachusetts Compliant Firearms prior to issuance

of the Notice of Enforcement, even though the transactions were legal when they occurred, because of the Notice of Enforcement's retroactive interpretation of the Challenged Laws. *See* Wallace Decl., Ex. 5 at pp. 1–2, ¶¶ 5–6; O'Leary Decl., Ex. 6 at pp. 1–3, ¶¶ 4, 6; *see also* Linden Decl., Ex. 2 at p. 2, ¶ 8; Worman Decl., Ex. 1 at p. 2, ¶ 7; Sawyer Decl., Ex. 3 at pp. 2–3, 118.

F. The Phrase "Copies or Duplicates" As Used in the Ban Is Subject to Differing Interpretations.

77. The phrase "copies or duplicates" in the Challenged Laws is not defined in the law itself, nor is the phrase defined in the Federal Ban on which the statute is based or in any other state law or court decision. *See* Klein Dep., Ex. 17 at 123:8-11, 131:1–2.

78. Massachusetts law requires Defendants to inspect records of all firearm transfers for violations. *See* G. L. c. 140, § 123. By continuously inspecting firearms records and processing tens of thousands of applications for Massachusetts Compliant Firearms from 1998 up until the issuance of the Notice of Enforcement – a period of 18 years – the scope of the phrase "copies or duplicates" in the Challenged Laws was interpreted by Defendants through practice and custom to exclude Massachusetts Compliant Firearms. *See* Remarks of Attorney Gen. Maura Healey, Assault Weapons Ban Press Conference as Prepared for Delivery (July 20, 2016), Ex. 24 at p. 3 (stating that over 10,000

Massachusetts Compliant Firearms were sold in 2015 alone).

79. The Notice of Enforcement provides two circumstances under which a firearm is a "copy or duplicate" of an Enumerated Banned Firearm. *See supra* at ¶ 11. Massachusetts has no written protocol for determining whether a weapon is a copy or duplicate, other than the Attorney General's Notice of Enforcement. Solet Dep., Ex. 18 at 73:7–12.

80. No single government official has "primary responsibility" for determining when a weapon constitutes a copy or duplicate. *Id.* at 72:10–12. When asked for the identities of people involved in developing the Notice of Enforcement, Defendants could not pinpoint anyone affiliated with the Massachusetts State Police who was involved in determining whether particular firearms were copies or duplicates. Halpin Dep., Ex. 16 at 18:16–19:5.

81. The Notice of Enforcement's proposed guidance on the definition of "copies or duplicates" does not clarify the statutory phrase. Political Science professor Robert Spitzer, Defendants' expert in firearms policy could not articulate what certain phrases in the guidance mean, nor could he identify whether one of his own firearms was a "copy or duplicate" under Massachusetts law. *See* Deposition of Robert Spitzer, Ex. 19 at 122:5–18.; 122:13–125:5 ("[T]hat depends on how that phrase is interpreted under the law."). Instead, he stated that he would contact the Massachusetts State Police to ask them whether a firearm was banned. *Id.*

at 127:9–128:7. But, the Massachusetts State Police stated that it does not answer such questions. *See* Halpin Dep., Ex. 16 at 24:9–25:6.

82. Defendants' witnesses described procedures for determining when a firearm qualifies as a copy or duplicate, ranging from a visual inspection coupled with extensive training to the examination of admittedly incomplete digital records. *Compare* Solet Dep., Ex. 18 at 76:1–9, Deposition of Michaela Dunne, Director of the Firearms Records Bureau, Ex. 15, 18:11–14 ("Any other firearm that could be considered an assault weapon under the Federal assault weapons definition we wouldn't be able to tell, because we'd have to physically inspect the firearm."), *with* Solet Dep., Ex. 18 at 22:19–23:7 ("[T]here's never been an entry made [in the state records] that says this is a copy or duplicate, this is not a copy or duplicate. There's no tab that you could click that would say give me all the copies or duplicates[.]").

83. To make an accurate determination of whether a firearm is a "copy or duplicate," a person would need to inspect a weapon's inner workings and various parts, rendering a purely visual assessment incomplete. Bolcome Dep., Ex. 14 at 12:9–11, 49:5–9, 51:17–21; *see also* Halpin Dep., Ex. 16 at 61:21-62:8, 65:14-15, 65:18-66:3 (explaining that determining whether a weapon is "substantially similar" to an Enumerated Banned Firearm requires an analysis of "the internal structure and mechanism of the weapon"). Thus, a person would also need extensive knowledge of

every Enumerated Banned Firearm to make an accurate determination.

84. Most citizens' only resource for clarification is the Commonwealth's website. Klein Dep., Ex. 17 at 118:5–7. If the website cannot provide a clear answer (which happens "[i]n some cases," *see id.* at 178:12–16), Massachusetts requires the person to rely on the seller—or even the manufacturer—to determine whether a particular gun is a copy or duplicate of a banned firearm. *Id.* at 147:10–20. (Q: How does the citizen wishing to purchase a semi-automatic rifle determine whether or not the internal functional components are substantially similar in construction and configuration to those of an enumerated weapon? A: We expect in the first instance that the gun seller is going to help them make that determination and that the gun seller knows whether the gun, for example, is effectively an AR-15 for all intents and purposes, but if there was any doubt, the manufacturer would know."). Yet, Defendant Healey has accused the gun industry of "openly def[ying] Massachusetts laws "for nearly two decades." *See* Press Release, AG Healey Announces Enforcement of Ban on Copycat Assault Weapons (July 20, 2016), Ex. 23 at p. 1. Defendant Healey made clear in her remarks when issuing the Notice of Enforcement that the reason the Notice of Enforcement was necessary was because the Defendants do not agree with the determinations made by firearms sellers and manufacturers: "[T]he gun industry has taken it upon itself to interpret our assault weapons ban. . . . My office's action today will give us the full protection of the

state assault weapons ban – and not leave it to gun manufacturers' self-appointed interpretation." *See* Remarks of Attorney Gen. Maura Healey, Assault Weapons Ban Press Conference as Prepared for Delivery (July 20, 2016), Ex. 24 at pp. 3–4.

85 The Attorney General will not answer questions on the issue. *See* Bolcome Dep., Ex. 14 at 40:10–13 (confirming it is not the position of the Attorney General to answer questions about whether a Smith and Wesson MP-15.22 would be considered a "copy or duplicate" under the Notice of Enforcement).

86. Even Defendants and their witnesses have difficulty determining how to apply the above-cited tests. For example, in his deposition testimony, the Attorney General's Office was unable to say whether a semiautomatic rifle chambered in a different caliber would be banned under the similarity test. *Id.* at 18:21—22. And the Attorney General's Office was unable to answer whether a weapon would be banned if it was rendered incapable of semiautomatic fire. Klein Dep., Ex. 17 at 135:23–136:4. Furthermore, police departments in Massachusetts have no policy or written guidance for determining substantial similarity. Halpin Dep., Ex. 16 at 67:15–20, 68:9–15. Because not all officers are "trained on the internal components of the enumerated banned firearms," individual officers without training on the Banned Firearms will be called upon to apply the Notice of Enforcement's technical "similarity" test to determine when probable cause for an arrest exists. *See id.* at 68:23–69:6, 69:8–11, 69:13–18.

87. The Notice of Enforcement provides that a manufacturer's advertising of a particular firearm will be "relevant" in determining whether it is a "copy or duplicate." *See* Notice of Enforcement, Ex. 25 at 4. But the Notice of Enforcement does not articulate what "relevant" means or how relevance will be used to determine if a firearm is a "copy or duplicate." *Id.* Most police officers do not receive training on the marketing of firearms. Halpin Dep., Ex. 16 at 72:3–7.

88. The Notice of Enforcement also states that a firearm that qualifies as a "copy or duplicate" will remain a "copy or duplicate," even if it is altered to no longer meet these tests. *See* Notice of Enforcement, Ex. 25 at 4. Plaintiffs cannot even rely on the current configuration of the firearm when trying to determine if a firearm is a banned "copy or duplicate," but must also be aware of the firearm's historical configuration. *See id.* ("If a weapon, as manufactured or originally assembled, is a Copy or Duplicate under one or both of the applicable tests, it remains a prohibited Assault weapon even if it is altered by the seller.").

89. Plaintiffs are uncertain whether their firearms, or firearms they wish to purchase, constitute a "copy or duplicate" of an "assault weapon," because of the lack of clarity in the Challenged Laws and the Notice of Enforcement. *See* Ricko Decl., Ex. 7 at p. 2, ¶ 5; Chamberlain Decl., Ex. 4 at p. 1, ¶ 4; O'Leary Decl., Ex. 6 at p. 2, ¶ 5; Worman Decl., Ex. 1 at p. 2, ¶ 5, 7; Sawyer Decl., Ex. 3 at p. 2, ¶ 4.

Dated: December 15, 2017

Respectfully submitted,

/s/ James M. Campbell
James M. Campbell (BBO#541882)
Richard P. Campbell (BBO # 071600)
Campbell Campbell Edwards & Conroy
One Constitution Center
Boston, MA 02129
(617) 241-3000
jmcambpell@campbell-trial-lawyers.com

/s/ John Parker Sweeney
John Parker Sweeney (admitted *Pro Hac Vice*)
T. Sky Woodward (admitted *Pro Hac Vice*)
James W. Porter, III (admitted *Pro Hac Vice*)
Marc A. Nardone (admitted *Pro Hac Vice*)
Connor M. Blair (admitted *Pro Hac Vice*)
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street N.W., Suite 1350
Washington, D.C. 20036
P (202) 719-8216 F
(202) 719-8316
isweeney@bradley.com

Counsel for Plaintiffs, David Seth Worman, Anthony Linden, Jason William Sawyer, Paul Nelson Chamberlain, Gun Owners' Action League, Inc., On Target Training, Inc., and Overwatch Outpost

[Table Of Exhibits And Certificate Of Service Omitted]

DECLARATION OF DAVID SETH WORMAN

I, David Seth Worman, under penalty of perjury, declare and state, to the best of my knowledge, information and belief, as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration and am competent to testify to the matters stated below,

2. I am a licensed physician, specializing in orthopedic surgery. I am a responsible, law abiding citizen, I live in Newton, Massachusetts, and I have been a citizen of the Commonwealth of Massachusetts since 2003.

3. I lawfully own firearms which may be classified as a "copy or duplicate" of an "assault weapon" under the tests set forth in the July 20, 2016 Notice of Enforcement, purchased these firearms in Massachusetts after the enactment of G. L. c. 140 § 121 & 131M, but before Defendant Healey issued the Notice of Enforcement. Before the Notice of Enforcement, I was never informed that my purchases were or may have been illegal. Nor did any law enforcement agency attempt to halt these transactions. Instead, these transactions were approved by Defendants. I relied upon this approval, and I believed I was engaging in legal activity. I also own several pistols that are designed for, and come standard with, detachable magazines which hold in excess of ten rounds. I lawfully own multiple detachable magazines which hold in excess of ten rounds.

4. I own my firearms primarily for defense of my home and my family. I fortunately have never had occasion to use any of my firearms in self-defense, but it is an unfortunate reality that there will be times when the police or the government simply will not be able to help me. The firearms that I own that may be classified as "assault weapons" possess features which make them ideal for self-defense in the home. I also possess these firearms for recreational target shooting and as collector's items.

5. I desire to purchase additional full-sized semiautomatic firearms with standard detachable magazines holding in excess of ten rounds after July 20, 2016, if allowed to do so by law. However, I cannot do so because I cannot determine whether these firearms are "copies and duplicates" as that term is vaguely defined in the Notice of Enforcement. I cannot make this determination because the Notice of Enforcement is vague and because of the uncertainty of Defendants' interpretations of the phrase "copies or duplicates."

6. I am a responsible firearms owner. I have taken numerous safety and training courses. Several of these courses are designed for training in self-defense. Moreover, I keep my firearms stored in a locked safe in my home.

7. Because the Office of the Attorney General "reserves the right to amend th[e] guidance" in the Notice of Enforcement, I live in fear that my possession of firearms will become criminalized. I believe that G. L. c. 140 § 121 & 131M and the July 20, 2016 Notice of

Enforcement violate my civil rights. I also believe the Notice of Enforcement is vague and confusing as to what is prohibited and what is not.

I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information, and belief.

/s/ David Seth Worman	12-13-17
David Seth Worman	Date

DECLARTION OF ANTHONY LINDEN

I, Anthony Linden, under penalty of perjury, declare and state, to the best of my knowledge, information and belief, as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration and am competent to testify to the matters stated below.

2. I am a responsible, law-abiding citizen of Massachusetts. I live in North Dighton, Massachusetts.

3. I lawfully own a firearm which may be classified as a "copy or duplicate" of an "assault weapon" under the tests set forth in the July 20, 2016 Notice of Enforcement. It is an AR-15 style firearm that I custom built myself. I purchased the parts for this firearm and assembled it after the enactment of G. L. c. 140 § 121 & 131M, but before Defendant Healey issued the Notice of Enforcement. This firearm was designed for

detachable magazines which hold in excess of ten rounds. I lawfully own several detachable magazines which hold in excess of ten rounds.

4. I have polyarthritis, a type of arthritis that involves five or more joints simultaneously. As a result of this disease, it is difficult for me to operate quickly and effectively some types of firearms. Accordingly, I require access to AR-platform rifles and full-capacity magazines to fully utilize my firearms at the practice range, while I hunt, and to ensure my ability to defend myself in my home if necessary. The AR-15 style firearm that I own possesses features which makes it ideal for someone with my disease.

5. I plan on purchasing additional full-sized semiautomatic firearms with standard detachable magazines holding in excess of ten rounds after July 20, 2016, if allowed to do so by law.

6. The primary purpose for owning my firearms is for hunting, recreational shooting, and self-defense of my home and my family, I enjoy spending time with my son at the shooting range.

7. I am a responsible firearms owner. I have taken numerous safety and training courses. I keep my firearms stored in locked safes in my home.

8. I believe the Second Amendment protects certain individuals' rights to own and possess firearms that are in common use for lawful purposes. I believe that G. L. c. 140 § 121 & 131M and the Notice or Enforcement unconstitutionally infringe upon my Second

Amendment rights. Further, because the Office of the Attorney General "reserves the right to amend th[e] guidance" in the Notice of Enforcement, I live in fear that my possession of firearms will become criminalized.

I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information, and belief.

/s/ Anthony Linden	12/12/17
Anthony Linden	Date

DECLARATION OF JASON WILLIAM SAWYER

I, Jason William Sawyer, under penalty of perjury, declare and state, to the best of my knowledge, information and belief, as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration and am competent to testify to the matters stated below.

2. I was honorably discharged from the Marine Corps after serving five years of active duty service and an additional three years of inactive reserves for a total enlistment of eight years. I achieved the rank of

Corporal (E-4) during my service. While on active duty, my primary weapon was an M-16A2. From time to time, I was also issued other weapons, including an M9 service pistol. In the military, I received extensive weapons training, including training with various firearms. I have also taken numerous firearms courses since leaving the military. I am an NRA certified instructor as well as a Massachusetts State Police certified instructor.

3. Now, as a civilian, several of the firearms that I own may be classified as "assault weapons."

4. The primary purpose for owning my firearms is for competitive shooting events. I'm a nationally ranked competitive shooter, competing primarily in the "Across the Course High Power" event. A typical across the course high power match requires competitors to fire at 200, 300 and 600 yard distances from the targets. For competitive shooting events, I use AR-15 platform rifles—firearms that are banned by G. L. c. 140 § 121 & 131M or may be banned as a "copy or duplicate" under the tests set forth in the July 20, 2016 Notice of Enforcement. Accordingly, I lawfully own firearms which may be classified as a "copy or duplicate" of an "assault weapon" under the tests set forth in the July 20, 2016 Notice of Enforcement. I purchased these firearms in Massachusetts after the enactment of G. L. c. 140 § 121 & 131M, but before Defendant Healey issued the Notice of Enforcement. Before the Notice of Enforcement, I was never informed that these purchases were or may have been illegal. Nor did any law enforcement agency attempt to halt these

transactions. Instead, these transactions were approved by Defendants. I relied upon this approval, and I believed I was engaging in legal activity. I also own several pistols that are designed for, and come standard with, detachable magazines which hold in excess of ten rounds. I lawfully own several detachable magazines which hold in excess of ten rounds. Further, I wish to purchase certain firearms that may be classified as a "copy or duplicate" of an "assault weapon," but I cannot do so because of the uncertainty of Defendants' interpretations of the phrase "copies or duplicates."

5. I also possess firearms for self-defense and defense of my home. Firearms that may be classified as "assault weapons" possess features which make them ideal not only for competitive shooting, but also for self-defense in the home. Because they are lightweight, have relatively little recoil, and are available with an adjustable stock, they are the easiest firearm to shoot accurately.

6. I live in Melrose, Massachusetts. I have lived in Massachusetts since late 2000 or early 2001. I attended Northeastern University on the GI Bill. I currently work in the software industry as a presales engineer.

7. I am a responsible, law-abiding firearms owner. Through my military experience, competitive shooting practice, and numerous training courses, I am well-versed on how to safely and properly own and use

firearms. Moreover, I keep my firearms stored in a locked safe in my home.

8. Because the Office of the Attorney General "reserves the right to amend th[e] guidance" in the Notice of Enforcement, I live in fear that my possession of firearms will become criminalized. I believe that G. L. c. 140 § 121 & 131M and the July 20, 2016 Notice of Enforcement violate my civil rights.

I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information, and belief.

/s/ Jason William Sawyer	12-12-17
Jason William Sawyer	Date

DECLARATION OF
PAUL NELSON CHAMBERLAIN

I, Paul Nelson Chamberlain, under penalty of perjury, declare and state, to the best of my knowledge, information and belief, as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration and am competent to testify to the matters stated below.

2. I live in East Weymouth, Massachusetts. Except for two years I spent in New Hampshire, I am a lifelong resident of the Commonwealth of Massachusetts.

3. I work as a safety manager and have done so for the past 17 years. As a safety manager, my responsibilities include analyzing, understanding, and ensuring compliance with various complex Environmental Protection Agency (EPA) and Occupational Safety and Health Administrative (OSHA) rules and regulations.

4. Even with my experience interpreting complex regulations, I cannot determine whether certain firearms I may wish to purchase are prohibited by G. L. c. 140 § 121 & 131M and the July 20, 2016 Notice of Enforcement because the Notice of Enforcement is vague and because of the uncertainty of Defendants' interpretations of the phrase "copies or duplicates."

5. Although I do not currently possess firearms that are banned by G. L. c. 140 § 121 & 131M and the July 20, 2016 Notice of Enforcement, I wish to do so, and I would do so but for the prohibition. I am a responsible, law-abiding citizen, and I would purchase these firearms for, among other things, self-defense in my home. I do, however, lawfully own several detachable magazines which hold in excess of ten rounds. I secure my firearms and magazines in a safe in my home.

/s/ Paul Nelson Chamberlain	12/12/17
Paul Nelson Chamberlain	Date

DECLARATION OF JAMES WALLACE

I, James Wallace, under penalty of perjury, declare and state, to the best of my knowledge, information and belief, as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration and am competent to testify to the matters stated below.

2. I am the Executive Director of Gun Owners' Action League, Inc. ("GOAL") and have been in this position since 2005. I have worked at GOAL in other positions since 2000. Before working with GOAL, I served in the United States Army.

3. GOAL is a nonprofit corporation that is dedicated to promoting safe and responsible firearms ownership, marksmanship competition, and hunter safety throughout Massachusetts. For over 40 years, GOAL has helped protect and preserve Massachusetts citizens' Second Amendment rights. It is the leading advocate in Massachusetts for its more than 15,000 members, consisting of current and future gun owners, hunters, and conservationists as well as firearm and marksmanship clubs. GOAL also offers firearms safety classes.

4. To aid in its firearms safety classes, GOAL possesses firearms which may be classified as a "copy or duplicate" of an "assault weapon" under the tests set forth in the July 20, 2016 Notice of Enforcement. GOAL also possesses several pistols that are designed

for, and come standard with, detachable magazines which hold in excess of ten rounds. It also lawfully possesses multiple detachable magazines which hold in excess of ten rounds.

5. GOAL possesses a number of firearms-related licenses, including a federal firearms license and a Massachusetts License to Sell Ammunition. GOAL lawfully owns, and before July 20, 2016 sold, firearms which may be classified as a "copy or duplicate" of an "assault weapon" under the tests set forth in the July 20, 2016 Notice of Enforcement. GOAL transferred these firearms in Massachusetts after the enactment of G. L. c. 140 § 121 & 131M, but before Defendant Healey issued the Notice of Enforcement. Before Attorney General Healey issued the Notice of Enforcement, GOAL was never informed that its transfers were or may have been illegal. At no time was any action taken against it by any law enforcement agency to halt or prevent these transactions; Defendants instead approved them. GOAL relied upon this approval and believed it was engaging in legal activity.

6. GOAL and its membership are harmed by the combination of the Notice of Enforcement and the Challenged Laws because they cannot acquire the most popular semiautomatic rifles and standard capacity magazines sold today. This has an appreciable effect on their meaningful ability to defend themselves in the home, and constitutes a manifest violation of their Second Amendment rights. Additionally, the Notice of Enforcement has the further effect of retroactively criminalizing what had been accepted, lawful

behavior, placing both GOAL and its membership in an untenable legal position, for which the alleged "safe harbor" provision in the Notice of Enforcement provides no meaningful relief.

/s/ James Wallace		12/13/17
James Wallace		Date

DECLARATION OF ON EDWARD O'LEARY

I, Edward O'Leary, under penalty of perjury, declare and state, to the best of my knowledge, information and belief, as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration and am competent to testify to the matters stated below.

2. I live in East Bridgewater, Massachusetts, where I have owned On Target Training since 1998. I am a lifelong resident of the Commonwealth of Massachusetts, and I served as a police officer for 32 years, retiring in 2012. I was also an adjunct professor in criminal justice, constitutional law, evidence, and other subjects at Massasoit Community College and Anna Maria College. I am also an NRA certified firearms instructor.

3. On Target Training is a family-owned retail gun store and training facility. I am the sole owner, and my wife and daughter are employees. On Target Training is a federal firearm licensed dealer. It is also

licensed in Massachusetts to perform services as a gunsmith, to sell, rent or lease firearms, rifles, shotguns or machine guns, and to sell ammunition.

4. In addition to selling ammunition, holsters, safety glasses, ear protection, and cleaning supplies, On Target Training engages in the sale of firearms. We sell handguns, shotguns, and rifles. Until the effective date of the Notice of Enforcement, On Target Training sold firearms that may be banned under the tests set forth in the Notice of Enforcement. On Target Training intends to and, but for the credible threat of prosecution under the Notice of Enforcement and G. L. c. 140 § 121 & 131M, would continue to sell these constitutionally protected firearms and magazines. Before Attorney General Healey issued the Notice of Enforcement, On Target was never informed that its transfers were or may have been illegal. At no time was any action taken against it by any law enforcement agency to halt or prevent these transactions; Defendants instead approved them. On Target relied upon this approval and believed it was engaging in legal activity.

5. My company suffers ongoing economic harm because it can no longer sell these constitutionally protected firearms and magazines. On Target Training is losing money. On Target Training suffers further harm because of the vagueness of the Notice of Enforcement, which prevents me from knowing what firearms I can lawfully sell. Accordingly, there are a number of rifles I would sell but cannot because I either cannot sell them or I cannot be certain if I can lawfully sell them and fear prosecution if I attempt to sell them. Rifle

sales have almost completely ceased. Sales of large capacity magazines are also down about 50% since the enactment of the Notice of Enforcement, and ammunition sales are also down significantly since the enactment of the Notice of Enforcement.

6. I also fear that my transactions involving firearms that may be banned under the tests set forth in the Notice of Enforcement may be retroactively criminalized, even though they were commonly understood to be lawful and accepted at the time, and even though the State of Massachusetts recorded and approved of each such transaction. The Notice of Enforcement has cast aside decades of common practice and presumptively legal conduct, and declared that dealers like me had conducted hundreds if not thousands of transactions that were illegal under Massachusetts law at the time they were made. Attorney General Healey's refusal to state that transfers that occurred in the past were legal at the time they occurred has clarified the State's position on this. Her statement that "[t]he Guidance will not be applied to future possession, ownership or transfer of Assault weapons by dealers, provided that the dealer has written evidence that the weapons were transferred to the dealer in the Commonwealth prior to July 20, 2016, and provided further that a transfer made after July 20, 2016, if any, is made to persons or businesses in states where such weapons are legal" provides no guarantee that my then-legal transfers are not now retroactively illegal. If these transactions are deemed illegal, I could be in violation of federal law and, at a minimum, could lose

my federal firearms license and other firearms-related licenses.

/s/ Edward O'Leary — 12/12/2017
Edward O'Leary — Date

DECLARATION OF CHARLES RICKO

I, Charles Ricko, under penalty of perjury, declare and state, to the best of my knowledge, information and belief, as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration and am competent to testify to the matters stated below.

2. I live in Charlemont, Massachusetts, where I own Overwatch Outfitters and where I have served as a volunteer police officer for the past 10 years.

3. Overwatch Outpost is a federal firearm licensed dealer. It is also licensed in Massachusetts to perform services as a gunsmith, to sell, rent or lease firearms, rifles, shotguns or machine guns, and to sell ammunition. Overwatch Outpost is an "outfitter," meaning it caters to all of its customers' outdoors needs. In addition to general fishing and hunting needs, Overwatch Outfitters engages in the sale of firearms. Approximately 70% of my revenue comes from firearms sales. Overwatch Outfitters intends to and, but for the credible threat of prosecution under the Notice of Enforcement and G. L. c. 140 § 121 & 131M, would continue to sell these constitutionally protected

firearms and magazines that are banned under the Notice of Enforcement and G. L. c. 140 § 121 & 131M. Before Attorney General Healey issued the Notice of Enforcement, Overwatch Outpost was never informed that its transfers were or may have been illegal. At no time was any action taken against it by any law enforcement agency to halt or prevent these transactions; Defendants instead approved them. Overwatch Outpost relied upon this approval believed it was engaging in legal activity.

4. Until the effective date of the Notice of Enforcement, Overwatch Outfitters sold firearms that may be banned under the tests set forth in the Notice of Enforcement. I fear that my transactions involving these firearms may retroactively be deemed illegal. I understood these transactions to be legal at the time they occurred—the State of Massachusetts recorded and approved each such transaction. The Notice of Enforcement declared that dealers like me that had conducted hundreds if not thousands of presumptively-legal and then-accepted transactions may have in fact been violating Massachusetts law at the time these transactions occurred. Attorney General Healey's refusal to state that transfers that occurred in the past were legal at the time they occurred has clarified the State's position on this. Her statement that "[t]he Guidance will not be applied to future possession, ownership or transfer of Assault weapons by dealers, provided that the dealer has written evidence that the weapons were transferred to the dealer in the Commonwealth prior to July 20, 2016, and provided further that a transfer made after July 20, 2016, if any, is made

to persons or businesses in states where such weapons are legal" provides no guarantee that my then-legal transfers are not now retroactively illegal. If these transactions are deemed illegal, I could be in violation of federal law, and, at a minimum, could lose my federal firearms license and other firearms-related licenses.

5. Additionally, my company suffers ongoing economic harm because it can no longer sell these constitutionally protected firearms and magazines. Overwatch Outpost suffers further harm because of the vagueness of the Notice of Enforcement, which prevents me from knowing what firearms I can lawfully sell. Accordingly, there are a number of firearms I would sell but cannot because I either cannot sell them or I cannot be certain if I can lawfully sell them and fear prosecution if I attempt to sell them.

/s/ Charles Ricko	December 12, 2017
Charles Ricko	Date

DECLARATION OF J. BUFORD BOONE III

I, J. Buford Boone III, under penalty of perjury, declare and state as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration, and am competent to testify to the matters stated below.

2. I am enclosing a copy of my expert report in this matter as Attachment A, the contents of which are, to the best of my knowledge and belief, true and accurate, with the exception that there is a typographical error on page 3, paragraph 2, line 3 where "1988" should actually read "1998". I hereby adopt and incorporate that report as if set forth fully herein.

3. I am qualified to provide expert testimony regarding ballistics and defensive uses of firearms in this matter. I am currently the owner and founder of Boone Ballistics, LLC. I am a retired Supervisory Special Agent (SSA) of the Federal Bureau of Investigation (FBI), where I worked from 1988 to 2012. I was the primary SSA with oversight of the FBI Ballistic Research Facility (BRF) from 1997 to 2012. The BRF has responsibility for testing and evaluating all ammunition, firearms, and body armor used operationally by the FBI. At the BRF, I:

a. performed or directed all functions of the BRF, including overseeing all aspects of the BRF's research;

b. was the primary source of ballistic information regarding ammunition, firearms, and body armor for all FBI Agents;

c. directed the creation of a procurement of 5.56mm NATO ammunition using piezoelectric conformal transducers for pressure testing;

d. was the primary author of the FBI Body Armor Test Protocol and was the primary

author of specifications for ammunition procurements (for both training and operational/"service" use) for the FBI;

e. provided expertise to the Special Operations Community and helped the BRF form a strong liaison with the Department of Defense. In fact, the Department of Defense Law of War Chair, during my time of oversight of the BRF, established protocol that all new DOD small arms munitions required testing and evaluation by the FBI BRF prior to legal authorization being granted for their use;

f. represented, at the request of the Department of Defense, the United States in Darligen, Switzerland in discussions of wound ballistics;

g. provided numerous live-fire terminal ballistic demonstrations to local, state and federal law enforcement officers as well as to all branches of the United States Military;

h. conducted international presentations on wound ballistics, ammunition selection, weapon selection, and body armor;

i. briefed the Secretary of the Army and provided, at his request, my professional opinion of a 5.56mm NATO cartridge intended to replace the M855;

j. functioned as the primary instructor of 40 Basic Law Enforcement Sniper/Observer

schools (52 total: 6 before BRF assignment, 6 in retirement);

k. earned the 2008 recipient of the National Defense Industrial Association Joint Armaments Committee's Gunnery Sergeant Carlos Hathcock Award; and

l. authored the following publications at law enforcement or a governmental official's request:

   i. Review of Accuracy 1st Training;

   ii. Weapon Selection – Revision III;

   iii. Ammunition Selection 2007;

   iv. TSWG MURG Briefing Accuracy Expectations;

   v. AIM III TSWG Briefing 3/16/2010;

   vi. Wound Ballistics; and

   vii. B2 Sniper Rifle Cleaning Method.

Prior to working in the BRF in 1997, I served as an FBI Special Agent in New Haven, Connecticut, beginning in 1988, where I became trained, qualified, and experienced as a Firearms Instructor in 1989. I was promoted to the position of Principal Firearms Instructor for the New Haven Division in 1992. I was promoted to Supervisory Firearms Instructor at the FBI Academy in Quantico in 1996. Before working for the FBI, I was a police officer with the Tuscaloosa, Alabama, Police Department. My detailed CV is included in Attachment A. I am intimately familiar with the matters of my

testimony, which is based upon external sources as well as my own experience. My opinions were not developed for purposes of any expert testimony.

4. I was qualified as an expert witness in ballistics and terminal effects of small arms projectiles and provided in-court testimony in the Western District of Virginia [*U.S. v. Armet Armored Vehicles*, No. 4:12-cr-0021] on September 28, 2017. I have provided expert testimony in only one other case, *Kolbe v. O'Malley*, No. 1:13-cv-02841 (D. Md.) on January 2, 2014. My qualifications as an expert witness were not challenged in that case.

5. Semiautomatic rifles mischaracterized and defined by Massachusetts as "assault weapons", particularly those based on the AR-15 platform, are well suited for defensive shooting—shooting use in defense of self, others, and home. Further, standard capacity magazines (those for which the firearm was designed) are appropriate and potentially necessary for successful defense of oneself or home.

6. Put simply, semiautomatic rifles, including rifles based on the popular AR-15 platform, are among the best firearms for defensive shooting. Effective defensive shooting requires stopping the human aggressor as quickly as possible, and certain attributes of semiautomatic rifles make them the ideal firearm for defensive shooting. When properly selected, the ammunition for which AR-15 semiautomatic rifles typically are chambered (.223 caliber Remington or 5.56 NATO, which are very similar) is more effective and reliable

at stopping human attackers than the best ammunition of handgun calibers typically used for defensive or law enforcement purposes. The penetration range of the aforementioned .223/5.56mm ammunition, as shown in testing conducted by the FBI and other agencies, is 12–18". This is the range which the FBI has determined is the most desirable for effectiveness.

7. Semiautomatic rifles of the AR-15 variety are among the easiest firearms to shoot accurately and are appropriate for close-quarter encounters. These rifles generally have the following additional characteristics which make them particularly suitable for defensive purposes:

a. They are relatively lightweight;

b. They are available with a telescoping/adjustable stock;

c. They have a vertical pistol grip;

d. They are semi-automatic and can be fired with one hand;

e. They are chambered for cartridges that can be effective while having relatively mild recoil; and

f. They utilize magazines with a standard capacity of 20 or 30 rounds.

8. Certain optional features available for semiautomatic rifles further enhance their suitability for defensive shooting. For instance, a telescoping/adjustable stock allows for a more compact overall size, thereby enhancing the user's ability to maneuver in

the tight spaces of a home (though this feature does not contribute meaningfully to the concealability of the rifle as the adjustment range is typically only about three inches, which is enough to make a critical difference in maneuverability without significantly enhancing concealability). This feature also enables the firearm to be quickly adjusted to fit people of different statures. The vertical pistol grip design is easier to operate with one hand than traditional pistol grips. This can be of particular benefit when the user needs to use one hand to hold a flashlight or call 911. By contrast, pump, lever and bolt action firearms typically require two hands to function if more than one shot is required. Finally, the most common chambering used in AR-15 semiautomatic rifles is effective when the proper projectile is used, and its relatively mild recoil renders it easily mastered by persons of slight stature.

9. To conclude that the semiautomatic rifle is well-suited for defensive shooting, one need look no further than the fact that the AR-15 rifle is the most common rifle in use by American law enforcement (including the FBI), who may discharge their firearms for defensive purposes only.

10. Handguns, by contrast, are less effective firearms than semiautomatic rifles in defensive shooting situations for two reasons. First, handguns typically used for defensive purposes offer far less terminal effectiveness. Second, handguns are more sensitive to shooter technique and therefore are much more difficult to fire accurately than a semiautomatic rifle.

11. Semiautomatic rifles are superior to shotguns for defensive shooting for three reasons. First, effective shotgun ammunition has significantly more recoil than a 5.56 mm semiautomatic rifle and is therefore more difficult to fire repeat shots accurately. It is a common misapprehension that the "spread" of shotgun pellets[1] make accuracy less critical when using a shotgun. This is not the case, as the most common defensive shotgun rounds, for instance a 00 buckshot used in a 2 3/4" 12 gauge shotgun, commonly spread beyond the scoring area of the FBI target, which is based on the size of a human torso, even when fired from a distance of only 21 feet. This means that the increase in hit probability is accompanied by the likelihood that some projectiles will miss. The increased probability of projectiles missing the intended target also increases the risk to unintended targets (innocent people). Second, shotguns typically have a capacity of between two and eight rounds, most commonly five. This inherently limits shotguns' effectiveness in defensive shooting situations requiring more than two to eight rounds. Third, effective shotgun ammunition's penetration range is unnecessarily deep, practically guaranteeing pass-thru shots, and posing considerable danger to others in the area.

12. A limit on a magazine's capacity may hinder defensive shooting, as evidenced by the fact that nearly

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[1] A shotgun can fire multiple projectiles with each pull of the trigger. For instance, if 00 buckshot is used in a 2 3/4" 12 gauge shotgun, multiple (between 8 and 12) .32" lead balls are expelled with each shot.

all law enforcement agencies, including the FBI, issue their officers magazines capable of holding more than 10 rounds of ammunition. To successfully survive a violent encounter, the FBI teaches its agents to fire until the threat is eliminated. There is no minimum or maximum amount of shots per subject. If a 30 round magazine is used and only one shot is required, the victim has stopped his attacker. If, however, a 10 round magazine is used and 12 rounds are required to stop the attacker(s), the victim could very likely be injured and might not survive. The best evidence of the appropriateness of magazine capacity can be found by looking at those issued by the FBI's Defensive Systems Unit ("DSU"), which administers the FBI's ammunition and firearms support for its operations personnel. The DSU issues 30 round magazines. In fact, I am unaware of any US law enforcement agency that issues AR-15 magazines of less than 20 round capacity. And, in my experience, 20 round magazines are the exception; 30 round magazines are the norm. It can only be concluded that US law enforcement believes that 30 round magazines are the most appropriate choice for defensive purposes when using an AR-15 rifle. Moreover, standard magazines for the currently issued FBI handgun (Glock 17 or 19) hold 17 or 15 rounds. The previous standard issue FBI handgun was the Glock 22. Its magazines held 15 rounds. During my time at the BRF, Glock manufactured a 10 round magazine for the Glock 22 pistol, but, to my knowledge, the FBI has never used the 10 round magazine. Nor am I aware of any law enforcement agency that issues pistol

magazines that are restricted below standard capacity to some arbitrary limit like 10.

13. Firearms, by themselves, are rarely used to cause injury. Though there are instances of a firearm being used as an impact weapon, most injuries attributed to a firearm are more correctly attributed to a projectile launched by that firearm. Assuming similar launch velocity and barrel twist rate, a projectile launched by an AR-15 rifle is no more or less injurious than if launched by a bolt, pump, lever action or single-shot rifle. There is no scientific way to accurately characterize "wounds caused by an AR-15" as any more or less injurious than those caused by any other, similarly chambered, firearm.

14. Projectile design, in conjunction with the cartridge in which it is loaded, is the primary factor of effectiveness. All .223/5.56 cartridges are not equal. To characterize the .223/5.56 as "high power" ignores the fact that identical projectiles can be loaded to higher velocity in other cartridges. The .223/5.56 is not legal in some states for hunting whitetail deer while other ("more powerful") cartridges, such as the .243 and above, are allowed.

15. With respect to the ability to quickly launch projectiles, it should be remembered that a shotgun, chambered for 3" 12ga, is capable of firing 41 supersonic projectiles of .24" diameter with each trigger pull.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ J. Buford Boone III	12/12/2017
J. Buford Boone III	Date

DECLARATION OF GARY KLECK

I, Gary Kleck, under penalty of perjury, declare and state as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration, and am competent to testify to the matters stated below.

2. I am attaching a copy of my expert report in this matter as Attachment A, the contents of which are, to the best of my knowledge and belief, true and accurate. I hereby adopt and incorporate that report as if set forth fully herein.

3. I am qualified to provide expert testimony regarding criminology, specifically the impacts of gun control, in this matter. I have a Ph.D. in sociology and am a Professor Emeritus of Criminology and Criminal Justice at Florida State University. During my years as a professor, I have extensively researched and written about the subject of gun control and am a nationally-recognized authority on this subject. I have published and presented extensively on the issues of guns, violence, and gun control. I have closely examined news media accounts of every large-scale mass

shooting (more than six victims killed or injured) committed in the United States from 1987 through July 2013 in which it was known that a large-capacity magazine with the capacity to hold more than 10 rounds (a "large capacity magazine") was used, with a focus on whether large capacity magazine use by the killers affected the number of victims shot. I have testified before Congress and state legislatures on gun control issues, and worked as a consultant to the National Research Council, National Academy of Sciences Panel on the Understanding and Prevention of Violence, as a member of the U.S. Sentencing Commission's Drugs-Violence Task Force, and as a member of the Institute of Medicine and National Research Council Committee on Priorities for a Public Health Research Agenda to Reduce the Threat of Firearm-Related Violence. My full background can be reviewed in the attached Curriculum Vitae, which is included in Attachment A. I am intimately familiar with the matters of my testimony, which is based upon external sources as well as my own experience. My opinions were not developed for purposes of any expert testimony.

4. I have participated as an expert witness regarding gun control and provided deposition testimony in the Northern District of Illinois [*Illinois Assoc. of Firearms Retailers v. Chicago*, No., 1:10-cv-04184] on October 28, 2011; the District of Columbia [*Parker v. District of Columbia*, No., 03-cv-00213], on July 2, 2013; the District of Colorado [*Cook v. Hickenlooper*, No. 13-cv-01300] in March and April 2013; the Chancery Division of the Circuit Court of Cook County, Illinois [*Wilson v. Cook County*, No. 07 CH 4848] on September 16, 2013; the District of Maryland [*Kolbe v.*

O'Malley, No. 1:13-cv-02841] on January 2, 2014; the Northern District of Illinois [*Friedman v. City of Highland Park*, No. 1:13-cv-9073] in May or June 2014; the Eastern District of California [*Tracy Rifle and Pistol, LLC v. Harris*, No. 2:14-cv-02626] on November 2, 2016; and the Southern District of California [*Flanagan v. Becerra*, No. 16-6164] on July 25, 2017.

5. A ban on large capacity magazines ("Magazine Ban") will not reduce the number of homicides and violent crimes committed in Massachusetts. My research has found no link between a limit on magazine capacity and the number of homicides or violent crimes, and no such link can be found in the literature.

6. Nor will such a ban cause any significant reduction in the number of gun-violence victims. Criminals rarely actually discharge their firearm. Instead, the gun is used most often only to threaten the victim. *See* Gary Kleck and Karen McElrath, The Effects of Weaponry On Human Violence, SOCIAL FORCES, 69(3): 669-92 (1991) (a true and accurate copy of which is attached as Attachment B). In fact, a study from Jersey City, New Jersey found that offenders did not fire a single shot in over two-thirds of crimes in which the offender was armed with a handgun. *See* Reedy, D.C. & Koper, C.S., Impact of handgun types on gun assault outcomes: A comparison of gun assaults involving semiautomatic pistols and revolvers. Injury Prevention, 9, 151-55 (2003) (a true and accurate copy of which is attached as Attachment C).

7. When criminals do fire their weapons, they usually fire very few rounds. Of all violent crimes in

which handguns were fired, the offender fired more than 10 rounds only 2.5–3.0% of the time. *Id.* The average number of rounds fired was 3.23–3.68 in incidents involving semi-automatic firearms and 2.30–2.58 in incidents involving revolvers. In a sample of Philadelphia gun homicides, the average number of rounds fired was 2.7 for attacks committed with semi-automatic pistols and 2.1 for those with revolvers. *See* McGonigal, M.D., Cole, J., Schwab, C.W., Kauder, D.R., Rotondo, M.F., and Allgood, P.B., Urban firearm deaths: a five-year perspective, The Journal of Trauma, 35:532–37 (1993) (a true and accurate copy of which is attached as Attachment D). It is clear that for the vast majority of instances in which an attacker fires his weapon, the unavailability of large capacity magazines would be inconsequential to the number of shots fired and also to the number of victims.

8. The Magazine Ban does, however, impair a victim's ability to defend themselves in situations requiring more than 10 rounds of ammunition. Situations requiring the defensive use of a firearm occur with some frequency, as a study I conducted for the Nationwide Defense Survey determined that in 1993 there were approximately 2.5 million incidents in which victims used guns for self-protection. The research further indicated that 46% of these defensive gun situations involved women and that a disproportionate share of African-American or Hispanic individuals were in a situation requiring the defensive use a firearm. The Magazine Ban has the potential to impair their abilities to defend themselves or their loved

ones—if more than 10 rounds of ammunition are required to stop an attacker, the Magazine Ban can be the critical difference in surviving or not surviving a self-defense situation.

9. Similarly, a ban on large capacity magazines will not have any significant effect on the number of victims killed or injured in mass shootings. As an initial matter, mass shootings where a magazine capable of holding more than 10 rounds of ammunition was used are very rare. I recently conducted a study where I identified, as comprehensively as possible, all mass shootings that occurred in the United States in the 20-year period from 1994 through 2013. *See* Gary Kleck, Large-Capacity Magazines and the Casualty Counts in Mass Shootings: The Plausibility of Linkages, Justice Research and Policy, 17(1) 28-47 (2016) (a true and accurate copy is attached as Attachment E). I found 23 such shootings. In all 23, the shooters' use of a large capacity magazine was rendered essentially irrelevant because the shooters either: (a) had multiple guns, (b) had multiple magazines, or (c) reloaded their guns without interference from others. Therefore, the shooters did not need a large capacity magazine to fire large numbers of rounds and kill or injure as many victims as they did. Of the 23 incidents, shooters had multiple guns in 17 (74%) of them. Among the six incidents in which shooters possessed only a single gun, the shooter was known to also possess multiple magazines. Thus, all of these mass shooters would have been able to fire more than 10 rounds of ammunition even if they had not possessed a large capacity magazine. Additionally,

I have previously studied news media accounts of 15 widely-reported mass shootings that occurred in the U.S. between 1984 and 1993 and found that the shooters had more than one gun in 13 of the 15 incidents. *See* Gary Kleck, Targeting Guns (NY: Aldine de Gruyter, 1997, p. 144. In sum, the historical evidence tells us that Massachusetts' Magazine Ban will not impact the number of shots a mass shooter is able to fire and therefore will not affect the number of victims killed or injured in mass shootings.

10. Perhaps most importantly, historical evidence shows that the Challenged Laws (Mass G. L. c. 140 §§ 121, 31M) will have virtually no effect of any kind in Massachusetts. Homicides committed using a rifle of any kind (much less an "assault weapon" as that term is arbitrarily defined under Massachusetts law) are extremely rare in Massachusetts and nationally. FBI Uniform Crime Reporting data indicates that in 2005, one murder was committed with a rifle of any kind in Massachusetts. In 2006, this number was two (the same year, twice as many people were murdered with "hands and feet"). In 2007, the FBI again reported that only one murder was committed with any rifle; in 2008 only two persons; 2009 only two persons. In 2010, 2011, and 2012, no individuals were murdered with any rifle in Massachusetts. In 2013, two individuals were murdered with a rifle in Massachusetts, but in 2014 that number again decreased to zero. In 2015, one individual was murdered with a rifle. In sum, a total of eleven individuals were killed with a rifle of any kind from 2005 through 2015 in Massachusetts. Further, it

is not even clear that these rifles are banned by the Challenged Laws. And even if all of these killings were committed with the subset of rifle mischaracterized as assault rifles, it is clear that these weapons do not claim more than a tiny share of Massachusetts homicides. In sum, the Challenged Laws aim to fix a small (perhaps non-existent) problem by hindering the self-defense capabilities and endangering the lives of every law-abiding Massachusetts citizen.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Gary Kleck	12-11-17
Gary Kleck	Date

DECLARATION OF GARY ROBERTS, D.D.S.

I, Gary Roberts, under penalty of perjury, declare and state as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration, and am competent to testify to the matters stated below.

2. I am attaching a copy of my expert report in this matter as Attachment A, the contents of which are, to the best of my knowledge and belief, true and accurate. I hereby adopt and incorporate that report as if set forth fully herein.

3. I am qualified to provide expert testimony regarding wound ballistics and defensive uses of firearms in this matter. I am currently on staff in the Department of Surgery at Stanford University Medical Center, a level one trauma center, where I perform hospital dentistry and surgery, and am a licensed dentist in the state of California. At the hospital, among other duties, I treat various traumatic injuries, including gunshot wounds. I also own a private dental practice where I treat a variety of odontogenic and orofacial illnesses, as well as trauma related injuries, including reconstruction from gunshot wounds. While treating patients over the past 30 years, I have participated in the care of individuals who have suffered gunshot wounds from handguns, shotguns, rifles, and automatic weapons.

4. I was a U.S. Navy Reserve Officer from 1986–2008 (with active duty from 1988–1992). I graduated from the University of the Pacific dental school in 1988 and I completed my residency at U.S. Navy Hospital Oakland in 1989. In residency, I did rotations in anesthesia, emergency medicine, internal medicine, otolaryngology, as well as various dental specialties—concentrating on oral surgery, oral medicine, and diagnosis. I also received training in advanced trauma life support and combat casualty care. After I graduated from residency, I deployed overseas as a Battalion Dental Surgeon, performing dentistry and oral surgery; this included triaging and treatment of gunshot wounds.

5. During my military healthcare training, I became the U.S. Navy's Subject Matter Expert in wound ballistics and terminal ballistics. Terminal ballistics is the study of how a moving projectile behaves from the time it hits a target until it comes to rest. Wound ballistics is a subsection of terminal ballistics that focuses on the anatomic and physiological trauma caused by projectiles from the time they strike living tissue until they stop. I studied at the Army Wound Ballistics Research Laboratory at the Letterman Army Institute of Research while on active military duty. Thereafter I became one of the first members of the International Wound Ballistics Association. Over the course of my career, I have performed military, law enforcement, and privately funded wound ballistic testing and analysis, including being assigned to the U.S. Joint Service Wound Ballistic Integrated Product Team, serving as a consultant to the Joint FBIUSMC munitions testing program, as well as the DOD CTTSO-TSWG MURG program. Over the years, I have been a technical advisor to the Association of Firearms and Toolmark Examiners and to a variety of federal, state and municipal law enforcement agencies. I graduated from Police Academy and served as a Reserve Police Officer in the San Francisco Bay area. I am currently in a law enforcement training role where I provide consultations, lectures, and training materials on terminal ballistics and body armor to various law enforcement agencies around the country. My detailed CV is included in Attachment A. I am intimately familiar with the matters of my testimony, which is based upon external sources as well as my own experience. My

opinions were not developed for purposes of any expert testimony.

6. I have been participated as an expert witness in terminal and wound ballistics in the Western District of New York [*New York State Rifle and Pistol Ass'n v. Cuomo*, No. 13-CV-291S]; in the Northern District of Illinois [*Friedman v. City of Highland Park*, No. 1:13-cv-9073]; in the District of Maryland [*Kolbe v. O'Malley*, No. 1:13-cv-02841]; and in the Chancery Division of the Circuit Court of Cook County, Illinois [*Wilson v. Cook County*, No. 07 CH 4848].

7. Semiautomatic rifles mischaracterized and defined by Massachusetts as "assault weapons", particularly those based on the AR-15 platform, are well suited for use in defense of self and home. Further, a limit on a magazine's capacity may hinder defensive shooting effectiveness.

8. Based on my experience, training and research, semiautomatic rifles are among the best firearms for defensive shooting purposes for several reasons. First, semi-automatic rifles, like those based on the AR-15 platform, are the most ergonomic, safe, readily available, and effective firearm for civilian defensive shooting. Semiautomatic rifles like the AR15 offer superior accuracy, less recoil, greater effective range, faster reloading, reduced downrange hazard, better ergonomics, and a larger ammunition capacity than many other types of firearms, such as handguns and shotguns. In addition, they are generally easier to operate one-handed in case of injury compared to other

shoulder fired weapons. It is also important to note that more American's have been trained to safely use AR15 type rifles than other weapon, as there are over 25 million American veterans who have been taught how to properly use an AR15 type rifle through their military training, not to mention in excess of 1 million American LE officers who have qualified on the AR15 over the last several decades. In addition, there are numerous civilian target shooters and hunters who routinely use AR15's and know how to safely operate them.

9. The FBI determined that the desired penetration depth into human tissue for defensive ammunition is 12 to 18 inches. Under-penetration or over-penetration reduces the ammunition's effectiveness at stopping a dangerous attacker. Appropriately selected center-fire ammunition fired from a semiautomatic rifle penetrates human tissue between 12 and 18 inches. Therefore, it penetrates human tissue to the desired depth and can cause wounds that are more from semiautomatic rifles (.223 caliber Remington or 5.56 NATO, which are very similar) is more likely to incapacitate an attacker than ammunition fired from most handguns or birdshot from shotguns.

10. Properly selected ammunition fired from AR15 type semiautomatic rifles (.223 caliber Remington or the very similar 5.56 mm NATO) is more effective and reliable at stopping human attackers than typical handgun ammunition. Ammunition fired from semiautomatic rifles can reliably and rapidly stop hostile individuals who pose an immediate, life

threatening danger and prevent them from continuing their violent actions than with handguns.

11. Because .223/5.56mm ammunition fired from an accurate and ergonomic semiautomatic rifle like the AR15 has a high potential to hit the desired target and is less likely to over-penetrate the target, using semiautomatic rifles can prove safer than using other types of firearms. Accurate and effective ammunition can reduce the need for multiple shots, decreasing the chance of shots missing the intended hostile opponent and striking innocent bystanders. Also, as proven by numerous tests, including those by the FBI and BATFE, .223/5.56mm ammunition fired from a semiautomatic rifle is less likely to over-penetrate human tissue or intermediate barriers and then pose a hazard to innocent bystanders compared to ammunition fired from many other types of firearms, such as handguns and those commonly used for hunting.

12. I have seen and/or treated patients with gunshot wounds from rifles (including those banned under the Challenged Laws), handguns, and shotguns. Projectiles fired by common hunting weapons, frequently create more tissue damage that that caused by the Massachusetts banned Enumerated Firearms. Likewise, ammunition fired from many handguns has a greater potential of over-penetrating than .223/5.56 mm ammunition from a semiautomatic rifle like an AR15.

13. It is often times more time consuming and complex for healthcare providers to repair multiple

gunshot wounds. Use of an accurate semiautomatic rifle in a defensive encounter can result in the need to fire less shots. Handguns are less effective at stopping attackers and so more gunshots are often needed to end an encounter. Additionally, shotguns release multiple projectiles with each pull of the trigger, increasing the likelihood of multiple wounds. Therefore, the use of consistent, reliable, and effective defensive ammunition (for example, .223/5.56mm fired from a semiautomatic rifle) may reduce the number of gunshot wounds, thereby potentially limiting the amount of surgical intervention needed to control hemorrhage and repair injuries. Reducing the number of rounds expended in a defensive shooting encounter also reduces the risk that an innocent bystander is unintentionally hit by a stray bullet.

14. To conclude that semiautomatic rifles are well-suited for defensive shooting, one need look no further than the fact that the AR15 is the most commonly used and recommended rifles by law enforcement personnel, who may lawfully discharge their firearms for defensive purposes only. In fact, over one million law enforcement personnel have qualified on the AR-15. It follows that private citizens who wish to own a firearm for self- and home-defense should use a semiautomatic rifle—most likely the same firearm and ammunition chosen by police in their community. This is because the degree of force required to stop a violent felon does not change whether confronted by law enforcement officers or a private citizen. The violent felon's anatomy, physiology, and incapacitation

potential does not change depending on the intended victim's profession.

15. A limit on magazine capacity may hinder defensive shooting. Oftentimes, defensive shooting requires more than 10 rounds of ammunition, even for trained law enforcement officers. The most recently released New York Police Department (NYPD) "Annual Firearms Discharge Report" data from 2015 documents that in 35% of NYPD Intentional Discharge-Adversarial Conflict cases, officers needed to fire more than 5 shots to stop the threat. (A true and accurate copy of the Annual Firearms Discharge Report is attached hereto as Attachment B). In 17% of the incidents, officers needed more than 10 shots to end the violent encounter, including one case where 84 shots were required. It stands to reason that civilians who, unlike NYPD police officers, likely have no body armor, no radio, no partner, no cover units, and no duty belt with extra magazines, yet who are targets of opportunity being confronted by the same violent felons as the police, need at least as many rounds of ammunition in their magazines as trained police officers. Individuals with disabilities may have difficulty easily changing magazines, so having a magazine with standard capacity greater than 10 rounds may be crucial to their survival in a lethal force defensive encounter. Furthermore, I am unaware of any person who has had to use lethal force to defend their life in a gunfight who wishes they had less ammunition during the encounter.

16. Additionally, the most commonly-used magazines by civilians hold more than 10 rounds of ammunition. According to data from the BATFE, the majority of pistols (approximately 62%) currently manufactured each year in the U.S. are designed to use magazines with a standard capacity (the number of cartridges the firearm was designed to operate with) greater than 10 rounds. Numerous tests by law enforcement organizations have documented that the most reliable magazines are those the weapon was originally designed to use; both high capacity and reduced capacity magazines have frequently demonstrated more malfunctions in various types of firearms. The U.S. military has not adopted a handgun with a standard magazine capacity less than 10 rounds since 1911. Likewise, all U.S. military rifles that have been adopted since 1937 have a magazine capacity of 15 or more rounds. By capriciously limiting magazine capacity to 10 rounds or less, the government denies citizens the benefits of modern technology and forces them to use defensive tools from a bygone era.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Gary Roberts, D.D.S.		12/12/17
Gary Roberts, D.D.S.		Date

DECLARATION OF GUY ROSSI

I, Guy Rossi, under penalty of perjury, declare and state as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration, and am competent to testify to the matters stated below.

2. I am attaching a copy of my expert report in this matter as Attachment A, the contents of which are, to the best of my knowledge and belief, true and accurate. I hereby adopt and incorporate that report as if set forth fully herein.

3. I am qualified to provide expert testimony regarding self-defense in this matter. My specific areas of expertise include use of force and firearms and defensive tactics in defensive shooting situations. I have dedicated my life to law enforcement and training my fellow law enforcement officers. I worked for 21 years, starting in 1977, as a uniformed police officer. I began my career as a deputy sheriff, village, town, and city police officer in the Greater Rochester, New York area. During my time as a police officer, I responded to all manner of service calls, including criminal and drug investigations. In 1991, I was promoted to Sergeant for the Rochester Police Department. This promotion carried the responsibility of the direct supervision of the afternoon and midnight shifts in high-crime precincts. Specifically, my duties involved being the first responding supervisor to any call involving violence, public danger or civil disorder. Frequently due to the high

demand for police service, I was often placed in a role of backup officer as well as first responder. Additionally, I was responsible for supervising investigators and their caseloads.

4. I have been actively involved in departmental law enforcement training since 1979, much of this training has involved defensive tactics including defensive shooting. Also, from 1992 to my retirement from uniformed service in 1998, I was assigned to the Professional Development Section (training) as the Field Training and Evaluation Administrator for the Rochester Police Department, overseeing recruit training for the entire agency of 700 officers. I developed curriculum that was approved by the New York State Division of Criminal Justice Services that served as the basis of instruction for instructors in the areas of field training, officer safety, defensive tactics and firearms. I continue to instruct and consult at our academy and for the State of New York Division of Criminal Justice Services. I also instruct at national and international law enforcement conferences on use of force and law enforcement training.

5. My opinions are based on a continuing lifelong career that immersed me in every aspect of police training from recruit, instructor training and development, academy instructor, curriculum developer, program coordinator, policy analyst, use of force curriculum development, instructor certifier and accreditation manager. My opinions are also based on my experience as a New York State Department of Criminal Justice Services Master Instructor in teaching

NYSPL Article 35.00 (Defense of Justification) regarding Use of Force to police recruits, in-service officers and instructors for thirty-five years as well as the former Program Coordinator of Curriculum Development & Defensive Tactics for the Public Safety Training Facility of Monroe Community College. It is also based on my experience of having trained hundreds of recruits, law enforcement in-service officers, defensive tactics instructors, defensive tactics instructor-trainers, Monadnock Police Baton users, instructors and instructor-trainers locally and on a national as well as international scale.

6. I have participated as an expert witness regarding defense tactics in defensive shooting situations and provided deposition testimony in the Southern District of California [*Flanagan v. Becerra*, No. 16-6164] in 2017; in the District of Maryland [*Kolbe v. O'Malley*, No. 1:13-cv-02841] on January 6, 2014; in the District Court of Connecticut [*Skew v. Malloy*, No. 3:13-cv-739] in 2013; and in the Western District of New York [*New York State Rifle and Pistol Assn. v. Cuomo*, No., 1:13-cv-00291] on January 14, 2014.

7. Police do not have the practical ability to rescue all crime victims, so it is essential that all law-abiding citizens be able to protect themselves. Put simply, higher capacity magazines allow individuals to better protect themselves. It is of paramount importance that individuals have quick and ready access to ammunition in quantities sufficient to provide a meaningful opportunity to defend themselves and their loved ones. Large capacity magazines reduce

the time-consuming need to reload in situations requiring more than 10 rounds of ammunition to stop an attacker. Reloading is especially time-consuming if the victim is handicapped, disabled or injured. Massachusetts G.L. c. 140 § 121 ("Magazine Ban") arbitrarily limits law-abiding citizens' ability to defend themselves, defend others, and defend their homes effectively to situations that require 10 shots or less. This is an unconscionable restriction on their right to self-defense.

8. As an initial matter, defensive shooting situations requiring more than 10 shots are fairly common. The 2015 New York City Police Department's Annual Firearms Discharge Report ("AFDR") provides detailed information on all incidents in which NYPD officers discharged their weapons in 2015, (A true and accurate copy of the AFDR is attached as Attachment B). In that year, there were 33 incidents where a police officer intentionally discharged her firearm in an encounter of adversarial conflict. In 17% of these incidents, the NYPD officer(s) involved fired more than 10 rounds, If highly trained and experienced police officers required the use of at least 11 rounds in 17% of their close-range encounters to subdue an aggressive assailant, it stands to reason that an untrained civilian gun owner under duress (and certainly far less experienced and trained than a police officer) would need at least that many rounds at least as often to stop an unexpected, imminent assault by one or more armed assailants within her home. The Magazine Ban's effects are not merely philosophical but have life or death consequences for Massachusetts residents.

9. Reloading a semiautomatic firearm with a detachable magazine is a 12-step process that is time-consuming under ideal circumstances. Defensive shooting situations are intensely stressful, and so reloading is a significantly more time-consuming process. It is a known fact that under the "stress flood" of a life or death encounter the blood within one's body is re-routed to the larger muscles so as to allow a "flee or fight" response. This physiological reaction to extreme stress causes significant reloading difficulty during an attack due to loss of fine motor control in the fingers. Completing any of the 12 steps necessary to reload a magazine, such as trying to push a magazine release or align a magazine with the magazine, with fingers that are shaking and weakened due to blood loss is very difficult for even a seasoned veteran soldier or police officer who expects this phenomena. These crucial tasks are far more difficult for a civilian who has never been trained that such changes will occur, trained during realistic scenario-based training, or who is experiencing a life-threatening attack for the first time. Reloading a semiautomatic weapon takes at least several seconds without consideration of other factors such as distractions, noise, multiple assailants, lighting conditions, nervousness and fatigue. *See* Management of Aggressive Behavior Instructor Manual, MOAB Training International (a true and correct copy of which is attached as Attachment C).

10. Very few, if any, instances in which the use of a firearm is necessary for self-defense afford the time necessary to reload. In the well-known Tueller Drill for police training, it is emphasized that an attacker who

is 21 feet away can close the entire distance between himself and the victim in only 1.5 seconds. It is physically impossible to reload a firearm in under 1.5 seconds, especially when under duress. If the defensive shooting situation requires more than 10 rounds, the Magazine Ban has ended any chance the law-abiding victim had at stopping the violent attacker.

11. Beyond being time-consuming, reloading a weapon is physically and mentally consuming. Reloading a firearm requires two hands (one to hold the firearm and one to load the magazine). Therefore, requiring victims to reload their firearm limits their ability to escape, fend off the attacker, use a phone to call 911, or give physical aid or direction to others. Also, reloading a firearm requires focus and therefore distracts the victim from the assailant and her surroundings as well as from any other necessary decision making processes. This is important because brainwave research of Olympic shooters shows that the greater a shooter's distraction, the greater the possibility of a missed shot. *See* Bill Lewinski, Stress Reactions of Lethal Forces Encounters, THE POLICE MARKSMAN, May/June 2002, at 27 (a true and accurate copy of which is attached as Attachment D).; N. Konttinen, D.M. Landers, & H. Lyytinen, Aiming Routines and Their Electrocortical Concomitants Among Competitive Rifle Shooters, 10 SCANDANAVIAN J. MED. & SCI. IN SPORT 169 (2000) (a true and accurate copy of which is attached as Attachment E).

12. For obvious reasons, reloading is especially time-consuming and mentally and physically distracting

if the victim is handicapped, disabled or injured. Victims are often injured or otherwise rendered handicapped during an attack. For instance, in my extensive experience with force-on-force simulation training, it was a very common occurrence (30-40% occurrence rate) for police officers engaged in a gunfight to be struck in the hand by the attacker. It is not difficult to imagine any number of other injuries that may occur during an attack requiring defensive shooting. The Magazine Ban is particularly devastating for those who are already (or become) physically disadvantaged.

13. The bottom line is that the Magazine Ban hinders law-abiding citizens' ability to defend themselves, and it may cost lives. The legitimate and compelling need for a large capacity magazine for self-defense is underscored by the fact that police officers and retired law enforcement officers are exempt from the restrictions on magazine capacity and on loading more than ten rounds in a magazine. If a police officer, who generally may only discharge a firearm in self-defense, needs large capacity magazines, then of course the law-abiding citizens of Massachusetts do too.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Guy Rossi	12/11/17
Guy Rossi	Date

DECLARATION OF JAMES CURCURUTO

I, James Curcuruto, under penalty of perjury, declare and state as follows:

1. I am over the age of 18, have personal knowledge of the facts and events referred to in this declaration, and am competent to testify to the matters stated below.

2. I am attaching a copy of my expert report in this matter as Attachment A, the contents of which are, to the best of my knowledge and belief, true and accurate. I hereby adopt and incorporate that report as if set forth fully herein.

3. I am qualified to provide expert testimony regarding firearms industry data, in particular the commonality of modem sporting rifles and magazines capable of holding more than 10 rounds of ammunition, in this matter. I am currently working as the Director of Research and Market Development at National Shooting Sports Foundation. In this position I have been tasked with additional responsibilities related to participant recruitment and retention. A majority of my previous job responsibilities remain unchanged. From November 2009 through October 2017, I was the Director of Industry Research & Analysis for the National Shooting Sports Foundation Inc. ("NSSF"), which is the firearms industry trade association. In my current position, I am still responsible for most of the research activities at NSSF, which includes researching and compiling accurate, reliable market data regarding consumer preferences and market

trends in the firearms and ammunition industry. This information is provided to NSSF's members, consisting of approximately 10,000 manufacturers, distributors, firearm retailers, shooting ranges, sportsmen's organizations, and publishers. Many members rely on the data we provide to help them make informed, strategic business decisions. Further, under my direction, the NSSF has released dozens of informational reports and studies regarding this information. Data from these releases has been referenced many times in online and print newspaper and magazine articles, used in corporate reports and briefings, and mentioned in other media. Through my research and experiences, I have unique knowledge and expertise on the popularity and commonality of certain firearms, including those banned in Massachusetts under the Challenged Laws. I am familiar with the matters of my testimony, which is based upon external sources as well as my own experience. My opinions were not developed for purposes of any expert testimony.

4. I have participated as an expert witness regarding the firearms industry and provided deposition testimony in the Northern District of Illinois [*Friedman v. City of Highland Park*, No. 1:13-cv-9073] on May 27, 2014; in the District of Maryland [*Kolbe v. O'Malley*, No. 1:13-cv-028411 on January 24, 2014; and in the Chancery Division of the Circuit Court of Cook County, Illinois [*Wilson v. Cook County*, No. 07 CH 4848] on November 7, 2013.

5. Data clearly shows that modern sporting rifles (mischaracterized and defined by Massachusetts as

"assault weapons"), as well as magazines capable of holding more than 10 rounds of ammunition, are commonly possessed for lawful purposes.

6. Modern sporting rifles, particularly AR- and AK-platform rifles, are some of the most popular and commonly owned firearms in America. They are owned or used by tens of millions of persons in the U.S. each year for a variety of lawful purposes, including recreational and competitive target shooting, home defense, hunting, and collecting. Figures from the Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") Annual Firearms Manufacturers and Exports Reports ("AFMER") show that between 1990 and 2015, U.S. manufacturers produced approximately 9,309,000 AR-platform rifles for sale in the U.S. commercial marketplace. (A true and accurate copy of the AFMER report is attached as Attachment B, at p. 1). During these same years, figures from the U.S. International Trade Commission ("ITC") show that approximately 4,430,000 AR- and AK-platform rifles were imported into the U.S. for sale in the commercial marketplace. *See* Attachment B, at p. 1. Additionally, because AR- and AK-47 platform rifles have been sold to civilians in the U.S. since the late 1950s, it is reasonable to conclude that many more of these rifles were manufactured in or imported to the U.S. before 1990.

7. It is also clear that modern sporting rifles are growing in popularity. Of the approximately 13,739,000 AR- and AK-platform rifles manufactured in or imported to the U.S. between 1990 and 2015, more than 1,500,000 of them were manufactured in or

imported to the U.S. in 2015 alone. Attachment B, at p. 1. By way of comparison, in 2015, the number of modem sporting rifles manufactured in or imported to the U.S. was nearly double the number of the most commonly sold vehicle in the U.S. (the Ford F series pick-up trucks (including F-150, F-250, F-350, F-450 and F-550), of which a total of 780,354 were sold). *See* http://fordauthority.com/fmc/ford-motor-companysales-numbers/ford-sales-numbers/ford-f-series-sales-numbers/. It is indisputable that modem sporting rifles are commonly possessed.

8. As of 2013, more than 4,800,000 people, most of whom are married with some college education and a household income greater than $75,000, own at least one modern sporting rifle. *See* 2013 Modern Sporting Rifle Comprehensive Consumer Report published by NSSF (a true and accurate copy of which is attached as Attachment C), at p. 9. This same survey indicates that self-defense is a critical concern for many citizens who purchase a modern sporting rifle and is one of the primary reasons for their purchase. Attachment C, at p. 34. Further illustrating their commonality is the fact that modem sporting rifles are the most frequently-sold long gun in America—not shotguns or traditionally styled rifles. According to a 2017 survey of 324 firearm retailers across the U.S., in 2016, modem sporting rifles accounted for 17.9% of all firearm sales while shotguns and traditionally styled rifles accounted for only 11.5% and 11.3% of all firearm sales, respectively. *See* Firearms Retailer Survey Report 2017 Edition ("2017 Survey), published by NSSF (a true and

accurate copy of which is attached as Attachment D), at p. 12. In 2016, modern sporting rifles accounted for approximately 40% of all long gun sales. Attachment D, at p. 12. Again in 2016, approximately 93% of the 2017 Survey's respondents sell new modern sporting rifles. Attachment D, at p. 5.

9. The commonality of modern sporting rifles extends beyond ownership – they are even more commonly used by citizens for a variety of lawful purposes. For instance, according to the Sports Shooting Participation in the U.S. in 2016 report, published by the NSSF, approximately 14,000,000 people participated in target shooting with a modern sporting rifle in 2016, a 57% increase from 2009. (A true and accurate copy of the Sports Shooting Participation in the U.S. in 2016 report is attached as Attachment E, at p. 11).

10. It is also indisputable that magazines capable of holding more than 10 rounds of ammunition are commonly possessed. Millions of people across the country possess magazines capable of holding more than 10 rounds of ammunition. Between 1990 and 2015, Americans owned approximately 114,700,000 of these magazines, accounting for approximately 50% of all magazines owned during this time (approximately 230,000,000). *See* Data compiled and released by the NSSF in 2017, a true and accurate copy of which is attached as Attachment F. It is reasonable to assume that many more such magazines were purchased in the U.S. prior to 1990 and that even more people possess a magazine capable of holding more than 10 rounds of ammunition. The standard capacity magazines for

modern sporting rifles are capable of holding more than 10 rounds of ammunition, *see* Attachment C, at p. 28, and many modern semi-automatic handguns come equipped with standard capacity magazines holding more than 10 rounds.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ James Curcuruto		12/13/17
James Curcuruto		Date