No. 19-404

In the Supreme Court of the United States

DAVID SETH WORMAN, ET AL.,
Petitioners,

v.

MAURA T. HEALEY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Commonwealth's statute that bars civilian possession of assault weapons and large-capacity magazines comports with the Second Amendment to the United States Constitution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Court Rules

Miscellaneous

STATEMENT

1. The Commonwealth of Massachusetts prohibits civilians from possessing assault weapons and large-capacity magazines, weapons with distinct military origins that are used disproportionately in mass public shootings and killings of law enforcement officers. *See* Mass. Gen. Laws ch. 140, §§ 121, 131M. Enacted in 1998, the Massachusetts Assault Weapons Ban was modeled on the 1994 federal assault weapons ban, which barred the transfer and possession of semiautomatic assault weapons and large-capacity magazines nationwide. *See* Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, §§ 110102(a), 110103(a), 108 Stat. 1796, 1996-2010 (1994). Congress enacted the federal law after learning that assault weapons have enhanced "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 (1994). "Public concern about semiautomatic assault weapons has grown," the House Report explained, "because of shootings in which large numbers of innocent people have been killed and wounded, and in which law enforcement officers have been murdered." *Id.* at 14.

Under the federal law, the prohibited weapons included only a small subset of semiautomatic weapons. The law defined "semiautomatic assault weapon" to include 19 enumerated firearms or firearm models, "or copies or duplicates of th[os]e firearms in any caliber." *See* Pub. L. No. 103-322, § 110102(b), 108 Stat. 1997-98. Among the enumerated weapons were the Colt AR-15 rifle and all models of Avtomat

Kalashnikovs, including the AK-47 rifle. *Id.*[1] The law also defined "semiautomatic assault weapon" to include any semiautomatic firearm that had the ability to accept a detachable magazine (except in the case of shotguns), and that had two or more combat-style features. *Id.* § 110102(b), 108 Stat. 1998. Examples of the combat-style features included barrel shrouds, folding or telescoping stocks, flash suppressors, grenade launchers, bayonet mounts, and protruding pistol grips. *Id.*

Separately, the federal law banned "large capacity ammunition feeding devices," defined as feeding devices that have "a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition." *Id.* §§ 110103(a)-(b), 108 Stat. 1998-99. As the House Report described, these large-capacity magazines "make it possible to fire a large number of rounds without re-loading, then to reload quickly when those rounds are spent," so that "a single person with a single assault weapon can easily fire literally hundreds of rounds within minutes." H.R. Rep. No. 103-489, at 19.

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[1] The full list of enumerated weapons included: "(i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (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) INTRATEC TEC-9, TEC-DC9 and TEC-22; and (ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12." Pub. L. No. 103-322, § 110102(b), 108 Stat. 1997-98. The Bureau of Alcohol, Tobacco, and Firearms profiled these weapons when the federal legislation was enacted. *See* U.S. Dep't of the Treasury, *Assault Weapons Profile* 1-17 (Apr. 1994) (CA1 App. Vol. VII at 2842-51).

By its terms, the federal law did not ban all semiautomatic weapons, nor did it ban all large-capacity magazines. Its grandfathering provisions excluded any assault weapon or large-capacity magazine lawfully possessed before September 13, 1994, the enactment date of the statute. Pub. L. No. 103-322, §§ 110102(a), 110103(a), 108 Stat. 1997, 1999. It also exempted 661 other rifles and shotguns listed in Appendix A to the statute, and "replicas or duplicates of th[os]e firearms." *Id.* §§ 110102(b), 110106, 108 Stat. 1997, 2000-10. The exempted rifles and shotguns, many of them semiautomatic, were commonly used in hunting, target practice, and other sporting activities.[2] The law made clear that "[t]he fact that a firearm is not listed in Appendix A shall not be construed to mean that" it is banned. *Id.* § 110102(b), 108 Stat. 1997. And it also exempted other types of semiautomatic weapons, including "any semiautomatic rifle that cannot accept a detachable magazine that holds more than 5 rounds of ammunition" and "any semiautomatic shotgun that cannot hold more than 5 rounds of ammunition in a fixed or detachable magazine." *Id.*

By operation of its sunset provision, the federal law was in effect for ten years. *Id.* § 110105, 108 Stat. 2000. It was not renewed when it expired in 2004.

2. Four years after the federal ban went into effect, the Massachusetts Legislature enacted a state law that forbade the sale and possession of assault

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[2] *See* H.R. Rep. No. 103-489, at 20 (the exempted long guns were "most commonly used in hunting and recreational sports"); U.S. Dep't of the Treasury, *Assault Weapons Profile* 20 (Apr. 1994) (CA1 App. Vol. VII at 2853) (Appendix A exempted "conventional sporting firearms" from the ban).

weapons and large-capacity magazines in the Commonwealth. *See* 1998 Mass. Acts, ch. 180, §§ 8, 47, codified at Mass. Gen. Laws ch. 140, §§ 121, 131M. The Legislature adopted virtually the same definition of "assault weapon" that Congress had employed. Thus, the law provided that the term "assault weapon" under state law "shall have the same meaning as a semiautomatic assault weapon as defined in the federal" law, and therefore "shall include, but not be limited to," each of the 19 enumerated weapons, and "copies or duplicates of th[os]e weapons, of any caliber." Mass. Gen. Laws ch. 140, § 121. By referencing the federal law, the state law separately banned semiautomatic weapons with two or more of the combat-style features. *See id.* The definition of "large capacity feeding device" also tracked the federal ban. *See id.*

Like the federal law, the Massachusetts Assault Weapons Ban applied only to certain semiautomatic weapons that presented a special risk to the public and law enforcement officers. The Legislature, like Congress, exempted the 661 rifles and shotguns in Appendix A, or "replicas or duplicates of such weapons," commonly used in hunting and other sporting activities. Mass. Gen. Laws ch. 140, § 121. It also exempted "any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition," "any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine," and any weapon "rendered permanently unable to be designated a semiautomatic assault weapon." *Id.* And, like the federal law, the Massachusetts law did not apply to assault weapons and large-capacity

magazines lawfully owned before September 13, 1994. *Id.* § 131M.

In 2004, the Legislature made the Massachusetts Assault Weapons Ban permanent. *See* 2004 Mass. Acts, ch. 150, § 1. In signing the bill into law, Governor Mitt Romney stressed that assault weapons and large-capacity magazines "are not made for recreation or self-defense. They are instruments of destruction with the sole purpose of hunting down and killing people." CA1 App. Vol. III at 1408. Lieutenant Governor Kerry Healey hailed the bill as a measure "to stop the flood of dangerous weapons into our cities and towns and to make Massachusetts safer for law-abiding citizens." *Id.* Governor Romney added that while the law indeed made the state safer, it also preserved the rights of the Commonwealth's "great sportsmen." CA1 App. Vol. IV at 1433. He thus highlighted the Legislature's effort to balance its public safety objectives with its commitment to safeguarding residents' access to firearms used in self-defense, hunting, and other lawful activities.

3. Petitioners—four individual gun owners, two gun dealers, and a firearms advocacy organization—filed suit to challenge the Massachusetts Assault Weapons Ban in January 2017. Petitioners claimed, among other things,[3] that the law violates the Second Amendment.

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[3] The complaint also asserted claims (1) challenging an enforcement notice interpreting the Massachusetts Assault Weapons Ban, and (2) challenging the statutory phrase "copies or duplicates" as unconstitutionally vague. *See* Pet. App. 42-43. Neither of those claims is at issue in this petition. *See* Pet. App.

The District Court granted summary judgment to the respondents. Pet. App. 30-73. The court held that assault weapons and large-capacity magazines are not "within the scope of the personal right to 'bear Arms' under the Second Amendment." *Id.* at 53. Quoting this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008), the District Court 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.'" Pet App. 33. After examining the undisputed facts concerning the history and functionality of the weapons covered by the Assault Weapons Ban, the court concluded the weapons are, indeed, "like" those weapons "most useful in military service." *Id.* at 55-59. It therefore ruled that petitioners' Second Amendment claim failed as a matter of law because assault weapons and large-capacity magazines are not protected by the Second Amendment. *Id.* at 55-61.

4. The First Circuit unanimously affirmed, but on a different basis. Pet. App. 1-29. In analyzing Second Amendment claims, the court explained, it first must ask "whether the challenged law burdens conduct that is protected by the Second Amendment." *Id.* at 12 (citing *Gould v. Morgan*, 907 F.3d 659, 668-69 (1st Cir. 2018), *pet. for cert. pending*, No. 18-1272). If the law does burden protected conduct, the court reviews the law under an appropriate level of heightened constitutional scrutiny. Pet. App. 12.

The first inquiry turned on whether assault weapons and large-capacity magazines are "the type

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8 (noting that, on appeal, petitioners challenged only the District Court's rejection of their Second Amendment claim).

of arms 'understood to be within the scope of the [Second Amendment] right at the time of ratification.'" Pet. App. 13 (quoting *Gould*, 907 F.3d at 669). To address that question, the First Circuit looked to *Heller*. Pet. App. 13-15. As explained by *Heller* and reaffirmed in *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027-28 (2016) (*per curiam*), "'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.'" Pet. App. 14-15 (quoting *Heller*, 554 U.S. at 582). But *Heller* also made clear that "the Second Amendment 'extends only to certain types of weapons.'" Pet. App. 14 (quoting *Heller*, 554 U.S. at 623). *Heller* further elaborated 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.'" Pet. App. 14 (quoting *Heller*, 554 U.S. at 627). And, in explaining why modern "'developments have limited the degree of fit between the prefatory clause [of the Second Amendment] and the protected right,'" *Heller* took as given that "'weapons that are most useful in military service—M-16 rifles and the like—may be banned.'" Pet. App. 15 (quoting *Heller*, 554 U.S. at 627).

From these passages in *Heller*, the First Circuit reasoned that weapons "in common use for lawful purposes like self-defense" are protected by the Second Amendment. Pet. App. 16. But the court explained that the record contained scant evidence "as to actual use of any of the proscribed weapons or [large-capacity magazines] for self-defense." *Id.* at 17. Rather than rule definitively on whether assault weapons and large-capacity magazines are in common use for self-defense, however, the court assumed, for

purposes of its decision, that the Assault Weapons Ban does impose a burden on constitutionally protected conduct. *Id.* at 17-18.

Having made that assumption, the First Circuit determined the proper standard of constitutional scrutiny for reviewing the Assault Weapons Ban. Pet. App. 18-23. That question turned on how heavily the law burdens the core of the Second Amendment—*i.e.*, the right of law-abiding, responsible individuals to defend themselves in their homes. *Id.* at 18-19. A law banning in-home possession of handguns, the quintessential self-defense weapon, would heavily burden the core Second Amendment right, the First Circuit explained. *Id.* at 19 (citing *Heller* 554 U.S. at 628-29, 632). But the Assault Weapons Ban, in contrast, does not impose a heavy burden on that core Second Amendment right. Pet. App. 20-21. The evidence demonstrated that assault weapons and large-capacity magazines are not commonly used for self-defense in the home; indeed, "when asked directly, not one of the [petitioners] 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." *Id.* at 20. The First Circuit noted that assault weapons do not share the same features that make handguns especially suitable for self-defense, but do pose clear safety risks to people in adjacent apartments and nearby streets because of their enhanced firepower. *Id.* at 20-21. And the court emphasized that, while the Assault Weapons Ban proscribes a specific group of semiautomatic weapons and magazines, many other semiautomatic weapons and magazines remain available to the petitioners. *Id.* at 19-20.

Having determined that the Assault Weapons Ban does not substantially burden petitioners' ability to defend themselves in their homes, the First Circuit reviewed the law under intermediate, rather than strict, constitutional scrutiny. Pet. App. 21-23. Applying that standard, it ruled that the law is substantially related to Massachusetts' important interests in public safety and crime prevention. *Id.* at 23-24. Indeed, the record contained "ample evidence of the unique dangers posed" by assault weapons and large-capacity magazines. *Id.* at 25. The court explained that, owing to their design, assault weapons and large-capacity magazines have become the weapons of choice in many of the deadliest mass shootings in modern U.S. history, including the rampages in Pittsburgh, Parkland, Las Vegas, Sutherland Springs, Orlando, Newtown, and Aurora. *Id.* Assault weapons and large-capacity magazines enable shooters to rapidly fire multiple rounds into multiple victims, and the wounds they inflict are more devastating than the wounds inflicted by conventional handguns. *Id.* at 25-26. The court also noted that most mass shooters obtain their assault weapons and large-capacity magazines legally, a fact tending to support the Legislature's conclusion that a ban on such weapons will curtail mass shootings. *Id.* at 26-28. Thus, the court concluded, the fit between the Assault Weapons Ban and the Commonwealth's compelling interest in public safety "is both close and reasonable." *Id.* at 29.

REASONS FOR DENYING THE PETITION

The petition in this case presents no question that warrants this Court's review. In upholding the Commonwealth's Assault Weapons Ban as consistent

with the Second Amendment, the First Circuit joined six other federal courts of appeals that have affirmed the constitutionality of laws that prohibit possession of assault weapons or large-capacity magazines. The First Circuit's decision is likewise consistent with *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (*per curiam*). Those decisions recognize that the Second Amendment does not eliminate States' "ability to devise solutions to social problems" like mass shootings and murders of police officers. *McDonald*, 561 U.S. at 785. Massachusetts has permissibly chosen to prohibit a narrowly defined group of weapons used disproportionally in those acts of violence, while at the same time ensuring that law-abiding residents have access to a host of other firearms for self-defense and other lawful activities. That legislative policy judgment accords fully with the rights protected by the Second Amendment.

I. The Courts of Appeals Have Unanimously Upheld Laws that Ban Assault Weapons and Large-Capacity Magazines.

There is no conflict in the courts of appeals over the constitutionality of laws that ban assault weapons and large-capacity magazines. Since *Heller*, the courts of appeals have rejected all Second Amendment challenges to statutes that ban assault weapons. *See Wilson v. Cook Cty.*, 937 F.3d 1028 (7th Cir. 2019); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) ("*NYSRPA*"); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011)

("*Heller II*"). The courts of appeals have also rejected Second Amendment challenges to statutes that ban large-capacity magazines. *See Wilson*, 937 F.3d 1028; *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of New Jersey*, 910 F.3d 106 (3d Cir. 2018); *Kolbe*, 849 F.3d 114; *NYSRPA*, 804 F.3d 242; *Friedman*, 784 F.3d 406; *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *Heller II*, 670 F.3d 1244.[4] And this Court has repeatedly declined to review these decisions. *See Kolbe v. Hogan*, 138 S. Ct. 469 (2017) (No. 17-127); *Shew v. Malloy*, 136 S. Ct. 2486 (2016) (No. 15-1030); *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015) (No. 15-133).

Petitioners do not dispute the unanimity in the courts of appeals on the constitutionality of laws that ban assault weapons and large-capacity magazines. Instead, they contend that the courts employ different reasoning to reach the same result. Pet. 21-27. Even if true, that would not constitute a "conflict" warranting this Court's intervention. Sup. Ct. R. 10(a). But in any event, the contention is simply

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[4] One divided Ninth Circuit panel ruled that a district court did not abuse its discretion in enjoining, on a preliminary basis, California's ban on possession of large-capacity magazines. *See Duncan v. Becerra*, 742 Fed. App'x 218 (9th Cir. 2018). The panel's unpublished memorandum does not, however, establish binding precedent for the circuit. *See* 9th Cir. R. 36-3(a). In substance, the panel refused to reweigh the district court's evidentiary determinations in that court's intermediate scrutiny analysis, and it emphasized that it had not "'determine[d] the ultimate merits.'" *Duncan*, 742 Fed. App'x at 220-22 (quoting *Fyock*, 779 F.3d at 995). The Ninth Circuit is currently considering the appeal of the district court's subsequent judgment on the merits, which invalidated California's large-capacity magazine ban. *See Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019), *appeal pending*, No. 19-55376 (9th Cir.).

wrong. Each circuit court has reviewed the respective challenges to assault weapons bans under the same framework applied across the courts of appeals for Second Amendment claims.[5] That is, the courts first considered whether the laws banning assault weapons and large-capacity magazines burden conduct falling within the scope of the Second Amendment and, after concluding or assuming that such laws do burden constitutionally protected conduct, upheld the laws under intermediate scrutiny. *See* Pet. App. 11-28; *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116-24; *Kolbe*, 849 F.3d at 133-40; *NYSRPA*, 804 F.3d at 254-64; *Fyock*, 779 F.3d at 996-1001; *Heller II*, 670 F.3d at 1260-64. And while the Seventh Circuit in *Friedman* did not directly apply intermediate scrutiny, *see* 784 F.3d at 410, the Seventh Circuit subsequently explained that its reasoning in *Friedman* "fits comfortably under the umbrella of" *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011), a case that adopted the same two-part framework for assessing Second Amendment

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[5] *See, e.g.*, *Gould*, 907 F.3d at 668-69; *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 562 U.S. 1158 (2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194, 206 (5th Cir. 2012), *cert. denied*, 571 U.S. 1196 (2014); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Horsley v. Trame*, 808 F.3d 1126, 1130-31 (7th Cir. 2015); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010), *cert. denied*, 563 U.S. 990 (2011); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012), *cert. denied*, 568 U.S. 1088 (2013); *Heller v. District of Columbia*, 801 F.3d 264, 272 (D.C. Cir. 2015).

claims embraced by the other courts of appeals. *Wilson*, 937 F.3d at 1036.[6]

Petitioners are wrong to suggest that the circuit courts' "application of intermediate scrutiny is nothing more than a rubber stamp." Pet. 25. In upholding laws that prohibit possession of assault weapons and large-capacity magazines, the courts of appeals have hewed closely to this Court's precedent. Each court has demanded that the government demonstrate that the challenged laws advance a "substantial" or "important" government interest. *See* Pet. App. 23-24; *Wilson*, 937 F.3d at 1036; *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 119; *Kolbe*, 849 F.3d at 139; *NYSRPA*, 804 F.3d at 261; *Fyock*, 779 F.3d at 1000; *Heller II*, 670 F.3d at 1262. And each court has likewise insisted that the government show

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[6] Petitioners suggest that the Fifth Circuit would apply strict scrutiny to a "firearm ban." Pet. 25. But the cited Fifth Circuit case explains that a "regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use *a handgun* to defend his or her home and family . . . triggers strict scrutiny." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012), *cert. denied*, 571 U.S. 1196 (2014) (emphasis added). That reasoning is consistent with *Heller*, which explained that handguns are the "quintessential self-defense weapon" and are "overwhelmingly chosen by American society for that lawful purpose." 554 U.S. at 628-29. Assault weapons and large-capacity magazines, in contrast, are not typically chosen by Americans for self-defense and, indeed, were designed for offensive, not defensive, uses. *See* Pet. App. 20, 56-58. Thus, the Fifth Circuit's holding that a handgun ban is subject to strict scrutiny is consistent with the First Circuit's holding that laws banning assault weapons and large-capacity magazines receive only intermediate scrutiny, because the latter laws do not intrude on the core of the Second Amendment.

a substantial relationship between its asserted interest and the laws. In the decision below, for example, the First Circuit reviewed the "ample" record evidence of the risks to public safety posed by assault weapons and large capacity magazines. *See* Pet. App. 25-28. And the court concluded that the Commonwealth had established not only a "reasonable" fit between its Assault Weapons Ban and its important public safety objectives, but also a "close" fit. *Id.* at 29. Each of the other courts of appeals has likewise discussed, in comprehensive fashion, the record evidence establishing that laws banning assault weapons and large-capacity magazines advance important public safety and crime prevention objectives. *See Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 119-24; *Kolbe*, 849 F.3d at 124-28, 139-41; *NYSRPA*, 804 F.3d at 262-64; *Friedman*, 784 F.3d at 409-12; *Fyock*, 779 F.3d at 1000-01; *Heller II*, 670 F.3d at 1262-64.

Aware that the lower courts are not divided on the constitutionality of laws banning assault weapons and large-capacity magazines, petitioners contend that the decision below conflicts with a case about a different weapon altogether. *See* Pet. 17, 19. They point to *Ramirez v. Commonwealth*, 479 Mass. 331, 94 N.E.3d 809 (2018), a decision that struck down a Massachusetts law barring possession of stun guns. Pet. 17, 19. In *Ramirez*, the Supreme Judicial Court ("SJC") did not subject the stun gun ban to constitutional scrutiny after concluding that stun guns are protected by the Second Amendment. *See* 94 N.E.3d at 815. But *Ramirez* was decided shortly after Justices on this Court explained that "stun guns are widely owned and accepted as a legitimate means of self-defense across the country." *Caetano*, 136 S. Ct.

at 1033 (Alito, J., concurring in the judgment). The SJC presumably did not subject the stun gun ban to constitutional scrutiny because, like the handgun ban in *Heller*, the stun gun ban "would fail constitutional muster" under "any of the standards of scrutiny that [this Court has] applied to enumerated constitutional rights." 554 U.S. at 628-29. In contrast, the record in this case demonstrated that, unlike handguns and stun guns, the banned weapons and magazines were specifically designed for offensive uses; assault weapons are seldom used for self-defense; and people virtually never fire more than ten rounds in self-defense. *See* Pet. App. 20, 56-58. Reflecting the stark differences in the weapons' respective suitability for self-defense, the SJC has separately upheld the Massachusetts Assault Weapons Ban against a Second Amendment challenge, just as the First Circuit did in the decision below. *See Commonwealth v. Cassidy*, 479 Mass. 527, 96 N.E.3d 691, 701-03, *cert. denied*, 139 S. Ct. 276 (2018).

There is, accordingly, no conflict for this Court to resolve between the First Circuit and the SJC on the question presented by this case. Nor is there conflict between the First Circuit and any federal court of appeals. Where all appellate courts agree on the constitutionality of laws that ban assault weapons and large-capacity magazines, this Court's review of that question is not warranted.

II. The Decision Below Is Correct and Consistent with *Heller*.

The petition should also be denied because the First Circuit's decision is correct and consistent with this Court's Second Amendment decisions. *Heller*

recognized that the Second Amendment protects an "individual right to possess and carry weapons in case of confrontation," but it also explained that the Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever." 554 U.S. at 592, 626. Indeed, *Heller* emphasized, "the Second Amendment right . . . extends only to certain types of weapons." *Id.* at 623. While the Second Amendment protects weapons "'in common use at the time' for lawful purposes like self-defense," it does not protect weapons, like short-barreled shotguns, that are "not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 624-25 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1923)). Under those principles, "weapons that are most useful in military service—M-16 rifles and the like—may be banned." *Id.* at 627.

The First Circuit did not pass judgment on the District Court's conclusion that assault weapons and large-capacity magazines are not protected by the Second Amendment under the standards articulated in *Heller*. But that conclusion was correct—and would provide an alternative basis for affirmance—because petitioners failed to offer evidence that assault weapons and large-capacity magazines have ever been commonly used by law-abiding citizens for lawful purposes like self-defense. When asked directly, not one of the plaintiffs or their six experts could identify a single example of an AR-15, AK-47, or other assault weapon used in self-defense. *See* Pet. App. 20; CA1 App. Vol. II at 931 (¶ 142). Nor could they identify a single episode in which ten or more shots were fired in self-defense. *See* Pet. App. 20; CA1 App. Vol. II at 933 (¶ 152). And, in line with this Court's observation that handguns are the "quintessential self-defense

weapon," *Heller*, 554 U.S. at 629, the evidence showed that common self-defense guides do not mention any assault weapon as an appropriate choice for self-defense, but instead focus principally on handguns. *See* CA1 App. Vol. II at 931-33 (¶¶ 144, 150); CA1 App. Vol. VI at 2667-92. Weapons covered by the Assault Weapons Ban, in contrast, are not designed to deter intruders, but rather to fire dozens of rounds in rapid succession and inflict maximal damage on the human body. *See, e.g.*, H.R. Rep. No. 103-489, at 12-20; D. Long, THE COMPLETE AR-15/M16 SOURCEBOOK 3-106 (2d ed. 2001) (CA1 App. Vol. IV at 1628-1732); T. Craig et al., *As the Wounded Kept Coming, Hospitals Dealt with Injuries Rarely Seen in U.S.*, WASH. POST (Oct. 3, 2017) (CA1 App. Vol. VII at 2881-85).

The First Circuit's holding that the Assault Weapons Ban survives heightened scrutiny—and in particular, intermediate, rather than strict, scrutiny—was also consistent with this Court's Second Amendment decisions. *Heller* made clear 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." 554 U.S. at 635. As described, the Assault Weapons Ban does not heavily burden that core Second Amendment right because assault weapons and large-capacity magazines are not commonly used or suitable for self-defense. *See supra*, at 16-17. Petitioners have lawful access to, and indeed own, a range of other semiautomatic firearms that they may use for self-defense.[7] The state's Executive Office of Public Safety

[7] Each of the individual petitioners already owns several semiautomatic firearms and multiple ammunition magazines that are not banned by the Massachusetts Assault Weapons Ban. Pet. App. 124-25 ¶¶ 3-5, 126-27 ¶¶ 3-6, 129-30 ¶¶ 3-4, 132 ¶ 5.

and Security publishes a list of nearly a thousand handguns, many of them semiautomatic, that are unaffected by the Assault Weapons Ban and available for sale in Massachusetts. *See* CA1 App. Vol. VI at 2641-65; CA1 App. Vol. VII at 3268. And the Assault Weapons Ban itself exempts hundreds of rifles and shotguns, many of them also semiautomatic, that are likewise available for sale in the Commonwealth. *See* Mass. Gen. Laws c. 140, § 121; *supra*, at 4-5. Simply put, the Assault Weapons Ban does not meaningfully burden petitioners' ability to defend themselves within, or beyond, their homes, and the First Circuit properly declined to review the law under strict scrutiny.

Applying intermediate scrutiny, the First Circuit correctly held that the Assault Weapons Ban is substantially related to the Commonwealth's vital public safety and crime prevention objectives. Pet. App. 24-28; *see Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."). The weapons covered by the ban—in particular, Colt AR-15 and AK-47 rifles and copies of those weapons—are extraordinarily dangerous. Derived from weapons used by militaries around the world, the banned weapons are designed to inflict catastrophic injuries—different in kind than the injuries typically inflicted by other semiautomatic weapons. As a trauma surgeon who treated victims of the Aurora movie theater and Columbine High School massacres reported in this case, injuries from assault weapons are "higher in complexity" than injuries from non-assault weapons; assault weapons "cause far greater damage to the muscles, bones, soft tissue, and vital

organs," which are "too often shredded beyond repair." CA1 App. Vol. II at 854-55; *see also* G. Kolata & C.J. Chivers, *Wounds from Military-Style Rifles? 'A Ghastly Thing to See'*, N.Y. TIMES (March 4, 2018).[8] Assault weapons are, moreover, disproportionately attractive to criminals who commit mass shootings and target police officers. Although the weapons represent at most 3% of the U.S. gun stock, they are used in at least a quarter of mass public shootings, especially those with the highest number of fatalities, and in one in five murders of police officers. *See* CA1 App. Vol. VI at 2361, 2380-81; CA1 App. Vol. VIII at 3754; Violence Policy Ctr., *New Data Shows One in Five Law Enforcement Officers Slain in the Line of Duty in 2016 and 2017 Were Felled by an Assault Weapon* (Sept. 25, 2019).[9] Large-capacity magazines, which enable shooters to fire more bullets more quickly without reloading and therefore give rise to a greater number of wounds per victim and a greater number of victims, are likewise disproportionately used in mass public shootings and murders of police officers. *See* H.R. Rep. No. 103-489, at 19; CA1 App. Vol. VI at 2380; CA1 App. Vol. VII at 3071-78; CA1 App. Vol. VIII at 3754.

Petitioners have never disputed the evidence demonstrating the close nexus between the Assault Weapons Ban and the Commonwealth's public safety objectives. Instead, they have contended that if the Assault Weapons Ban burdens Second Amendment rights at all, a court must deem the law "per se unconstitutional" without reviewing it under any standard of heightened scrutiny. *See* Pet. 14-18. That

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[8] Available at https://tinyurl.com/y9am72x5.

[9] Available at https://tinyurl.com/wqvhgcg.

theory is inconsistent with *Heller* and with every appellate decision to address a statutory ban on assault weapons or large-capacity magazines. *See supra*, at 10-14. *Heller* did not conclude that the District of Columbia's ban on in-home possession of handguns was unconstitutional simply because handguns are protected by the Second Amendment. *See* 554 U.S. at 628-29. Rather, *Heller* held that the handgun ban "would fail constitutional muster" under "any of the *standards of scrutiny* that [this Court] ha[s] applied to enumerated constitutional rights." *Id.* (emphasis added). Indeed, the *Heller* majority rejected the "'interest-balancing inquiry'" urged by Justice Breyer's dissenting opinion because it "propose[d] . . . none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis)" of constitutional scrutiny. *Id.* at 634 (quoting *id.* at 689 (Breyer, J., dissenting)). And the Court further suggested that Second Amendment claims may be evaluated in a manner similar to First Amendment claims, *see id.* at 634-35, which are analyzed under tiers of constitutional scrutiny. *See, e.g.*, *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623-35 (1995) (ban on lawyers' targeted direct-mail solicitations within 30 days of an accident or disaster upheld under intermediate scrutiny); *Burson v. Freeman*, 504 U.S. 191, 198-211 (1992) (plurality op.) (ban on political speech within 100 feet of a polling place upheld under strict scrutiny). Thus, the First Circuit's decision subjecting the Assault Weapons Ban to the traditionally expressed level of intermediate constitutional scrutiny—and upholding the law under that standard—is entirely consistent with *Heller*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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