

No. \_\_\_\_\_

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

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OCEAN STATE TACTICAL, LLC, et al.,

*Petitioners,*

v.

STATE OF RHODE ISLAND, 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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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

This Court has repeatedly underscored that “the Second Amendment protects the possession and use of weapons that are ‘in common use at the time.’” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 21 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)). Nevertheless, the same week *Bruen* was decided, Rhode Island enacted a law prohibiting the possession of ammunition feeding devices capable of holding more than ten rounds, even though tens of millions of law-abiding Americans have long lawfully owned hundreds of millions of these devices as integral components of legal firearms. And Rhode Island did not stop at banning acquisition of these common arms prospectively. Its law applies retrospectively, dispossessing citizens of lawfully acquired and constitutionally protected property without any compensation from the state. The First Circuit admitted that “no directly on-point tradition” supports banning commonly owned arms and that Rhode Island’s law does not permit citizens to keep their lawfully acquired property. But rather than follow those admissions to their logical conclusions, the court—in a decision emblematic of a troubling trend of continuing to distort this Court’s precedents in cases involving firearms—blessed this incursion on fundamental rights.

The questions presented are:

1. Whether a retrospective and confiscatory ban on the possession of ammunition feeding devices that are in common use violates the Second Amendment.
2. Whether a law dispossessing citizens without compensation of property that they lawfully acquired and long possessed without incident violates the Takings Clause.

**PARTIES TO THE PROCEEDING**

Petitioners (plaintiffs-appellants below) are Ocean State Tactical, LLC, d/b/a Big Bear Hunting and Fishing Supply, Jonathan Hirons, James Robert Grundy, Jeffrey Goyette, and Mary Brimer.

Respondents (defendants-appellees below) are the State of Rhode Island, Peter F. Neronha, in his official capacity as the Attorney General for the State of Rhode Island, and Colonel Darnell S. Weaver, in his official capacity as the Superintendent of the Rhode Island State Police.

**CORPORATE DISCLOSURE STATEMENT**

Petitioners Jonathan Hirons, James Robert Grundy, Jeffrey Goyette, and Mary Brimer are individuals. Petitioner Ocean State Tactical, LLC, has no parent corporation and no publicly held company owns 10% or more of its stock.

### **STATEMENT OF RELATED PROCEEDINGS**

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Ocean State Tactical, LLC, et al. v. State of Rhode Island, et al.*, No. 23-1072 (1st Cir.), judgment entered on March 7, 2024.
- *Ocean State Tactical, LLC, et al. v. State of Rhode Island*, No. 22-cv-00246 (D.R.I.), judgment entered on December 14, 2022.

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## PETITION FOR WRIT OF CERTIORARI

This case presents the Court with an opportunity to address a recurring issue on which the lower courts are in dire need of greater guidance: What arms may a state ban consistent with the Second Amendment? Unsurprisingly, several of the same states whose outlier discretionary-permitting regimes this Court invalidated in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), likewise have imposed severe restrictions on what arms their residents may own, banning firearms and ammunition feeding devices that have long been ubiquitous among law-abiding citizens and remain legal in the rest of the country. And while one would have thought that *Bruen* would prompt states to reassess the constitutionality of such restrictions, it has instead produced a rash of what can only be understood as protest legislation imposing *more* restrictive bans on long-common arms. Indeed, some states, like Rhode Island here, have even forced law-abiding citizens to surrender common arms that they lawfully acquired.

At the very least, one would have thought that the courts whose mode of Second Amendment analysis *Bruen* thoroughly repudiated would give these bans a meaningful fresh look after *Bruen*. Yet there too, it has remained largely business as usual, with courts straining to sustain arms bans for largely the same reasons that they sustained them under the now-abrogated two-step regime—albeit while once again failing to reach any consensus on questions as basic as what brings arms within the plain text of the Second Amendment; what this Nation’s historical traditions

vis-à-vis arms bans are; and what role (if any) common use plays in the analysis.

This is a case in point. In rejecting petitioners’ challenge to Rhode Island’s recent ban on magazines capable of holding more than ten rounds (which describes roughly half the magazines in the country), the district court began by quoting at length from Justice Breyer’s *Bruen* dissent positing that courts are “ill equipped” to analyze historical tradition, App.41-43 (quoting 597 U.S. at 111), and then concluded that the magazines necessary to render modern firearms operable are not protected by the Second Amendment *at all* because the magazine itself is not used “to cast at or strike another,” App.61-62 (emphasis omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008)). The First Circuit, for its part, was willing only to assume without deciding that a ban on feeding devices implicates the Second Amendment, before upholding the ban under a “nuanced” historical analysis that featured the convoluted claim that magazines that come standard-issue with all manner of semiautomatic firearms are especially “dangerous” because they can be used in AR-15 rifles, which it deemed “almost the same gun as the M[-]16 machinegun.” App.18 (quoting *Bevis v. City of Naperville*, 85 F.4th 1175, 1195 (7th Cir. 2023), *cert. denied sub nom. Harrel v. Raoul*, 144 S.Ct. 2491 (2024)). And the court purported to find historical support for magazine-capacity restrictions in the same founding-era gunpowder storage laws that *Heller* rejected as *disanalogous* to bans on common arms. App.19; *see Heller*, 554 U.S. at 632.

That smacks of a result in search of a reason. And it vividly “illustrates why this Court must provide more guidance” (to put it mildly) on which arms the Second Amendment protects. *Harrel*, 144 S.Ct. at 2492 (Thomas, J., respecting the denial of certiorari). As these and other post-*Bruen* decisions have proven, absent the absolute clearest of mandates from this Court, lower courts set on sustaining arms bans will continue “contorting what little guidance” they are willing to concede this Court has offered to insulate them from meaningful review. *Id.* Indeed, notwithstanding that *Heller* invalidated an arms ban, courts continue to profess to find this Court’s cases “of little help” when it comes to assessing their constitutionality. App.59-62; *see also, e.g., Bevis*, 85 F.4th at 1198. In the rare event that it even looks like citizens might vindicate their Second Amendment rights, moreover, the same courts that reflexively upheld these bans before *Bruen* have proven ready and willing to grant emergency stays, *sua sponte* en banc review, or whatever else it takes to prevent that from happening. And just to keep out of the hands of law-abiding citizens firearms and magazines so ubiquitous that they dwarf the most popular vehicle in the country.

None of that is remotely consistent with this Court’s precedents, let alone with historical tradition. Yet owing to these efforts, the same law-abiding citizens who were unconstitutionally deprived of their right to carry arms outside the home before *Bruen* continue to be deprived of their right to keep arms that are common in the rest of the country. The result is a Nation that remains split, with the Second Amendment alive and well in (most of) the vast

middle, but routinely disregarded near the coasts. Whatever else the Framers intended in enshrining the right to keep and bear arms into our charter of fundamental freedoms, it was not to tolerate a Nation divided on a question as consequential as which arms that right covers. This Court should grant certiorari and reject Rhode Island's late-breaking effort to dispossess its citizens of arms that have been kept and borne by law-abiding citizens for the better part of a century.

### **OPINIONS BELOW**

The First Circuit's opinion, 95 F.4th 38, is reproduced at App.1-29. The district court's opinion, 646 F.Supp.3d 368, is reproduced at App.30-95.

### **JURISDICTION**

The First Circuit issued its opinion on March 7, 2024. Justice Jackson extended the time to file a petition for writ of certiorari to August 4, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Second, Fifth, and Fourteenth Amendments to the U.S. Constitution are reproduced at App.96. Rhode Island's Large Capacity Feeding Device Ban Act of 2022 ("HB6614") is reproduced at App.97-98.

### **STATEMENT OF THE CASE**

#### **A. Legal and Factual Background**

On June 20, 2022, just days before *Bruen* reiterated that "the Second Amendment protects the possession and use of weapons that are 'in common use,'" 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627),



Rhode Island enacted HB6614, a sweeping ban outlawing some of the most common arms in America. HB6614 makes it unlawful to “manufacture, sell, offer to sell, transfer, purchase, possess, or have under [one’s] control a large capacity feeding device.” R.I. Gen. Laws §11-47.1-3. The statute defines “[l]arge capacity feeding device” to mean any “magazine, box, drum, tube, belt, feed strip, or other ammunition feeding device” that is “capable of holding, or can readily be extended to hold, more than ten (10) rounds of ammunition to be fed continuously and directly therefrom into a semi-automatic firearm,” except for “attached tubular device[s] ... capable of holding only .22 caliber rimfire ammunition.” *Id.* §11-47.1-2(2). That prohibition is criminal, and the penalties for violating it are steep, including “imprisonment of not more than five (5) years.” *Id.* §11-47.1-3(a).

The law’s broad (mis)classification of what makes a feeding device “large capacity” captures magazines that tens of millions of Americans, many Rhode Islanders included, have long lawfully kept and borne for lawful purposes such as self-defense. Indeed, hundreds of millions of feeding devices that can hold more than ten rounds of ammunition have been sold in the United States in the past few decades alone, making them far more common than the Ford F-150, the most popular vehicle in the country. *See* Nat’l Shooting Sports Found., *Detachable Magazine Report 1990-2021* (2024), <https://tinyurl.com/4p2j5xbz>; Brett Foote, *There Are Currently 16.1 Million Ford F-Series Pickups on U.S. Roads*, Ford Auth. (Apr. 9, 2021), <https://bit.ly/3GLUtaB>. In fact, the average American gun owner owns *more* ten-plus round magazines than magazines that hold only ten rounds or fewer. *See*

William English, Ph.D., *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 24-25 (Sept. 28, 2022), <https://bit.ly/3yPfoHw>. The most common reasons cited for owning these arms are target shooting (64.3% of owners), home defense (62.4%), hunting (47%), and defense outside the home (41.7%). *Id.* at 23.

That should come as no surprise. The magazines Rhode Island now bans have long been lawful in most of the country (including, until 2022, Rhode Island) and remain lawful in most states today. *See* Lillian Mongeau Hughes, *Oregon voters approve permit-to-purchase for guns and ban high-capacity magazines*, NPR (Nov. 15, 2022), <https://n.pr/3QMJCC1>. Tracking consumer preference, many modern handguns—the “quintessential self-defense weapon,” *Heller*, 554 U.S. at 629—come standard with such magazines. *See Gun Digest 2018* at 386-88, 408 (Jerry Lee & Chris Berens eds., 72d ed. 2017). So do many modern rifles, including all the best-selling models. *See* Nat’l Shooting Sports Found., *Modern Sporting Rifle Comprehensive Consumer Report* 31 (July 14, 2022), <https://bit.ly/3GLmErS>. In short, what the D.C. Circuit said more than a decade ago is even more true today: “There may well be some capacity above which magazines are not in common use but ... that capacity surely is not ten.” *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011).

Nevertheless, Rhode Island not only banned these ubiquitous magazines, but took the extraordinary step of confiscating them from law-abiding citizens who lawfully acquired them long before the ban took place. Those who “lawfully possesse[d] a large capacity

feeding device” before the law was enacted and still possessed one when it took effect had to do one of three things—none of which included keeping their property intact—within 180 days of the Act’s passage: (1) permanently alter their feeding devices to hold no more than ten rounds; (2) surrender them to the police; or (3) transfer or sell them to a third party outside the state who may lawfully own them. R.I. Gen. Laws §11-47.1-3(b)(1). The 180-day mark came and went in December 2022, so any Rhode Islander who currently possesses a magazine capable of holding more than ten rounds, save for the few narrow classes of people the Act exempts (federally licensed firearms dealers, certain law-enforcement officers, and active-duty members of the U.S. Armed Forces or National Guard, *see id.* §11-47.1-3(b)(2-3)), is now a criminal.

### **B. Proceedings Below**

Fearing criminal punishment should they continue to possess their lawfully acquired arms, petitioners brought this suit just days after HB6614 was enacted. The district court was resistant to their claims—and this Court’s cases—right out of the gate. The court began by quoting at length from the *Bruen* dissent’s claim that *Heller* was “wrong” and that courts are “ill equipped” to conduct the historical analysis *Bruen* requires. App.42-43 (quoting *Bruen*, 597 U.S. at 108, 111 (Breyer, J., dissenting)). Not surprisingly given that inauspicious introduction, the court swiftly denied petitioners’ request for injunctive relief, ruling that keeping ammunition feeding devices is not even conduct presumptively protected by the Second Amendment. App.57-65. In so ruling, the court dismissed this Court’s Second Amendment cases

as “of little help.” App.59-62. It then posited that ammunition feeding devices are not “Arms” because people do not use the device itself “to cast at or strike another,” and deferred to the views of “a professor of linguistics” who opined that such devices are better understood to be “accoutrements.” App.62-64. After that, “the court’s Second Amendment analysis simply end[ed]”; it did not put the state to the burden of justifying its incursion on a fundamental right as consistent with historical tradition. App.71.

Petitioners fared no better on their remaining claims. Despite acknowledging that “the only way to comply with the statute for some plaintiffs ... is to forfeit” their property without compensation, the district court found “no ‘taking.’” App.72. According to the court, a law that mandates forfeiture or destruction of lawfully obtained property is a mere “use restriction[],” which the court deemed exempt from Takings Clause scrutiny entirely so long as it is an exercise of the “police power.” App.73-74. So, after “find[ing that] the LCM Ban [is] a valid exercise of police power,” the court once again simply stopped. App.88. The court then quickly dispatched the remaining preliminary-injunction factors, finding all of them to favor the state. App.88-94.

The First Circuit affirmed. At the threshold, the court was willing only to assume without deciding that magazines capable of holding more than ten rounds are “arms’ within the scope of the Second Amendment,” and so did not disturb the district court’s contrary holding. App.6-7. The court then brushed aside the lack of any historical restrictions on ammunition feeding devices or how many rounds a

firearm could fire without being reloaded, reasoning that Rhode Island's recent effort to ban magazines that have been around for a century "implicat[es] unprecedented societal concerns" because "today's semiautomatic weapons fitted with LCMs are 'more accurate and capable of quickly firing more rounds' than their historical predecessors." App.7-8.

Turning to historical tradition, the court began by focusing not on whether the arms Rhode Island has banned are commonly kept and borne, but on "the extent to which LCMs are actually used by civilians in self-defense" situations—i.e., how often someone fires more than ten rounds at an attacker. App.9. While the court acknowledged that people rarely fire their firearms in self-defense *at all*, it insisted that *Bruen* "directs us in no uncertain terms to assess the burden imposed by modern gun regulations" by ignoring how often people keep and bear the arms a state seeks to ban. App.21. For good measure, the court then derided the common-use inquiry as a "popularity test," declaring that it "defies reason" to maintain (as *Heller* and *Bruen* do) that "the constitutionality of arms regulations is to be determined based on the ownership rate of the weapons at issue." App.21-22.

Having neatly excised from the equation the conduct the Second Amendment textually protects—i.e., keeping and bearing arms—the court posited that Rhode Island's ban "imposes no meaningful burden on the ability of [its] residents to defend themselves" since people rarely fire at would-be attackers all the ammunition in the magazines that they commonly keep and bear. App.10-11. The court then deemed Rhode Island's ban analogous in "how" it burdens

Second Amendment rights to bans on *uncommon* arms that are “*unprotected* by the Second Amendment,” like sawed-off shotguns and machineguns, and what it labeled “severe restrictions” on Bowie knives, which were really mostly just concealed-carry bans or outlier restrictions on *all* arms recognized either contemporaneously or more recently by this Court to be inconsistent with our nation’s historical traditions. App.11 & n.9.

Turning to the “why” component of the analysis, the court once again focused on Bowie knives, sawed-off shotguns, and machineguns, and purported to “infer” from laws restricting them the principle that the Second Amendment does not protect arms that the government deems too “dangerous,” App.17—by which the court apparently meant dangerous in the hands of someone bent on committing mass murder, since it never considered whether they pose any unique danger in the hands of the *law-abiding* citizens whose rights the ban actually burdens. The court then posited that ammunition feeding devices that hold more than ten rounds are analogous to machineguns because they are “frequently used” in a semiautomatic AR-15, which it (like the Seventh Circuit) declared to be “almost the same gun as the M[-]16 machinegun.” App.18 (quoting *Bevis*, 85 F.4th at 1195). And the court closed by declaring Rhode Island’s magazine ban analogous to founding-era laws that “limited the quantity of gunpowder that a person could possess, and/or limited the amount that could be stored in a single container.” App.19. In the court’s view, “[i]t requires no fancy to conclude that ... founding-era communities,” who were worried about the fire-safety risk of storing highly combustible gunpowder in large

quantities, may also have been amenable to “limiting the number of bullets that could be held in a single magazine.” App.19.

The court’s analysis of petitioners’ Takings Clause claim was equally stilted. Because Rhode Island gives citizens a menu of options for getting rid of their property—forced sale, government forfeiture, or compulsory modification—the court held that it does not effect a physical taking. In its view, physical takings occur only when “the government necessarily occup[ies], tak[es] title to, or physically possess[es] the relevant item.” App.27. That Rhode Island gives (or at least gave) citizens “the option to sell, transfer, or modify their magazines” thus defeated petitioners’ claim, even though the court admitted that the law prohibits petitioners from “continu[ing] to possess” their property “in the state of Rhode Island” as it was when they acquired it. App.27. The court further held that HB6614 does not even effect “a regulatory taking,” on the theory “that property owners must ‘necessarily expect[]’ the government to force them to “dispos[e] of” or destroy their property ““from time to time.”” App.27 (first alteration in original).

### **REASONS FOR GRANTING THE PETITION**

In the wake of this Court’s decision in *Bruen*, one would have thought lower courts would take a much harder look at late-breaking efforts to ban firearms and ammunition feeding devices that have been common for the better part of a century. As the decisions below instead illustrate, it remains business as usual in courts that routinely rubber-stamped firearms restrictions under the interest-balancing test that *Bruen* explicitly repudiated. The district court

here would not even accept that the ammunition feeding devices necessary for semiautomatic firearms to operate as intended are at least *presumptively* protected by the Second Amendment. And the First Circuit purported to find historical analogs to magazine bans that did not come around until a few decades ago only by declaring *semiautomatic* and *fully* automatic firearms “almost the same,” deeming concealed-carry laws equivalent to possession bans, and resurrecting the same gunpowder-storage laws that *Heller* expressly rejected as having nothing to do with possession bans.

Unfortunately, the courts below are not alone in reducing *Bruen* to a mere speedbump on the road to continuing to bless late-breaking bans on long-common arms. After concluding that a ban on rifles, pistols, and shotguns does not even burden conduct presumptively protected by the Second Amendment, the Seventh Circuit began and ended its analysis of a similar magazine ban by deeming it sufficient that a law-abiding citizen who wants “a magazine that loads 30 rounds can buy three 10-round magazines instead.” *Bevis*, 85 F.4th at 1197. When a district court had the temerity to invalidate California’s magazine ban after the state failed to produce any meaningful historical analogs, the Ninth Circuit took the extraordinary step of reconvening an en banc panel (composed mostly of senior judges, no less) just to grant a temporary emergency stay before the plaintiffs could even respond. *Duncan v. Bonta*, 83 F.4th 803, 805-07 (9th Cir. 2023) (en banc). When a Fourth Circuit panel expressed considerable sympathy at oral argument for a challenge to Maryland’s ban on so-called “assault weapons,” the full court stepped in and granted en



banc review *sua sponte* before the panel could issue a decision. *Bianchi v. Brown*, 2024 WL 163085, at \*1 (4th Cir. Jan. 12, 2024). And the Third Circuit recently refused to even consider whether plaintiffs were likely to succeed on a challenge to a Delaware magazine and firearms ban, on the remarkable theory that they would not be entitled to a preliminary injunction even if the law is likely unconstitutional. *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 2024 WL 3406290, at \*5 (3d Cir. July 15, 2024).

All of that raises the troubling prospect of déjà vu all over again, with the same states that unlawfully withheld from their residents the right to carry arms now withholding the right to keep common ones, and the same courts that distorted *Heller* in service of upholding those restrictive carry regimes (albeit, as here, often for contradictory and constantly shifting reasons) now distorting both *Heller* and *Bruen* in service of upholding arms bans. Indeed, courts are routinely examining arms bans as if the only thing this Court has ever said on the matter is that machineguns bans are constitutional—even though *Heller* not only invalidated a ban on common arms, but explained exactly why historical tradition compelled that result. Yet courts have openly refused to even consider the common-use test that *Heller* employed and *Bruen* reiterated, insisting that this Court cannot possibly have meant what it has (at least) twice said, since that might actually require them to hold some or all of these bans unconstitutional.

If courts truly think what this Court has said about arms bans is “of little help” in assessing their

constitutionality, then this Court should take up the charge to say more. What arms a state may ban consistent with the Second Amendment was already one of the most hotly litigated issues before *Bruen*, and the recent rash of *Bruen*-resistance laws has brought it even more front and center. It is also perhaps the single most important issue, as the right to keep and bear arms does not mean much without any consensus on which arms it covers. And this is an excellent case in which to address that question, as the First Circuit never even so much as hinted that any further factual or historical development would alter its view that Rhode Island's ban passes constitutional muster. This Court should grant review and make clear that it will not sit on the sideline as courts chip away at the historical-tradition test that *Rahimi* just reiterated remains the law of the land.

### **I. This Court Should Resolve Whether States May Ban Commonly Owned Arms.**

1. As *Heller* explained and *Rahimi* and *Bruen* reiterated, “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms.” *Bruen*, 597 U.S. at 28 (quoting *Heller*, 554 U.S. at 582); accord *United States v. Rahimi*, 144 S.Ct. 1889, 1897 (2024); *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (per curiam). That presumptive protection covers “any thing that a man ... takes into his hands, or useth in wrath to cast at or strike another,” *Heller*, 554 U.S. at 581, which an ammunition feeding device surely is. As their name suggests, feeding devices are not passive holders of ammunition, like a cardboard cartridge box of yore; they are integral to the design of semiautomatic

firearms and the mechanism that makes them work, actively feeding ammunition into the firing chamber. *Duncan v. Becerra*, 970 F.3d 1133, 1146 (9th Cir. 2020). A semiautomatic firearm equipped with a feeding device is thus indisputably a “thing that a man ... takes into his hands,” *Heller*, 554 U.S. at 581, and a “bearable” instrument that “facilitate[s] armed self-defense,” *Bruen*, 597 U.S. at 28. After all, “without bullets, the right to bear arms would be meaningless,” and the central purpose of the Second Amendment—self-defense—eviscerated. *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014).

That makes the threshold inquiry here simple. Indeed, not even the First Circuit was willing to embrace the district court’s remarkable holding that ammunition feeding devices are not protected by the Second Amendment *at all*, which would essentially mean that semiautomatic firearms are not either. But the court apparently could not bring itself to reverse that holding either, so it simply “assume[d]” for the sake of argument that ammunition feeding devices are presumptively protected. App.6-7.

Answering the historical-tradition question here should have been equally straightforward. This Court has repeatedly held that “arms” cannot be prohibited “consistent with this Nation’s historical tradition” if they are “in common use today” for lawful purposes, as opposed to “dangerous and unusual.” *Bruen*, 597 U.S. at 17, 27, 47; *accord Heller*, 554 U.S. at 625, 631. An arms ban thus can pass muster only if the banned arms are “*both dangerous and unusual*.” *Caetano*, 577 U.S. at 417 (Alito, J., concurring in the judgment). The First Circuit did not dispute that the magazines

Rhode Island has banned are commonly kept and borne by law-abiding citizens for lawful purposes like self-defense. Nor could it, as any claim that arms more common by an order of magnitude than the Ford F-150 are “unusual” would not pass the straight-face test. *Compare Detachable Magazine Report, supra* (hundreds of millions of magazines that hold more than ten rounds sold in the U.S. in recent decades), *with Foote, supra* (16 million F-series trucks sold).

That should have been the end of the matter, for our Nation’s historical tradition is one of protecting the right of law-abiding citizens to keep and bear arms that are “in common use today” for lawful purposes. *Bruen*, 597 U.S. at 47. But even if one were to look beyond common use, the historical record reveals no tradition whatsoever of banning firearms or feeding devices based on firing capacity. Firearms capable of firing more than ten rounds have been around for centuries. Yet “[a]t the time the Second Amendment was adopted, there were no laws restricting ammunition capacity.” David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 *Alb. L. Rev.* 849, 864 (2015). And while semiautomatic firearms equipped with feeding devices holding more than ten rounds have been on the civilian market since the turn of the twentieth century, not a single state in the Union (or Congress) restricted the manufacture, sale, or possession of magazines or other ammunition feeding devices *until the 1990s*.

To be sure, a handful of states enacted laws restricting the firing capacity of semiautomatic firearms in the 1920s, contemporaneous with their enactment of restrictions on *fully* automatic firearms

that had just started to make their way onto civilian markets in very limited numbers. *See* 1927 Mich. Pub. Acts 887, 888; 1927 R.I. Acts & Resolves 256, 256-57; 1933 Minn. Laws ch. 190. But all those laws were soon either repealed or replaced with laws that restricted *only* fully automatic firearms—which, unlike semiautomatics, were never widely adopted by law-abiding citizens for lawful purposes. *See* 1959 Mich. Pub. Acts 249, 250; 1959 R.I. Acts & Resolves 260, 260, 263; 1963 Minn. Sess. L. ch. 753, at 1229. And none of those laws—which were outliers even in the brief period when they were on the books—was ever understood to apply to magazines or other feeding devices, regardless of capacity. Kopel, *supra*, 78 Alb. L. Rev. at 864-66.

The first state law restricting magazine capacity did not come until 1990—two centuries after the founding and well over a century after the ratification of the Fourteenth Amendment. *See* 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. §2C:39-1(y), -3(j)).<sup>1</sup> And the vast majority of states still today allow

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<sup>1</sup> Before 1990, only D.C. restricted magazines themselves—and even that restriction dates back only to 1975. In 1932, Congress passed a local D.C. law prohibiting the possession of firearms that “shoot[] automatically or semiautomatically more than twelve shots without reloading.” Act of July 8, 1932, Pub. L. No. 72-275, §§1, 14, 47 Stat. 650, 650, 654 (1932), *repealed via* 48 Stat. 1236 (1934), *currently codified as amended at* 26 U.S.C. §§5801-72. At the time, the law was not understood to sweep up ammunition feeding devices; indeed, when Congress enacted the National Firearms Act just two years later, it imposed no restrictions on magazines. *See* Pub. L. No. 73-474, 48 Stat. 1236 (1934). But after the District achieved home rule in 1975, the new D.C. government interpreted the 1932 law to “outlaw[] all

law-abiding citizens to decide for themselves what ammunition capacity best suits their needs. As for the federal government, it did not regulate magazine capacity until 1994, when Congress temporarily banned ammunition feeding devices with a capacity of more than ten rounds. *See* Pub. L. No. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)). Unlike Rhode Island’s ban, however, that federal law was time limited and operated only prospectively, allowing people who had already lawfully acquired such magazines to keep them. *Id.* And Congress let the law expire in 2004 after a study by the Department of Justice revealed that it had produced “no discernible reduction” in violence with firearms across the country. Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, Rep. to the Nat’l Inst. of Just., U.S. Dep’t of Just. 96 (2004), <https://bit.ly/3wUdGRE>.

In short, the common-use test and the historical record confirm the same conclusion: There is no historical tradition in our Nation of prohibiting ammunition feeding devices (or firearms) based on their capacity to fire without being reloaded.

2. It should come as little surprise, then, that the First Circuit did not purport to find one. In fact, the court candidly conceded that there is “no directly on-point tradition” that might justify HB6614, App.8, which is just another way of saying that the law is *inconsistent* with our Nation’s historical tradition.

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detachable magazines and all semiautomatic handguns.” Kopel, *supra*, 78 Alb. L. Rev. at 866. (*Heller*, of course, invalidated the latter portion.)

But rather than follow that concession to its logical end, the court converted it into an excuse to cast a much wider net, reasoning that states are entitled to greater leeway when it comes to arms that “are ‘more accurate and capable of quickly firing more rounds’ than their historical predecessors.” App.7.

The consequences of that (il)logic are perverse. Technological advancements that improve the accuracy, capacity, and functionality of firearms are exactly what law-abiding citizens want, as they increase the chances of hitting one’s target and decrease the risk of causing collateral damage in a stressful self-defense situation. To be sure, those same qualities unfortunately are also often attractive to individuals determined to commit heinous criminal acts. *See* App.7-8. But if the government could ban any arm that is exceptionally dangerous in the hands of those who would use it to inflict maximum injury, then it is hard to see what modern arms it could not ban. Indeed, much of what the First Circuit said about why the magazines Rhode Island now deems too “large” are supposedly different from their historical predecessors could be said equally of semiautomatic handguns or rifles without regard to the magazine with which they are equipped.

That is precisely why our historical tradition is one of protecting arms that are commonly chosen by law-abiding citizens, not focusing on how dangerous arms would be in the hands of criminals. Simply put, advancements in accuracy and capacity that are welcomed by law-abiding citizens are not the sort of “dramatic technological changes” with which *Bruen* was concerned—as evidenced by the Court’s emphatic

focus on whether arms are “in common use *today*.” 597 U.S. at 47 (emphasis added).<sup>2</sup> To say that is not to deny that there are some who have misused the arms Rhode Island has banned for unlawful—indeed, awful—purposes. But that was equally true of the handguns banned in *Heller*. The *Heller* dissenters protested that handguns “are specially linked to urban gun deaths and injuries” and “are the overwhelmingly favorite weapon of armed criminals.” 554 U.S. at 682 (Breyer, J., dissenting). The majority did not dispute these points; it just found them irrelevant to whether handguns are constitutionally protected, because that question does not turn on whether arms are misused by criminals. It turns on whether law-abiding citizens commonly own and use them for lawful purposes.

Having watered down the historical-tradition inquiry, the First Circuit proceeded to distort the “how” and “why” inquiries too. The court first insisted that the “how” inquiry necessitates determining whether a law imposes a “meaningful” burden on Second Amendment rights, which it further insisted turns exclusively on how frequently people use the arms a state has banned to ward off an attack. App.10-11. The court then posited that Rhode Island’s ban on ubiquitous arms imposes an “(at most) negligible burden” on Second Amendment rights because people rarely expend more than ten bullets

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<sup>2</sup> The First Circuit’s claim that modern firearms are a new phenomenon justifying additional regulation also suffers from a history problem: The semiautomatic action was invented in 1885. Nicholas J. Johnson et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* 498 (3d ed. 2022).



when fighting off an attacker. App.12. That reasoning is wrong at every turn.

At the outset, *Bruen* does not instruct courts to conduct an ad hoc inquiry into whether the burden a law imposes is “meaningful.” It was the *dissent* that advocated a test focused on “the degree to which the [challenged] law burdens the Second Amendment right.” *Bruen*, 597 U.S. at 131 (Breyer, J., dissenting). The majority embraced a test that examines “how” a law “burdens” the right, not how *much* of a burden (a court thinks) a law imposes. Courts are thus supposed to conduct *Bruen*’s historical inquiry by comparing the *mechanics* of historical and modern laws—i.e., how they regulate—not by looking at where laws fall on some overarching “burdensomeness” spectrum.

*Rahimi* is illustrative. When analyzing whether 18 U.S.C. §922(g)(8) is consistent with historical tradition, the Court did not start by situating the law in a “substantial,” “meaningful,” or “minimal” burden category. It examined how the law actually works—i.e., by authorizing state actors to disarm someone only after a “judicial determination[]” that the person “likely would threaten or had threatened another with a weapon,” and even then only for a “limited duration”—and compared that to how the government’s proffered historical analogs worked. 144 S.Ct. at 1902. That makes eminent sense, since the whole point of embracing a historical-tradition mode of analysis is to get courts out of the business of making subjective assessment of whether a burden on Second Amendment rights is “meaningful.”

But even if the abstract degree of burden a law imposes mattered, the First Circuit’s assessment of

that question defies this Court's cases, the Constitution's text, and common sense. According to the First Circuit, *Bruen* "directs [courts] in no uncertain terms to" look exclusively to how often people fire a particular arm at would-be attackers to determine whether banning it "meaningfully" burdens Second Amendment rights. App.20-21. In fact, *Bruen* never even mentioned how often people fire handguns in self-defense situations when determining whether they have a right to carry them. It sufficed there, just as it did in *Heller*, that "handguns are the most popular weapon *chosen* by Americans for self-defense." *Heller*, 554 U.S. at 629 (emphasis added); *see also Bruen*, 597 U.S. at 47. And *Heller* explicitly described the Second Amendment as protecting arms "*typically possessed* by law-abiding citizens for lawful purposes," 554 U.S. at 624-25 (emphasis added), not arms typically fired at would-be attackers. Far from backing away from that sensible proposition (let alone doing so "in no uncertain terms"), *Bruen* juxtaposed the phrase "weapons that are those 'in common use at time'" with the phrase "those that 'are highly unusual in society at large.'" 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627). That juxtaposition makes sense only if the "uses" that matter include keeping and bearing.

The First Circuit's contrary view also elides the Constitution's text. The Second Amendment does not protect the right to self-defense in the abstract; it protects the right "to keep and bear Arms" for self-defense. U.S. Const. amend. II. As this Court has (twice) explained, that includes not just firing arms at would-be attackers, but keeping and "carry[ing]" arms equipped with ammunition "for the purpose ... *of being armed and ready* for offensive or defensive action."

*Bruen*, 597 U.S. at 32 (emphasis added) (ellipsis in original) (quoting *Heller*, 554 U.S. at 584). And thankfully so, as the right to use firearms in self-defense would be meaningless without the right to keep and bear them at the ready. How frequently people keep versus carry the arms they acquire for self-defense, or fire them at practice ranges versus at attackers, is therefore irrelevant. A citizen “uses” her firearm and the feeding device within it in the manner the Second Amendment protects anytime she does *any* of those things.

More fundamentally, the First Circuit’s theory that the scope of the right to keep and bear arms depends on what the government thinks is *necessary* to exercise it is irreconcilable with the very notion that the Second Amendment protects a fundamental right. In the First Circuit’s eyes, so long as law-abiding citizens rarely expend more than “two to three rounds of ammunition” in life-or-death armed confrontations, states have carte blanche to prohibit keeping or bearing any more than that. App.10. By that logic, Rhode Island could decide tomorrow that its residents really only need five, or four, or three rounds—or that they do not really need ammunition at all, since the mere presence of a firearm scares off most would-be attackers. See English, *2021 National Firearms Survey, supra*, at 26 (“[I]n most defensive gun uses the gun was not fired.”). When *Bruen* rejected means-end balancing as “one step too many,” 597 U.S. at 19, it took “out of the hands of government ... the power to decide” what the people really *need* for their own self-defense, *id.* at 23 (quoting *Heller*, 554 U.S. at 634). The First Circuit’s how-many-do-you-really-need

approach to a fundamental right is fundamentally wrong.

Things got no better when the court finally turned to the historical record. Unable to find any historical capacity limits (because there are none), the court invoked bans on sawed-off shotguns and machineguns, as well as purportedly “severe[] restricti[ons]” on Bowie knives. App.14-18. But as the court itself was forced to acknowledge, sawed-off shotguns and machineguns have never been common among law-abiding citizens, who instead commonly saw fit to ban both almost as soon as they appeared roughly a century ago. App.14-17 & n.13; *see also Garland v. Cargill*, 602 U.S. 406, 430-32 (2024) (Sotomayor, J., dissenting). No similar tradition developed for semiautomatic firearms capable of firing more than ten rounds without reloading—even though they have been around even longer. Moreover, sawed-off shotguns and machineguns pose different risks than semiautomatic firearms even in the hands of law-abiding citizens because they are harder to accurately aim and control. Those longstanding bans thus say little, if anything, about the constitutionality of Rhode Island’s late-breaking effort to ban ammunition feeding devices that account for roughly half the magazines in the country.

As for the purportedly “severe restrictions placed on Bowie knives by forty-nine states and the District of Columbia,” App.11-12, 16-17, those laws almost uniformly either prohibited only the concealed carry of Bowie knives (or carry with intent to do harm) or simply provided heightened punishments for using one in the commission of a crime. *See* David Kopel,

*Bowie Knife Statutes 1837-1899*, Reason.com (Nov. 20, 2022), <https://bit.ly/3RNRpQD>. While *Bruen* of course does not demand “a historical *twin*,” 597 U.S. at 30, restrictions on how people may carry and use arms are not remotely analogous to laws that, like HB6614, not only “broadly restrict arms” lawfully used “by the public generally,” but take the extreme step of banning them outright. *Rahimi*, 144 S.Ct. at 1901.

The court’s reliance on gunpowder-storage laws was even less justifiable. App.19-20. Laws designed to ensure that combustible material would not combust when *not* in use are self-evidently different from laws that confine the universe of arms citizens may use. Only by completely ignoring “how” these historical laws regulated could the court deem them analogous to an outright ban on feeding devices with a capacity of more than ten rounds.

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In the end, the First Circuit’s analysis looks disturbingly similar to the analysis it deployed in the pre-*Bruen* world. Before *Bruen*, the First Circuit analyzed (and uniformly rejected) Second Amendment claims via the following schematic: It first would ask whether the challenged law “burdens conduct that falls somewhere within the compass of the Second Amendment.” *Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019), *abrogated by Bruen*, 597 U.S. 1. Usually, the court would “assume, albeit without deciding,” that the answer was yes, at which point it would “train the lens of [its] inquiry on ‘how heavily [the challenged law] burdens th[e] right’ the Amendment protects. *Id.* (quoting *Gould v. Morgan*, 907 F.3d 659, 670-71 (1st Cir. 2018), *abrogated by Bruen*, 597 U.S. 1)). That is

the path the court followed in upholding Massachusetts' magazine ban in *Worman*, which ended with the court holding that Massachusetts' ban "does not heavily burden" Second Amendment rights because (1) "it proscribes only ... magazines of a particular capacity," and (2) "self-defense episode[s] in which ten or more shots were fired" are few and far between. *Id.* at 37.

This Court was unequivocal in abrogating *Worman*, and it was equally unequivocal in holding that interest balancing has no place in Second Amendment analysis. *See Bruen*, 597 U.S. at 19 & n.4. Yet the analysis the First Circuit applied below was no different from the one it applied six years ago. "To gauge how HB 6614 might burden the right of armed self-defense," the First Circuit "consider[ed] the extent to which LCMs are actually used by civilians in self-defense." App.9. And rather than focus on the uses the Second Amendment protects—namely, "keep[ing] and bear[ing]"—the court whittled what it means to use an arm down to the nub. The court thus used the exact same arguments to excuse the lack of any historical analogs for Rhode Island's law.

*Bruen* was not an invitation for lower courts to do everything just the same as before, with some new window dressing. And even accepting the (dubious) proposition that Rhode Island's late-breaking effort to ban magazines that Americans have lawfully kept and borne for a century implicates "unprecedented societal concerns or dramatic technological changes," *Bruen*, 597 U.S. at 27, no amount of "nuance" can justify deeming an outright ban on arms analogous to a concealed carry law or a restriction on how gunpower

may be stored because of concerns about fires, not criminal misuse of the powder. Any mode of analysis that suggests otherwise has strayed far from this Court's teachings.

**II. This Court Should Decide Whether States May Compel Law-Abiding Citizens To Dispossess Themselves Of Lawfully Acquired Property Without Compensation.**

Rhode Island's decision not only to prospectively ban commonly owned magazines capable of holding more than ten rounds of ammunition, but to *confiscate* them from law-abiding citizens who lawfully acquired them long before the ban was enacted, is one of the rare government initiatives that violates not one, but two provisions of the Bill of Rights. The First Circuit's contrary holding finding no Takings Clause violation is as profoundly wrong as it is profoundly important.

Under the Takings Clause, "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *see Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (applying Takings Clause to the states). A physical taking for which just compensation must be paid occurs whenever the government "dispossess[es] the owner" of her lawfully acquired property. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324 n.19 (2002); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982). That is true of personal property no less than real property; the Constitution's "categorical duty to pay just compensation" applies "when [the state] takes your car, just as when it takes your home," *Horne v. Dep't of Agric.*, 576 U.S. 350, 358

(2015), and it applies equally even when the state-authorized “invasion” is only partial, *see Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021). Rhode Island’s confiscatory ban runs afoul of those settled principles, as it forces citizens to dispossess themselves of their lawfully acquired property without any compensation from the state.

Rhode Island’s ban requires law-abiding property owners to: (1) permanently alter their feeding devices to hold no more than ten rounds; (2) surrender them to the police; (3) transfer or sell them to a third party in another state who may lawfully possess them. R.I. Gen. Laws §11-47.1-3(b)(1). There is no question that the second and third options require physical dispossession: The owner must hand the property over to someone else. That is literally the definition of a taking. *See* Taking, *Black’s Law Dictionary* (12th ed. 2024) (“taking” includes “transfer of possession”). And Rhode Islanders’ other “option”—to permanently alter their magazines to accept fewer than ten rounds—does not change the equation.

That is obviously true, of course, with respect to the subset of magazines “that cannot be modified.” App.72 (district court “accept[ing] that there are some that cannot be”); *see also* App.26 (circuit court recognizing that “[t]he statute ... offers no exceptions for any magazines that cannot be converted to lower capacity”). Dispossession is the only option for that property. But even as to magazines that *can* be “[p]ermanently modifie[d],” R.I. Gen. Laws §11-47.1-3(b)(1)(i), the shrink-or-surrender “option” does not eliminate the taking. It made no difference in *Horne* that the raisin growers could have avoided the taking



by “plant[ing] different crops” or selling “their raisin-variety grapes as table grapes or for use in juice or wine.” 576 U.S. at 365. Likewise, in *Loretto*, it made no difference that the property owner could have avoided the taking by converting her building into something other than an apartment complex. 458 U.S. at 439 n.17. This case is no different. Indeed, even Rhode Island referred to HB6614 in its briefing below as a “complete possessory ban.” RI.CA1.Br.52.<sup>3</sup>

The First Circuit held otherwise only by ignoring this Court’s precedents. According to the court of appeals, no physical taking occurs unless the state “occup[ies], tak[es] title to, or physically possess[es] the relevant item.” App.27. In other words, in the First Circuit’s view, a law that forces a private party to give his property to a private third party does not constitute a taking for which just compensation must be paid. That is not the law. In fact, this Court has explicitly rejected that theory. In *Kelo v. City of New London*, it made no difference that the law allowed Ms. Kelo to sell her property to a “private nonprofit entity.” 545 U.S. 469, 473-75 (2005). Petitioners pointed that out multiple times below. See CA1.Opening.Br.39; CA1.Reply.Br.22. The First Circuit offered no response.

That is likely because there is none. Whether a government edict forces the owner to hand her property over to the government or to a private third

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<sup>3</sup> At a minimum, forcing citizens to permanently alter their property or render it inoperable places an unconstitutional condition on its possession, which itself is a taking for which just compensation must be paid. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013).

party, there is still a taking—and an obligation for the state to pay just compensation. A statute that says, “You can give your property to the government, or you can give it to someone else, but you cannot keep it,” effects a taking for which compensation must be paid no less than a law that offers only the first option. Any other conclusion would make property rights trivially easy to destroy. “[P]roperty rights ‘cannot be so easily manipulated.’” *Horne*, 576 U.S. at 365 (quoting *Loretto*, 458 U.S. at 439 n.17).

The court’s attempt to analogize to regulatory takings cases likewise misses the forest for the trees. The principal problem with the state’s confiscatory ban is not that it deprives market actors of the expected economic use of their property (although it does). See App.27. The problem is that the ban deprives them of their continued possession of their property. A complete deprivation of possession is not just a “use” restriction that can be dismissed as a mere regulatory taking. See *Andrus v. Allard*, 444 U.S. 51, 66 (1979); accord *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978). After all, a person cannot *use* physical property *at all* unless she can possess it.

The First Circuit’s embrace of Rhode Island’s “police powers” argument is, if anything, even more problematic. See App.26-27. To be sure, the police power may make a taking *permissible* (other constitutional provisions aside), insofar as it tends to show that the state took property for a public use. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (“The ‘public use’ requirement is ... coterminous with the scope of a sovereign’s police powers.”). But that

has nothing to do with whether the government has an obligation to pay just compensation. As this Court has emphasized numerous times, whether a law effects a taking is “a separate question” from whether the state has the power to enact it. *Loretto*, 458 U.S. at 425. And an uncompensated taking is unconstitutional “without regard to the public interests that it may serve” or the state power from which it is derived. *Id.* at 425-26; *see also Chi., Burlington & Quincy Ry. Co. v. Illinois ex rel. Grimwood*, 200 U.S. 561, 593 (1906).

This is not a close question. This Court has held that a law enacted pursuant to a state’s “police power” is not immune from Takings Clause scrutiny even under the *regulatory* takings doctrine. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1020-27 (1992). As the Court explained there, the “legislature’s recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated.” *Id.* at 1026. The same is true *a fortiori* for the categorical rule that the state must compensate for physical takings.

Moreover, *Lucas* emphasized the importance of asking whether a property owner could use his property in a particular manner *before* the state tried to restrict it. *See id.* at 1027. Here, the state seeks to dispossess its citizens of magazines that they lawfully obtained before the state decided to prohibit them. Of course, a citizen who *unlawfully* obtained such a magazine after the ban was already in place could not object (at least under the Takings Clause) to having it confiscated. But just as “confiscatory regulations” of real property “cannot be newly legislated or decreed

(without compensation),” *id.* at 1029, nor can confiscations of personal property be decreed after the fact. After all, whatever expectations people may have regarding property regulations, they “do not expect their property, real or personal, to be actually occupied or taken away.” *Horne*, 576 U.S. at 361. That is especially true when the property is protected by another provision of the Constitution, as the First Circuit assumed to be the case here.

All of that underscores the need for this Court’s intervention. It is bad enough for a court to allow a state to prohibit law-abiding citizens from possessing what the Constitution protects. To hold that a state may freely *confiscate* what the Constitution protects without even providing just compensation adds constitutional insult to constitutional injury. Even if Rhode Island’s ban on common arms could somehow be reconciled with the Second Amendment, there is no Second Amendment exception to the Takings Clause.

### **III. The Questions Presented Are Exceptionally Important, And Now Is The Time To Resolve Them.**

Whether and when the government may ban—and even confiscate from law-abiding citizens—common arms is an issue of incredible importance. After all, the scope of the right to keep and bear arms depends, first and foremost, on what arms it covers. And that issue has taken on even greater practical significance since *Bruen*, as several of the states that expressed open hostility to this Court’s decision responded with protest legislation imposing even *greater* restrictions on which arms law-abiding citizens may keep and bear. Yet, as the decision below

demonstrates, the same courts that were reversed in *Bruen* for refusing to take *Heller* at face value are now doing the same thing all over again with *Bruen*.

Take, for instance, the Seventh Circuit's recent decision resuscitating its own pre-*Bruen* precedent to uphold a ban on long-lawful arms. The court reached the remarkable conclusion that the most common rifle in America is not even an "arm" within the meaning of the Second Amendment, and then rejected a challenge to a magazine ban without so much as mentioning text or historical tradition. *Bevis*, 85 F.4th at 1197. The Third Circuit, meanwhile, recently refused to even consider a challenge to Delaware's magazine and firearms ban, on the equally remarkable theory that individuals who wish to possess the banned arms would not be entitled to relief *even if the law is likely unconstitutional* because "they already own" other arms. *Del. State Sportsmen's Ass'n*, 2024 WL 3406290, at \*7-8. *But see Heller*, 554 U.S. at 629 ("It is no answer to say ... that it is permissible to ban ... handguns so long as ... other firearms ... [are] allowed.").

The Ninth Circuit's recent actions in *Duncan v. Bonta* are likewise eerily reminiscent of its pre-*Bruen* patterns. After this Court vacated an earlier en banc decision upholding California's magazine ban and remanded for re-analysis in light of *Bruen*, 142 S.Ct. 2895 (2022), the en banc court instead remanded to the same district court that had already held the ban unconstitutional, which unsurprisingly did so again, in an opinion that exhaustively examined the historical record, 695 F.Supp.3d 1206 (S.D. Cal. 2023). The Ninth Circuit, however, would have none of it.

The court bypassed the ordinary appellate-review process, reconvened an en banc panel now composed mostly of non-active judges, and granted an “emergency” stay over the dissent of most of the active judges, in an opinion that cited *Bruen* only for the truism that “the right secured by the Second Amendment is not unlimited.” 83 F.4th at 805-07. The court then en banc’d yet *another* case after a panel had the temerity to hold a ban on butterfly knives unconstitutional. *See Teter v. Lopez*, 93 F.4th 1150 (9th Cir. 2024).

The Fourth Circuit, for its part, en banc’d not one but two Second Amendment cases in the span of a day—one *sua sponte*, no less—after one produced an opinion vindicating the Second Amendment rights of law-abiding citizens who simply wish to obtain the requisite permit to carry arms, and another appeared poised to invalidate Maryland’s so-called “assault weapons” ban. *See Bianchi*, 2024 WL 163085, at \*1; *Md. Shall Issue, Inc. v. Moore*, 2024 WL 124290, at \*1 (4th Cir. Jan. 11, 2024).

All of that vividly “illustrates why this Court must provide more guidance” on which arms the Second Amendment protects. *Harrel*, 144 S.Ct. at 2492 (Thomas, J., respecting the denial of certiorari). Absent the absolute clearest of instructions, lower courts will continue “contorting” this Court’s cases to uphold arms bans, producing a parade of ever-more confused and contradictory opinions aligned only in being utterly “unmoored from both text and history.” *Id.* The time has come for this Court to step in, and this case provides an excellent vehicle to do so. While it arises in the preliminary-injunction posture, there

was nothing preliminary or tentative about the First Circuit's analysis. Indeed, unlike the Seventh Circuit in *Bevis*, the First Circuit never even suggested that any further factual or historical development might impact its analysis, let alone actually change its mind. So, unless this Court intervenes, law-abiding citizens in the First Circuit will be forced to live under an abridged version of the Second Amendment that does not even allow them to possess magazines that are routinely chosen by tens of millions of Americans throughout the rest of the country as the best means of defending themselves and their loved ones. The Court should step in now, provide the guidance lower courts profess to lack, and ensure that law-abiding citizens in outlier states who do not share the founding generation's respect for the right to keep and bear arms do not have their constitutional rights trampled all over again.

**CONCLUSION**

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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August 2, 2024



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*Appendix A*

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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No. 23-1072

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OCEAN STATE TACTICAL, LLC, d/b/a Big Bear Hunting  
and Fishing Supply; JONATHAN HIRONS; JAMES  
ROBERT GRUNDY; JEFFREY GOYETTE; MARY BRIMER,

*Plaintiffs-Appellants,*

v.

STATE OF RHODE ISLAND; COLONEL DARNELL S.  
WEAVER, in his official capacity as the  
Superintendent of Rhode Island State Police; PETER  
F. NERONHA, in his official capacity as the Attorney  
General for the State of Rhode Island,

*Defendants-Appellees.*

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Filed: Mar. 7, 2024

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Before: Kayatta, Selya, and Gelpí, *Circuit Judges.*

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**OPINION**

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KAYATTA, *Circuit Judge.* In response to proliferating mass shootings across the country, the Rhode Island General Assembly enacted House Bill 6614, the Large Capacity Feeding Device Ban of 2022 (“HB 6614” or “LCM ban”). The legislation amended

Rhode Island’s Firearms Act to prohibit possession of certain large capacity feeding devices or magazines (“LCMs”), defined as those that hold more than ten rounds of ammunition. R.I. Gen. Laws § 11-47.1-3. As a result, all owners of LCMs were required to (a) permanently modify their LCMs to accept no more than ten rounds; (b) sell them to a firearms dealer; (c) remove them from the state; or (d) turn them into law enforcement. *Id.*

Four gun owners and a registered firearms dealer joined as plaintiffs to file this lawsuit, alleging that HB 6614 violates the United States Constitution. In due course, the district court considered and denied plaintiffs’ motion to preliminarily enjoin enforcement of HB 6614. *Ocean State Tactical, LLC v. Rhode Island (“Ocean State”)*, 646 F. Supp. 3d 368, 373 (D.R.I. 2022).

After hearing plaintiffs’ appeal, we now affirm the district court’s denial of the preliminary injunction, finding that plaintiffs have not shown a sufficient likelihood of success on the merits of their claims. Our reasoning follows.

## I.

For nearly a century, Rhode Island has banned possession of certain items “associated with criminal activity.” In 1927, the state’s General Assembly proscribed machine guns<sup>1</sup> and silencers. 1927 R.I. Pub. Laws 256. In 1956, it banned armor-piercing bullets, R.I. Gen. Laws § 11-47-20.1, bombs, and bombshells. *Id.* § 11-47-21. In 2018, it prohibited

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<sup>1</sup> The 1927 law defined “machine gun” as any automatic weapon, or any semiautomatic weapon which shoots more than twelve shots semiautomatically without reloading.

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bump stocks. *Id.* § 11-47-8.1. And on June 21, 2022, the legislature passed HB 6614, adding LCMs to this list of items that most Rhode Islanders may not possess.<sup>2</sup> *Ocean State*, 646 F. Supp. 3d at 372.

Rhode Island defines an LCM as

a magazine, box, drum, tube, belt, feed strip, or other ammunition feeding device which is capable of holding, or can be readily extended to hold, more than ten (10) rounds of ammunition to be fed continuously and directly therefrom into a semiautomatic firearm.

R.I. Gen. Laws § 11-47.1-2(2). By holding multiple rounds of ammunition, magazines enable shooters to fire repeatedly without reloading. While some firearms have “fixed” magazines that are integral to the frame, “most modern semi-automatic firearms” use detachable magazines. *Ocean State*, 646 F. Supp. 3d at 376. When a magazine is detachable, it can be removed and replaced with another fully loaded magazine, “much as an extra battery pack gets swapped in and out of a battery-operated tool.” *Id.* at 375.

HB 6614 includes a grace period of 180 days within which to comply with the ban. R.I. Gen. Laws § 11-47.1-3(b)(1). The legislation punishes the possession of LCMs after the grace period with up to

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<sup>2</sup> The possession ban exempts certain law enforcement officers, retired law enforcement officers, and members of the armed services. *Id.* § 11-47.1-3(b)(2)-(3). The ban also excepts from its reach tubes that can hold exclusively .22 caliber ammunition. *Id.* § 11-47.1-2(2).

five years in prison. *Id.* § 11-47.1-3(a); *Ocean State*, 646 F. Supp. 3d at 373.

Before the grace period ended, plaintiffs sued the State of Rhode Island, its Attorney General, and its Superintendent of State Police (collectively “the State” or “Rhode Island”) in federal district court, claiming that HB 6614 violated the Second Amendment, Fifth Amendment’s Takings Clause, and Fourteenth Amendment’s Due Process Clause. Plaintiffs sought a declaration that the LCM ban was unconstitutional, and moved for a preliminary injunction against its enforcement while this lawsuit proceeded. After considering the parties’ arguments and numerous declarations from expert witnesses, the district court denied the preliminary injunction primarily on the basis that plaintiffs were unlikely to succeed on any of their constitutional claims. *See Ocean State*, 646 F. Supp.3d at 373-74. Plaintiffs timely appealed.

## II.

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The movant’s likelihood of success on the merits is the “main bearing wall” of our analysis. *W Holding Co. v. AIG Ins. Co. - Puerto Rico*, 748 F.3d 377, 383 (1st Cir. 2014).

We review the denial of a preliminary injunction for abuse of discretion. *Together Emps. v. Mass Gen. Brigham Inc.*, 32 F.4th 82, 85 (1st Cir. 2022). Under that deferential standard, “[w]e review the district

court's factual findings for clear error" and "its legal conclusions de novo." *Id.* The parties dispute whether the district court's findings of "legislative facts for its *own* analyses" are subject to clear error review, but resolution of this dispute makes no difference to the outcome of this appeal. Finally, we may "affirm [the district court's] decision on any basis supported by the record and the law." *Lydon v. Loc. 103, Int'l Bhd. of Elec. Workers*, 770 F.3d 48, 53 (1st Cir. 2014).

In concluding that plaintiffs were unlikely to succeed on any of their constitutional claims, the district court reasoned that HB 6614 did not violate the Second Amendment because plaintiffs failed to prove that "LCMs are 'Arms' within the meaning of the Second Amendment's text." *Ocean State*, 646 F. Supp. 3d at 374. It then found that HB 6614 was consistent with the Fifth Amendment as a valid use of the police power, and posed no vagueness or retroactivity problems under the Fourteenth Amendment. *Id.* As to the effect of any injunction on the public interest, the district court determined that the LCM ban promotes public safety because, "in a mass shooting incident every pause to reject a spent magazine and load a new one represents the opportunity to preserve a specific life -- or more than one." *Id.* at 401. And because that same "momentary interruption" to plaintiffs "is not the kind of irreparable harm required for a preliminary injunction to issue," the district court ultimately concluded that "the State is entitled to enforcement" of its LCM ban.<sup>3</sup> *Id.* at 400-01.

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<sup>3</sup> Both parties construe the district court's opinion as requiring the State to "ensur[e] that any forfeited magazines be retained in

Plaintiffs do not argue on appeal that the balance of irreparable harms and the effect on the public interest mandate an injunction even if their claims are not likely to succeed on the merits. Rather, defining the harm as the denial of a constitutional right, and the public interest as disfavoring such a denial, they rest their appeal on the argument that they are likely to prevail on the merits of at least one of their constitutional claims. We focus our review accordingly.

### III.

#### A.

To assess plaintiffs' claim that Rhode Island's LCM ban violates the Second Amendment, we proceed in the manner directed by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and most recently in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Under that approach, we first consider whether "the Second Amendment's plain text covers" the possession of LCMs. *Bruen*, 597 U.S. at 17. If it does, we then consider whether Rhode Island's ban is "consistent with this Nation's historical tradition of firearm regulation" and thus permissible under the Second Amendment. *Id.*

As to the first consideration, we find it unnecessary on this appeal to decide whether the district court erred in deeming LCMs outside the realm of "arms" protected by the plain text of the

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a safe manner so that they may be returned to their owners if a permanent injunction is granted in the future." *Id.* at 400. The State does not challenge this requirement.



Second Amendment. Instead, we assume that LCMs are “arms” within the scope of the Second Amendment and proceed to consider whether HB 6614 is consistent with our history and tradition.

Plaintiffs contend that because firearms capable of firing more than ten rounds without reloading “are nothing new” and have at times been unregulated, Rhode Island’s ban is at odds with tradition. To support this position, they point out that some multi-shot firearms existed in the late 1700s, and others were more common by the mid-to-late 1800s in the form of the Henry and Winchester rifles. But as plaintiffs concede, today’s semiautomatic weapons fitted with LCMs are “more accurate and capable of quickly firing more rounds” than their historical predecessors. And they are substantially more lethal.

More importantly, we find in the record no direct precedent for the contemporary and growing societal concern that such weapons have become the preferred tool for murderous individuals intent on killing as many people as possible, as quickly as possible. This is unsurprising, given evidence that “the first known mass shooting resulting in ten or more deaths” did not occur in this country until 1949.<sup>4</sup> *Oregon Firearms Fed’n, Inc. v. Brown*, 644 F. Supp. 3d 782, 803 (D. Or.

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<sup>4</sup> The record suggests that mass shootings have become more frequent and more deadly. See James Densley & Jillian Peterson, Editorial, *We Analyzed 53 Years of Mass Shooting Data. Attacks Aren’t Just Increasing, They’re Getting Deadlier*, L.A. Times (Sept. 1, 2019), <https://perma.cc/TV49-J74J> (noting that, as of the study’s publication in 2019, 20% of mass shootings in approximately the last fifty years had occurred within the last five years, and 33% of those since 2010).

2022). Likewise, “[a]t the Founding, there was no comparable problem of gun violence at schools.”<sup>5</sup>

Concern about the increasing frequency of LCM-aided mass shootings today prompted the Rhode Island legislature to pass HB 6614.<sup>6</sup> And since the record contains no evidence that American society previously confronted—much less settled on a resolution of—this particular concern, we have no directly on-point tradition on which to rely in determining whether Rhode Island’s ban is consistent with our history and tradition.

This lack of directly on-point tradition does not end our historical inquiry, but it does affect our mode of analysis. The Supreme Court has instructed that cases like this one “implicating unprecedented societal concerns . . . may require a more nuanced approach” to historical analysis. *Bruen*, 597 U.S. at 27. To that end, it has cautioned that we not limit our consideration to whether Rhode Island’s law is “a dead ringer for historical precursors” or has “a historical twin.” *Id.* at 30. We must instead employ “analogical reasoning” to determine whether historical analogues

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<sup>5</sup> Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. 99, 156 (2023). (detailing the precipitous rise in school shootings from “eleven shootings a decade ago” to “ninety-three shootings during the 2020-2021 school year”).

<sup>6</sup> See Press Release, Rhode Island Gen. Assembly, Assembly Approves Large-Capacity Magazine Ban (June 14, 2022), <https://perma.cc/B4LX-PNLR> (“High-capacity magazines have enabled mass shooters to commit the most devastating, appalling, and most lethal attacks on the public in recent decades. With this bill, we are finally saying we will not tolerate these dangerous weapons.”).

are “relevantly similar.” *Id.* at 28 (quoting C. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 773 (1993)).

“Relevantly similar” in what sense? The Supreme Court provides the answer. We must train our attention on two comparisons: “*how* and *why* the regulations burden a law-abiding citizen’s right to armed self-defense.” *Id.* at 29 (emphasis added). First, we consider the “how,” comparing the “burden on the right of armed self-defense” imposed by the new regulation to the burden imposed by historical regulations. *Id.* at 29. Second, we turn to the “why,” comparing the justification for the modern regulation to the justification for historical regulations. *Id.*

**B.**

**1.**

To gauge how HB 6614 might burden the right of armed self-defense, we consider the extent to which LCMs are actually used by civilians in self-defense. The answer supplied by the record in this case is that civilian self-defense rarely—if ever—calls for the rapid and uninterrupted discharge of many shots, much less more than ten. Plaintiffs claim that 39 million Americans have (at some time) owned at least one magazine holding more than ten rounds. But while any self-defense fusillade of more than ten rounds would surely beget publicity, plaintiffs’ expert can point only to a single 2015 news article reporting that a victim of an attempted robbery in Texas emptied a

12-round clip when shooting two assailants two and seven times, respectively.<sup>7</sup>

More recently, Edward Troiano, the Chief of the Rhode Island Bureau of Criminal Identification and Investigation, conducted a review of self-defense incidents in Rhode Island in which semiautomatic firearms were discharged, and unearthed no incidents “in which a civilian has ever fired as many as 10 rounds in self-defense.” Troiano’s finding is consistent with our prior observation in *Worman v. Healey* that the record in that case revealed not “a single example of a self-defense episode in which ten shots or more were fired.” 922 F.3d 26, 37 (1st Cir. 2019). It also aligns with determinations of our sister circuits that “most homeowners only use two to three rounds of ammunition in self-defense,” *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. N.J.*, 910 F.3d 106, 121 n.25 (3d Cir. 2018), and that the use of more than ten bullets in self-defense is “rare.” *Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017).<sup>8</sup>

Given the lack of evidence that LCMs are used in self-defense, it reasonably follows that banning them imposes no meaningful burden on the ability of Rhode

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<sup>7</sup> G. Halek, *Houston Concealed Carriers Unload on Armed Muggers-Why We Travel in Packs*, Concealed Nation (Dec. 21, 2015), <https://perma.cc/X33S-89KZ>.

<sup>8</sup> Each of these three cases was abrogated by *Bruen*, but *Bruen* did not call into question courts’ observations about the actual use of LCMs. We have also considered the fact that a weapon can be “used” in self-defense by way of threat, even if it is not actually fired. But plaintiffs claim no plausible scenario in which a threat has proved less effective because the brandished weapon could only fire ten rounds at once without reloading.

Island's residents to defend themselves. True, one could imagine Hollywood-inspired scenarios in which a homeowner would need to fend off a platoon of well-armed assailants without having to swap out magazines. But we read *Bruen* as requiring us to ascertain how a regulation actually burdens the right of armed self-defense, not how it might be imagined to impose such a burden. And even if we were to consider imagined burdens in our analysis, we would certainly accord them little weight. Otherwise, the assessment of how a regulation burdens the right of armed self-defense would always find a substantial burden.

2.

Having considered how HB 6614 burdens—or more accurately, does not burden—the right of armed self-defense, we next consider for comparison purposes the burdens imposed by the regulation of other arms throughout our history, as *Bruen* requires. That historical regulation includes bans on sawed-off shotguns, which the Supreme Court has deemed unprotected by the Second Amendment, *see United States v. Miller*, 307 U.S. 174, 177 (1939), restrictions on machine guns, most of which have been effectively banned nationally since 1986, *see* 18 U.S.C. § 922(o), and even the severe restrictions placed on Bowie knives by forty-nine states and the District of Columbia in the nineteenth century once their popularity in the hands of murderers became apparent.<sup>9</sup>

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<sup>9</sup> *See, e.g.*, 1893 R.I. Pub. Laws 231; 1837 Ala. Laws 7, No. 11 § 2; 1837 Ga. Laws 90, § 1; 1837-1838 Tenn. Pub. Acts 200-01, §§ 1-2; 1838 Fla. Laws 36, No. 24, § 1; 1838 Va. Acts 76, ch. 101;

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In each instance, it seems reasonably clear that our historical tradition of regulating arms used for self-defense has tolerated burdens on the right that are certainly no less than the (at most) negligible burden of having to use more than one magazine to fire more than ten shots.

### C.

Having determined that HB 6614 likely imposes very little—if any—burden on the right of armed self-defense as compared to the burdens imposed on that right by its historical predecessors, we now turn to considering “why” Rhode Island enacted HB 6614. At this step, Bruen directs us to consider the extent to which the justification for Rhode Island’s LCM ban is analogous to justifications for the laws that form “this Nation’s historical tradition of firearm regulation.” 597 U.S. at 17.

#### 1.

Rhode Island justifies HB 6614 as a reasoned response by its elected representatives to a societal concern: that the combination of modern semiautomatic firearms and LCMs have produced a growing and real threat to the State’s citizens, including its children. Mass shootings have of late “become a weekly—and sometimes daily—event.” *Ocean State*, 646 F. Supp 3d at 393. And in those shootings, semiautomatic firearms equipped with LCMs “have been the weapons of choice.” *Worman*, 922 F.3d at 39.

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1839 Ala. Acts 67, ch. 77; 1881 Ark. Acts 191-92, No. 96 § 1; 1882 W. Va. Acts 421-22, ch. 135 § 7; Ariz. Rev. Stat. Ann. § 385 (1901).

The record indicates that such weapons have indeed been deployed in many of the “deadliest mass shootings in recent history.” *Id.* It also provides insight as to why: Semiautomatic firearms fitted with LCMs are highly effective weapons of mass slaughter. They are designed to “shoot multiple human targets very rapidly,” and to “allow the shooter to spray-fire from the hip position.” *Ocean State*, 646 F.Supp.3d at 394 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1262-63 (D.C. Cir. 2011)). Citing the testimony of emergency physician Dr. Megan Ranney, the district court detailed how this ability to “spray a crowd with bullets results in more injuries per person.” *Id.* at 395. The ensuing “cases with multiple bullet wounds are more complex, have a higher likelihood of injury that requires surgical intervention, and have a higher likelihood of death in the emergency department.” *Id.*

Plaintiffs offer testimony that a practiced shooter can switch out a spent magazine for a full one in a mere 2-3 seconds. They claim that “[s]uch a miniscule difference in practical fire rate would be unlikely to have any appreciable effect on lethality.” Were this so, it would reinforce the conclusion that the ban likely imposes no meaningful burden on the right of armed self-defense. And even if it is so, experts for the State testified that even momentary pauses for a magazine change have historically provided opportunities for “citizens or law enforcement [to] intervene.”<sup>10</sup> They

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<sup>10</sup> Consider the 2011 shooting in Tucson, Arizona that wounded U.S. Representative Gabby Giffords and killed six people including Chief Judge John Roll of the U.S. District Court for the District of Arizona. There, the shooter “was able to fire 31 rounds

likewise cite instances in which mass-shooting survivors were able to run for cover “in the few pauses where the shooter reloaded.”<sup>11</sup> Surveying the evidence, the district court “[found] as fact that in those two or three seconds a child—or two children, or even three—may escape the fire of a mad person.” *Id.* at 394.

Statistical evidence supports these anecdotal findings, confirming that magazine capacity directly corresponds to lethality. The State submitted expert testimony that, without extended magazines—defined as magazines holding more than 10 rounds—“semiautomatic rifles cause an average of 40 percent more deaths and injuries in mass shootings than regular firearms.” But “with extended magazines, semiautomatic rifles cause an average of 299 percent more deaths and injuries than regular firearms.”

## 2.

Having assessed Rhode Island’s justification for its LCM ban, we must now compare it to the justifications for HB 6614’s historical analogues. First, consider the rationale for excluding sawed-off shotguns<sup>12</sup> from Second Amendment protection.

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with a Glock 19 semiautomatic handgun in a matter of seconds before bystanders could disarm him as he changed magazines. Every one of those rounds hit an individual.”

<sup>11</sup> For example, in Newtown, Connecticut, “nine children were able to escape while the gunman paused to change out a thirty-round magazine.” Similarly, survivors of the 2017 Las Vegas mass shooting were able to run out of harm’s way while the shooter reloaded.

<sup>12</sup> A sawed-off shotgun is a shotgun with a barrel length of less than 18 inches (shorter than that of a regular shotgun),



Congress began regulating sawed-off shotguns in 1934, after they became popular with the “mass shooters of their day”—notorious Prohibition-era gangsters like Bonnie Parker and Clyde Barrow.<sup>13</sup> There is no doubt that these regulations are constitutional: Plaintiffs concede that sawed-off shotguns “are permissibly prohibited arms due to their dangerous and unusual nature,” and the Supreme Court has affirmed that Second Amendment protection does not extend to such “dangerous and unusual” weapons. *Heller*, 554 U.S. at 627.

Sawed-off shotguns may well be less effective at accomplishing mass murder—and more conducive to self-defense—than are semiautomatic rifles fitted with LCMs. As the State explains, standard “shotguns . . . are not semiautomatic because they require manual intervention before they are ready to fire again.” And as Congress noted while comparing the lethality of shotguns and semiautomatic weapons, shotguns “typically have much smaller magazine capabilities—from 3-5” and those magazines cannot be

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regardless of whether it has been shortened with a saw. *See Sawed-Off Shotgun*, Merriam-Webster.com Dictionary, <https://perma.cc/UA7J-BFH8>; *Is a Shotgun a Firearm Subject to the NFA?*, Bureau of Alcohol, Tobacco, Firearms and Explosives (Jan. 30, 2020), <https://perma.cc/J7V7-7MYZ>. The shorter barrel makes them easier to conceal but considerably less precise in aim. *See United States v. Amos*, 501 F.3d 524, 531 (6th Cir. 2007) (McKeague, J., dissenting).

<sup>13</sup> *See* National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (codified as amended at 26 U.S.C. §§ 5801-72); Ronald G. Shafer, *They Were Killers with Submachine Guns. Then the President Went After Their Weapons*, Wash. Post (Aug. 9, 2019), <https://perma.cc/PW9V-LF6R>.

replaced as quickly. H.R. Rep. No. 103-489, at 19 (1994). Thus, while a sawed-off shotgun might be easier to wield in a self-defense situation due to its shorter barrel, shotguns cannot unleash the torrents of “spray-fire” into a crowd that makes the combination of semiautomatic weapons and LCMs so deadly. *See Ocean State*, 646 F. Supp. at 394-95 (recounting the testimony of emergency-medicine expert Dr. Megan Ranney).

For an even older example, consider the justification for curtailing access to the Bowie knife, a distinctive weapon with a “longer blade[] designed expressly for fighting, rather than hunting or utility.” Its features made it “well-suited to cutting or stabbing” and other violent crime in the nineteenth century. At that time, Bowie knives were considered more dangerous than firearms; the Texas Supreme Court explained that, “[t]he gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least . . . . The bowie-knife differs from these in its device and design; it is the instrument of almost certain death.” *Cockrum v. State*, 24 Tex. 394, 402 (1859).

The record demonstrates that, when the country experienced a “nationwide surge of homicides” in the nineteenth century, states reacted by “passing laws severely restricting access to certain dangerous weapons,” including Bowie knives. These restrictions were nearly ubiquitous: From the beginning of the 1830s through the early twentieth century, the District of Columbia and every state except New

Hampshire passed laws restricting Bowie knives.<sup>14</sup> As they had with sawed-off shotguns, legislators responded to a growing societal concern about violent crime by severely restricting the weapons favored by its perpetrators, even though those same weapons could conceivably be used for self-defense.

Consider, too, an additional category of weapons that the Supreme Court has deemed outside the ambit of the Second Amendment: “weapons that are most useful in military service.” *Heller*, 554 U.S. at 627. These weapons, which include “M-16 rifles and the like . . . may be banned.” *Id.*; *see also* 18 U.S.C. § 922(o). Although the Court did not explicitly detail *why* such weapons are excepted from Second Amendment protection, one can infer the answer: They are more dangerous, and no more useful for self-defense, than a normal handgun or rifle.

By contrast, the Supreme Court opined that handguns cannot be banned in part because they are “the quintessential self-defense weapon.” *Heller*, 554 U.S. at 629. In so doing, the Court detailed several reasons why handguns are more conducive to self-defense than long guns, which include M-16s and many of the weapons that accept LCMs. Handguns, they reasoned, are “easier to store in a location that is readily accessible in an emergency,” “easier to use for those without the upper-body strength to lift and aim a long gun,” and “can be pointed at a burglar with one hand while the other hand dials the police.” *Id.*

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<sup>14</sup> Robert J. Spitzer, *Understanding Gun Law History After Bruen: Moving Forward by Looking Back*, 51 *Fordham Urb. L.J.* 57, 93-94 (2023).

There is no question that semiautomatic weapons fitted with LCMs much more closely resemble the proscribable “M-16 rifles and the like” than they do traditional handguns. *Id.* at 627. As the Seventh Circuit recently observed, the AR-15 (a semiautomatic weapon frequently used in combination with LCMs) “is almost the same gun as the M[-]16 machinegun.” *Bevis v. City of Naperville*, 85 F.4th 1175, 1195 (7th Cir. 2023). Indeed, the two weapons “share the same core design, and both rely on the same patented operating system.” *Id.* at 1195-96.

Additionally, LCMs minimize one of the few meaningful differences that *do* exist between M-16s and semiautomatic weapons: rate of fire. M-16s have a higher fire capacity than AR-15s, but LCMs can greatly reduce the need to reload, allowing shooters to fire many rounds in a shorter amount of time. *Id.* at 1197. Thus, LCMs enable semiautomatic weapons to function even more like their proscribable automatic counterparts: Both M-16s and semiautomatic firearms equipped with LCMs can rapidly hit very many human targets. And while empirically this is not a useful feature for self-defense, it is presumably conducive to combat in war zones.<sup>15</sup>

Finally, there exists one founding-era tradition that provides an especially apt analogy to Rhode Island’s LCM ban, as it involves both an analogous societal concern and an analogous response to that concern. Recall that the Rhode Island General Assembly passed HB 6614 to address growing societal

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<sup>15</sup> We do not consider in this opinion whether a state may ban semiautomatic weapons themselves.

concern about mass killings by lone individuals. To mitigate that risk, the legislature required its citizens to break down the size of the containers (magazines) used to store and feed ammunition.

Founding-era society faced no risk that one person with a gun could, in minutes, murder several dozen individuals. But founding-era communities did face risks posed by the aggregation of large quantities of gunpowder, which could kill many people at once if ignited. In response to this concern, some governments at the time limited the quantity of gunpowder that a person could possess, and/or limited the amount that could be stored in a single container. *See, e.g.*, 1784 N.Y. Laws 627 (preventing “Danger Arising from the Pernicious Practice of Lodging Gun Powder” by limiting individuals to 28 pounds of gunpowder apiece, which they were required to separate into four different cannisters).<sup>16</sup>

It requires no fancy to conclude that those same founding-era communities may well have responded to today’s unprecedented concern about LCM use just as the Rhode Island General Assembly did: by limiting the number of bullets that could be held in a single magazine. Indeed, HB 6614 is more modest than founding-era limits on the size of gun-powder containers in that it imposes no limits on the total amount of ammunition that gun owners may possess.

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<sup>16</sup> For additional, similar gunpowder storage laws from the founding era, see 1798-1813 R.I. Pub. Laws 85; Act of Dec. 6, 1783, chap. 1059, 11 Pa. Stat. 209; 1786 N.H. Laws 383-84; 1806 Ky. Acts 122 § 3.

As the forgoing examples illustrate, our nation's historical tradition recognizes the need to protect against the greater dangers posed by some weapons (as compared to, for example, handguns) as a sufficient justification for firearm regulation.<sup>17</sup> This exact justification stands behind HB 6614.

**D.**

In sum, the burden on self-defense imposed by HB 6614 is no greater than the burdens of longstanding, permissible arms regulations, and its justification compares favorably with the justification for prior bans on other arms found to pose growing threats to public safety. Applying *Bruen's* metrics, our analogical reasoning very likely places LCMs well within the realm of devices that have historically been prohibited once their danger became manifest.

**E.**

Plaintiffs nevertheless offer three main critiques of this reasoning. We address these critiques in turn.

**1.**

First, plaintiffs argue that whether people actually use LCMs in self-defense is irrelevant to the extent of HB 6614's burden on Rhode Islanders. Since "most people fortunately never have to fire their firearms for self-defense," the argument goes, what matters is whether citizens *possess* LCMs "for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another

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<sup>17</sup> For a collection of historical state restrictions on dangerous weapons, see *Repository of Historical Gun Laws*, Duke Ctr. for Firearms Law, <https://perma.cc/562R-7FJX>.

person.” *Bruen*, 597 U.S. at 32. *Bruen*, though, directs us in no uncertain terms to assess the burden imposed by modern gun regulations “on the right of armed self-defense.” *Id.* at 29. Depriving citizens of a device that is virtually never used in self-defense imposes less of a burden on that right than does banning a weapon that is, in fact, traditionally used in self-defense.

2.

Second, plaintiffs try to distinguish HB 6614 from our tradition of permissible arms regulations by pointing out that LCMs are owned by millions of Americans and are thus not “unusual.” Recall that the Supreme Court has held that some weapons (such as sawed-off shotguns) can be banned because the Second Amendment does not authorize “the carrying of dangerous and unusual weapons.” *Heller*, 554 U.S. at 627 (internal quotations omitted). Plaintiffs distort this characterization to insist that LCMs can *only* be banned if they are “highly unusual in society at large.” *Id.* at 625.

It defies reason to say that legislatures can only ban a weapon if they ban it at (or around) the time of its introduction, before its danger becomes manifest. The Supreme Court has made clear that the Second Amendment is no “regulatory straightjacket.” *Bruen*, 597 U.S. at 30. Law advances more slowly than the technology it regulates, but must nonetheless be able to respond when the ramifications of a technological development become more apparent over time. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 35 (2001) (decrying a “mechanical interpretation” of the Fourth Amendment that would leave today’s citizens “at the mercy of advancing technology”); *see also* National

Firearms Act of 1934, ch. 757, Pub. L. No. 73-474, 48 Stat. 1236 (federally regulating machine guns for the first time, even though they had existed in similar form for fifty years).<sup>18</sup>

Plaintiffs’ proposed popularity test contravenes case law in addition to logic. While the Supreme Court has indeed identified a “historical tradition of prohibiting the carrying of dangerous and unusual weapons,” it has not held that states may permissibly regulate only unusual weapons. *Bruen*, 597 U.S. at 21 (internal quotations omitted). Nor has it intimated that a weapon’s prevalence in society (as opposed to, say, the degree of harm it causes) is the sole measure of whether it is “unusual.”

While the Supreme Court has noted the common selection of handguns for self-defense in the home, it has not suggested that the constitutionality of arms regulations is to be determined based on the ownership rate of the weapons at issue, regardless of its usefulness for self-defense.<sup>19</sup> *See Heller*, 554 U.S. at 628-29. *Miller*’s determination that sawed-off shotguns fall outside the realm of Second Amendment protection, for example, contains no hint that the court somehow assumed that few people owned such weapons before they were banned. *See generally* 307 U.S. 174.

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<sup>18</sup> *The Machine Gun: Its History, Development and Use: A Resource Guide*, Library of Cong. (Sept. 2, 2022), <https://perma.cc/5EZH-DS8Q>.

<sup>19</sup> Even if widespread ownership was a valid source of constitutional validity, plaintiffs only assert that about ten percent of Americans have owned LCMs.



The closest arguable support for plaintiffs’ preferred rule—that a weapon cannot be banned once a large number of people own it even if that number is a small fraction of the general population—comes from a concurring opinion in *Caetano v. Massachusetts*, 577 U.S. 411 (2016). Writing for himself and Justice Thomas, Justice Alito pointed out that the stun guns at issue had already been purchased by “[h]undreds of thousands of . . . private citizens” making them “widely owned and accepted as a legitimate means of self-defense across the country.” *Id.* at 420 (Alito, J., concurring in the judgment) (internal quotations omitted). For that reason, according to Justice Alito, “Massachusetts’ categorical ban of such weapons . . . violate[d] the Second Amendment.” *Id.*

Here, plaintiffs argue in part that LCMs likewise cannot be banned because the number of LCMs owned by Americans today “dwarfs the number [of weapons at issue] in *Caetano*.” This argument treats the concurring opinion as if it were binding authority. It also elides a critical difference between stun guns and LCMs that bears heavily on the justification for any ban: Stun guns were specifically designed as *non-lethal* weapons, making them far less dangerous than semiautomatic firearms.<sup>20</sup> Despite plaintiffs’ fixation on the ownership rates of LCMs, such statistics are ancillary to the inquiry the Supreme Court has directed us to undertake.

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<sup>20</sup> See Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 Stan. L. Rev. 199, 204 (2009).

## 3.

Plaintiffs' final critique would, if correct, render meaningless that same Court-directed inquiry: They contend that any "laws first enacted long after ratification"—including those passed in the late nineteenth century—"come too late to provide insight" into the meaning of the Second Amendment. *Bruen*, 597 U.S. at 37.

The Supreme Court has indeed indicated that "founding-era historical precedent" is of primary importance for identifying a tradition of comparable regulation. *Id.* at 27. But it has also relied upon "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century." *Heller*, 554 U.S. at 605. The Court has likewise left open the possibility that "late-19th-century evidence" and "20th-century historical evidence" may have probative value if it does not "contradict[] earlier evidence." *Bruen*, 597 U.S. at 66 n.28.

We are therefore unpersuaded by plaintiffs' assertion that the laws regulating sawed-off shotguns, Bowie knives, and M-16s provide no insight into our "Nation's historical tradition of firearm regulation." *Id.* at 17. After all, if plaintiffs were correct on this point, then it would follow that those laws must themselves violate the Second Amendment. And because not even plaintiffs claim that those laws are invalid, we see no reason why those same laws cannot provide insight as apt historical precursors with which to compare HB 6614's burden and justification, as *Bruen* directs us to do. *Id.* at 29.

\* \* \*

Rhode Island was confronted with a societal concern regarding the frequency with which LCMs are facilitating mass murder. The concern is unprecedented and growing, and could not have been confronted—let alone resolved—by our founders. In response, the state passed a law that places no meaningful burden on the right of self-defense as actually practiced. The justification for the law is a public safety concern comparable to the concerns justifying the historical regulation of gunpowder storage and of weapons like sawed-off shotguns, Bowie knives, M-16s and the like. The analogical “how” and “why” inquiry that *Bruen* calls for therefore strongly points in the direction of finding that Rhode Island’s LCM ban does not violate the Second Amendment.

Common sense points in the same direction. It is fair to assume that our founders were, by and large, rational. To conclude that the Second Amendment allows banning sawed-off shotguns, Bowie knives, and M-16s—but not LCMs used repeatedly to facilitate the murder of dozens of men, women, and children in minutes—would belie that assumption. Accordingly, it should not be surprising that *Bruen*’s guidance in this case leads us to conclude that HB 6614 is likely both consistent with our relevant tradition of gun regulation and permissible under the Second Amendment.

#### IV.

Plaintiffs also fail to show a likelihood of prevailing on their Fifth Amendment takings claim. The Fifth Amendment provides that “private property” shall not “be taken for public use, without

just compensation.” U.S. Const. amend. V. “The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). In addition to these “physical” takings, the Court has recognized “regulatory takings” when a regulation “denies all economically beneficial or productive use” of the property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992). Nonetheless, it has established that a property owner can expect “the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.” *Id.* at 1027.

HB 6614 required all owners of LCMs to choose one of four options within 180 days of the law’s passage: They could (a) permanently modify their LCMs to accept ten rounds or fewer of ammunition; (b) sell them to a federally licensed firearms dealer or out-of-state resident; (c) transfer them out-of-state; or (d) turn them in to law enforcement. R.I. Gen. Laws § 11-47.1-3. The statute does not provide for payment in the event of forfeiture, and offers no exceptions for any magazines that cannot be converted to lower capacity.

Plaintiffs argue that, by dispossessing owners of their LCMs (whether through transfer, forfeiture, sale, or alteration), HB 6614 effects a physical taking. Consequently, to plaintiffs, the State has an obligation to pay just compensation, no matter the justification for the law. Plaintiffs point to *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), in which the Court held that a requirement that raisin growers grant the

government possession and title to a certain percentage of raisins constituted a physical taking, and *Loretto v. Teleprompter Manhattan CATV Corp.*, where the Court held that a mandated physical invasion of a landlord's real property for the permanent installation of cable-television devices constituted a physical taking. 458 U.S. 419, 436-37 (1982). Plaintiffs argue that HB 6614 effects a similar taking. We disagree. Both *Horne* and *Loretto* involved the government necessarily occupying, taking title to, or physically possessing the relevant item. Here, by contrast, LCM owners have the option to sell, transfer, or modify their magazines. HB 6614 does not effect a physical taking just because Rhode Island offered to assist LCM owners with the safe disposal of their soon-to-be-proscribed weapons.

Plaintiffs do not argue that HB 6614 deprives LCM owners of all "economically beneficial or productive use" of their magazines, as would be required to show a regulatory taking. *See Lucas*, 505 U.S. at 1015-16. Nor could they. The only thing they may not do is continue to possess them without modification in the state of Rhode Island. We find this regulation to be the very type of use restriction that property owners must "necessarily expect[] . . . from time to time" as states legitimately exercise their police powers. *Id.* at 1027.

In short, HB 6614 likely effects neither a physical taking nor a regulatory taking. As such, we affirm the district court's holding that plaintiffs have failed to show a likelihood of success on their Fifth Amendment claims.

**V.**

Finally, we are unpersuaded by plaintiffs' claim that HB 6614 violates the Fourteenth Amendment. Plaintiffs contend that Rhode Island's law violates due process for two reasons: first because it has "retroactive effects" and second because it is impermissibly vague. We briefly discuss each claim in turn.

**A.**

First, plaintiffs argue that HB 6614 violates their due process rights because it is "obviously retroactive." A statute is considered retroactive if it "attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269-70 (1994).

Here, plaintiffs contend that the law does so by "reach[ing] back to long-closed, lawful transactions and render[ing] their result illegal." But HB 6614 does not impose new liability back to the date of purchase—the "lawful transactions" to which plaintiffs are presumably referring. And even if possession—rather than purchase—of an LCM were the operative "event" for our retroactivity analysis, the "legal consequence" contained in the law did not "attach" until six months after its passage. We therefore do not see how HB 6614 could possibly be considered retroactive.

**B.**

Plaintiffs further argue that, since the law does not define "[p]ermanent[] modifi[cation]" or "ammunition," *see* R.I. Gen. Laws § 11-47.1-2, "people of ordinary intelligence" may not "understand

whether their actions will result in adverse consequences” under the law.

We trust that Rhode Island gun owners are much more intelligent than plaintiffs posit and are familiar with what ammunition is, for example. Nor is the concept of modifying a magazine a puzzler. A simple Google search of “modify magazines ten rounds” yields reams of products and instructional videos designed to help users “make [their] magazines state compliant” by limiting their capacity to fit ten or fewer rounds.<sup>21</sup> While Google is hardly a legal test, these results indicate that a large number of people have figured out what conduct the statute (and others like it) prohibits, and what modifications are necessary to comply. Plaintiffs’ facial vagueness argument borders on the frivolous.

## VI.

We need go no further. Plaintiffs’ failure to demonstrate a likelihood of success on the merits of their claims sinks their attempt to require the district court to issue a preliminary injunction. *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). We therefore *affirm* the judgment of the district court, denying the request for a preliminary injunction.

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<sup>21</sup> See, e.g., Level Up Tactical, *How to Make Your Magazines State Compliant for Under \$7 Each*, YouTube (Jun. 7, 2019), <https://perma.cc/N9CR-PSSE>. The video specifically provides instructions on how to “permanently” modify an LCM by epoxying to it a ten-round limiter. We find that a person of ordinary intelligence would understand epoxying something to be within the ordinary meaning of modifying it permanently.

App-30

*Appendix B*

**UNITED STATES COURT DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND**

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No. 22-cv-246

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OCEAN STATE TACTICAL, LLC; JONATHAN HIRONS;  
JAMES ROBERT GRUNDY; JEFFREY GOYETTE; MARY  
BRIMER,

*Plaintiffs,*

v.

STATE OF RHODE ISLAND; COLONEL DARNELL S.  
WEAVER; PETER F. NERONHA,

*Defendants.*

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Filed: Dec. 14, 2022

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**MEMORANDUM AND ORDER**

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JOHN J. MCCONNELL, JR., United States  
District Court Chief Judge.

Four gun owners and a registered firearms dealer (collectively, “plaintiffs”) have come to this Court challenging a six-month-old Rhode Island law that prohibits the possession of Large Capacity Feeding Devices<sup>1</sup> (“LCMs”), which turn firearms into multiple-

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<sup>1</sup> Large Capacity Feeding Devices are typically referred to as Large Capacity Magazines or High-Capacity Magazines. The plaintiffs refer to them as “Standard Capacity Magazines.” The



shot weapons. The legislation was passed on June 21, 2022, with a grace period of 180 days, by which time all those in possession of such devices must have (a) permanently modified them to be incapable of holding more than ten rounds; or (b) divested themselves of them by selling them to a federally registered dealer or turning them in to law enforcement. R.I. Gen. Laws § 11-47.1-3(b) (“LCM Ban”). Although the law does not address other dispositions, its delayed effective date until December 18, 2022 allowed those owning such magazines to lawfully move them from the state by transporting them to a place where the owner could lawfully possess them or by selling them to an out of state firearms dealer. The LCM Ban declares unlawful possession after December 18, 2022 a felony. *Id.* § 11-47.1-3(a).

The plaintiffs, suing the State of Rhode Island, its Attorney General, and its Superintendent of State Police (“the State”), mount three constitutional challenges: (a) that the statute violates the Second Amendment (Count I); (b) that the statute’s command amounts to a “taking” of the magazines without just compensation, in violation of the Fifth Amendment (Counts II and III); and (c) that the statute violates the Fourteenth Amendment’s guarantee of Due Process in

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Court refers to them as LCMs. They are defined by R.I. Gen. Laws § 11-47.1-2, which became effective upon its passage on June 21, 2022, as “a magazine, box, drum, tube, belt, feed strip, or other ammunition feeding device which is capable of holding, or can readily be extended to hold, more than ten (10) rounds of ammunition to be fed continuously and directly therefrom into a semi-automatic firearm.” Tubes which hold exclusively .22 caliber ammunition are explicitly excluded.

that its terms are vague and its reach is not justified by the police power of the State (Count IV).<sup>2</sup> These allegations, and their invocation of 42 U.S.C. §§ 1343(a)(3), 1983, 1988 to redress a deprivation of rights under color of state law, successfully call on the federal question jurisdiction of this Court under 28 U.S.C. § 1331.

The plaintiffs moved for a preliminary injunction that the defendants oppose. ECF No. 8.<sup>3</sup> Both sides have submitted extensive briefs, accompanied by evidentiary declarations from a number of expert witnesses. They agreed the Court would accept those submissions as evidence in lieu of an evidentiary hearing. On November 5, 2022, the Court heard oral arguments. This Memorandum and Order follows and, for the reasons stated, the Court denies preliminary injunctive relief.<sup>4</sup>

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<sup>2</sup> Both the Second Amendment and Fifth Amendment arguments are technically Fourteenth Amendment challenges, as the Second and Fifth Amendments control state action only because they are incorporated into the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (2nd Amendment) and *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897) (due process taking). They are referred to throughout this opinion as simply “Second Amendment” and “Fifth Amendment” claims.

<sup>3</sup> With consent of both parties, the Court on August 18, 2022, converted the Motion for Temporary Restraining Order (ECF No. 8) to a Motion for Preliminary Injunction.

<sup>4</sup> While the State has challenged Article III standing, the Court finds that the plaintiffs have standing. The individuals have declared that they own firearms whose possession will be outlawed if the LCM Ban is not overturned before December 18th. ECF Nos. 8B, 22D, 22E. The statute imposes an affirmative duty on them to modify those weapons or relieve themselves of

In summary, the Court finds that the plaintiffs lack a likelihood of success on the merits, that they will not suffer irreparable harm if the law is allowed to take effect, and that the public interest is served by denying injunctive relief. Specifically, regarding the merits, the plaintiffs have failed in their burden to demonstrate that LCMs are “Arms” within the meaning of the Second Amendment’s text. Moreover, even were they “arms,” the plaintiffs have failed to prove that LCMs are weapons relating to self-defense. There is no Second Amendment violation from the LCM Ban because of those two shortfalls of persuasion. The Court must therefore consider the LCM Ban outside the core of Second Amendment protection. The Court further finds that the statute is not vague. Because the LCM Ban is a valid exercise of police power, there is no “taking” requiring just compensation and, consequently, no violation of the Fifth Amendment. The Rhode Island General Assembly passed, and the Governor signed, legislation to lower the risk of harm that results from the availability of devices that assist someone intent on murdering large numbers of people. This common-sense public safety legislation does not implicate the

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possession. The retail plaintiff has alleged a clear economic injury through his claim that his inventory of LCMs now cannot be sold. ECF No. 8C. Other courts have found that plaintiffs have standing with respect to similar statutes and similar challenges. *See, e.g., N.Y. State Rifle and Pistol Ass’n, Inc. v. Cuomo*, 990 F. Supp. 2d 349, 358 (W.D.N.Y. 2013), *rev’d in part on other gnds.*, 804 F.3d 242 (2d Cir. 2015) (standing by virtue of ownership of large-capacity magazines and intention, but for the ban, to purchase them).

Second Amendment and violates no one's constitutional rights.

## I. BACKGROUND

Chapter 47 of Title 11 of the Rhode Island General Laws, known as the “Firearms Act,” has long regulated the type of firearms that may be lawfully possessed in Rhode Island. Some weapons have been banned altogether, such as sawed-off shotguns and machine guns.<sup>5</sup> Still others are lawful only when carried by persons licensed to possess them or in limited specified locations such as target shooting areas or the home. R.I. Gen. Laws §§ 11-47-8 (license or permit except to keep at home), 11-47-10 (target range). Some people are excluded altogether from possessing firearms. *Id.* §§ 11-47-5 (possession by felons), 11-47-6 (“mental incompetents” and “drug addicts”), 11-47-7 (undocumented immigrants).

On June 21, 2022, Rhode Island amended Chapter 47.1 to prohibit additional weaponry that had become popular additions to the arsenals of some individuals relatively recently and have been employed in recent mass shootings. For example, Chapter 47 added to its list of prohibited items “ghost guns,” which are guns that lack serial or any other identifying numbers, *Id.* § 11-47-2(8);<sup>6</sup> “3D print[ed]” guns, which are

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<sup>5</sup> See State's Memorandum for a more complete catalog of prohibited weapon related items. ECF No. 19 at 7-8.

<sup>6</sup> The obliteration of serial numbers has been prohibited in Rhode Island for some time. “Ghost guns,” however, are privately made weapons that *never* had a serial number, nor any other identifying information on any of the parts. Joseph Greenlee, a historian cited frequently by the plaintiffs, maintains that there was historically an unrelated practice of building guns, but the

assembled under computer control from computer files, *Id.* § 11-47-2(1);<sup>7</sup> and “bump-fire stocks” which, by replacing a semiautomatic weapon’s standard stock with one that does not require a trigger-pull between

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use of the phrase “ghost guns” is of recent origin. Jake Charles, *Ghost Guns, History, and the Second Amendment*, Duke Center for Firearms Law (Apr. 27, 2022) <https://firearmslaw.duke.edu/2022/04/ghost-guns-history-and-the-second-amendment/>. The parts are sold in kits, accompanying an “unfinished frame,” and are easily assembled. *What are Ghost Guns?*, Brady: United Against Gun Violence: Resources, <https://www.bradyunited.org/fact-sheets/what-are-ghost-guns> (last visited Nov. 15, 2022). They cannot be traced. *Id.* Ghost guns were used in at least four mass shootings in California: in 2013 (Santa Monica), 2017 (Tehama County), 2019 (Santa Clarita), and Saugus (2019). Carter Evans, *Santa Monica Shooter Built His Own Weapon*, CBS News (June 14, 2013, 8:12 PM), <https://www.cbsnews.com/news/santa-monica-shooter-built-his-own-weapon/>; *Tehama County Rampage Puts Spotlight on Homemade ‘Ghost Guns’*, KRON4 News (Nov. 16, 2017, 8:42 PM), <https://www.kron4.com/news/teham-county-rampage-puts-spotlight-on-homemade-ghost-guns/>; Dakin Andone, *The Gunman in the Saugus High School Shooting Used a ‘Ghost Gun,’ Sheriff Says*, CNN (Nov. 21, 2019, 3:52 PM), <https://www.cnn.com/2019/11/21/us/saugus-shooting-ghost-gun/index.html>; Alain Stephens, *Officials Confirm Santa Clarita Shooter Used A Ghost Gun*, LAist (Nov. 20, 2019, 2:45 PM), <https://laist.com/news/feds-investigating-whether-saugus-santa-clarita-shooter-used-ghost-gun>.

<sup>7</sup> 3D guns first appeared for popular consumption, according to *The New Republic*, when a “25 year old gun activist named Cody Wilson uploaded his open-design plans to the internet in 2013. Kim Kelly, *The Rise of the 3D-Printed Gun*, *The New Republic: The Soapbox* (May 21, 2020), <https://newrepublic.com/article/157753/rise-3d-printed-gun>. By the time the U.S. Department of State closed the site down, more than 100,000 people had downloaded them and virtually any 3D printer at home could be used to assemble them.” *Id.*

rounds, makes the firearm function similarly to a machine gun, *Id.* § 11-47-2(4).<sup>8</sup>

None of the foregoing prohibitions is challenged here. But, when it amended Chapter 47, the General Assembly enacted § 11-47.1-1 *et seq.*, which specifically ban LCMs. Rhode Island was not alone in doing so. In the wake of recent mass shootings, many of which have occurred in schools, a number of states have enacted limitations on the capacity of magazines that enable a firearm to fire multiple rounds. While the maximum number of rounds permitted in a single magazine varies, the majority of states with bans prohibited the sale or possession of any magazine containing more than ten rounds. ECF No. 22-1, Ex. B, at 2 (internal pagination).<sup>9</sup> For the uninitiated—

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<sup>8</sup> The Department of Justice banned bump stocks in the wake of the 2017 massacre that killed 58 people in Las Vegas. Luis Gomez, *A Brief History of Bump Stocks Leading up to the Ban by the Trump Administration*, The San Diego Union-Tribune: The Conversation (Dec. 18, 2018, 3:15 PM), <https://www.sandiegouniontribune.com/opinion/the-conversation/sd-brief-history-bump-stocks-before-they-were-banned-20181218-htmlstory.html>. The shooter there, using weapons with bump stocks attached, “sprayed” bullets into the crowd. *Id.* This article claims that about the time bump stocks were temporarily (and mistakenly, it later maintained) approved by the ATF, videos of them first appeared on YouTube, showing viewers how to rig a semiautomatic rifle “to fire continuously with a single pull of the trigger.” *Id.*

<sup>9</sup> Where indicated, page numbers refer to the internal pagination of the document cited. Where that is not indicated, page numbers refer to the electronically assigned page numbers of the filed document. This distinction is made necessary because of the filing of multiple documents in the same electronic filing, particularly by the plaintiffs.

which, until this case appeared on its docket, the Court considered itself—magazines are devices holding extra ammunition and are inserted into and removed from the frame of the firearm, much as an extra battery-pack gets swapped in and out of a battery-operated tool, like a leaf blower, for example. “Reloading,” in this context, means removing an empty magazine and substituting it with a full one.<sup>10</sup> The process may be as simple as pressing a button to eject the spent magazine, in order to push a new one in. ECF No. 22-1, Ex. B at n.33.

The reader should have at least a cursory understanding of handguns and how they operate. Handguns are built with an internal mechanism that holds the bullets. They may be revolving cylinders or fixed chambers. “A ‘magazine’ is a vehicle for carrying ammunition. It can be either integral to the gun or detachable.” ECF No. 22-1, Ex. B at n.2. The handguns that use magazines are built with slots into which the magazines are inserted. Magazines became prevalent around the mid-nineteenth century. ECF No. 22-1, Ex. A at 36. “Most pistols sold in the United States

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<sup>10</sup> The declarations and exhibits from the parties, the briefs of the parties, and some published material the Court has unearthed on its own, provide explanations to the unfamiliar of how these weapons and their accessories work. Facts such as how a magazine works, *when undisputed*, are presented by the Court largely without citation. Any facts *found* by the Court from disputed assertions carry citations to where in the record they are supported. In addition, the Court has taken care to cite outside sources—articles not cited by the parties—only for non-controversial and presumably undisputed matters. The facts on which the Court actually relies are gleaned from the evidentiary submissions of the parties.

come equipped with magazines that hold between 10 and 17 rounds.” ECF No. 22-1, Ex. B at 3 (internal pagination). “Most modern semi-automatic firearms, whether handguns or semi-automatic rifles like AR-15s, use detachable box magazines.” ECF No. 19-3 at ¶ 5.

When a multiple-round device like an LCM is attached, a handgun becomes a “semiautomatic” weapon, meaning that it is capable of rapidly firing several bullets, one right after another. However, the gun still requires a trigger-pull for each round fired. *Semiautomatic*, Merriam-Webster (Dec. 8, 2022), <https://www.merriam-webster.com/dictionary/semi-automatic>. Nevertheless, a semiautomatic weapon can fire at rates of 300 to 500 rounds per minutes. *Kolbe v. Hogan*, 849 F.3d 114, 136 (4th Cir. 2017) (en banc). A fully automatic weapon, such as a machine gun, differs from a semiautomatic weapon in that only one trigger-pull is necessary to release a barrage of bullets that are then sprayed continuously from the barrel until a manual action is taken to stop them.

As described *infra*, there is no legacy provision in the LCM Ban and thus, on the day it is effective, those who already possess such magazines will be guilty of a felony. The law, however, granted a 180-day period for those individuals to avoid that predicament. These individuals can modify the magazine to a lower capacity, they can sell or transfer the magazine to a person or location where it is lawful, or they can surrender it to law enforcement. The plaintiffs maintain that the whole LCM Ban—lock, stock and barrel—violates the Second Amendment as an unconstitutional restriction on gun ownership and the



Fifth Amendment because it is a “taking” without just compensation by forcing “the mandatory dispossession” of previously lawful LCMs. ECF No. 12 at 4.

## II. STANDARD OF REVIEW

“A request for a preliminary injunction is a request for extraordinary relief.” *Cushing v. Packard*, 30 F.4th 27, 35 (1st Cir. 2022). “To secure a preliminary injunction, a plaintiff must show ‘(1) a substantial likelihood of success on the merits, (2) a significant risk of irreparable harm if the injunction is withheld, (3) a favorable balance of hardships, and (4) a fit (or lack of friction) between the injunction and the public interest.’” *NuVasive, Inc. v. Day*, 954 F.3d 439, 443 (1st Cir. 2020) (quoting *Nieves-Marquez v. Puerto Rico*, 353 F.2d 108, 120 (1st Cir. 2003)). As the Court examines how this case measures up against these criteria, it is mindful that “the first two factors, likelihood of success and of irreparable harm, [are] ‘the most important’ in the calculus.” *Brunx v. Mayhew*, 750 F.3d 61, 65 (1st Cir. 2014) (quoting *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 79 (1st Cir. 2009)).<sup>11</sup>

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<sup>11</sup> Some courts have held that certain preliminary injunctions are “disfavored” and that a plaintiff seeking one of those has an even “heavier burden on the likelihood-of-success-on-the-merits and the balance-of-harms factors.” *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 797 (10th Cir. 2019) (stating that an injunction that “grants all the relief that the moving party could expect from a trial win” falls into the disfavored category). In this case, the plaintiffs seek a declaration that the statute is unconstitutional and an injunction against its enforcement, precisely the relief sought on the merits.

In evaluating whether the plaintiffs have met the most important requirement of likelihood of success on the merits, a Court must keep in mind that the merits need not be “conclusively determine[d];” instead, at this stage, decisions “are to be understood as statements of probable outcomes only.” *Akebia Therapeutics, Inc. v. Azar*, 976 F.3d 86, 93 (1st Cir. 2020) (partially quoting *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991)). “To demonstrate likelihood of success on the merits, plaintiffs must show ‘more than mere possibility’ of success—rather, they must establish a ‘strong likelihood’ that they will ultimately prevail.” *Sindicato Puertorriqueno de Trabajadores, SEIU Local 1996 v. Fortuno*, 699 F.3d 1, 10 (1st Cir. 2012) (per curiam).

### **III. DISCUSSION**

#### **A. The Second Amendment and Magazines**

##### **1. Background on the Second Amendment**

The Court finds that the plaintiffs have failed to show that their claim that the LCM Ban violates the Second Amendment enjoys a likelihood of success. The Second Amendment, which protects the right to bear arms, is intended at its core to safeguard the individual’s right to self-defense. For the reasons discussed below, the Court finds that the plaintiffs have not demonstrated that LCMs are “Arms” within the textual meaning of the Amendment, nor have they demonstrated that LCMs are weapons of self-defense. LCMs therefore fall outside the embrace of any guarantee the Second Amendment confers.

In the twin cases of *Heller v. District of Columbia*, 554 U.S. 570 (2008), and *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, \_\_ U.S. \_\_, 142 S. Ct. 2111 (2022), the Supreme Court instructs us that a Second Amendment approach to the constitutionality of a weapons restriction must entail a journey into America’s history. Courts must examine not only the text itself, but the historical context in which the text was written. *See Heller*, 554 U.S. 570; *Bruen*, 142 S. Ct. There are questions that the Court needs to answer in order to follow the analytical path dictated by *Bruen*. For the most part, those answers are found only after a historical analysis. For example, are LCMs even “Arms” within the embrace of the Second Amendment’s text? If so, are they by virtue of their function central to the “core” right to self-defense inside *or* outside the home? In assessing the constitutionality of a restriction, courts must inquire whether LCMs were in common use during the relevant historical period and whether they were unusual and dangerous. *See Bruen*, 142 S. Ct.

In both *Heller* and *Bruen*, the five-justice majorities undertook their own historical analyses. Both majority opinions are replete with direct references to ancient tomes and original research.<sup>12</sup> As

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<sup>12</sup> Note, for example, these references:

William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to “keep arms in their houses.” 4 Commentaries on the Laws of England 55 (1769) (hereinafter Blackstone); see also 1 W. & M., ch. 15, § 4, in 3 Eng. Stat. at Large 422 (1689) (“[N]o Papist . . . shall or may have or keep

Justice Breyer noted in his *Bruen* dissent, “[t]he majority in *Heller* undertook 40 pages of textual and historical analysis.” “Two years later, [however,] 21 English and early American historians (including experts at top universities) told us in *McDonald v. Chicago* . . . [that historical analysis was] wrong.” *Bruen*, 142 S. Ct. at 2177-78 (internal citations omitted). He warned that *Bruen*’s reliance almost exclusively on history for constitutional interpretation “will pose a number of practical problems . . . especially acute in the lower courts.”

Lower courts—especially district courts—typically have fewer research resources, less assistance from *amici* historians, and higher caseloads than we do. They are therefore ill equipped to conduct the type of searching

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in his House . . . any Arms . . . ”); 1 W. Hawkins, *Treatise on the Pleas of the Crown* 26 (1771) (similar).

*Heller*, 554 U.S. at 584.

Henry VIII issued several proclamations decrying the proliferation of handguns, and Parliament passed several statutes restricting their possession. See, e.g., 6 Hen. 8 c. 13, § 1 (1514); 25 Hen. 8 c. 17, § 1 (1533); 33 Hen. 8 c. 6 (1541); *Prohibiting Use of Handguns and Crossbows* (Jan. 1537), in 1 *Tudor Royal Proclamations* 249 (P. Hughes & J. Larkin eds. 1964) . . . .

Similarly, James I considered small handguns—called dags—“utterly unserviceable for defence, Militarie practise, or other lawful use.” *A Proclamation Against Steelets, Pocket Daggers, Pocket Dagges and Pistols* (R. Barker printer 1616). But, in any event, James I’s proclamation in 1616 “was the last one regarding civilians carrying dags,”

*Bruen*, 142 S. Ct. at 2140.

historical surveys that the Court's approach requires.

*Id.* at 2179. Nevertheless, the majority commands this Court to undertake such an analysis.

There is another difference beyond resources between the Supreme Court and district courts, however, that redounds to our benefit. Unlike the Supreme Court, trial courts have the ability to receive evidence and rely on that evidence to find facts that support the legal reasoning and lead to conclusions. *Bruen* itself was decided on no factual record. *See id.* The district court had granted a motion to dismiss in what was then known as *State Rifle & Pistol Assn., Inc. v. Beach*, which, of course, took allegations at their face value. *N.Y. State Rifle & Pistol Assn., Inc. v. Beach*, 354 F. Supp. 3d 143 (N.D.N.Y. 2018). Even more significantly, the issue raised by the plaintiffs in the case was the *very same* that had previously been rejected by the Second Circuit six years earlier in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). The only purpose in litigating *Beach* was to get another Second Circuit rejection of plaintiffs Second Amendment theory so that the plaintiffs could try to bring the issue to the United States Supreme Court. They forthrightly acknowledged to the district court that “the result they seek is contrary to *Kachalsky*, [they] do not dispute that the precedential effect of its holding binds [the district court], and [they] have not advanced any other factual allegations suggesting legally plausible claims.” *Beach*, 354 F. Supp. 3d at 149. Thus, dismissal was granted as a matter of law without the development of a factual record. *Id.* The Second Circuit then summarily

affirmed. *N.Y. State Rifle & Pistol Assn., Inc. v. Beach*, 818 Fed. Appx. 99 (2d Cir. 2020) (Mem).

Unlike the *Bruen* Court, this Court *has* an evidentiary record upon which to base its findings.<sup>13</sup> The parties agreed to submit documentary declarations and exhibits in lieu of an evidentiary hearing, and the Court has pored over them. Both parties have retained expert historians to inform the Court's factfinding. The curricula vitae ("CVs") of some of the experts are before the Court as are their writings directed at pivotal factual disputes, and both parties have submitted additional helpful exhibits. While this Court professes no independent scholarly historical knowledge, it does have solid experience in resolving disputes between experts. Parties, in both civil and criminal cases, routinely rely on expertise in topics well beyond the ken of any particular factfinder to decide contested issues of fact. For example, does a criminal defendant have a mental disorder that is sufficient to excuse her from criminal responsibility? Was a steel slab made defectively and did that defect cause it to give way? Did a product infringe on a pre-existing patent by employing the same basic design? Without any expertise in psychiatry, metallurgy, or industrial design, courts regularly resolve factual disputes between expert witnesses, and they do so relying on tried-and-true, conventional considerations related to credibility and reliability.

In the ordinary course of an opinion, the Court might examine the applicable law before addressing

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<sup>13</sup> The State noted in its opening Memorandum that no court has developed a full evidentiary record concerning LCMs post-*Bruen*. ECF No. 19 at 2 (internal pagination).

the facts to which it would then apply that law. In this case, however, it is useful to discuss the facts, and the Court's assessment of the evidence before it, before engaging in the *Heller/Bruen* analysis.

## **2. The Court's Findings of Fact**

In the procedural posture of a motion for preliminary injunction, the Court does not have to make final findings of fact. Instead, an examination of all the evidence and consideration of the expertise of those proffering opinions occurs in the framework of an inquiry into whether the plaintiffs have shown a *likelihood* that their experts' opinions will be accepted. In that context, the Court has, in considering the evidence, asked itself basic questions that courts pose all the time and, indeed, direct juries to employ when making decisions based on expert opinions. These questions include: what are the experts' respective qualifications? Are their opinions intelligible to a lay judge or jury? Is there other evidence that casts doubt on the opinions or corroborates them? *See Woodman v. United States*, \_\_ F. Supp. 3d \_\_, 2022 WL 1444529, \*2 (D.N.H. May 6, 2022) (plaintiffs non-specialist expert's opinion given less weight than others because his testimony was contradicted by treating providers). Do the opinions appear to have sufficient support? *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 84 (1st Cir. 1998) (whether articles relied on by expert were published and subject to peer review was an indicum of the reliability of the expert's opinion). Are they based on sufficient data? *Malden Transp., Inc. v. Uber Tech., Inc.*, 404 F. Supp. 3d 404, 423 (D. Mass. 2019) (expert's opinion unreliable where he excluded major variables). And did the expert approach the

problem objectively or with a partisan bias? *See Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 28 (1st Cir. 1998) (jury could find defendant's expert not a disinterested witness because he was a former employee of the defendant and testified often on its behalf).

In this case, the credentials of the proffered experts weigh heavily in the Court's view of which opinions to accept where there is a conflict. The Court must discount to some extent the declaration of both the plaintiffs' experts because neither has been engaged in relevant *neutral* scholarly research.

- Ashley Hlebinsky, a historian versed in the history of firearms, is a private consultant. Her only academic appointments seem to have been a decade ago as a course-specific teaching assistant at the University of Delaware, while she received both her Bachelor's and Master's in American History from that institution. She is a co-founder and senior fellow of the University of Wyoming's College of Law's Firearms Research Center.<sup>14</sup> She has

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<sup>14</sup> While the aim of the Center will be to promote academic research, it has yet to be formally founded, according to an article authored by Ms. Hlebinsky. The Center is "going through the University of Wyoming's approval process . . ." but apparently is not yet formally affiliated. Ms. Hlebinsky does not appear to have a faculty appointment at the College of Law. *Faculty: College of Law*, Univ. of Wyoming, <https://www.uwyo.edu/law/directory/> (last visited Dec. 13, 2022). The Center does not appear to have a website of its own, nor is it listed as a Department on the University of Wyoming's website, but the article appears under the auspices of the United States Concealed Carry Association



extensive experience in firearms museums and appears to be very active in the National Shooting Sports Foundation. She has many published pieces, the majority of which have appeared in niche magazines such as *American Frontiersman*, *Recoil Magazine*, and *Glock Magazine*. ECF No. 22-1 at 35-37. One of the disadvantages of relying on documentary submissions is that the Court has no opportunity to explore the nature of an expert's research or how politically neutral or advocacy-oriented her prior work has been. The Court can only take at face value an expert's CV. Matthew Larosier, the plaintiffs' second expert, was at the time he wrote the article a legal researcher employed by the CATO Institute, a public policy thinktank. His submission is entitled "Losing Count: The Empty Case for 'High-Capacity' Magazine Restrictions," that appeared in CATO's Legal Policy Bulletin's July 17,

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(USCCA). Ashley Hlebnsky, *University of Wyoming Law School's Firearms Research Center*, U.S. Concealed Carry Ass'n (Apr. 27, 2022), <https://www.usconcealedcarry.com/blog/firearms-research-center/>. The USCCA on its website solicits members with the following pitch: "Let's face it: There are people who HATE the fact that you and I carry guns. They're determined to teach us a lesson just for exercising our inalienable God-given right to self-defense." *Are You Prepared to Face Our "Justice" System?*, U.S. Concealed Carry Ass'n, <https://www.deltadefense.com/offers/5f6c9c07df964/join-the-uscca-today?tID=61e9a2b6538f0> (last visited Dec. 13, 2022).. Ms. Hlebnsky's biases are obvious.

2018, issue. ECF No. 22-2. The submission's only note "about the author" reveals that he is a former legal associate. ECF No. 22-2 at 59. CATO lists several fellows whom it terms "scholars," but Mr. Larosier is not one of those, nor is he identified as an "adjunct scholar" or as an "expert" fellow, formerly or presently. *Experts: Fellows*, CATO Inst., <https://www.cato.org/people/fellows> (last visited Dec. 13, 2022). The Court has no information about his background or credentials, except that he seems to no longer be associated with CATO. Beyond that, while the CATO Institute is a well-known repository of research, it is not a neutral actor in the raging gun control vs. gun rights debate. Its website proclaims that it exists to "promote libertarian ideas in policy debates." *About*, CATO Inst., <https://www.cato.org/about> (last visited Nov. 22, 2022). Thus, while the Court casts no aspersions on Mr. Larosier's scholarship, his report does not carry the indicia of reliability of a scholarly article published in a respected peer-review forum.<sup>15</sup> *See, e.g., Ruiz-Troche*, 161 F.3d at

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<sup>15</sup> Mr. Larosiere's opinion strikes the Court as flawed for another reason. He opens the section on "Legal Background and Constitutional Concerns" by describing *Heller* as protecting "arms in 'common use,' . . . which would cover the 20-round magazines that are standard equipment for a significant portion of weapons currently in lawful use." ECF No. 22-B at 46. The Second Amendment extends, he declares, "to all instruments that

84 (exposure to peer review demonstrates “a measure of acceptance of the methodology within the scientific community”). Nor has the Court been provided with a CV for him. “Though DACO cries foul due to the court’s ‘gratuitous swipe’ at Dr. Logan’s bona fides, such credibility determinations are the prerogative—indeed, the duty—of the district judge in a bench trial.” *Texaco P. R., Inc. v. Dep’t of Consumer Affairs* (“DACO”), 60 F.3d 867, 878 n.5 (1st Cir. 1995) (finding such where appellant’s expert was “intimate[ly] involve[d]” with one of the parties). The State’s historians are more traditional neutral academics.

- Randolph Roth, an expert in the history of crime, is a Distinguished Professor of History and Sociology at The Ohio State University. He received his B.A. from Stanford University and his Ph.D. from Yale University, both in History. He has taught at several institutions and was an Assistant Professor of History at Grinnell College for seven years before moving to Ohio State. His two books were published by Cambridge University Press and the Belknap Press of Harvard University. Like Ms. Hlebinsky, Prof. Roth has published a number of articles, but, unlike

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constitute bearable arms in common use . . . .” *Id.* at 47. In describing *Heller* that way, he completely untethers it from the required use for self-defense.

hers, his have appeared primarily in scholarly journals. ECF No. 19-1 at 4-8. Michael Vorenberg is a tenured Associate Professor of History at Brown University, previously an assistant professor at The State University of New York at Buffalo, and before that, a post-doctoral fellow and lecturer at Harvard University. His A.B., A.M., and Ph.D. were all awarded by Harvard University. He has published three books and contributed to well over a dozen more. While there is no contest of numbers here, his writings have appeared primarily in academic texts, and his list of fifty-seven lectures during the last two decades, generally in university settings, is impressive. ECF No. 19-2 at 4-13. Dennis Baron is a professor of English and Linguistics at the University of Illinois. His Ph.D. was obtained from the University of Michigan and his Master's from Columbia University. A Professor Emeritus now, he taught for 47 years, wrote ten published books and contributed chapters to twenty-two more. ECF No. 19-7 at 4-16.<sup>16</sup>

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<sup>16</sup> The State has presented the opinions of two other experts relevant to factual issues. Edward Troiano is Chief of the Bureau of Criminal Identification and Investigation, R.I. Office of the Attorney General, and is a former Special Agent for the Bureau of Alcohol, Tobacco, Firearms, and Explosives. ECF No. 19-3. Megan L. Ranney, M.D. is a Professor of Emergency Medicine at Brown University Medical School, as well as Professor of Behavioral and Social Sciences and Health Services, Policy, and

The opinions offered by the experts for both parties, and the Court's reaction to them, are discussed below, as relevant.

### **3. Legal Landscape of the Second Amendment**

The pertinent application of the Second Amendment begins with *District of Columbia v. Heller*, which concerned a challenge to the prohibition of handguns in the District of Columbia.<sup>17</sup> Specifically, the plaintiff, a D.C. special police officer, claimed a Second Amendment right to possess such firearms in his home without registering or licensing them. *Heller*, 554 U.S. at 575-76. The Court held that the prefatory words “[a] well regulated Militia, being necessary to the security of a free State,” did not confine the Amendment’s protection to those connected to military or law enforcement. *Id.* at 627-28. Instead, the Court held, the Amendment protected the right of the unaffiliated individual to protect herself. *Id.* at 628-29.

The right established in *Heller*, however, was not without context or limitation. Instead, the right of the individual is circumscribed by the “use [of handguns] for self-defense in the home.” *Id.* at 636. The

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Practice at the Brown University School of Public Health. ECF No. 19-10. Because these two experts have expressed opinions that are not directly contradicted by the plaintiffs’ experts, the Court need not choose between them. It suffices to say that their credentials show them to be well qualified to render the opinions they hold.

<sup>17</sup> The D.C. law also regulated certain aspects of maintaining other weapons, such as long guns that had to be kept unloaded and either disassembled or locked. *Heller*, 554 U.S. at 575.

Amendment was not adopted, the majority made clear, “to protect the right of citizens to carry arms for *any sort* of confrontation . . . .” *Id.* at 595. Rather, the right was understood historically to be tied to “the right of having and using arms for self-preservation and defence.” *Id.* at 594 (citing, *inter alia*, 1 Blackstone, 140). In addition, the Court cautioned, nothing in *Heller* was intended to confer a right to “keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at 626.

The holding of *Heller* was relatively narrow. It linked the right to possess firearms tightly to self-defense and the home, but even in the home it did not confer unlimited freedom to the gunowner. In particular, the majority cautioned, only those weapons “in common use at the time” are entitled to Second Amendment protection, and in particular, that would not include “weapons that are most useful in military service . . . .” *Id.* at 627. Laws promoting safety, such as those regulating storage could coexist with the Amendment so long as they did not “burden the right of self-defense.” *Id.* at 632. The Court specifically eschewed “cast[ing] doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27. And in granting relief to Heller, it directed that “the District [of Columbia] must permit him to register his handgun and must issue him a license to carry it in the home,” *Id.* at 635, thus implicitly

validating at least in concept both registration and licensing schemes.

That *Heller* was specifically concerned with protecting an individual's right to exercise self-defense in her home was confirmed two years later in *McDonald v City of Chicago*, 561 U.S. 742, 749-50 (2010), the case that held the Second Amendment applicable to the states through the Fourteenth Amendment. *McDonald* was decided by a Court almost identical to the one issuing the *Heller* opinion. The five-justice majority remained the same and, in the minority, retiring Justice David H. Souter had been replaced by Justice Sonia M. Sotomayor.

*McDonald* granted *certiorari* on the single question of “[w]hether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment’s Privileges or Immunities or Due Process Clauses.” *McDonald v. Chicago*, No. 08-1521, 2009 WL 1640363, at \*1 (June 9, 2009) (Petition for Writ of Certiorari). In answering “Yes,” the Court did not address the scope of *Heller* but merely considered whether its holding was binding on the states. The plaintiffs had asserted only a right to be free from state restriction on the ability to “keep handguns in their homes for self-defense,” *McDonald*, 561 U.S. at 750, and that is all that was decided. The discussion of incorporation itself reflected the Court’s long-held view that the application of incorporated rights to the states is identical with that when applied to the Federal Government. *Id.* at 765.

*McDonald* described *Heller* as holding “that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense . . . .” *Id.* at

749-50. “[W]e stressed [in *Heller* that the right was also valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was ‘the *central component* of the right itself.’” *McDonald*, 561 U.S. at 787 (quoting *Heller*, 554 U.S. at 599) (emphasis in original). More than a decade passed before the Court addressed the *scope* of *Heller*, and the scope of the Second Amendment protection in *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*.

In the interim, the Circuit Courts of Appeals were busy applying *Heller*. They were near-unanimous on two things. First, they agreed that *Heller* conferred maximum protection only with respect to the exercise of self-defense in the home. Second, as to the world outside the home, *Heller* determined that intermediate scrutiny was appropriate, requiring only that those statutes be “substantially related” to a compelling government interest and that there be a reasonable fit between that interest and the means outlined in the statute to advance it. The First Circuit applied *Heller* first in *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), reviewing a challenge to the state licensing statute as implemented by the cities of Boston and Brookline. *Id.* at 662. The plaintiffs sought the right to carry firearms generally. *Id.* at 664. While allowing unrestricted possession in the home, the licenses issued for public carry were restricted at the discretion of the municipality, which made determinations based on the purported purpose of carrying the firearm, such as an individualized need for self-defense, employment, hunting, or target practice. *Id.*



The question posed in *Gould* was precisely that later answered—differently—in *Bruen*: “Does the Second Amendment protect the right to carry a firearm outside the home for self-defense?” *Id.* at 666.<sup>18</sup> In answering the question in the negative, the First Circuit employed the same construct adopted by its sister Circuits. *Id.* at 668-69. This construct used a two-step analysis that determined first “whether the challenged law burdens conduct that falls within the scope of the Second Amendment’s guarantee.”<sup>19</sup> *Id.* This first step “is a backward-looking inquiry, which seeks to determine whether the regulated conduct

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<sup>18</sup> The second question put to the Court was, if the answer to the first were “yes,” may the granting of a license be conditioned on an applicant’s showing a particularized need to defend herself beyond that of the general public—i.e., a “good reason (beyond a generalized desire for self-defense) for carrying a firearm outside the home?” *Id.*

<sup>19</sup> The two-step analytic paradigm adopted in *Gould* was identical to that adopted by nearly all the Circuit Courts of Appeals. *See Gould*, 907 F.3d at 668-69 (citing *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012)); *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 874 (4th Cir. 2013); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of ATFE (NRA)*, 700 F.3d 185, 194-95 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 703-04 (7th Cir. 2011); *Young v. Hawaii*, 896 F.3d 1044, 1051 (9th Cir. 2018); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *Heller v. Dist. Of Columbia (Heller II)*, 670 F.3d 1244, 1252-53 (D.C. Cir. 2011). “*Bruen* resoundingly repudiated the ‘two-step analysis’ widely embraced in the lower courts . . . . As the last decade of experience shows, the lower courts have in virtually every case used the two-part test to balance away Second Amendment rights.” Mark W. Smith, *NYSRPA v. Bruen: A Supreme Court Victory for the Right to Keep and Bear Arms—and a Strong Rebuke to “Inferior Courts,”* 2022 Harvard J. Law & Pub. Pol’y Per Curiam 24, at \*6 (2022).

‘was understood to be within the scope of the right at the time of ratification.’” *Id.* at 669 (quoting *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)). The second step, if the desired conduct falls *outside* the “core” and some regulation is therefore permitted, is to decide what level of scrutiny must be brought to bear upon the regulation. *Id.* The Circuit Courts of Appeals, including the First Circuit, again acting in harmony, determined that intermediate scrutiny was appropriate. *Gould*, 907 F.3d at 668-69; *see supra* at n.13 (citing cases from other circuits).

In *Bruen*, the Supreme Court bluntly cast aside the reasoned analysis of all these Circuit Courts of Appeals. While acknowledging that “the Courts of Appeals have coalesced around a ‘two-step’ framework for analyzing Second Amendment challenges that combines history with means-end scrutiny,” *Bruen*, 142 S. Ct. at 2125, the high court nonetheless “decline[d] to adopt that two-part approach.” *Id.* at 2126. In its place, the Court raised a presumptive umbrella of protection whenever “the Second Amendment’s plain text covers an individual’s conduct . . . .” *Id.* Rather than looking at the scope of the *right* to determine whether a statute such as the LCM Ban is constitutional (and then applying a means-end analysis), the focus is on the *restriction* to determine whether it is “part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Id.* at 2127.<sup>20</sup>

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<sup>20</sup> *Bruen* did not appear out of the blue in 2022. In 2015, Justice Clarence Thomas, who would ultimately write the majority opinion in *Bruen*, joined by the late Justice Antonin G. Scalia, dissented from a denial of *certiorari* in an opinion that hinted at

Although *Bruen* did not purport to define the parameters of lawful purposes, it stressed that “individual self-defense is ‘the *central component*’ of the Second Amendment right.” *Id.* at 2133 (quoting *McDonald*, 561 U.S. at 767). The *Bruen* opinion opens with the declaration that “[W]e . . . now hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual’s right to carry a handgun *for self-defense outside the home*.” *Id.* at 2122 (emphasis added). This Court’s focus, therefore, must be on whether the LCM Ban unduly impairs the right of an individual to engage in self-defense. That this is the primary focus of the Second Amendment analysis is the constant refrain of *Bruen*—*e.g.*, “[w]e therefore turn to whether the plain text of the second Amendment protects [plaintiffs’] proposed course of conduct—carrying handguns publicly for self-defense.” *Id.* at 2134. And, later, “[t]he Second Amendment’s plain text thus presumptively guarantees petitioner’s [] a right to ‘bear’ arms in public for self-defense.” *Id.* at 2135.

#### 4. Magazines Do Not Constitute “Arms”

The threshold issue in this Second Amendment analysis must be whether a detachable magazine is “Arms” within the meaning of the text of the

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what would become the *Bruen* analysis. *Friedman v. City of Highland Park, Ill.*, 577 U.S. 1039 (2015) (Thomas, J., dissenting). The ultimate question under *Heller*, Justice Thomas wrote, is “whether the law bans types of firearms commonly used for a lawful purpose—regardless of whether alternatives exist.” *Id.* at 449 (citing *Heller*, 554 U.S. at 627-29).

Constitution.<sup>21</sup> The Amendment on its face protects only “the right of the people to keep and bear Arms, [which] shall not be infringed.” If a magazine is not encompassed by “Arms,” it falls outside the protection of the Second Amendment.<sup>22</sup> In the First Circuit, Courts address this question on a nearly blank slate. In *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019), which upheld a ban on LCM’s and assault rifles pre-*Bruen*, the First Circuit “assume[d], without deciding, that the proscribed weapons have some degree of protection under the Second Amendment.” *Id.* at 30.<sup>23</sup>

There appear to be no Circuit Courts of Appeals holding that LCMs are not “Arms.” Some, like

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<sup>21</sup> It is worth noting now that Rhode Island’s statute avoids the pitfall of being directed against the *firearm* and not the magazine. Some other states’ statutes “proscribe weapons that are ‘capable of accepting’ a large-capacity magazine, however defined.” ECF No. 22-B. That language, according to plaintiffs’ expert Matthew Darosiere, is problematic because many weapons designed to use limited magazines will actually accept large-capacity magazines instead. ECF No. 22-1 at 44-45. Rhode Island’s statute prohibits the LCM because of what it *does*, not the firearm for what it *could do*.

<sup>22</sup> The Court discusses separately, *infra*, whether LCMs fail to achieve *Bruen*’s protection because they are not weapons of self-defense. In fact, two issues—“arms” and “self-defense”—are related, as *Bruen* states, “even though the Second Amendment’s definition of ‘arms’ is fixed according to its historical understanding, that general definition covers modern instruments *that facilitate armed self-defense*.” *Bruen*, 142 S. Ct. at 2132 (emphasis added).

<sup>23</sup> The issue of whether LCMs are “Arms” at all was raised only by *amici* in *Worman*, and explicitly for that reason, although terming it a “clever” argument, the Court declined to consider it. *Worman*, 922 F.3d at 33 n.3.

*Worman*, have assumed *arguendo* that they are. This issue, that large-capacity magazines are entirely outside of Second Amendment protection for the independent reason that such magazines constitute firearms “accessories” rather than protected “Arms,” was raised by *amici* in *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 263 n. 127 (2d Cir. 2015). Like the First Circuit, the Second Circuit found it sufficient to “proceed on the assumption that these laws ban weapons protected by the Second Amendment” because it upheld the prohibition of LCMs.<sup>24</sup> *Id.* at 257. In *Kolbe v. Hogan*, the Fourth Circuit reviewed and vacated a panel decision that had declared magazines protected “Arms” without addressing that issue, finding LCMs not protected by the Second Amendment for other reasons. *Kolbe v. Hogan*, 849 F.3d 114, 136, 137 n.12 (4th Cir. 2017) (*en banc*).

Courts that have held that LCMs *are* “Arms” have for the most part equated LCMs with bullets and, by doing so, have been able to declare that LCMs are an integral part of firearms such that the weapons are useless without them. Thus, they reason, LCMs must be protected as “Arms” in the same way that the firearms themselves are. Although it is their burden to show that large-capacity magazines fall within the purview of the Second Amendment, the plaintiffs offer no expert opinion on the meaning of the word “Arms.”

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<sup>24</sup> The Second Circuit did strike down the provision of the statute that forbade the *loading* of a magazine with more than seven rounds, but it upheld the restriction on the *capacity* of the LCM at ten rounds. *New York State Rifle & Pistol Ass’n*, 804 F.3d at 269.

Instead, the plaintiffs simply assert that “without the magazine, many weapons would be useless” (ECF No. 32 at 7) and rely on *Duncan v. Becerra*, 970 F.3d 1133, 1146 (9th Cir. 2020), *rev’d*, *Duncan v. Bonta*, 19 F.4th 1087, 1096 (9th Cir. 2021) (*en banc*), which stated that “[f]irearm magazines are ‘arms’ under the Second Amendment” because “[w]ithout a magazine, many weapons would be useless.” The plaintiffs’ reliance on the panel decision in *Duncan* in light of its reversal *en banc* is suspect. What is more concerning, though, is that the panel opinion engaged in no textual or historical analysis of the word “Arms.” Further, this Court finds the panel opinion’s equation of “magazines” with “bullets” unpersuasive.<sup>25</sup> The Ninth

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<sup>25</sup> Indeed, *Duncan* specifically relied on its previous holding in *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014), which applied the Second Amendment to bullets. *Jackson*, however, noted the lack of historical evidence in the record. The *Duncan* court relied on *Jackson* without recognizing the distinction between bullets and magazines, between ammunition and the *holder* of ammunition. Moreover, the judgment in *Duncan* was vacated and rehearing *en banc* was granted. *Duncan v. Becerra*, 988 F.3d 1209 (9th Cir. 2021). On rehearing, the district court was reversed, *Duncan v. Bonta*, 19 F.4th 1087, 1096 (9th Cir. 2021) (*en banc*), the Court holding that the ban “outlaws no weapon, but only limits the size of the magazine that may be used with firearms . . . .” While there is no discussion of whether magazines are included under “Arms,” the Ninth Circuit’s description of the complete ban on large-capacity magazines as “outlaw[ing] no weapon” is consistent with finding a magazine an accessory, not itself a firearm. In any event, the current status of *Duncan* is that it has been remanded again to the district court post-*Bruen*. *Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022) (Mem).

*Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276 (N.D. Cal. 2014), upon which the State relies, did not distinguish between

Circuit also noted that the statement, “without a magazine, [the] weapon would be useless,” is not really true. Without *bullets*, a firearm would be useless. But a firearm can fire bullets without a detachable magazine, and in any event, a firearm does not need a magazine containing more than ten rounds to be useful.

The analysis under *Bruen* is twofold. First, the plain text itself must be examined; second, the Court can consider the historical context to discern what would have been the meaning accepted at the time. To assist our analysis, we turn first to *Heller*:

Before addressing the verbs “keep” and “bear,” we interpret their object: “Arms.” The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined “arms” as “[w]eapons of offence, or armour of defence.” 1 Dictionary of the English Language 106 (4th ed.) (reprinted 178) (hereinafter Johnson). Timothy Cunningham’s important 1771 legal dictionary defined “arms” as “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” 1 A New and Complete

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magazines and ammunition. It reasoned that if “magazines and ammunition” were not Arms, any state could end · run *Heller* by banning them. The Court did not recognize any difference between bullets and the container from which they are fed into the firearm. *Fyock*, however, ultimately refused to preliminarily enjoin the ban on LCMs, and that decision was affirmed with no discussion of whether LCMs are “Arms.” *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015).

Law Dictionary; see also N. Webster, American Dictionary of the English Language 1828) (reprinted 1989) (hereinafter Webster) (similar).

*Heller*, 554 U.S. at 581. Whether LCMs were in existence in the 18th century is of little concern. *Heller* teaches that “the Second Amendment extends prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* at 582. But *Heller* is of little help in resolving whether LCMs are “Arms.” *Heller* dispensed quickly with the discussion of the meaning of “Arms,” as there was little question that the handguns at issue there were “weapons of offence.” It is less clear that a magazine is such a weapon because, while it is something that a person “takes into his hands,” it is not a “thing . . . useth in wrath to cast at or strike another.” *Heller*, 554 U.S. at 582 (emphasis added). In this Court’s view, LCMs, like other accessories to weapons, are not used in a way that “cast[s] at or strike[s] another.” What one judge has said of silencers is equally apt when applied to LCMs: they “generally have no use independent of their attachment to a gun” and “you can’t hurt anybody with [one] unless you hit them over the head with it.” *United States v. Hasson*, No. GJH-19-96, 2019 WL 4573424, at \*2 (D. Md. Sept. 20, 2019), *aff’d*, 26 F.2d 610 (4th Cir. 2002), *cert. den.* 2022 WL 6572217 (Oct. 11, 2022); *accord United States v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018) (“A silencer is a firearm accessory; it’s not a weapon in itself (nor is it ‘armour of defence.’”).



This is where it is useful to turn to the opinion of historians and linguists. In interpreting the word “Arms,” we look to the word’s ordinary meaning, “guided by the principle that [t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *Heller*, 554 U.S. at 577. To the ordinary reader, magazines themselves are neither firearms nor ammunition. They are *holders* of ammunition, as a quiver holds arrows, or a tank holds water for a water pistol, or a pouch probably held the stones for David’s sling.<sup>26</sup>

The plaintiffs’ expert Ashley Hlebinsky, a firearms historian, seems to agree with the characterization of a magazine as less of a weapon and more of a *holder* of ammunition: She wrote, “[a] magazine is a container, detachable or fixed, that holds ammunition while it feeds into a repeating firearm.” ECF No. 22-1 at 8 ¶ 12. The fact that a magazine is an *attachment* to a firearm, rather than a necessary or integral part of the firearm itself, is acknowledged by her in the following language: “In the periods being discussed, there are repeating firearms that do not use magazines, such as revolvers, which use a rotating cylinder.” *Id.* Neither Ms. Hlebinsky nor the plaintiffs’ other proffered expert addresses

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<sup>26</sup> This view accords with the way at least some gun manufacturers themselves understand “magazines.” As the State points out, “Modern firearms manufacturers often do not list magazines under “gun parts” but under firearms “accessories” sections of their websites. ECF Nos. 19 at 30 (internal pagination), 19-4.

whether a magazine is encompassed by the definition of “Arms.”<sup>27</sup>

In this case, only the State has supported its argument with historical analysis. The Court finds credible the state’s expert, Prof. Dennis Baron, a professor of linguistics with an emphasis on “historical language usage,” and accepts his opinion. According to Prof. Baron, there was a clear distinction between “Arms” and “accoutrements” from the founding era through the period following ratification of the Fourteenth Amendment. The word “Arms” was a general term for weapons such as swords, knives, rifles, and pistols, but it did not include ammunition, ammunition containers, flints, scabbards, holsters, or “parts” of weapons such as the trigger, or a cartridge box. The reader is referred to State’s Exhibit G for a detailed analysis, but Prof Baron points out that in the 18th Century, bullets were kept in cartridge boxes or cases, called “accoutrements,” and the word “magazine,” which was used at that time to mean “storehouse” did not come to mean a compartment holding ammunition until the late 19th Century.

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<sup>27</sup> Ms. Hlebinsky’s opinion is confined, in her words, to the technology of repeaters and magazine-fed repeaters, the relationship between civilian and military weaponry, and the history of regulation. *Id.* at 1, 3-4. The plaintiffs’ expert Matthew Larosier focused on the history of restrictions, the plaintiffs’ vagueness argument that asserts a lack of common understanding for “high capacity,” and an argument that high-capacity magazines render firearms safer than other firearms because they have a greater likelihood of malfunctioning. His assertion that magazines are “Arms” was supported only by citation to *Duncan v. Becerra*, which, as the Court has noted *supra* at note 25, was reversed.

For the purposes of a preliminary injunction, it suffices for the Court to conclude that the plaintiffs have failed to meet their burden of establishing that LCMs are “Arms” within the textual meaning of the Second Amendment.

### **5. LCMs Are Not Instruments of Self-Defense**

There is simply no credible evidence in the record to support the plaintiffs’ assertion that LCMs are weapons of self-defense and there is ample evidence put forth by the State that they are not.<sup>28</sup> This Court

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<sup>28</sup> In *Worman v. Healey*, the constitutionality of restrictions on the possession of LCMs (and assault rifles) was squarely presented to the First Circuit. *Worman*, 922 F.3d at 26. *Worman* was abrogated by *Bruen*, which rejected its use of a two-step intermediate tier scrutiny standard, but its significance to this case is that *Worman* sidestepped the question of whether LCMs were weapons of self-defense. It

assume[d] without deciding that [assault weapons and LCMs] have some degree of protection under the Second Amendment. We further assume, again without deciding, that the Act [prohibiting them] implicates the core Second Amendment right of self-defense in the home by law-abiding, responsible individuals.

*Id.* at 30. While the First Circuit posed the question of “whether the proscribed weapons are in common use for lawful purposes like self-defense,” it specifically eschewed the need “to plunge into this factbound morass.” *Id.* at 35. The *Worman* analysis did not depend upon an answer to the question because it went on to determine, applying the pre-*Bruen* ends-means balancing, that any burden on the right of self-defense was minimal. “Viewed as a whole, the record suggests that wielding the proscribed weapons for self-defense within the home is tantamount to using a sledgehammer to crack open the shell of a peanut.” *Id.* at 37.

*Bruen* does not allow the Court to balance the extent of an intrusion into a Second Amendment protected right against the

has painstakingly examined the evidence put forth by the plaintiffs on this point and finds it wanting.<sup>29</sup> On

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strength of the public interest served by the LCM Ban or the closeness of the means of the statute and its end. The Court cannot, like *Worman*, conclude that the impairment is “modest” and “the fit between [legislative] interests and the restrictions imposed by the Act is both close and reasonable.” Instead, any intrusion into a right protected by the Second Amendment thrusts us into the territory of justifying the regulation as one historically placed on similar weapons. That latter issue is hotly contested between the parties.

<sup>29</sup> The plaintiffs’ evidentiary package consists of the following: Ex. 8-1A is the statute. Ex. 8-1B is the Affidavit of Plaintiff Jonathan Hirons who owns a number of LCMs but makes no reference at all to their use. Ex. 8-1C is the Affidavit of Andre Mendes, principal of the retailer plaintiff, which describes an inventory that includes LCMs but makes no reference to their use by him or his customers. Ex. 22-1A is the Declaration of expert Ashley Hlebinsky, a firearms historian. While Ms. Hlebinsky provides an extensive history of firearm development, use, and regulation in the founding era specifically, she offers no discussion at all about what LCMs were actually used for. In her discussion of the development of target shooting, for example, she mentions rifles and, in passing, “repeaters of all sorts” in models “indicating sporting vs. military variants.” *Id.* at 11 ¶ 17. She particularly elaborates on the interchangeability between civilian and military uses for weapons, *Id.* at ¶ 18, but fails to connect any of that information to the use of LCMs in self-defense. Her exposition on the development of repeating firearms is similarly lacking. *Id.* at 12 ¶ 21. The closest Ms. Hlebinsky comes to linking LCMs to lawful use is a quotation from William F. “Buffalo Bill” Cody who pronounced Winchesters his favorite for “hunting or Indian fighting.” *Id.* at 19 ¶ 31. In short, Ms. Hlebinsky’s report does nothing to inform the discussion of whether LCMs are in any way connected to the purpose of self-defense. Ex. 22-1B is an article written by Researcher Matthew Larosiere, then of the Cato Institute. It challenges restrictions on LCMs. It asserts that “[d]efensive uses of firearms can preserve human life,” *Id.* at 43. Nowhere does Mr. Larosiere discuss the

the other hand, the State's experts address the question head-on. Edward Troiano, who spent 25 years as a Special Agent for the Bureau of Alcohol, Tobacco & Firearms ("ATF"), and now is the Chief of the Rhode Island Bureau of Criminal Identification and Investigation, conducted a review of self-defense incidents in Rhode Island in which a semiautomatic firearm was used. That review, combined with the awareness of firearm investigations that his job requires, led him to assert that he is "unaware of any incident in which a civilian has ever fired as many as 10 rounds in self-defense." ECF No. 19-3 ¶ 10. In contrast, LCMs have "frequently" been used by

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actual use of LCMs in self-defense. The only empirical data he offers concerns the lower percentage of "hits" novice shooters have compared to more experienced shooters. "That [, he argues,]combined with the fact that an assailant is rarely stopped by a single bullet, makes magazine capacity all the more important for the effective defensive use of firearms." *Id.* at 52. Mr. Larosiere presents only one anecdote of a victim of an attempted ambush firing 12 times at his assailants. *Id.* at 52-53. Ex. 22-1C is a brochure entitled "The Best Duck Hunting Shotguns of 2022." Ex. 22-1D is an Affidavit of a plaintiff firearms dealer directed primarily at the allegation of "vagueness" of the term "permanent" modification. It does not mention self-defense. ECF No. 22-1, Ex. E is a second Affidavit of Plaintiff Jonathan Hiron, elaborating on his plans should the injunction not issue and the difficulty of modifying the plastic magazines he owns.

The Plaintiffs attempted to file an additional affidavit from Mr. Worthy, introducing new factual allegations, after the deadline for submissions had expired, without requesting permission to do so. ECF No. 23. The affidavit was signed two days before the hearing but not filed until the day before the hearing. The defendants' Motion to Exclude the Affidavit (ECF No. 24) is GRANTED.

persons committing criminal offenses “in the course of their criminal conduct.” *Id.*

The Court finds credible the submission of Prof. Michael Vorenberg, a historian with expertise particularly concerning the Civil War and Reconstruction periods. Prof. Vorenberg offered the direct opinion that “high-capacity firearms during the era were understood to be weapons of war or anti-insurrection, not weapons of individual self-defense.” ECF No. 19-2 at 16 ¶ 3. Veterans who retained them after their military service had concluded possessed the same understanding. *Id.* at 25 ¶ 21.

If [owners of LCMs] along with their weapons were transported by a time machine back to the Reconstruction-era South, they would find themselves suspected of being outlaws by law enforcement officers. If they then gathered together into organized companies, they would be considered insurrectionary militias, which is precisely how the Ku Klux Klan was regarded during Reconstruction by the U.S. army, the state militias, and other legitimate, pro-Union law enforcement officials.

ECF No. 19-2 at 63 ¶ 99.

In its supplemental memorandum, the plaintiffs fail to discuss whether there is a link between LCMs and the use of firearms for self-defense. They argue vociferously that LCMs were “in common use” (ECF No. 32 at 3 (citing *Bruen*, 142 S. Ct. at 2143)), but their argument is untethered from the concept of self-defense. Instead, the plaintiffs proceed on the premise that “[t]he Second Amendment’s protection extends to

those sorts of weapons that are in common use, and typically possessed by law abiding citizens for lawful purposes at the time.” ECF No. 32 at 3. The selective citation ignores the sentences in *Bruen* that *immediately* follow what the plaintiffs cite: “Whatever the likelihood that handguns were considered ‘dangerous and unusual’ during the colonial period, they are indisputably in ‘common use’ for *self-defense today*. They are, in fact, ‘the quintessential *self-defense* weapon.” *Bruen*, 142 S. Ct. at 2143 (emphasis added) (citation omitted).

The Court finds, on the evidence submitted, that the plaintiffs have failed to establish that they have a likelihood of success in demonstrating that LCMs are weapons of self-defense, such that they would enjoy Second Amendment protection.

## **6. Historical Tradition**

*Bruen* sets forth the standard for analyzing Second Amendment claims: “When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 2129-30. The parties vehemently dispute whether LCMs were in common usage at various historical times. They talk at length about long guns and repeaters. *See generally* ECF No. 19-1 (State’s expert Roth) and ECF No. 22-1 (plaintiffs’ expert Hlebinsky). And in doing so, they disagree on *which* historical era is most appropriate to examine: the “founding era” or the “reconstruction era.” The Second Amendment itself was drafted during the former;

however, it was made applicable to the states only through the adoption, during the Reconstruction era, of the Fourteenth Amendment.

The Court has already, for reasons expressed *supra* made clear that it finds the plaintiffs' proffered experts less credible than those of the State, and it could resolve the historical tussle by simply crediting the latter and rejecting the former on this point. But a simpler path is available which, while also looking to the record, is more straightforward.

Because of its holding that LCMs are neither "Arms" within the meaning of the Second Amendment's text, nor weapons of "self-defense," the Court need not investigate whether the LCM Ban's restrictions are consistent with the regulations of history, regardless of which historical period is more apt. The Court does not have to choose a historical backdrop, because the overwhelming evidence before it is that at *no* time were LCMs considered "Arms," nor were they used in any significant way for self-defense. They were not then, and they are not today.

What remains, then, is where the Court goes in its analysis after it has found that LCMs deserve no "presumptive protection" under the Second Amendment. *Bruen*, 142 S. Ct. at 2135. Does it examine the restriction using a routine rational basis analysis? Is there any basis for turning to intermediate scrutiny, not for the now-abrogated rationale of *Worman*,<sup>30</sup> but because weapons that are

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<sup>30</sup> *Worman* chose intermediate scrutiny because it found the Massachusetts ban "implicated" the right to possess weapons of



neither “Arms” nor used for self-defense deserve some favorable treatment anyway like a contender who fails to win a ribbon but nonetheless deserves honorary mention?

The answer, it seems, is that the Court’s Second Amendment analysis simply ends here. It has found that because LCMs appear to be neither “Arms” nor weapons related to self-defense, they are entitled to no presumptive protection under the Second Amendment. On Count I, therefore, the plaintiffs have failed to demonstrate a likelihood of success on the merits so as to warrant preliminary injunctive relief.

## **B. Banning High-Capacity Magazines and Takings Without Just Compensation**

### **1. Background on Takings**

The plaintiffs contend that the LCM Ban amounts to a “taking without just compensation” in violation of the Fifth and Fourteenth Amendments to the United States Constitution because it forces them to divest themselves of any LCMs designed to hold more than ten rounds of ammunition. While compliance with the LCM Ban does prohibit continued physical possession of LCMs, the statute gives LCM owners four options from which to choose by December 18, 2022. They may modify the magazine’s capacity to hold ten or fewer rounds, they may sell the offending LCM to a registered gun dealer, they may transport the offending gun to a place where it is lawfully possessed, or they may forfeit the LCM to a law enforcement

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self-defense but did not “heavily burden” that right. *Worman*, 922 F.3d at 38.

entity. The statute provides no payment in the event of forfeiture.

The parties dispute the prevalence of magazines that cannot be converted to lower capacity, but the Court need not resolve this dispute and accepts that there are some LCMs that cannot be modified.<sup>31</sup> Even assuming that the only way to comply with the statute for some plaintiffs vis-à-vis some weaponry is to forfeit them, the Court finds that no “taking” within the meaning of the Fifth Amendment has occurred and there is, therefore, no entitlement to “just compensation.”

There are two types of “takings” that may require compensation. First, there is a physical taking where property is appropriated by the government for public use. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017). This type of taking is accomplished by direct seizure or “the functional equivalent of a practical ouster of the owner’s possession.” *Id.* A second type of “taking,” deemed a regulatory taking, is accomplished when the owner is deprived of all economic or productive use of the product. *Id.* at 1942-43.

More than a century ago, the United States Supreme Court declared that “[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.” *Mugler v. Kansas*, 123 U.S. 623, 669 (1887).

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<sup>31</sup> None of the plaintiffs through their affidavits professes to own an LCM that definitively cannot be modified.

The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.

*Id.*; *Fesjian v. Jefferson*, 399 A.2d 861, 866 (D.C. 1979) (holding that a “proper exercise of police power to prevent a perceived public harm [] does not require compensation”). “Property seized and retained pursuant to the police power is not taken for a ‘public use’ in the context of the Takings Clause.” *Akins v. United States*, 82 Fed. Cl. 619, 622 (Fed. Cl. 2008) (quoting *Ameri.Source Corp. v. United States*, 525 F.3d 1149, 1152 (Fed. Cir. 2008)). If legislation is a valid exercise of police power, “the fact that it deprives the property of its most beneficial use does not render it unconstitutional.” *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 592 (1962).

The plaintiffs attempt to characterize the LCM Ban as a “physical taking,” in order to avoid the valid police power doctrine, and cite *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, the Supreme Court held that the installation of cable equipment on private property was a valid exercise of police power but nonetheless required just compensation. *Loretto* is restricted, however, only to concrete takings, not use restrictions: “Although this Court’s most recent cases have not addressed the precise issue before us, they have emphasized that physical *invasion* cases are special and have not

repudiated the rule that any permanent physical *occupation* is a taking.” *Id.* at 432 (emphasis in original). While the LCM Ban does include a forfeiture option, it does so as one option among several, not as a compelled taking. The gunowner has a series of other options she may exercise, at least two of which—modification and transfer to a state where LCMs are not banned—allow retention of the LCM and substantial beneficial use. Sale to a registered gun dealer is another option that gives the owner beneficial use. Only as a last resort—and only if the gun owner voluntarily eschews other options—might one choose forfeiture. That recourse to forfeiture is possible does not turn the LCM Ban into a physical taking and *Loretto* is not applicable here.

Thus, the Court returns to the doctrine that a regulatory restriction that is a valid exercise of police power does not entitle the property owner to compensation. In order to constitute a valid exercise of police power, legislation is required (A) to serve the public interest, (B) the means must be reasonably designed to accomplish the purpose, and (C) they must not be unduly oppressive upon individuals. *Goldblatt*, 369 U.S. at 594-95.

## 2. Public Interest

On top of an epidemic of violence in American society there has been layered the ultra-lethal pathogen of mass murders—shootings in which multiple people are killed and, often, dozens of others injured.<sup>32</sup> The shootings are the acts usually of a

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<sup>32</sup> Mass shootings are defined by the Gun Violence Archive as a shooting in which at least four people are wounded in the same place at the same time. By that definition, there have been more

single stranger,<sup>33</sup> mowing down random bystanders in the line of fire only because of where they happened to be at a tragic moment in time. On August 1, 1966, Charles Whitman climbed twenty-eight stories to the observation deck of the main building on the campus of The University of Texas at Austin and began indiscriminately shooting at people below. He fired for ninety-six minutes, killing fourteen and wounding thirty-one others. At the time, such murders seemed unthinkable. David Montgomery, *Texas Marks '66 Sniper Attack as University Prepares for 'Campus Carry' Law*, New York Times (July 30, 2016), <https://www.nytimes.com/2016/07/31/us/university-of-texas-marks-sniper-attack-with-memorial-and-new-gun-law.html>. But while the Texas sniper is often considered the first of the modern wave of mass shootings, a New Jersey man mowed down thirteen people with a semiautomatic weapon in 1949. David M. Zimmer, *America's First Mass Shooting: 70 Years Ago, A WWII Veteran Killed 13 of His Neighbors*, USA Today (Aug. 28, 2019), <https://www.usatoday.com/>

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than 600 mass shootings in 2022 as of November, an average of 1.8 per day. There have been thirty-six mass murders in the same time period, shootings in which at least four people are killed. *Gun Violence Archive 2022: Charts and Maps*, Gun Violence Archive, <https://www.gunviolence-archive.org/> (last visited Nov. 28, 2022). The number has more than doubled since 2014 and increased by 50% from 2019 to 2020. *Id.*

<sup>33</sup> The mass shootings and killings that occupy our attention are those of a lone shooter. American history contains numerous instances of mass shootings perpetrated by mobs, *e.g.*, Nat Turner's rebellion, Bloody Monday in Louisville, and the massacres of countless unarmed Native Americans. ECF No. 19-1 at 50 ¶ 34.

story/news/nation/2019/08/28/wwii-veteran-became-america's-first-mass-shooter-1949/2139054001/.

At the time of this writing, what is more unthinkable is that mass murders have become a weekly-and sometimes daily-event. For example, on Sunday, November 13, a University of Virginia student opened fire on a bus, killing three of his classmates and leaving a fourth seriously wounded. Six days later, on Saturday, November 19, a shooter opened fire at a gay and lesbian nightclub in Colorado Springs, killing five and injuring twenty-five others. Three days later, a Walmart employee in El Paso walked into a break room and started shooting at fellow employees, killing six and wounding at least six more. According to *The Washington Post*, “[n]ot a single week in 2022 has passed without at least four mass shootings.” Julia Ledur, *There Have been More than 600 Mass Shootings So Far in 2022*, Washington Post (Nov. 23, 2022, 11:49 AM), <https://www.washingtonpost.com/nation/2022/06/02/mass-shootings-in-2022/>.

The events are referred to now simply by shorthand name, which sadly is enough without elaboration to bring the grizzly details to mind. Remember just a few: San Ysidro, California (July 18, 1984, twenty-one dead and nineteen wounded); Columbine, Colorado (Apr. 20, 1999, thirteen dead and twenty-four wounded); Edmond, Oklahoma (Aug. 20, 1986, fourteen dead and six injured); Red Lake, Minnesota (Mar. 21, 2005, seven dead); Virginia Polytechnic Institute, Blacksburg, Virginia (Apr. 16, 2007, thirty-two killed and seventeen wounded); Bingham, New York (Apr. 3, 2009, thirteen dead and

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four wounded); Fort Hood, Texas (Nov. 5, 2009, thirteen dead and thirty-one injured); Oakland, California (Apr. 2, 2012, seven dead and three wounded); Cinemark Century Theater in Aurora, Colorado (July 20, 2012, twelve killed and fifty-eight wounded); Sandy Hook Elementary in Newtown, Connecticut. (Dec. 14, 2012, twenty-six dead and two wounded); Marysville, Washington (Oct. 24, 2014, four dead and four wounded); San Bernardino, California (Dec. 2, 2015, fourteen killed and twenty-two wounded); Pulse Night Club in Orlando, Florida (June 12, 2016, forty-nine dead and fifty-three wounded); Dallas, Texas (July 7, 2016, five dead and eleven injured); Las Vegas, Nevada (Oct. 1, 2017, fifty-eight dead and 850 wounded); Sutherland Springs, Texas (Nov. 5, 2017, twenty-six dead and twenty wounded); Stoneham-Douglas High School in Parkland, Florida (Feb 14, 2018, seventeen dead and seventeen wounded); Santa Fe, Texas (May 18, 2018, ten dead and thirteen wounded); Temple of Life Synagogue in Pittsburgh, Pennsylvania (Oct. 27, 2018, eleven dead and six wounded); Midland-Odessa, Texas (Aug. 31, 2019, seven killed and twenty-five injured).<sup>34</sup> And

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<sup>34</sup> Sources: Matthew Lynch, *Definitive List of School Shootings in The United States In The 21st Century*, The Edvocate (June 8, 2022) <https://www.theedadvocate.org/definitive-list-of-school-shootings-in-the-united-states-in-the-21st-century/>; Mandi Cai, *Texas has had eight mass shootings in the past 13 years, while lawmakers have steadily loosened restrictions on carrying firearms*, The Texas Tribune (Nov. 12, 2019) [https://apps.texastribune.org/features/2019/texas-10-years-of-mass-shootings-timeline/?\\_ga=2.137769844.599227537.1669671525424901157.1669671525](https://apps.texastribune.org/features/2019/texas-10-years-of-mass-shootings-timeline/?_ga=2.137769844.599227537.1669671525424901157.1669671525); Mark Berman, *'I'm Not Gonna Lay Here and Just Get Shot.'* *Survivors Describe the Terror and Chaos of Las Vegas Massacre*, Washington Post (May 17, 2018),

then there was Uvalde, Texas, where video cameras inside Robb Elementary School on May 24, 2022, allowed a stunned and horrified public to watch 376 law enforcement officers stand by while a lone gunman murdered twenty-one victims, mostly children, in a seventy-five minute massacre; eighteen more, also mostly children, were wounded. Six weeks later, a shooter opened fire on a July 4th parade in Highland Park, Illinois, killing seven people and wounding thirty.

The asserted governmental interest of public safety stemming from mass gun murders could not be more undeniably compelling.

### **3. Reasonably Designed to Accomplish the Purpose**

The prohibition against LCMs is a reasonable response to the public safety interest of the state. Indeed, it is “substantially related to the promotion of

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<https://www.washingtonpost.com/news/post-nation/wp/2018/05/16/im-not-gonna-lay-here-and-just-get-shot-survivors-describe-the-terror-and-chaos-of-las-vegas-massacre/>; *A Study of Active Shooter Incidents in the United States*, U.S. Dept. of Justice Bulletin (Sept. 16, 2013); Zach Despart, “Systemic Failures” in *Uvalde Shooting Went Far Beyond Local Police, Texas House Report Details*, *The Texas Tribune* (July 17, 2022), <https://www.texastribune.org/2022/07/17/law-enforcement-failure-ualde-shooting-investigation/>; Christine Hauser & Livia Albeck-Ripka, *Victims of Highland Park Shooting Sue Gun Maker and Retailer’s*, *New York Times* (Sep. 29, 2022), <https://www.nytimes.com/2022/09/29/us/highland-park-shooting-victims-lawsuit.html>; (ECF No. 19-11); Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, *N.Y. Times* (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>.



the general welfare.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978). While a ban on LCMs does not prevent mass shootings, it unquestionably makes them less deadly.<sup>35</sup> As the District of Columbia Circuit Court said in its consideration of *Heller* after remand, LCMs are designed to “shoot multiple human targets very rapidly” and to “allow the shooter to spray-fire from the hip position.” *Heller II*, 670 F.3d at 1262-63. An LCM may be designed for quick reloading, but logic dictates that any reloading time saves lives.

The plaintiffs rebut by minimizing estimated reloading time, to two or three seconds, in an attempt to shrink its life-saving impact.<sup>36</sup> “Such a minuscule difference in practical fire rate would be unlikely to have any appreciable effect on lethality.” ECF No. 22-

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<sup>35</sup> The analogy to automobiles and speed limits comes to mind. Imposing a national highway speed limit of fifty-five miles per hour in 1974 did not eliminate accidents, but it made them significantly less deadly. *Long Term Effects of Repealing the National Maximum Speed Limit in the United States*, Am J. Pub. Health, at 1626-31 (Sept. 2009) (noting that in the year after enactment, fatalities were reduced by 16.4%).

<sup>36</sup> The plaintiffs also argue that, because LCMs are complex machinery, they are subject to jamming and breakdowns. These fortuitous events allow victims to escape, making firearms fitted with LCMs *safer* in the plaintiffs’ opinion than those with lower-capacity chambers. “One can argue that true high-capacity magazines would be ‘safer’ in a mass shooting situation than multiple low-capacity magazines.” ECF No. 22-1 at 50. The plaintiffs omit mentioning the irony of this position: what they point to as a fatality-reducing event that they would rely on to promote safety happens only occasionally, but it is *exactly* what the legislation tries to achieve by plan and design—a pause in the shooting.

1 at 50. But the Court finds as fact that in those two or three seconds a child—or two children, or even three—may escape the fire of a mad person. In Las Vegas, one young woman who got up and ran during a moment's pause was able to get as far as the door before being shot in the arm. Berman, *supra* note 34. Others describe running for cover in the few pauses where the shooter reloaded. ECF No. 19-1 at 23 (citing Natalie Bruzda, *Veteran's Quick Reactions Saved Lives During Las Vegas Shooting*, Las Vegas Rev. J. (Nov. 10, 2017)) (internal pagination). A gunman's need to reload twice using three ten-round magazines instead of a single thirty-round magazine, clearly saves lives. It is undisputed that requiring a pause in the shooting saves lives. This assertion is based on society's experience with what is now a catastrophic number of these incidents, not merely conjecture. In Tucson, while two bystanders tackled the gunman, a sixty-one-year-old woman wrestled a fresh magazine from him as he tried to reload.<sup>37</sup> In California, twelve people were able to escape out the back window of the bar while the gunman paused to reload.<sup>38</sup> As the *en*

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<sup>37</sup> Jessica Hopper et al., *Heroes of Tucson Shooting: 'Something Had to Be Done'*, ABC News (Jan. 10, 2011), <https://abcnews.go.com/US/heroes-rep-gabrielle-giffords-shooting-tucson-arizona-subdued/story?id=12580345>; Kevin Dolak & Justin Weaver, *Women Wrestled Fresh Ammo Clip from Tucson Shooter as He Tried to Reload*, ABC News (Jan. 9, 2011), <https://abcnews.go.com/Politics/patricia-maisch-describes-stopping-gunman-reloading/story?id=12577933>.

<sup>38</sup> *California Bar Shooting: Witnesses Describing Escaping as Gunman Reloaded*, CBS Mornings (Dec. 7, 2018), <https://www.cbsnews.com/news/borderline-bar-shooting-thousand-oaks-california-12-dead-witnesses-describe-gunman-storming-in/>; *Witnesses on "Utter chaos" and Escape from*

*banc* Fourth Circuit observed in *Kolbe v. Hogan*, the use of ten round magazines instead of LCMs would afford “six to nine chances” for bystander intervention for every 100 rounds fired. *Kolbe*, 849 F.3d at 128.

The plaintiffs’ estimate of “two seconds” to reload a new magazine presumably assumes ideal circumstances. In reality, however, “[m]any criminals are not practiced in changing magazines, and the stress of a confrontation can also increase the time to change a magazine . . . allowing valuable moments for victims or law enforcement to act.” ECF No. 19-3, Affidavit of Edward Troiano ¶ 13.

The reduction of how many rounds can be shot in a given time period, due to the need to reload, serves public safety in another way as well. “[C]riminals’ use of large capacity magazines increases the likelihood of their indiscriminate fire resulting in a strike, or multiple strikes, to a victim.” *Id.* Because bullets “can travel through the walls of homes and even car doors, [and] the use of large capacity magazines in criminal activity also increases the risk that innocent bystanders will be injured.” *Id.*

The more shots fired, the greater the number of people wounded, the more bullets that hit a single person, the more serious the injuries, and the less able emergency rooms are to treat them or save lives. The state has supplied a declaration of Dr. Megan Ranney, an expert in the field of emergency medicine with impeccable credentials. She received her A.B. *summa*

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*California Bar Shooting*, CBS News (Nov. 8, 2018), <https://www.cbsnews.com/video/witnesses-on-utter-chaos-and-escape-from-california-bar-shooting/>.

*cum laude* from Harvard College, her medical degree from Columbia University, and a Master of Public Health from Brown University. She is a Diplomate of the American Board of Emergency Medicine and a Fellow of the American College of Emergency Medicine. Her awards, appointments, and publications in peer-reviewed journals, reflecting original research in this field, are numerous. ECF No. 19-10 at 4-71.

The State has submitted the credible evidence of Dr. Ranney's first-person description of care and treatment of gunshot wounds that takes the reader into the trauma rooms of an emergency medicine facility. It describes, from the arrival of the ambulances to the patient outcomes, a play-by-play of treatment procedures. The ability to spray a crowd with bullets results in more injuries per person, and "cases with multiple bullet wounds are more complex, have a higher likelihood of injury that requires surgical intervention, and have a higher likelihood of death in the emergency department." *Id.* at 2 ¶ 8.

Trying to simultaneously stop the blood loss from a lacerated liver, spleen, and lung is much more complex than addressing a single such injury. Internal organs bleed a lot; a heart with a hole in it doesn't work; blood in the lungs makes us unable to get enough oxygen to the body; and we simply can't stem all of these at the same time, even with multiple physicians in the room.

*Id.* at 3 ¶ 10. When there are multiple victims arriving at the same time, the inability to treat adequately is exacerbated. From her practice for the

past fourteen years as an attending physician in emergency medicine at both Miriam and Rhode Island Hospitals she reports, “I have worked evenings when the number of patients arriving in the emergency department with gunshot wounds stretches our staff, our number of available operating rooms, and even our number of blood supplies available.” *Id.* at ¶ 11.

The data provided by Dr. Ranney, while in her estimation are still sparse, nonetheless support the direct connection between employment of LCMs and increased injuries, both in number and seriousness. Among the explicit findings were that cases in which LCMs were used “had an average of 11.8 deaths per incident (compared with 7.3 per incident when a large-capacity magazine was not used.)” ECF No. 19-J at 78-79. In Tucson, Arizona, the shooter who wounded U.S. Representative Gabby Giffords fired thirty-one rounds, *each* of which found a human target, resulting in six dead and twelve injured—an average of 1.6 bullets hitting each person. ECF No. 22A ¶ 49. One preeminent researcher in this field has estimated that “restrictions on magazine capacity would decrease the number of deaths in mass shootings by 11-15%.” *Id.* (citing Koper, C.S., *Assessing the Potential to Reduce Deaths and Injuries From Mass Shootings through Restrictions on Assault Weapons and Other High-Capacity Semiautomatic Firearms*, Criminal Pub. Pol’y 2020, Vol. 19, 147-170); *see also* ECF No. 22A, Affidavit of Randolph Ross ¶ 46 (“[T]he development of semiautomatic rifles and handguns dramatically

increased the number killed or wounded in mass shootings from 1966 to the present.”).<sup>39</sup>

Beyond the feeble argument that the Court described *supra* at note 36, the plaintiffs have nothing to say to rebut this argument, save for the suggestion that the reloading time is so *de minimus* that any loss of life or bloodshed it achieves is *de minimus* as well.<sup>40</sup> The Court rejects that assertion: the eleven children who escaped the Sandy Hook massacre during an apparent reloading<sup>41</sup> are compelling evidence that the

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<sup>39</sup> From 1966 to the present, mass shootings with non-semiautomatic weapons resulted in an average of 5.4 persons killed. The use of a semiautomatic handgun raised that to 6.5—an additional person dead; and the use of a semiautomatic rifle produced an average of 9.2 persons killed—an increase of 50%. The number of those wounded was even more dramatically affected. The use of non-semiautomatic weapons produced an average of 3.9 wounded (but not killed); use of a semiautomatic handgun increased the number wounded by more than 50% to 5.8, and the use of a semiautomatic rifle nearly *tripled* the number of people wounded, to an average of 11.0. ECF No. 22A ¶ 46. “[W]ith extended magazines, semiautomatic rifles cause an average of 299 percent more deaths and injuries than regular firearms, and semiautomatic handguns 184 percent more than regular firearms. In combination, semiautomatic firearms and extended magazines are extraordinarily lethal.” *Id.* at ¶ 48.

<sup>40</sup> The plaintiffs’ expert declared, “Such a minuscule difference in practical fire rate would be unlikely to have any appreciable effect on lethality.” ECF No. 22-1 at 50.

<sup>41</sup> Corky Siemaszko, *Want to Save Lives in Mass Shootings? Ban Large-Capacity Magazines, Researchers Say*, NBC News (Oct. 17, 2019), <https://www.nbcnews.com/news/us-news/want-save-lives-mass-shootings-ban-large-capacity-magazines-researchers-n1066551>. Nine children had managed to run out of Classroom 10, and two had escaped to the classroom’s restroom. ECF No. 6 at 15. In one of the two classrooms in which children were massacred, three separate 30-round magazines were found;

LCM Ban is a reasonable public safety regulation designed to reduce harm to society.

**4. Not Unduly Oppressive on Individuals**

The statute clearly has an adverse impact on individuals who own LCMs. It places a burden on them to disengage from the weapon, by modifying it, selling it, transporting it elsewhere, giving it away, or forfeiting it. The Court considers this burden minor. It is not at all clear, at least from the evidence the plaintiffs have offered, that it is impossible to modify the LCMs in current use to accept fewer than eleven rounds. While the plaintiffs assert that, they have given the Court no way to quantify the resulting “injury”: which, exactly, are the magazines that cannot be modified? How many of them are in use in Rhode Island? Even if there are some, at a cost as little as under \$14.95 for some thirty-round magazines (ECF No. 19-4 at 15, 30), it does not seem much of a burden even if they must be discarded in favor of another, lower-capacity one. The same failure of proof affects the plaintiffs’ assertion that there are certain handguns that can *only* accept an LCM and cannot accommodate a lower-capacity magazine made by any manufacturer. The plaintiffs have submitted no data to support that assertion. “The impracticability of any particular option, such as the alleged lack of a market for these [large-capacity] magazines, the burden in removing these magazines from the state, or the lack of guidance on what constitutes a permissible

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one had twenty-four rounds in it, one had ten, and the third was empty. Eighty empty casings were found on the classroom floor. *Id.* at 26.

permanent modification does not transform the regulation into a physical taking. *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1198 (E.D. Cal. 2018). Nor does a physical modification of an LCM to accept no more than 10 rounds “destroy[s] the functionality.” *Id.*; see *Goldblatt*, 369 U.S. at 592 (a valid exercise of police power does not become a “taking” even if it “deprives the property of its most beneficial use”).

To the extent that the statute, by prohibiting LCMs, diminishes the shooting ability of the person holding the firearm, it is truly *de minimus*. The law puts no limit on the number of ten-round magazines an owner may have at her feet at any one time. The ground can be littered with magazines that, in the aggregate, give the recreational shooter dozens, or even hundreds, of bullets to fire. It is worth noting again that there is no evidence that any person has ever had any need to fire more than ten rounds in self-defense. But even if such an occasion existed, by the plaintiffs’ own admission, the reloading process is so quick and easy, it would seem hardly burdensome for a person to fire thirty rounds from three ten-round capacity magazines instead of from two fifteen-round capacity magazines or a single thirty-round device. If this is even a burden at all, it pales in comparison to the substantial nature of the public safety interest at stake.

## 5. Conclusion

The Court finds the LCM Ban to be a valid exercise of the police power. Statutes similar to Rhode Island’s, which outlaw possession of LCMs with no provision for compensation, have been upheld against Takings Cause challenges, as have a number of laws



prohibiting particularly deadly firearm accessories. See *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106, 124-25 (3d Cir. 2018), *vac. on other gnds sub nom, Assn. of N.J. Rifle & Pistol Clubs, Inc. v. Bruck*, 142 S. Ct. 2894 (June 30, 2022) (LCMs);<sup>42</sup> *Duncan v. Banta*, 19 F.4th at 1112 (California statute similar to Rhode Island's); *Wiese v. Becerra*, 306 F. Supp. 3d at 1198 (California prohibition of LCMs); *Cf. Akins*, 82 Fed. Cl. at 622-23 (no taking by the ATF's classification of a certain weapon as a "machine gun," thus prohibiting its sale to civilians); *Fesjian*, 399 at 866 (D.C. 1979) (Firearm Control Act of 1975 prohibiting registration of machine guns not a 5th Amendment taking); *Maryland Shall Issue v. Hogan*, 353 F. Supp. 3d 400, 417 (D. Md. 2018) (ban of bump stocks and other rapid-fire trigger activators not a taking); *McCutchen v. United States*, 14 F.4th 1355, 1368 (Fed. Cir. 2021) (inclusion of bump stocks in category of prohibited machine guns not a taking, even though ATF changed its position); *Mitchell Arms, Inc. v. United States*, 26 Cl. Ct. 1, 5 (1992), *aff'd*, 7 F.3d 212 (Fed. Cir. 1993), *cert. den.*, 511 U.S. 1106 (1994) (declaration by ATF that semiautomatic assault-type rifles were not suitable for "sporting" purposes, which made them not importable, not a taking); *Roberts v. Bondi*, No. 8:18-cv-1062-T-33TGW, 2018 WL 3997979, at \*3 (M.D. Fla.

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<sup>42</sup> While a number of these decisions have either been implicitly abrogated by *Bruen* because of their Second Amendment "intermediate scrutiny" holdings, or remanded for reconsideration, *Bruen* did not address a "takings" argument and therefore cast no doubt on the integrity of these decisions on that account. Indeed, *certiorari* was not granted to address the takings portion of the Second Circuit's decision.

2018) (prohibition of bump stocks not a taking); *Rupp v. Becerra*, No. 3:17-cv-00746-MLS-JDE, 2018 WL 2138452, at \*8 (C.D. Cal. May 9, 2018), *rem. for cons. of Bruen*, 2022 WL 2382319 (9th Cir. June 28, 2022) (prohibition of “bullet buttons,” which allowed a quick detaching and replacement of magazine, used in San Bernardino 2015 mass shooting to shoot thirty-six people in less than four minutes, not a taking).

For these reasons, the Court finds the LCM Ban to be a valid exercise of police power, and therefore not a taking that would implicate Fifth Amendment protection. The plaintiffs have failed to show the likelihood of success of their Fifth Amendment claims.

### **C. The Rhode Island Statute and Due Process and Vagueness**

The plaintiffs challenge the LCM Ban with two direct Fourteenth Amendment arguments: that it violates due process and that it is vague in its failure to define what constitutes “permanent modification” of an LCM to accept no more than ten bullets. ECF No. 8 at 13-14. They claim by affidavit and in their memorandum that they are in a “tough corner” where they have to choose between forfeiture without compensation or modification without knowing exactly whether the modification that they choose will be sufficient.

It is unclear to the Court upon which theory of due process the plaintiffs are proceeding, although presumably it is substantive due process. To the extent that the plaintiffs challenge the rationality or capriciousness of the LCM Ban, the Court has found it is a valid exercise of police power. *See supra*. Moreover, the First Circuit has already ruled that a

similar Massachusetts restriction on LCMs survived intermediate scrutiny. *Worman*, 922 F.3d at 26.

The Court sees nothing vague about the statutory language. The necessary modification is defined in the statute itself as “such that [the magazine] cannot hold more than ten rounds of ammunition.” Permanent in ordinary parlance uniformly means “in a way that continues without changing or ending; in a way that is not brief or temporary.” *Permanently*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/permanently> (last visited Dec. 14, 2022). It means “lasting for a long time or for all time in the future.” *Permanent*, Oxford Advanced Learner’s Dictionary, [https://www.oxfordlearnersdictionaries.com/us/definition/english/permanent\\_l#:~:text=permanent ;adjective,future%3B%20existing%20all%20the %20time](https://www.oxfordlearnersdictionaries.com/us/definition/english/permanent_l#:~:text=permanent%20adjective,future%3B%20existing%20all%20the%20time) (last visited Dec. 14, 2022). It is defined similarly in dictionaries of common usage. “Lasting for a long time or forever.” *Permanent*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/permanent> (last visited Dec 14, 2022).

This statute “provide [s] people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000). And it is hard to see how it could encourage “arbitrary and discriminatory enforcement.” *Id.* There seems no discretion for a law enforcement officer to exercise in a way that abuses power: either a given magazine has a place to insert an eleventh bullet or it does not. The plaintiffs have provided no evidence that modifying an LCM could leave a law enforcement officer unable to discern how many bullets it will accept.

At the least, the plaintiffs have failed to carry their burden of demonstrating a likelihood of success with their direct Fourteenth Amendment arguments.

**D. Irreparable Injury and Balance of the Harms**

In addition to demonstrating a likelihood of success on the merits, a plaintiff seeking a preliminary injunction must show that, without the requested relief, she will suffer irreparable harm.<sup>43</sup> “‘Irreparable injury’ in the preliminary injunction context means an injury that cannot adequately be compensated for by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy.” *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005) (finding that imminent foreclosure qualified as irreparable injury). In this

case, the plaintiffs claim several potential injuries. The plaintiffs first cite *Flower Cab Co. v. Petite*, 685 F.2d 192, 194-95 (7th Cir. 1982), for the proposition that “[a] violation of ‘personal’ constitutional rights is a per-se irreparable harm where the protected right has been personal and the violation non-compensable.” ECF No. 22 at 34. That

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<sup>43</sup> As the Court has found insufficient likelihood of success on the merits, it need not examine the other factors relevant to the issuance of a preliminary injunction. *Ryan v. U.S. Immigration & Customs Enft*, 974 F.3d 9, 18 (1st Cir. 2020) (quoting *New Comm. Wireless Servs, Inc. v. SprintCom, Inc.*, 287 F.3d 1, 19 (1st Cir. 2002)) (“If the movant ‘cannot demonstrate that he is likely to succeed in his ques, the remaining factors become matters of idle curiosity.”). The Court has continued beyond the first step, however, in order to provide the parties with a complete opinion.

may be, but the essence of the injury here is clearly economic. Indeed, by virtue of their Fifth Amendment Takings Clause argument, the individual plaintiffs virtually concede that there exists “just compensation” for their being deprived of their LCMs or for firearms that cannot use any magazine but an LCM. The injury alleged by the firearms dealer is entirely economic—an inventory that can no longer be lawfully sold and, perhaps, lost profits on what may have been future sales of the prohibited LCM. Plaintiff Jonathan Hirons alleges he would suffer irreparable harm by having to forfeit his LCMs—a compensable event. ECF No. 8-1, Ex. B. He also complains that he would become a felon if he did not dispossess himself of his LCMs. But, like any “if it were not assizes-time” statement,<sup>44</sup> the harm does not come to pass if he complies with the statute. “A finding of irreparable harm must be grounded on something more than conjecture, surmise, or a party’s unsubstantiated fears of what the future may have in store.” *Charlesbank Equity Fund II, Ltd. P’ship v. Blinds to Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004). The retail plaintiff alleges any number of harms—all economic injuries: financial harm from being unable to sell LCMs in-store, loss of business revenue from selling LCMs, having to find another business location from which to sell LCMs in-store, and the inability to sell models for which lower-capacity magazines are made. ECF No. 8-1 at 11-15.

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<sup>44</sup> The phrase is reported to come from *Tuberville v. Savage*, 1 Mod. Rep. 3, 86 ER 684 (1669); it refers to a conditional event that is avoided if the condition does not occur.

None of these feared consequences constitutes irreparable harm. Besides, the Court in fashioning its Order is ensuring that any forfeited magazines be retained in a safe manner so that they may be returned to their owners if a permanent injunction is granted in the future. *See San Francisco Veteran Police Officers Ass'n v. City & Cty. of San Francisco*, 18 F. Supp. 3d 997, 1005 (N.D. Cal. 2014) (“In the event that plaintiffs prevail on the merits, however, the City and County of San Francisco is ordered to return plaintiffs’ surrendered magazines back to them.”). Any plaintiff who is confident of ultimate victory may ensure that the loss of enjoyment of her LCM is temporary by choosing forfeiture and safekeeping of the weapon.

To the extent that the plaintiffs complain that their right to self-defense may be imperiled, the Court is persuaded by the Declaration of Rhode Island Bureau of Criminal Identification and Investigations Chief Edward Troiano that an occasion in which a victim threatened with violence might need to rapidly fire that eleventh, twelfth, or twentieth bullet is so speculative as to be non-existent. In Mr. Troiano’s experience, from 1994 to the present, confirmed by his review of self-defense incidents, there has not been “any incident in which a civilian has ever fired as many as 10 rounds in self-defense.” ECF No. 22-C ¶ 10. Rhode Island is not alone with no incidents of self-defense use of LCM-equipped firearms. *Kolbe*, 849 F.3d at 127 (“neither the plaintiffs nor Maryland law enforcement officials could identify a single incident in which a Marylander has . . . needed to fire more than ten rounds, to protect herself.”). *See also Worman*, 922 F.3d at 37 (“[N]ot one of the plaintiffs or their six

experts could identify . . . even a single example of a self-defense episode in which ten or more shots were fired.”). See *Oregon Firearms Fed’n, Inc. v. Brown*, No. 2:22-cv-01815-IM, 2022 WL 17454829, at \*11 (D. Ore. Dec. 6, 2022) (NRA Armed Citizen Database found more than ten bullets fired by self-defender only twice in 736 incidents).

Finally, to the extent that the plaintiffs or other recreational gun enthusiasts might somehow enjoy firing dozens of rounds in quick succession, that is hardly impaired. Nothing prevents such people from having dozens of lower-capacity magazines at their feet, allowing them to spray as many bullets as they like, with only the inconvenience of—as the plaintiffs concede—two seconds at a time to reload. That momentary interruption is not the kind of irreparable harm required for a preliminary injunction to issue.

Against what the Court has found is an absence of irreparable harm on the part of the plaintiffs, it must still consider the hardship to the nonmovant if enjoined and the impact of the Court’s decision, either way, on the public interest. *Ryan*, 974 F.3d at 18. Earlier, the Court examined the tightness of the relationship between the LCM Ban and public safety, finding that in a mass shooting incident every pause to reject a spent magazine and load a new one represents the opportunity to preserve a specific life—or more than one. That finding need not be embellished here. Suffice it to say that in very real terms, the plaintiffs’ proffered harm caused to them by an injunction pales in comparison to the unspeakable devastation caused by mass shooters wildly spraying bullets without end into a crowd of bystanders. Rhode

Island has yet to suffer the kind of massacre that occurred just across our border at Sandy Hook Elementary. But, if and when it does, at least while this lawsuit is pending, the State is entitled to enforcement of R.I. Gen. Laws § 11-47.1-1 *et seq.*

#### **IV. CONCLUSION**

It is not entirely accurate to say that the victims of mass shootings are chosen randomly. True, they are random in that their identities are usually not known to the shooter, and it appears to matter not to the shooter whether the next one killed is a particular person or the woman standing next to him. But in actuality, victims have not been chosen randomly. They have been chosen because they were attending synagogue in Pittsburgh or church in Sutherland Springs. Or because they were sitting in an elementary school classroom in Newtown or a high school classroom in Parkland. Or because they were at a concert in Las Vegas or a nightclub in Orlando. They were not chosen because of anything they did, but because of what they represented to a particular person with a gun and a lot of ammunition.

Consistent with its obligation to protect public safety, but consonant with its fealty to the Constitution, the Rhode Island General Assembly has responded with, among other firearms regulations, the LCM Ban. It is perhaps inevitable that Rhode Island will one day be the scene of a mass shooting. The LCM Ban is a small but measured attempt to mitigate the potential loss of life by regulating an instrument associated with mass slaughter. It prohibits a device that itself is neither “Arms” nor embraced by the core right to self-defense. The LCM



Ban is reasonable, it is measured, and the plaintiffs have failed to persuade the Court that it is likely unconstitutional.

The motion for preliminary injunction (ECF No. 8) is DENIED.<sup>45</sup>

IT IS SO ORDERED:

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John J. McConnell, Jr.

Chief Judge

United States District Court

December 14, 2022

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<sup>45</sup> The defendants Attorney General and Rhode Island State Police Superintendent shall make arrangements with state and local law enforcement to preserve in safe and undamaged condition any LCMs turned in by citizens in compliance with the LCM Ban so that they may be returned to their owners should the plaintiffs ultimately prevail on the merits. If the plaintiffs do not prevail, the Court and parties will work together to ensure a grace period during which owners may make arrangements to direct a disposition of their LCMs out of safe keeping in a way that complies with the statute.

*Appendix C*

**RELEVANT CONSTITUTIONAL AND  
STATUTORY PROVISIONS**

**U.S. Const. amend. II**

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

**U.S. Const. amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. CONST. AMEND. XIV, §1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**R.I. Gen. Laws §11-47.1-2. Definitions.**

As used in this chapter:

(1) “Federally licensed firearm dealer” means a person who holds a valid federal firearm dealers license issued pursuant to 18 U.S.C. § 923(a).

(2) “Large capacity feeding device” means a magazine, box, drum, tube, belt, feed strip, or other ammunition feeding device which is capable of holding, or can readily be extended to hold, more than ten (10) rounds of ammunition to be fed continuously and directly therefrom into a semi-automatic firearm. The term shall not include an attached tubular device which is capable of holding only .22 caliber rimfire ammunition.

**R.I. Gen. Laws §11-47.1-3. Large capacity feeding devices prohibited.**

(a) No person, except for a federally licensed firearm dealer, shall manufacture, sell, offer to sell, transfer, purchase, possess, or have under his or her control a large capacity feeding device, except as otherwise authorized under this chapter. Any person convicted of violating the provisions of this section shall be punished by imprisonment of not more than five (5) years, or by a fine of up to five thousand dollars (\$5,000), and the large capacity feeding device shall be subject to forfeiture.

(b) The provisions of subsection (a) of this section shall not apply to:

(1) Any person who, on June 20, 2022, lawfully possesses a large capacity feeding device; provided that, within one hundred eighty (180) days of June 20, 2022, the person:

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- (i) Permanently modifies the large capacity feeding device such that it cannot hold more than ten (10) rounds of ammunition;
  - (ii) Surrenders the large capacity feeding device to the police department in the city or town where the person resides in accordance with the procedures for surrender of weapons set forth by the police department or the Rhode Island state police, or, if there is no such police department or the person resides out of state, to the Rhode Island state police; or
  - (iii) Transfers or sells the large capacity feeding device to a federally licensed firearm dealer or person or firm outside the State of Rhode Island that is lawfully entitled to own or possess such a feeding device.
- (2)(i) Any law enforcement officer exempt under §§ 11-47-9 and 11-47-9.1; or
- (ii) A retired law enforcement officer exempt under §§ 11-47-9 and 11-47-9.1 who is not otherwise prohibited from receiving such a feeding device from such agency upon retirement, and who has a permit to carry pursuant to § 11-47-18(b).
- (3) An active duty member of the Armed Forces of the United States or the National Guard who is authorized to possess and carry such a feeding device.