

No. 19-404

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**In the  
Supreme Court of the United States**

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David Seth Worman, *et al.*,  
*Petitioners,*

v.

Maura T. Healey, *et al.*,  
*Respondents.*

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On Petition for Writ of Certiorari to the United  
States Court of Appeals for the First Circuit

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**BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION  
OF CHIEFS OF POLICE *ET AL.*  
IN SUPPORT OF PETITIONERS  
(*AMICI* LISTED INSIDE COVER)**

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National Association of Chiefs of Police

Western States Sheriffs' Association

California State Sheriffs' Association

California Reserve Peace Officers Association

New Mexico Sheriffs' Association

International Law Enforcement Educators and Trainers Association

Law Enforcement Legal Defense Fund

San Francisco Veteran Police Officers Association

International Association of Law Enforcement Firearms Instructors

CRPA Foundation

Connecticut Citizens Defense League

Gun Owners of California

New York State Rifle & Pistol Association

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICI CURIAE .....	1
SUMMARY OF ARGUMENT.....	5
ARGUMENT .....	8
I. THE BANNED FIREARMS ARE NO DIFFERENT FROM OTHER COMMONLY POSSESSED SEMI- AUTOMATIC FIREARMS.....	9
II. THE BANNED FIREARMS ARE NOT MORE LETHAL THAN OTHER RIFLES.....	12
III. THE BANNED FIREARMS ARE RARELY USED TO COMMIT CRIMES AND ARE NOT DISPROPORTIONATELY USED IN MASS SHOOTINGS.....	15
A. Only a very small percentage of homicides are committed with rifles of any kind .....	15
B. The banned firearms are not disproportionately used in mass shootings.....	17

IV. IN APPLYING ITS BALANCING TEST, THE COURT OF APPEALS GAVE ALMOST NO WEIGHT TO THE LEGITIMATE USE OF THE BANNED FIREARMS AND MAGAZINES FOR HOME AND SELF DEFENSE.....	18
A. Firearms are frequently used to repel criminal attacks.....	18
B. AR-15 platform rifles are suitable for home defense .....	22
C. AR-15 platform rifles are in fact effectively used for home defense.....	24
V. MAGAZINES WITH A CAPACITY OF OVER TEN ROUNDS ARE STANDARD CAPACITY, NOT LARGE CAPACITY, AND ARE TYPICALLY POSSESSED BY LAW ENFORCEMENT AND LAW-ABIDING CITIZENS FOR LAWFUL PURPOSES .....	26
CONCLUSION .....	28

## TABLE OF AUTHORITIES

Page

## CASES

*District of Columbia v. Heller*,  
554 U.S. 570 (2008) .....5, 18, 20, 28

*Gould v. Morgan*,  
907 F.3d 659 (1st Cir. 2018) ..... 19

*McDonald v. City of Chicago*,  
561 U.S. 742 (2010) ..... 5, 28

*Staples v. United States*,  
511 U.S. 600 (1994) ..... 10

*Stenberg v. Carhart*,  
530 U.S. 914 (2000) ..... 11

## CONSTITUTIONS AND STATUTES

U.S. CONST., AMEND. II ..... 7, 8, 17, 19, 28

G.L. c. 140 § 121 ..... 8

G.L. c. 140 §131M..... 8

**OTHER AUTHORITIES**

- Massad Ayoob, *Finding the Right Glock*, COMPLETE  
BOOK OF HANDGUNS (2013) ..... 27
- Jennifer Brett, *‘He had an AR-15, but so did I.’ Sutherland Springs hero hailed by NRA*, THE ATLANTA JOURNAL-CONSTITUTION  
(May 6, 2018)..... 25
- Mary Chastain, *15-Year Old Boy Uses AR-15 to Defend Himself, Sister Against Home Invaders*, BREITBART.COM (Jan. 10, 2013) ..... 25
- PHILIP COOK & JENS LUDWIG,  
GUNS IN AMERICA: RESULTS OF  
A COMPREHENSIVE NATIONAL  
SURVEY OF FIREARMS  
OWNERSHIP AND USE (1996) ..... 21
- Brian Doherty, *A Second Look at a Controversial Study About Defensive Gun Use*, REASON (Sep. 4, 2018)..... 21
- FBI UCR (2015), Table 20, Murder  
by State, Types of Weapons, 2015 ..... 16
- FBI UCR (2016), Table 12, Murder  
by State, Types of Weapons, 2016 ..... 16

FBI UCR (2017), Table 20, Murder by State, Types of Weapons, 2017 .....	16
FBI UCR (2018), Table 20, Murder by State, Types of Weapons, 2018 .....	16
FBI UCR (2018), Table 8, Murder Victims by Weapon, 2014-2018 .....	15
FoxNews, Killed in her sleep: <i>Illegal immigrants suspected in Mass. grandma's death faced deportation</i> (July 20, 2015) .....	16
<i>Homeowner shoots intruder in Vance County break-in</i> , WRAL.COM (May 12, 2014) .....	26
Gary Kleck & Marc Gertz, <i>Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun</i> , 86 J. Crim. L. & Criminol. 150 (1995) .....	21
Bruce H. Kobayashi & Joseph E. Olson, <i>In Re 101 California Street</i> , 8 STANFORD LAW & POLICY REV. 41 (1997) .....	11

William J. Krouse and Daniel J. Richardson, Congressional Research Service, Mass Murder with Firearms: Incidents and Victims 1999-2013 (Jul. 30, 2015).....	17, 18
MASSACHUSETTS MUNICIPAL POLICE TRAINING COMMITTEE, BASIC FIREARMS INSTRUCTOR COURSE: PATROL RIFLE 3 (2007) .....	22
Austin L. Miller, <i>Summerfield homeowner injured, kills 2 intruders with AR-15</i> , SARASOTA HERALD TRIBUNE (Jul. 11, 2019).....	26
NSSF, MODERN SPORTING RIFLE (MSR) COMPREHENSIVE CONSUMER REPORT (2013).....	24
JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA (1988) .....	11, 12
Tom W. Smith, <i>A Call for a Truce in the DGU War</i> , 87 J. Crim. L. & Criminol. 1462 (1997).....	21
Avalon Zoppo, <i>Oklahoma Man Uses AR-15 to Kill Three Teen Home Intruders</i> , NBC NEWS (Mar. 28, 2017) .....	25



**INTEREST OF *AMICI CURIAE*<sup>1</sup>****National Association of Chiefs of Police**

The mission of the National Association of Chiefs of Police (“NACOP”), a non-profit organization founded in 1967, is to promote and support the law enforcement profession. Membership is limited to command staff officers, and it currently has over 7,000 members. Among many other activities, NACOP provides frequent handgun training for law enforcement personnel and civilians.

**Western States Sheriffs’ Association**

The Western States Sheriffs’ Association was established in 1993, and consists of more than three hundred members from seventeen member states throughout the Western United States. Its mission is to assist sheriffs and their offices with federal and state legislative issues, address policy and procedural matters, and work together to keep the office of sheriff strong.

**California State Sheriffs’ Association**

The California State Sheriffs’ Association is a nonprofit professional organization that represents

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<sup>1</sup> No party’s counsel authored this brief in whole or in part. No party or party’s counsel, and no person other than *amici*, their members, or their counsel contributed money that was intended to fund preparation or submission of this brief. Counsel of record for all parties received timely notice of intent to file this brief under Rule 37.2(a) and consent was granted by all parties.

each of the fifty-eight California sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel, in order to improve law enforcement throughout the state.

#### **California Reserve Peace Officers Association**

The California Reserve Peace Officers Association (“CRPOA”) was founded in 1974, and CRPOA members dedicate their time to community service by working as part-time employees with law enforcement agencies both on a compensated and non-compensated basis. Approximately 600 law enforcement agencies currently employ more than 5,000 reserve law enforcement officers in California.

#### **New Mexico Sheriffs’ Association**

The New Mexico Sheriffs’ Association is a professional and educational organization dedicated to keeping the peace and to protecting the lives and property of the citizens of New Mexico. The elected New Mexico Sheriffs have the responsibility for upholding the laws of the state of New Mexico and of the United States of America, including the United States Constitution and the Second Amendment. The Association serves the people and communities of New Mexico through professional assistance, education, and unity.

#### **International Law Enforcement Educators and Trainers Association**

The International Law Enforcement Educators and Trainers Association (“ILEETA”) is an

association of 4,000 professional law enforcement instructors committed to the reduction of law enforcement risk, and to saving lives of police officers and the general citizenry through the provision of training enhancements for criminal justice practitioners. ILEETA's *amicus* briefs were cited in *District of Columbia v. Heller* and in *McDonald v. Chicago*.

#### **Law Enforcement Legal Defense Fund**

Law Enforcement Legal Defense Fund ("LELDF") is a 501(c)(3) non-profit organization, headquartered in Alexandria, Virginia, that provides legal assistance to law enforcement officers. LELDF has aided nearly one hundred officers, many of whom have been acquitted, mostly in cases where officers have faced legal action for otherwise authorized and legal activity in the line of duty.

#### **San Francisco Veteran Police Officers Association**

The San Francisco Veteran Police Officers Association is an organization that represents the interests of veteran police officers in the City and County of San Francisco, including the exercise of their members' rights to keep and bear arms under the Second Amendment.

**International Association of Law Enforcement  
Firearms Instructors**

The International Association of Law Enforcement Firearms Instructors is a non-profit association formed in 1981 whose 3,000-plus members come from local, state, and federal law enforcement agencies nationwide, including New Jersey. It conducts approximately 20 police firearms training events annually, and publishes authoritative training standards and guidelines.

The following are groups that promote the shooting sports, provide firearms safety training, enhance marksmanship, educate the public about firearms, and defend Second Amendment rights, including the right of ordinary, law-abiding citizens to obtain and use commonly-possessed firearms for legitimate purposes such as self-defense: CRPA Foundation, Connecticut Citizens Defense League, Gun Owners of California, and New York State Rifle & Pistol Association. These groups have numerous members who are current or former law enforcement officers.

Thus, *amici* are all organizations with members who are law enforcement officers or that support law enforcement officers and agencies. *Amici* believe that the perspective of front line law enforcement personnel should be of assistance to this Court in evaluating whether any interest in public safety is served by Massachusetts' ban on widely possessed semi-automatic firearms and standard capacity magazines.

## SUMMARY OF ARGUMENT

The court below refused to follow *Heller* and *McDonald*, and wrongly employed an intermediate scrutiny balancing test. This brief demonstrates that, in utilizing that erroneous test, the First Circuit opinion also made fundamental errors about the nature of the banned firearms and magazines.

The ordinary, commonly possessed semi-automatics that Massachusetts mischaracterizes as “assault weapons” function no differently than other commonly possessed semi-automatic firearms that have been lawfully possessed for well over a century. They are not machine guns. Machine guns fire continuously as long as the trigger is pulled or until the gun runs out of ammunition. Semi-automatics, by contrast, fire only a single shot with each pull of the trigger, and require that the trigger be released and pulled again to fire a second shot. Unlike machine guns and a few other items regulated by the National Firearms Act, AR-15s are among those firearms that, under this Court’s jurisprudence, “traditionally have been widely accepted as lawful possessions....”

So-called “assault weapons” are not defined as such according to their function, but because their military appearance is more likely to scare and confuse the public (and perhaps even legislators) and thus make them easier to ban. The name is a political term, developed by anti-firearms activists.

The banned rifles do not pose “unique dangers” and are not more lethal than other centerfire rifles. Compared to rifle ammunition used to hunt deer and

other big game, the power of the .223/5.56mm cartridge typically used in AR platform rifles is on the low side for centerfire rifle cartridges. The .30-06 cartridge, used in WWI, WWII, and Korea, and which remains a popular deer hunting cartridge, has over twice the muzzle energy of the .223/5.56mm.

The banned firearms are rarely used to commit crimes and are not disproportionately used in mass shootings. In 2018, only 2.1% of homicides in the United States were committed with rifles of any kind, and “assault weapons” will constitute only a portion of these. Far more homicides were committed that year with blunt objects (3.1%), hands, fists, and feet (4.8%), and knives and cutting instruments (10.7%). In Massachusetts, one homicide was committed with a rifle in 2015, and it was with a bolt-action hunting rifle. In 2016, 2017, and 2018 the number of homicides committed with a rifle of any kind was zero.

A recent report by the Congressional Research Service examined mass shooting data over a period of 15 years. It found that in only 31 out of 317 mass shootings were firearms that “could” be characterized as “assault weapons” used or even carried. That is 9.7%, or less than one in ten mass shootings, which does not make them the “weapon of choice” as the court below contended.

The court below discussed only the misuse of the banned firearms, and did not even consider their usefulness for legitimate defense. But the use of firearms by ordinary people to repel criminal assaults

and thereby save innocent lives is a frequent occurrence. Estimates of the frequency of defensive gun uses range from several hundred thousand per year to roughly two and a half million defensive uses.

AR platform rifles are suitable for home defense, and are frequently superior to shotguns and handguns, due to accuracy, sufficient power, less overpenetration, greater ammunition capacity, ease of handling, relatively mild recoil, and less muzzle flash and muzzle blast. There are numerous reports of ordinary citizens defending themselves and loved ones from criminal home invasions using AR-15s.

The magazines that Massachusetts defines as “large capacity” are in fact standard capacity. 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 greater than 10 rounds. About half of the 230 million magazines made in the U.S. between 1990 and 2015 could hold more than 10 rounds. These magazines are clearly of the kind typically possessed by law-abiding citizens for lawful purposes, and are thus protected under the Second Amendment.

**ARGUMENT**

This case challenges statutes that ban common semi-automatic firearms that Massachusetts arbitrarily categorizes as “assault weapons,” and also ban common magazines that are capable of holding more than ten rounds of ammunition. G.L. c. 140 §§ 121, 131M.

The court below refused to follow *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), by employing a two part balancing test to “balance away” the Second Amendment rights of residents of Massachusetts. *Heller* and *McDonald* should be followed, and certiorari granted, for reasons stated in the petition for certiorari.

In addition, as this brief demonstrates, in applying an intermediate scrutiny balancing test the First Circuit opinion made fundamental errors about the nature of the banned firearms and magazines. Other circuits, by utilizing intermediate scrutiny and mistaken information, have similarly failed to protect Second Amendment rights, including the right to own commonly-possessed rifles and standard magazines. Because of widespread misinformation broadcast by interest groups and the media that claims that so-called “assault weapons” are somehow uniquely dangerous, it is easy to form a misconception about the nature of these firearms. It is the purpose of this brief to show that the assertions and suppositions employed by the court below to uphold the bans under



intermediate scrutiny are themselves incorrect and fundamentally flawed.

**I. THE BANNED FIREARMS ARE NO DIFFERENT FROM OTHER COMMONLY POSSESSED SEMI-AUTOMATIC FIREARMS.**

So-called “assault weapons,” as Massachusetts defines them, are not more dangerous or lethal than other centerfire semi-automatic rifles.<sup>2</sup> That is because they are no different in the way in which they function; the difference is in their appearance.

They are not machine guns. Machine guns fire continuously as long as the trigger is pulled or until the gun runs out of ammunition. Semi-automatics, by contrast, fire only a single shot with each pull of the trigger, and require that the trigger be released and pulled again to fire a second shot. Semi-automatics, whether rifles, shotguns, or pistols, have been in common use for well over a century, JA470, and the banned firearms function in the same manner as all semi-automatics.

The banned AR and AK platform firearms are merely an arbitrary subset of semi-automatic rifles. As noted by firearms expert Jim Supica:

a semiautomatic firearm will fire only one round with a single trigger pull, the same as a single shot, double barrel, bolt action, pump

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<sup>2</sup> Of the firearms defined as “assault weapons” by Massachusetts, rifles constitute the overwhelming majority in terms of numbers of firearms in circulation.

action, lever action or revolving firearm. To fire a subsequent round, the trigger must be released and pulled again. These are not military-style firearms--they are civilian firearms. Although many semiautomatic rifles look like fully automatic rifles, they are functionally identical to other more traditional looking commercial semi-automatic rifles.

JA0471.

What Massachusetts calls “assault weapons” have traditionally been considered to be firearms that can be owned in perfect innocence. In *Staples v. United States*, 511 U.S. 600, 603 (1994), this Court recognized the fundamental distinction between machine guns and semiautomatics:

The AR-15 is the civilian version of the military’s M-16 rifle, and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire.

As the *Staples* court observed, machine guns are heavily regulated and must be registered with the federal government under pain of severe penalties. *Id.* at 602-03. However, “guns generally can be owned in perfect innocence.” *Id.* at 611. Unlike machine guns and a few other items regulated by the National Firearms Act, AR-15s are among those firearms that “traditionally have been widely accepted as lawful possessions....” *Id.* at 612.

So-called “assault weapons” are not defined as such according to their function, but because their military appearance is more likely to scare the public (and perhaps even legislators) and thus make them easier to ban. As Justice Thomas has noted in another context, “Prior to 1989, the term ‘assault weapon’ did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists....” *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (quoting Bruce H. Kobayashi & Joseph E. Olson, *In Re 101 California Street*, 8 STANFORD LAW & POLICY REV. 41, 43 (1997)).

In 1988, Josh Sugarmann, a firearms control activist who is Executive Director of the Violence Policy Center, explained why it would be easier to demonize certain semi-automatics based on their appearance and other extraneous factors:

[H]andgun restriction is simply not viewed as a priority. Assault weapons ... are a *new* topic. The weapons’ menacing looks, coupled with *the public’s confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun*—can only increase the chance of public support for restrictions on these weapons.

JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA, unpaginated Conclusion (1988) (emphasis added). Mr. Sugarmann also conceded that the “assault weapons” that he wanted

to ban were indistinguishable (except by appearance) from ordinary semi-automatic firearms:

Defining an assault weapon—in legal terms—is not easy. It’s not merely a matter of going after guns that are “black and wicked looking.”... [I]t’s extremely difficult to develop a legal definition that restricts the availability of assault weapons without affecting legitimate semi-automatic guns.

*Id.* That is because there is no functional difference between ordinary semi-automatic rifles and those banned by some jurisdictions as so-called “assault weapons.”

## **II. THE BANNED FIREARMS ARE NOT MORE LETHAL THAN OTHER RIFLES.**

The court below referenced the “unique dangers” posed by the so-called “assault weapons.” App. 25. It further referred to “the extensive evidence regarding the lethality of the proscribed weapons....” App. 27.

The court’s opinion cited articles in which physicians were interviewed, and provided sensationalistic descriptions of the damage caused to human bodies by so-called “assault weapons.” For example, one physician was quoted as saying that: “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.” App. 26. However, the article from which that statement is taken reveals that the physician in question had “served in Iraq and Afghanistan and is a lieutenant colonel in the Air

Force Reserve.” His observations were apparently about wounds sustained in combat; there was no indication he was talking about domestic shootings, and no indication of what kinds of weapons inflicted the wounds he was talking about.

More importantly, the lower court’s opinion almost completely ignored the real basis for the severe wounds that were described: these were wounds inflicted by rifle rounds rather than pistol rounds. Although there are several determinants regarding how severe a gunshot wound may be, including bullet (projectile) design and composition—which affect penetration and expansion of the bullet—a fundamental measure of power is the kinetic energy of the bullet measured at the muzzle of the firearm, commonly referred to as muzzle energy.<sup>3</sup>

As shown by Mr. Supica’s expert report, muzzle energy for standard size, centerfire handguns tends to run at about 240 to 465 foot pounds. JA490. Muzzle energy for AR platform rifles firing the .223 caliber or 5.56mm cartridge is about 1180-1380 foot pounds. *Id.*<sup>4</sup> Compared to centerfire rifle ammunition used to hunt deer and other big game, that muzzle energy is actually on the low side. For example, the .30-06 cartridge, which was used in the main U.S. battle

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<sup>3</sup> Kinetic energy is usually measured in foot-pounds. Energy at the muzzle (end of the barrel) is typically used because the bullet sheds energy as it slows due to air resistance while traveling downrange.

<sup>4</sup> The difference between a .223 cartridge and a 5.56 x 45mm cartridge is insignificant for purposes of this discussion.

rifles in WWI, WWII, and Korea, and which remains a popular cartridge for deer hunting, tends to have about 2,700 to 3,000 foot pounds of muzzle energy, well over twice as much power as the .223 typically used in AR platform rifles. *Id.* Far from being an exceptionally lethal round, the .223 is substantially less powerful than the cartridges used in most deer hunting rifles.

The court's opinion quoted an affidavit claiming that 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." App. 26. But just as there is no functional definition of "assault weapon," there is no functional definition of "non-assault weapons." Compared to the .223 or 5.56mm cartridge typically used in AR-15 platform rifles, a bullet from a .22 caliber rimfire cartridge (other things being equal) would generally cause a less serious wound, as would a bullet from a standard size handgun. But a bullet from a typical deer hunting rifle (again, other things being equal) would cause a greater wound, and a close range blast from a 12 gauge shotgun loaded with buckshot would cause an even greater and more complex wound yet. In short, a comparison of "assault weapons" to "non-assault weapons" is meaningless.

**III. THE BANNED FIREARMS ARE RARELY USED TO COMMIT CRIMES AND ARE NOT DISPROPORTIONATELY USED IN MASS SHOOTINGS.**

**A. Only a very small percentage of homicides are committed with rifles of any kind.**

According to the Federal Bureau of Investigation, the number of homicides committed in the United States during 2018 was 14,123. Only 297, or 2.1%, were committed with rifles of all types.<sup>5</sup> Thus, though commonly and legally possessed in the many millions, rifles defined as “assault weapons” by Massachusetts are probably used to commit less than 1% of the homicides in this country. By contrast, far more homicides were committed during that year with “blunt objects” such as clubs and hammers (443, or 3.1%) than with all rifles. *Id.* More than twice as many were committed with “personal weapons” such as hands, fists, and feet (672, or 4.8%), and more than five times as many using “knives or cutting instruments” (1,515, or 10.7%), than were committed with all rifles. *Id.*

Of the 136 murders committed in Massachusetts in 2018, the number carried out with rifles of any

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<sup>5</sup> FBI UCR (2018), Table 8, Murder Victims by Weapon, 2014-2018, <https://ucr.fbi.gov/crime-in-the-us/2018/crime-in-the-u.s.-2018/tables/expanded-homicide-data-table-8.xls>. The percentages for 2014-2017 are similar to 2018.

kind was *zero*.<sup>6</sup> In 2017, of the 170 murders in Massachusetts, the number carried out with rifles of any kind was *zero*.<sup>7</sup> In 2016, again there were *zero* murders committed with rifles in Massachusetts, out of 132 total.<sup>8</sup> In 2015, there was one homicide with a rifle.<sup>9</sup> That rifle was reported to be a .270 caliber bolt-action, which is not an “assault weapon” but a traditional hunting rifle.<sup>10</sup>

It is no answer to say that this proves that the Massachusetts ban has been effective. Substantial numbers of the banned firearms were grandfathered. In addition, according to respondents, “in 2015 alone, between 8,000 and 10,000 assault weapons had been sold in Massachusetts, despite the AWB” that were nearly identical to the Colt AR-15 and AK47 but did

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<sup>6</sup> FBI UCR (2018), Table 20, Murder by State, Types of Weapons, 2018, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-20>.

<sup>7</sup> FBI UCR (2017), Table 20, Murder by State, Types of Weapons, 2017, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-20>.

<sup>8</sup> FBI UCR (2016), Table 12, Murder by State, Types of Weapons, 2016, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-12>.

<sup>9</sup> FBI UCR (2015), Table 20, Murder by State, Types of Weapons, 2015, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-20>.

<sup>10</sup> FoxNews, *Killed in her sleep: Illegal immigrants suspected in Mass. grandma’s death faced deportation* (July 20, 2015) <http://www.foxnews.com/us/2015/07/20/killed-in-her-sleep-illegal-immigrants-suspected-in-mass-grandma-death-faced.html>.



not have the “features” that would have allowed them to be banned. Def. S.J. Mem. 4; JA0716. Comparable numbers were sold in 2014 and 2013. JA0716. If roughly 10,000 were being sold annually, the aggregate number including preceding years must be in the hundreds of thousands. Yet, despite these large numbers, rifles of any kind are almost never used to commit murders in Massachusetts. Rather than presenting “unique dangers,” App. 25, the banned firearms are of the kind “typically possessed by law-abiding citizens for lawful purposes” that are protected by the Second Amendment. *Heller*, 554 U.S. at 625.

**B. The banned firearms are not disproportionately used in mass shootings.**

The court below relied heavily on the theory that Massachusetts can ban these firearms because, in its view, “AR-15s equipped with LCMs have been the weapons of choice in many of the deadliest mass shootings in recent history,” citing seven shootings over a period of seven years. App. 25. However, when actual data are examined, it turns out that AR-15s or other putative “assault weapons” are not disproportionately used in mass shootings.

A recent report by the Congressional Research Service uses the FBI definition of “mass shooting”: a “multiple homicide incident in which four or more victims are murdered with firearms—not including the offender(s)—within one event, and in one or more locations in close geographical proximity.” William J. Krouse and Daniel J. Richardson, Congressional

Research Service, Mass Murder with Firearms: Incidents and Victims 1999-2013 13 (Jul. 30, 2015) (“CRS Report”).

“Assault weapons,” despite their overall prevalence, are infrequently used in mass shootings. The CRS Report states that in only 31 out of 317 mass shootings were firearms that “could” be characterized as “assault weapons” used or even carried. That is 9.7%, or less than one in ten mass shootings, even if the report’s apparently broad assumptions about what constitutes an “assault weapon” are accepted.<sup>11</sup> CRS Report 16, 29. Presence in less than one out of ten mass shootings does not make them the “weapons of choice” in such shootings.

#### **IV. IN APPLYING ITS BALANCING TEST, THE COURT OF APPEALS GAVE ALMOST NO WEIGHT TO THE LEGITIMATE USE OF THE BANNED FIREARMS AND MAGAZINES FOR HOME AND SELF DEFENSE.**

##### **A. Firearms are frequently used to repel criminal attacks.**

One of the reasons, at least, that *Heller* rejected the use of a balancing test—especially a watered

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<sup>11</sup> The report does not define “assault weapon.” The authors cast the net widely, including instances in which the offenders had firearms “that *could* be characterized as ‘assault weapons’ in that they *carried* rifles or pistols *capable* of accepting detachable magazines that *might have* previously fallen under the 10-year, now-expired federal assault weapons ban....” *Id.* at 16 (emphasis added).

down version such as the First Circuit employed—is that it allows courts rather than the text of the Constitution to determine whether an enumerated constitutional right is worthy of protection.

The circuit court’s opinion seems to assume that the principal use of the banned firearms is to conduct criminal attacks.<sup>12</sup> When plaintiffs suggested that AR platform rifles are useful for home defense the court, rather than taking that argument seriously, simply dismissed it as “too facile by half.”

Indeed, the court’s language showed that, in its view, whether the Second Amendment actually protects ordinary firearms commonly possessed by law-abiding citizens for lawful purposes is a policy question that is still up for grabs. The opinion observed 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....” (quoting *Gould v. Morgan*, 907 F.3d 659, 676 (1st Cir. 2018), petition for cert. pending *sub nom Gould v. Lipson*, No. 18-1272). Quoting *Gould* again, it noted that “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.*”

But the Second Amendment clearly states that the “right of the people to keep and bear arms shall not

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<sup>12</sup> “Semiautomatic assault weapons permit a shooter to fire multiple rounds very quickly, allowing him to hit *more victims* in a shorter period of time.” App. 25 (emphasis added).

be infringed,” and as this Court has held, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Heller*, 554 U.S. 636.

The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.

*Id.* at 634. The same is true of “policy judgments” by state legislatures.

But even if balancing were to be allowed, the opinion below discussed only the misuse of the banned firearms, and did not even consider their usefulness for legitimate defense.

As is well-known to law enforcement, the use of firearms by ordinary people to repel criminal assaults and thereby save innocent lives is a frequent occurrence.

The number of these defensive gun uses (“DGUs”) per year can only be estimated, but a number of studies have tried to do just that. Gary Kleck and Mark Gertz conducted an especially thorough survey in 1993, with stringent safeguards to weed out respondents who might misdescribe or misdate a

DGU report. Kleck and Gertz found results indicating between 2.2 and 2.5 million DGUs annually.<sup>13</sup>

Philip Cook of Duke University and Jens Ludwig of Georgetown University were skeptical of Kleck's results, so they conducted their own survey for the Police Foundation. That survey produced an estimate of 1.46 million DGUs.<sup>14</sup> In the mid-1990s, the Centers for Disease Control did well-designed research (though they did not publicize the results) that supports a finding of something over 1 million DGUs a year.<sup>15</sup> The National Opinion Research Center argues that the actual annual DGU figure is in the range of 256,500 to 1,210,000.<sup>16</sup> In other words, by almost all measures, the use of firearms in defense of self, home, or others is very frequent.

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<sup>13</sup> Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminol. 150 (1995). The Kleck/Gertz survey found that a large majority of defensive uses do not involve firing the weapon, but merely displaying it to deter an attacker. *Id.* at 175

<sup>14</sup> PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE 73 (1996), <https://www.Policefoundation.org/wp-content/uploads/2015/06/Cook-et-al.-1996-Guns-in-America.pdf>

<sup>15</sup> Brian Doherty, *A Second Look at a Controversial Study About Defensive Gun Use*, REASON (Sep. 4, 2018), <https://reason.com/2018/09/04/what-the-cdcs-mid-90s-surveys-on-defensi>.

<sup>16</sup> Tom W. Smith, *A Call for a Truce in the DGU War*, 87 J. Crim. L. & Criminol. 1462 (1997).

**B. AR-15 platform rifles are suitable for home defense.**

AR-15 platform rifles are preferred by law enforcement and civilians for several important reasons. A training course in the Patrol Rifle (AR-15) for Massachusetts Municipal Police states:

The [AR-15] rifle is a superior tool. It allows the officer to either stand off from the threat or, if the situation requires, advance to the threat with the confidence that the tool in their hands can deal with almost any perceived threat.

MASSACHUSETTS MUNICIPAL POLICE TRAINING COMMITTEE, BASIC FIREARMS INSTRUCTOR COURSE: PATROL RIFLE 3 (2007).

After noting that the AR-15 platform has sufficient power and “a larger magazine capacity than our service pistol or shotgun,” the course manual states that: “The longer sight radius makes it potentially a more accurate weapon which lowers the liability to the department.” *Id.* The longer sight radius resulting in increased accuracy also benefits civilians. The AR-15 platform is also far easier to shoot accurately than a handgun because it is stabilized against the shoulder, and handguns require more training and technique to shoot with accuracy. App. 146.

Additional reasons that both law enforcement and civilians prefer the AR-15 platform include:

The .223 (5.56mm) ammunition for which most AR platform rifles are chambered is adequate but not too powerful for home defense, and superior to most pistol cartridges. App. 144-145, 160. Ballistics expert Buford Boone III was for 15 years the primary Supervisory Special Agent with oversight of the FBI's Ballistic Research Facility (BRF). App. 141. The BRF is responsible for testing and evaluating all ammunition, firearms, and body armor used operationally by the FBI. *Id.* Mr. Boone notes:

The penetration range of ... .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.

App. 145. At the same time, "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." App. 161. It is also less likely than effective shotgun ammunition to overpenetrate. App. 147. This is an important consideration in law enforcement work, and to citizens acting in defense of their homes where there may be other family members present.

AR platform rifles are relatively lightweight, App. 145, and may be shorter than many traditional wood-stocked hunting rifles or most shotguns. That makes

them more maneuverable, for law enforcement officers and civilian home defense, in the tight spaces of a home. App. 145-46.

Recoil is relatively mild in its most common chambering (.223/5.56mm). App. 146. Recoil, muzzle flash (light from powder burning outside the barrel), and muzzle blast (noise) will be less than with more powerful rifles. This minimizes temporary blindness in dark conditions and disorientation caused by a firearm's loud report in an enclosed area.

For reasons such as these, large numbers of law enforcement officers purchase AR-15 platform or AK pattern rifles for their own private ownership at home. According to a large scale survey conducted by the National Shooting Sports Foundation ("NSSF"), 11% of private owners of modern sporting rifles or MSRs (a category that includes AR-15 and AK pattern rifles) had a law enforcement background. NSSF, MODERN SPORTING RIFLE (MSR) COMPREHENSIVE CONSUMER REPORT 12 (2013). Of these, half were active law enforcement officers, and half were retired. *Id.* For respondents with a military or law enforcement background, "home defense" was the second most important reason (8.35 on a scale of 10) for owning an MSR, just slightly lower than "recreational target shooting" (8.86). *Id.* (unpaginated cross-tabulation tables).

**C. AR-15 platform rifles are in fact effectively used for home defense.**

The court below contended that "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....” App. 20. But not only are AR-15 platform rifles suitable for home defense, they are in fact effectively used for that purpose. Following are some recent examples.

In a subdivision just outside Houston, a 15 year old boy used an AR-15 to protect himself and his 13 year old sister against two intruders who had broken into their home, hitting one adult invader with three shots.<sup>17</sup> Following the Sutherland Springs, Texas, church shooting, a citizen retrieved his own AR-15, ran to the scene, and shot the attacker (who later died) as he exited the church.<sup>18</sup>

In Oklahoma, a homeowner’s 23 year old son with an AR-15 shot and killed three home invaders dressed in black with black masks and gloves, at least two of whom were armed.<sup>19</sup> A homeowner in Henderson, North Carolina, grabbed his AR-15 from under the

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<sup>17</sup> Mary Chastain, *15-Year Old Boy Uses AR-15 to Defend Himself, Sister Against Home Invaders*, BREITBART.COM (Jan. 10, 2013); <https://www.breitbart.com/politics/2013/01/10/15-year-old-boy-uses-ar-15-to-defend-house-against-burglars/>.

<sup>18</sup> Jennifer Brett, *‘He had an AR-15, but so did I.’ Sutherland Springs hero hailed by NRA*, THE ATLANTA JOURNAL-CONSTITUTION (May 6, 2018), <https://www.ajc.com/blog/buzz/had-but-did-sutherland-springs-hero-hailed-nra/QAO2FwB8GcBBNdrax24lGO/>.

<sup>19</sup> Avalon Zoppo, *Oklahoma Man Uses AR-15 to Kill Three Teen Home Intruders*, NBC NEWS (Mar. 28, 2017), <https://www.nbcnews.com/news/us-news/oklahoma-man-uses-ar-15-kill-three-teen-home-intruders-n739541>.

bed and surprised an armed intruder who had kicked in the door to his house. Both men fired but the homeowner connected, and the intruder ran outside and collapsed across the street where he and an accomplice were apprehended by police.<sup>20</sup>

In July of 2019, a 61 year old disabled veteran was attacked in his home by four armed intruders who intended to rob him. The homeowner was shot once and hospitalized in stable condition, but he killed two of the attackers with his AR-15 and the police apprehended the two who survived.<sup>21</sup>

It is erroneous to dismiss out of hand, as the court below did, the fact that firearms of this kind are useful for defense of home and innocent life.

**V. MAGAZINES WITH A CAPACITY OF OVER TEN ROUNDS ARE STANDARD CAPACITY, NOT LARGE CAPACITY, AND ARE TYPICALLY POSSESSED BY LAW ENFORCEMENT AND LAW-ABIDING CITIZENS FOR LAWFUL PURPOSES.**

Beginning in the 1970s, law enforcement agencies and civilians alike began to replace revolvers as their

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<sup>20</sup> *Homeowner shoots intruder in Vance County break-in*, WRAL.COM (May 12, 2014), <https://www.wral.com/homeowner-shoots-intruder-in-vance-county-break-in/13638825/>.

<sup>21</sup> Austin L. Miller, *Summerfield homeowner injured, kills 2 intruders with AR-15*, SARASOTA HERALD TRIBUNE (Jul. 11, 2019), <https://www.heraldtribune.com/news/20190711/summerfield-homeowner-injured-kills-2-intruders-with-ar-15>.

preferred sidearms with semi-automatic pistols. Firearms, tactics, and police expert Massad Ayoob notes that the first Glock, the Glock 17 chambered for 9mm ammunition, established itself as “a ‘service pistol’ par excellence.”<sup>22</sup> The Glock 17 holds 17 rounds “in its standard magazine.” *Id.* Not long after, the Glock 22 was introduced, chambered for the .40 caliber S & W round. “Its standard magazine capacity is 15.” *Id.* At the time Mr. Ayoob was writing, it was “believed to be in use by more American police departments than any other....” *Id.*

Besides being “the most popular police handgun in America,” the Glock pistol is also “hugely popular for action pistol competition and home and personal defense.” *Id.* at 90. Nearly all major handgun manufacturers produce semi-automatic handguns with standard magazine capacities over 10 rounds—Ruger, Smith & Wesson, Glock, Beretta, Heckler & Koch, Springfield Armory, CZ, SIG-Sauer, Browning, and others.

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. App. 164. Magazines holding over ten rounds are also standard capacity for the AR-15 platform rifle. App. 176-77; JA0706.

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<sup>22</sup> Massad Ayoob, *Finding the Right Glock*, COMPLETE BOOK OF HANDGUNS 87 (2013).

As stated by FBI firearms expert Boone:

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.

App. 148-49.

Between 1990 and 2015, Americans owned approximately 114,700,000 of these magazines of over 10 round capacity, accounting for approximately 50% of all magazines owned during this time (approximately 230,000,000).

In brief, Massachusetts has banned half or more of existing magazines for rifles and pistols by calling them “large capacity” when in fact they are standard capacity. They are commonly possessed by law-abiding citizens for lawful purposes in the vast majority of states, and are thus protected under the Second Amendment as interpreted by this Court in *Heller* and *McDonald*.

### CONCLUSION

The petition for certiorari should be granted.

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