No. 19-404

In the Supreme Court of the United States

DAVID SETH WORMAN, *et al.*,
Petitioners

v.

MAURA T. HEALEY, *et al.*,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL AFRICAN AMERICAN GUN ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Massachusetts prohibits the possession of firearms and ammunition magazines that are typically possessed by law-abiding, responsible citizens for lawful purposes, including self-defense. The question presented is whether this prohibition unconstitutionally infringes on the individual right to keep and bear arms under the Second Amendment?

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae National African American Gun Association, Inc. (NAAGA) is a nonprofit association with headquarters in Griffin, Georgia, and organized under Internal Revenue Code § 501(c)(4).[1] NAAGA was founded in 2015 to preserve and defend the Second Amendment rights of members of the African American community. NAAGA has seventy chapters with approximately 30,000 members in thirty States.

NAAGA's mission is to educate on the rich legacy of gun ownership by African Americans, offering training that supports safe gun use for self defense and sport, and to advocate for the inalienable right to self defense for African Americans. Its goal is to have every African American introduced to firearm use for home protection, competitive shooting, and outdoor recreation. NAAGA welcomes people of all religious, social, and racial perspectives, including African American members of law enforcement and active/retired military.

NAAGA will bring before the Court matter not brought to its attention by the parties. All parties have consented to the filing of this amicus curiae brief.

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[1]No counsel for a party authored this brief in whole or in part nor did such counsel or any party make a monetary contribution to fund this brief. All parties have received timely notification of our intent to file this amicus brief. Preparation and submission of this brief was funded by the NRA Civil Rights Defense Fund.

SUMMARY OF ARGUMENT

This Court should grant the petition for the writ of certiorari because the decision of the lower court, like those of other courts upholding similar bans, is inconsistent with the text, history, and tradition of the Second and Fourteenth Amendments. Massachusetts' ban on commonly-possessed firearms and magazines is an infringement on the right to keep and bear arms.

Firearms and magazines are encompassed in the textual reference to "arms" in the Second Amendment. The banned firearms are "typically possessed by law-abiding citizens for lawful purposes" per *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

The Founding arms guarantees were adopted at the dawn of the development of repeating firearms. The Second Amendment was understood to protect a robust right to have arms. The Militia Act of 1792 reflects that the right extends to militia-type arms.

Repeating firearms were included in the understanding of the right to bear arms in the early Republic. Prohibitions on the right by African Americans reflected their status as slaves or non-citizens.

Repeating firearms with extended magazines were in common use when the Fourteenth Amendment was adopted in part to protect the right to bear arms from state infringement. That included protection from confiscation under the black codes of military

muskets that were bought by black soldiers when they left the service.

Firearms with detachable magazines have been commonly used for lawful purposes for well over a century. There are no longstanding historical restrictions of the type here.

Minority communities have a special interest in recognition of full Second Amendment rights. At critical points in history, African Americans – particularly those involved in the civil rights movement – used repeating firearms to defend themselves from racist violence.

ARGUMENT

Introduction

Massachusetts bans what it derogatorily calls "assault weapons," defined as (a) "the weapons, of any caliber, known as . . . Colt AR-15" and other names, (b) "copies or duplicates" thereof, and (c) firearms generically-described, including a semiautomatic rifle that accepts a detachable magazine and at least two other features, such as a "telescoping stock" and "a pistol grip that protrudes conspicuously beneath the action of the weapon." M.G.L. 140 § 121, incorporating 18 U.S.C. § 921(a)(3) (expired 2004).

Also banned are "large capacity feeding devices," defined as a magazine "capable of accepting . . . more than ten rounds of ammunition or more than five shotgun shells." M.G.L. 140 § 121.

Sale or possession of the above is punishable, for a first offense, by a fine of $1,000 to $10,000, imprisonment for not less than one year nor more than ten years, or both. M.G.L. 140 § 131M.

The above provisions were enacted in 1998. In 2016, without any change in the statute, the Attorney General issued an Enforcement Notice expanding the meaning of "copies or duplicates" of the listed firearms to include firearms in which (a) the "internal functional components are substantially similar" to a listed firearm, or (b) the receiver "is the same as or interchangeable with" that of a listed firearm. *Worman v. Healey*, 293 F. Supp.3d 251, 258 (D. Mass. 2018).[2]

The district court held that AR-15 rifles are "like" M-16 rifles, are "most useful in military service," and thus have no Second Amendment protection. *Id.* at 264, quoting *Kolbe v. Hogan*, 849 F.3d 114, 136 (4th Cir. 2017) (*en banc*), *cert. denied*, 138 S. Ct. 469 (2017). The court listed features that civilian and military rifles may have in common (e.g., adjustable stocks and light weight), *id.* at 265, but disregarded the unique feature of military rifles – ability to fire in the full automatic mode.

The court of appeals claimed that "*Heller* provides only meager guidance," despite *Heller*'s "common use" test and that five million Americans own the same types of firearms. *Worman v. Healey*, 922 F.3d 26, 35 (1st Cir. 2019). It asserted that the

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[2]While rejecting a vagueness challenge to the Notice, *id.* at 267-71, the court did not explain how an ordinary person would know that a firearm is a copy or duplicate under these criteria.

Act bans firearms with "combat-style features," but failed to explain what made these features "combat-style." *Id.* at 37. The court assumed that "assault weapons" use extraordinarily-powerful cartridges, *id.* at 37-40, disregarding that the Act bans the described firearms "of any caliber." M.G.L. 140 § 121.

Worman, *Kolbe*, and other opinions upholding such bans defy this Court's decisions. They include no justification of why specific features are banned and balance away Second Amendment rights.[3] This Court should resolve the issue.

I. THE BANNED FIREARMS AND MAGAZINES ARE "ARMS" UNDER THE TEXT AND ORIGINAL UNDERSTANDING

A. Semiautomatic Firearms and Magazines are Encompassed in the Textual Reference to "Arms"

Semiautomatic firearms and standard capacity magazines holding more than ten cartridges are "arms" in the meaning of the Second Amendment, which provides: "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."

Commonly possessed arms that would be useful in a militia – which is necessary to the security of a

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[3]See S. Halbrook, "Reality Check: The 'Assault Weapon' Fantasy & Second Amendment Jurisprudence," 14 *Geo. J.L. & Pub. Pol'y* 47 (2016).

free state – are presumptively protected. The term "bear arms" suggests that the right includes such hand-held arms as a person could "bear," such as rifles, shotguns, and pistols, but not heavy ordnance which one could not carry.

Heller recalled 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," and that the Second Amendment protects arms that are "typically possessed by law-abiding citizens for lawful purposes . . . ." *Heller,* 554 U.S. at 624-25 (citation omitted). Moreover, the right "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.

A weapon is not unprotected because it is "a thoroughly modern invention." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (*per curiam*). Moreover, "the weapons most commonly used today for self-defense, namely, revolvers and semiautomatic pistols," did not exist at the end of the 18th century. *Id.* at 1031 (Alito, J., concurring).

B. The Founding Arms Guarantees were Adopted When Repeating Firearms were Being Developed

State constitutional guarantees of the right to keep and bear arms began to be adopted in 1776, continued to be adopted as new states were admitted to the United States, and continued to be revised and

strengthened through current times.[4] This process was ongoing with every step of development of firearms technology, from single shots through repeaters using tubular magazines, and then semiautomatics with detachable magazines. The constant rejuvenation of arms guarantees alongside of improvement in arms technology demonstrates that modern arms maintain constitutional protection.

The need to guarantee the right to bear arms stemmed in part from the confiscation of arms by the Crown. *Heller*, 554 U.S. at 594. When General Gage ordered Bostonians to surrender their arms in 1775, they turned in "1778 fire-arms, 634 pistols, 973 bayonets, and 38 blunderbusses." Richard Frothingham, *History of the Siege of Boston* 95 (1903). In reaction, the first state declarations of rights recognized the right of the people to bear arms for defense of themselves and the state or the common defense. Pa. Dec. of Rights, Art. XIII (1776); Vt. Const., Art. I, § 15 (1777); N.C. Dec. of Rights, Art. XVII (1776); Mass. Dec. of Rights, XVII (1780).

While most firearms at the Founding had to be reloaded after each shot, repeating firearms – guns that fire multiple rounds without reloading – had been

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[4]See "State Constitutional Right to Keep and Bear Arms Provisions," http://www2.law.ucla.edu/volokh/beararms/statecon.htm.

developed two centuries before that.[5] In Boston, 9 and 11 shot repeaters were available during 1722-1756.[6]

In 1777, Joseph Belton test fired an 8-shot musket before members of the Continental Congress, which authorized him to make 100 such firearms. Robert Held, *The Belton Systems, 1758 & 1784-86: America's First Repeating Firearms* 17 (1986). He later demonstrated a 16-shot repeater that was recommended for approval by the Congress. *Id.* at 37.

The Founding generation was thus aware of improvements in firearms technology that allowed repeated shots to be fired without reloading. Such firearms were well within the right to bear "arms" for defense of self and state declared in the first state constitutions.

C. The Second Amendment was Understood to Protect a Robust Right to Have "Arms"

"The right to keep and bear arms was considered . . . fundamental by those who drafted and ratified the Bill of Rights." *McDonald v. City of*

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[5]See "A Sixteenth Century 16-Shooter," https://www.nrablog.com/articles/2017/11/a-sixteenth-century-16-shooter/; "The Kalthoff Repeater," https://firearmshistory.blogspot.com/2014/02/the-kalthoff-repeater.html.

[6]C. Sawyer, *Firearms in American History* 217 (1910); "Flint-lock magazine gun," http://collections.vam.ac.uk/item/O77720/flint-lock-magazine-cookson-john/.

Chicago, 561 U.S. 742, 768 (2010), citing, *inter alia*, S. Halbrook, *The Founders' Second Amendment* 171-278 (2008). The Federalists initially argued that no bill of rights was needed inasmuch that "[t]he supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed . . . ." Noah Webster, *An Examination of the Leading Principles of the Federal Constitution* 43 (1787).

The Anti-Federalists demanded written guarantees, such as: "That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game . . . ." 2 *Documentary History of the Ratification of the Constitution* 623-24 (1976) (Pa. Dissent of Minority).

It was further proposed that the "peaceable citizens" would never be disarmed, *id.*, vol. 6, at 1453 (2000) (Samuel Adams, Mass. convention), unless involved in "actual rebellion." *Id.*, vol. 18, at 188 (1995) (N.H. convention). All sides thus presupposed the existence of a robust right to bear arms.

In *The Federalist* No. 46, James Madison heralded "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to the European kingdoms, where "the governments are afraid to trust the people with arms." *Id.*, vol. 15, at 492-93. Today, Massachusetts trusts no ordinary citizen so much as to possess a semiautomatic rifle with an adjustable shoulder stock and a pistol grip, or a magazine with eleven rounds.

The federal Militia Act of 1792 particularized the meaning of a "well regulated militia" and of the "arms" the people had a right to keep and bear. In debate, Rep. Roger Sherman "conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made." 14 *Documentary History of the First Federal Congress* 92-93 (1996).

The Act required enrollment of "every free able-bodied white[7] male citizen" aged 18 to 44 years old. § 1, 1 Stat. 271 (1792). Each was required to "provide himself" with a musket or firelock, bayonet, and a box of "not less than twenty-four cartridges," or alternatively with a rifle, twenty balls, and a quarter pound of powder. *Id.*

A "musket" and "firelock" were defined in part as "a species of fire-arms used in war . . . ." Noah Webster, *An American Dictionary of the English Language* (1828). The above ammunition quantities were minimums – no maximum was set. With bayonets, ammunition never gives out, so to speak, as no need exists to "reload."

In sum, the militia arms to which every citizen was entitled included firearms, multiple rounds of ammunition, and bayonets. That again speaks to the broad nature of the "arms" protected by the Second Amendment.

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[7]During Reconstruction, the term "white" was deleted. 14 Stat. 422, 423 (1867).

II. FIREARMS WITH MAGAZINES WERE CONSIDERED "ARMS" PROTECTED BY THE FOURTEENTH AMENDMENT

A. Improved Repeating Firearms were Included in the Right to Bear Arms in the Early Republic

St. George Tucker wrote that "wherever the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." 1 Tucker, *Blackstone's Commentaries*, App., 300 (1803). That would include prohibiting the right, as here, under the color or pretext of "intermediate scrutiny."

The same year that Tucker wrote that, Meriwether Lewis acquired a rapid-firing air rifle with a magazine capacity of twenty-two balls. Invented in 1778, it was used by the Austrian military. Its use in the Lewis and Clark expedition was recorded in their diaries.[8]

Antebellum judicial decisions reflected the broad scope of protected arms. *Nunn v. State*, 1 Ga. 243, 251 (1846), explained:

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be

[8] "The Girandoni Air Rifle," *Defense Media Network*, May 14, 2013, https://www.defensemedianetwork.com/stories/the-girandoni-air-rifle/.

> *infringed*, curtailed, or broken in upon, in the smallest degree . . . .

The above "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause . . . ." *Heller*, 554 U.S. at 612.

B. Prohibitions on the Keeping and Bearing of Arms by African Americans Reflected Their Status as Slaves or Non-Citizens

From colonial times, slaves could not "keep or carry a gun," one of the many legal disabilities they suffered. St. George Tucker, *A Dissertation on Slavery* 65 (1796). Moreover, free blacks were prohibited from possessing arms, especially defensive or militia-type arms, without a license. Such laws reflected that African Americans were not recognized to be among "the people" with the rights of citizens.

Virginia law provided that "[n]o negro or mulatto slave whatsoever shall keep or carry any gun . . . ." Va. 1819, c. 111, § 7. Further, "[n]o free negro or mulatto, shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead," without a license. *Id.* § 8.

Such limits "upon their right to bear arms" were among the "numerous restrictions imposed on this class of people [free blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States." *Aldridge v. Commonwealth*, 2 Va. 447, 449 (Gen. Ct. 1824).

In North Carolina, it was unlawful "if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife," without a license." *State v. Newsom*, 27 N.C. 250, 207 (1844) (Act of 1840, ch. 30). This was upheld because "free people of color cannot be considered as citizens . . . ." *Id.* at 254.

Similar rulings were common. "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms . . . ." *Cooper v. Savannah*, 4 Ga. 72 (1848). The police power justified "the prohibition of free negroes to own or have in possession fire arms or warlike instruments." *State v. Allmond*, 7 Del. 612, 641 (Gen. Sess. 1856).

Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), notoriously argued against recognition of African Americans as citizens because it "would give to persons of the negro race . . . the full liberty of speech . . ., and to keep and carry arms wherever they went." *Id.* at 417.

In sum, having no right to bear arms was an incident of slavery and of refusal to recognize African Americans as citizens.

C. The Fourteenth Amendment was Understood to Guarantee the Right to Bear Arms, Which Included Repeating Firearms with Extended Magazines

The Fourteenth Amendment was understood to protect the right to keep and bear arms, deprivation of

which African Americans were subjected even after the abolition of slavery in the form of the black codes. Among the commonly-possessed arms in this epoch were repeating rifles with magazines holding more than ten cartridges.

The invention of fixed cartridges paved the way for mass production of repeating, lever-action firearms with magazines of various capacities. Designed in 1856, the Volcanic rifle had a magazine, depending on barrel length, holding 20, 25, or 30 cartridges. Harold F. Williamson, *Winchester: The Gun that Won the West* 9-13 (1952).

This developed into the Henry Repeating Rifle in 1860, which evolved into the Winchester Model 1866. The rifle version held 17 rounds and the carbine held 12. *Id.* at 22, 49.

The Spencer carbine could fire a magazine of seven cartridges in 30 seconds, and it could be reloaded quickly with extra magazine tubes. While over 94,000 Spencers were bought by the U.S. military, 120,000 were bought by civilians.[9]

Simultaneous with such developments in firearms technology was the extension of the right to keep and bear arms to African Americans. "In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." *Heller*, 554 U.S. at 614, citing S. Halbrook,

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[9]"Spencer Carbine," https://amhistory.si.edu/militaryhistory/collection/object.asp?ID=117.

Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876 (1998).

But the slave codes were reenacted as the black codes. South Carolina provided that no person of color would, without permission, "be allowed to keep a fire arm," except "the owner of a farm, may keep a shot gun or rifle, such as is ordinarily used in hunting, but not a pistol, musket, or other fire arm or weapon appropriate for purposes of war." S.C. Stat., No. 4730, § XIII, 250 (1865). An African American convention resolved that the enactment "to deprive us of arms be forbidden, as a plain violation of the Constitution . . . ." 2 *Proceedings of the Black State Conventions, 1840-1865*, 302 (1980).

In debate on the Freedmen's Bureau bill, Rep. Josiah Grinnell noted that "a white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war."[10] Cong. Globe, 39th Cong., 1st Sess. 651 (1866). Rep. Samuel McKee added that 27,000 black soldiers who were "allowed to retain their arms" returned to Kentucky, and "[a]s freedmen they must have the civil rights of freemen." *Id.* at 654.

Rep. Thomas Eliot quoted a report from the Freedmen's Bureau: "The civil law prohibits the

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[10]Discharged Union soldiers were allowed to buy their arms. Prices were $6 for a musket, $10 for a Spencer carbine, and $8 for other carbines and revolvers. General Order 101 (May 30, 1865), U.S. Congressional Serial 1497, at 167-72 (cited in *Civil War News* 15 (May 2016)).

colored man from bearing arms; returned soldiers are, by the civil officers, dispossessed of their arms and fined for violation of the law." *Id.* at 657. As the Commissioner of the Freedmen's Bureau put it, "the right of the people to keep and bear arms as provided in the Constitution is *infringed* . . . ." Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866).

Muskets used in military service were thus considered "arms" protected by the Second Amendment. "A rifle [musket] could fire a bullet with man-killing accuracy over 800 yards . . . ." William B. Edwards, *Civil War Guns* 13 (1962).[11] But that military utility did not preclude constitutional protection. Muskets also had civilian uses. A Freedmen's Bureau official testified that blacks "are proud of owning a musket or fowling-piece. They use them often for the destruction of vermin and game." Rpt. of Jt. Com. on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 246 (1866).

The Freedmen's Bureau Act declared that the rights to "personal liberty" and "personal security," "including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color or previous condition of slavery." § 14, 14 Stat. 173, 176-77 (1866). And the "arms" of that epoch included repeating rifles with magazines holding as many as thirty rounds.

Introducing the Fourteenth Amendment, Senator Jacob Howard referred to "the personal rights

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[11]Standard bullets were .58 caliber weighing 510 grains. Id. at 23-24.

guaranteed and secured by the first eight amendments," including "the right to keep and bear arms . . . ." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). He averred: "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766.

In debate on the Amendment, Senator Samuel Pomeroy described "the safeguards of liberty" as including "the right to bear arms for the defense of himself and family," which would allow a freedman to protect his cabin with "a well-loaded musket." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866). Again, the military utility of muskets did not preclude their use in self-defense.

Congress later sought to enforce the Fourteenth Amendment through the Civil Rights Act, 17 Stat. 13 (1871), today's 42 U.S.C. § 1983. Rep. George McKee argued that the bill was necessary to prevent recurrence of laws such Mississippi's 1865 ban on unlicensed possession of a firearm by a freedman. He recalled that "a soldier honorably mustered out of the United States Army was entitled to keep his musket or rifle by having the sum of eight dollars stopped from his pay" and that "[m]ost of the colored soldiers availed themselves of this privilege," but that "I have seen those muskets taken from them and confiscated under this Democratic law." Cong. Globe, 42nd Cong., 1st Sess. 426 (1871).

The same year the Civil Rights Act passed, *Andrews v. State*, 50 Tenn. 165, 179 (1871) (endorsed

by *Heller*, 554 U.S. at 629), explained that "the usual arms of the citizen of the country" were "the rifle of all descriptions, the shot gun, the musket, and repeater . . .; and that under the Constitution the right to keep such arms, can not be infringed or forbidden by the Legislature."[12] That included repeating rifles with magazines holding over ten rounds.

III. SEMIAUTOMATIC FIREARMS AND DETACHABLE MAGAZINES HAVE MET THE "COMMON USE" TEST FOR WELL OVER A CENTURY

Rifles and pistols with detachable magazines came into wide use toward the end of the nineteenth century. Winchester began making semiautomatic rifles with detachable magazines beginning with the Model 1907. Williamson, *Winchester* at 434.

"The first commercially available semi-automatic rifles, the Winchester Models 1903 and 1905 and the Remington Model 8, entered the market between 1903 and 1906." *Heller v. District of Columbia*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (citations omitted). "Many of the early semi-automatic rifles were available with pistol grips. . . . These semi-automatic rifles were

[12]As otherwise stated: "When we see a man with a musket to shoulder, or carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense." *State v. Bias*, 37 La. Ann. 259, 260 (1885).

designed and marketed primarily for use as hunting rifles . . . ." *Id.*

Over a century ago, to promote the national defense, Congress provided for the sale of "magazine rifles . . . for the use of rifle clubs . . . ." P.L. 58-149, 33 Stat. 986, 987 (1905). Sales continues today under the Civilian Marksmanship Program (CMP) in order "to instruct citizens of the United States in marksmanship," "to promote practice and safety in the use of firearms," and "to conduct competitions in the use of firearms . . . ." 36 U.S.C. § 40722. The CMP sells surplus M1 Garand rifles to civilians. 36 U.S.C. § 40728(a); 32 C.F.R. § 621.2. The semiautomatic M1 Garand was America's service rifle in World War II.

The CMP promotes and sponsors competitions using, *inter alia*, the M1 Garand, the AR15-type commercial rifle with a 20 or 30 round magazine, and the M1A-type rifle with a 10 or 20 round magazine. CMP, *Highpower Rifle Competition Rules* 33-38 (2019).[13] As this reflects, rifles and magazines of the types banned by Massachusetts are not only typically possessed for lawful purposes, their use is promoted by the United States to encourage civilian marksmanship.

Semiautomatic rifles with magazines holding 10, 15, 20, and 30 cartridges have become common for use in target shooting, competitions, hunting, self-protection, protection of livestock, law enforcement, military use, and other lawful purposes. Semiautomatic pistols with magazines holding

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[13]https://thecmp.org/wp-content/uploads/HighpowerRifleRules.pdf?vers=072319.

between eight and twenty cartridges also came into wide use for civilian and military purposes. See D. Kopel, "The History of Firearm Magazines & Magazine Prohibitions," 78 *Albany L. Rev.* 849 (2015).

Protected arms have been held to include "the rifle, the musket, the shotgun, and the pistol," i.e., "all 'arms' as were in common use, and borne by the people as such when this provision was adopted." *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921).

Similarly, protected arms have been said to be those that "are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles." *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972).

Heller followed the same traditional test in recognizing "arms 'in common use at the time' for lawful purposes like self-defense" as constitutionally protected. *Heller*, 554 U.S. at 624.

The Act here, which bans commonly-possessed arms, has no longstanding historical tradition. During the Depression, three outlier states restricted or required a license for semiautomatics that would fire

more than 12,[14] 16,[15] or 18 shots,[16] and all of these laws were repealed. California passed the first ban on "assault weapons" in 1989.[17] In 1990, New Jersey became the first state to ban detachable magazines holding more than 15 rounds.[18] Those bans of recent vintage remain outliers that do not exist in most states.

IV. MINORITY COMMUNITIES HAVE A SPECIAL INTEREST IN RECOGNITION OF FULL SECOND AMENDMENT RIGHTS

Minority communities have at different times in history been subjected to lynchings, hate crimes, and gang violence. African Americans, including civil rights icons, have a long tradition of use of firearms to protect themselves and their communities. See Nicholas Johnson, *Negroes and the Gun: The Black Tradition of Arms* (2014); Charles E. Cobb, Jr., *This*

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[14]1927 R.I. Acts & Resolves 256, 256–57; repealed, Ch. 278, sec. 1, § 11-47-2, 1975 R.I Pub. Laws 738, 738–39, 742.

[15]1927 Mich. Pub. Acts 888-89; repealed, Act No. 175, sec. 1, § 224, 1959 Mich. Pub. Acts 249, 250.

[16]1933 Ohio Laws 189, 189; repealed, H.B. 234, § 1, 2014 Ohio Laws File 165.

[17]Ca. Stats. 1989, ch. 19, § 3, at 64.

[18]N.J. L. 1990, c. 32, § 10 (1990), enacting N.J.S. §§ 2C:39-3(j) (banning possession), 2C:39-9(h) (banning sale).

Nonviolent Stuff'll Get You Killed: How Guns Made the Civil Rights Movement Possible (2014).

When slavery was coming to an end, Frederick Douglass famously said: "The best work I can do, therefore, for the freed-people, is to promote the passing of just and equal laws towards them. They must have the cartridge box, the jury box, and the ballot box, to protect them." "Frederick Douglass on the American Crisis," *Newcastle Weekly Courant*, May 26, 1865, at 6.

The Fourteenth Amendment did not prevent facially-neutral restrictions from being enforced only against African Americans. Florida made it a crime for a person to carry or have in one's manual possession "a pistol, Winchester rifle or other repeating rifle" without a license, which required a $100 bond. 1893 Fla. Laws 71-72. *Watson v. Stone*, 148 Fla. 516, 524, 4 So. 2d 700 (1941) (Buford, J., concurring), explained that "the Act was passed for the purpose of disarming the negro laborers," and "was never intended to be applied to the white population . . . ." *Id.* at 524. Further, the law "has been generally conceded to be in contravention of the Constitution . . . ." *Id.*

Ida B. Wells wrote that a "Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give." Ida B. Wells, *Southern Horrors: Lynch Law in All its Phases* 16 (1892). Her celebration of the Winchester repeating rifle was not empty rhetoric. She was referencing two recent episodes (in Jacksonville Florida and Paducah Kentucky), where

well-armed blacks had thwarted lynch mobs. Margaret Vandiver, *Lethal Punishment: Lynchings & Legal Executions in the South* 179 (2006); George C. Wright, *Racial Violence in Kentucky 1865-1940: Lynchings, Mob Rule & "Legal Lynchings"* 169-170 (1990).

Ida Wells drew similar lessons from blacks using repeating arms technology in self-defense in Oklahoma. Wells would travel there in search of a more hospitable environment where she might recommend that blacks should migrate after mobs in Memphis had lynched her best friends and sacked her newspaper. Seven months before she arrived, black men wielding Winchester rifles rescued Edwin McCabe, a black man who founded the town of Langston and had the grand vision of making Oklahoma a black state where he would serve as governor. D. Littlefield & L. Underhill, "Black Dreams & Free Homes: The Oklahoma Territory,1891-1894," 34 *Phylon*, 342, 348-349 (1973).

Ida Wells' exhortation was heeded by countless men and women who faced petty tyranny and mobbing during the first century of black citizenship in America. Examples include the July 1919 mob attack by white veterans (spurred by a *Washington Post* editorial) on black neighborhoods in Washington, D.C. Well-armed blacks stanched the mob. James Weldon Johnson (the first black head of the NAACP) declared that "the Negroes [of Northwest Washington] saved themselves and saved Washington by their determination not to run, but to fight in defense if themselves and their homes. If the white mob had

gone unchecked – Washington would have been another East St. Louis." Kevin Boyle, *Arc of Justice: A Saga of Race, Civil Rights, & Murder in the Jazz Age* 96 (2004).

As noted above, the federal CMP has long sold surplus military rifles, including M1 Garands, to civilians to promote marksmanship. Members of the black community in Monroe, North Carolina, formed an NRA gun club and used such rifles to defend against Klan attacks in 1957. Robert F. Williams, *Negroes with Guns* 57, 97 (1962).

Rosa Parks recalled that, in the wake of Klan violence, "my grandfather kept his gun – a doubled barreled shotgun – close by at all times," adding that when she and her husband organized meetings at their home, "This was the first time I'd seen so few men with so many guns." Rosa Parks & Jim Haskins, *Rosa Parks, My Story* 30-31, 67 (1992).

During the civil rights movement of the 1960s, state of the art repeating arms technology helped black activists survive racist terrorists and state-sponsored violence. Mississippi Delta activist Hartman Turnbow stanched a firebomb attack on his home by deploying his 16-shot semiautomatic rifle. The next morning the license plate of the local sheriff was found in Turnbow's driveway. Shadrach Davis, "Youth of the Rural Organizing & Cultural Center," in *Minds Stayed on Freedom: The Civil Rights Struggle in the Rural South* 166-167 (1991); Johnson, *Negroes & the Gun* 244.

One county over from Turnbow, activist Leola Blackman repelled Klansmen who set a cross afire in

her yard, using her own 16-shot semiautomatic rifle. Leola Blackmon, in "Youth of the Rural Organizing Cultural Center," 166-167,174-175.

In Bogalusa, Louisiana, in 1965, Robert Hicks, one of the early leaders of the Deacons for Defense, deployed the modern version of the Winchester repeating rifle that Ida Wells had extolled nearly a century earlier, to repel racist terrorists who attacked his home. "Bogalusa Riflemen Fight off KKK Attack," *Jet* (April 22, 1965); Lance Hill, *The Deacons for Defense* 118-119 (2005).

The Deacons for Defense would protect activists throughout the South, oftentimes armed with .30 caliber semiautomatic M1 Garand battle rifles. In 1966, as Martin Luther King and others gathered to support a wounded James Meredith and continue his Mississippi March against fear, Deacons armed with pistols and semiautomatic rifles patrolled the route and provided security for the marchers. Johnson, *Negroes & the Gun*, 265-268.

Condoleezza Rice described how her father joined others to arm themselves for protection following the 1963 Birmingham church bombing that killed four girls. She noted: "Because of this experience, I'm a fierce defender of the 2nd Amendment and the right to bear arms. . . . What better example of responsible gun ownership is there than what the men of my neighborhood did in response to the KKK . . . ." C. Rice, *Extraordinary, Ordinary People* 92-93 (2010).

In sum, the constitutional right to arms is no arcane vestige of the eighteenth century. The struggle

of black people for the basic rights of citizenship in the United States shows that the right to arms and the deployment of multishot firearms technology is a vital private resource for political minorities facing terrorism, mobs, state failure, and majoritarian tyranny.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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