No. 18-1545

In the United States Court of Appeals for the First Circuit

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

NICHOLAS ANDREW FELD
Plaintiff

v.

MAURA T. HEALEY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS; DANIEL BENNETT, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY; KERRY GILPIN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE MASSACHUSETTS STATE POLICE
Defendants-Appellees

CHARLES D. BAKER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS; MASSACHUSETTS STATE POLICE
Defendants

On Appeal from the United States District Court
for the District of Massachusetts (Boston)
Case No. 1:17-cv-10107-WGY

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CORPORATE DISCLOSURE STATEMENT

The nongovernmental corporate Plaintiffs-Appellants in this civil action, Gun Owners' Action League, Inc., On Target Training, Inc., and Overwatch Outpost, do not have any parent corporations, and no publicly held corporation owns 10% or more of their stock.

This, the 22nd day of August, 2018.

/s/ John Parker Sweeney
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully request oral argument in this case of first impression. Until now, this Court has not had occasion to analyze Massachusetts' statutory ban on commonly owned semiautomatic rifles and magazines. The important constitutional issues raised by this appeal have not been decided previously by this Court, and counsel's responses to inquiries from the Court may aid the Court in its decisional process. *See* Fed. R. App. P. 34(a)(1).

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants ("Plaintiffs") challenge the Massachusetts ban on common semiautomatic firearms and standard-capacity magazines (the "Banned Firearms and Magazines")—established by G. L. c. 140 §§ 121, 131M (the "Challenged Laws")—under the Second Amendment to the United States Constitution. The United States District Court for the District of Massachusetts had subject matter jurisdiction under 28 U.S.C. § 1331, and Plaintiffs had standing to bring their challenge. The district court entered summary judgment for Defendants-Appellees ("Defendants") and denied Plaintiffs' summary judgment motion on April 6, 2018. Plaintiffs filed a timely post-judgment motion on May 2, 2018. After the post-judgment motion was resolved, Plaintiffs timely noticed this appeal on June 7, 2018. This appeal is from a final judgment that disposes of all claims of all parties, so this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The United States Supreme Court recently rejected a Massachusetts ban of common arms, reaffirming, "The Court has held 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,' *District of Columbia v. Heller*, 554 U.S. 570, 582 [ ] (2008), and that this 'Second Amendment right is fully applicable to the States,' *McDonald v. Chicago*, 561 U.S. 742, 750 [ ] (2010)." *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam). Under *Heller*, the Second Amendment protects arms "in common use" that are "typically possessed by law-abiding citizens for lawful purposes," 554 U.S. at 624–25, and a ban is "off the table" because the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635–36.

The questions presented are whether the Second Amendment protects the Banned Firearms and Magazines that are indisputably in common use, and whether Massachusetts may ban these common arms from the homes of law-abiding, responsible citizens even though they are indisputably possessed for lawful purposes, including self-defense.

STATEMENT OF THE CASE

I. Course of Proceedings

Plaintiffs challenge the Massachusetts ban on semiautomatic firearms and standard capacity magazines under G. L. c. 140 §§ 121, 131M. (Complaint, Joint Appendix ("JA") Vol. 1 at 0025–57); (Challenged Laws, Addendum ("Add.") at A-17, A-22). The Challenged Laws violate the Second Amendment by banning an entire class of common firearms and magazines that are typically used by law-abiding, responsible citizens for lawful purposes like self-defense.[1] (*Id.* at 0047–48).

The district court denied Plaintiffs' motion for summary judgment and granted summary judgment in favor of Defendants. (Opinion, Add. at A-15). The district court applied a "two-part approach" for evaluating Second Amendment challenges, under which "courts first consider whether the law 'imposes a burden on conduct that falls within the scope' of the Second Amendment." (*Id.* at A-4) (quoting *Powell v. Tompkins*, 783 F.3d 332, 347 n.9 (1st Cir. 2015)). If the answer is yes, courts select and apply a level of heightened scrutiny—either strict or intermediate scrutiny. (*Id.*). The district court never reached the second step because it adopted the test advanced by the United States Court of Appeals for the Fourth Circuit in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), and ruled that the Banned Firearms

[1] Plaintiffs pursue only their Second Amendment claims on appeal.

and Magazines are "'weapons that are most useful in military service'" and "'thus fall outside the scope of the Second Amendment and may be banned.'" (*Id.* at A-9) (quoting *Kolbe*, 849 F.3d at 121).

II. Statement of the Facts

A. The individual Plaintiffs are law-abiding, responsible citizens seeking to exercise their fundamental rights.

The four individual Plaintiffs are law-abiding, responsible citizens of Massachusetts and are eligible under state and federal law to purchase and possess firearms and magazines. Each individual Plaintiff currently possesses and/or wishes to possess Banned Firearms and Magazines and would do so but for the credible threat of prosecution under the Challenged Laws. (Pls.' Statement of Undisputed Facts ("SUF"), JA Vol. 1 at 0082–85).

Plaintiffs David Seth Worman, Jason William Sawyer, and Anthony Linden all own firearms and magazines that are banned by the Challenged Laws as interpreted by the Massachusetts Attorney General's Notice of Enforcement, dated July 16, 2016 ("Notice of Enforcement").[2] (*Id.* at 0082–84). All keep their firearms

[2] The Plaintiffs legally purchased these firearms, sold as "Massachusetts Compliant Firearms," after the enactment of the Challenged Laws but before the issuance of the Notice of Enforcement. (Complaint, JA Vol. 1 at 0040–41). These purchases were made from licensed dealers and were duly recorded with Defendants. (*Id.* at 0042–43).

in their homes to protect themselves and their families, and all have taken numerous safety and training courses on the proper use of firearms. (*Id.*). Dr. Worman also keeps his firearms for target practice and as collector's items. (*Id.* at 0082–83). Mr. Sawyer, a former Marine Corps Corporal, is a nationally ranked competitive shooter and a certified firearms instructor for the National Rifle Association and the Massachusetts State Police. (*Id.* at 0083–84). Mr. Linden suffers polyarthritis and owns AR-15-platform rifles because they are easier to use at the practice range, while hunting, and in self-defense if necessary.[3] (*Id.* at 0084).

Unlike the other individual Plaintiffs, Paul Nelson Chamberlain does not currently own a Banned Firearm but would purchase a Banned Firearm but for the Challenged Laws. (*Id.* at 0084–85).

B. The other Plaintiffs represent the interests of law-abiding, responsible citizens seeking to exercise their fundamental rights.

Plaintiff Gun Owners' Action League, Inc. ("GOAL") is a non-profit corporation dedicated to promoting safe and responsible firearms ownership, marksmanship competition, and hunter safety throughout Massachusetts. (*Id.* at

[3] Polyarthritis is a type of arthritis that involves five or more joints simultaneously. (*Id.* at 0084). Individuals with polyarthritis may not be able to operate bolt action rifles efficiently, withstand the recoil effect of higher power rifles and shotguns, or replace magazines quickly, and would benefit from the Banned Firearms. *See infra* at 9–11.

0085). In this lawsuit, GOAL represents itself and its members—who are law-abiding, responsible citizens—all of whom are precluded by the Challenged Laws from acquiring the most popular semiautomatic rifles and standard capacity magazines sold today. (*Id.*; Complaint, JA Vol. 1 at 0031–32).

Plaintiffs On Target Training, Inc. ("On Target") and Overwatch Outpost ("Overwatch") are federally licensed firearms dealers, who are also licensed in Massachusetts to sell firearms and ammunition. (SUF, JA Vol. 1 at 0086–87). Both On Target and Overwatch would sell the Banned Firearms and Magazines but for the credible threat of prosecution under the Challenged Laws. (*Id.*). On Target and Overwatch represent themselves and their current and potential customers—who are law-abiding, responsible citizens—all of whom are precluded by the Challenged Laws from acquiring the most popular semiautomatic rifles and standard capacity magazines sold today. (Complaint, JA Vol. 1 at 0033).

C. The Challenged Laws ban firearms and magazines commonly kept for lawful purposes by law-abiding, responsible citizens.

1. The Challenged Laws prohibit the acquisition and possession of common semiautomatic firearms and ammunition magazines.

The Challenged Laws, as interpreted by the Notice of Enforcement, prohibit by name some of the most popular firearms in the country, including the ubiquitous AR-15 rifle, as well as their "copies or duplicates." (SUF, JA Vol. 1 at 0077); *see*

also (G. L. c. 140 § 121, Add. at A-17). The phrase "copies or duplicates" is not defined under Massachusetts law, *see id.*, but was broadly defined in the Notice of Enforcement. (SUF, JA Vol. 1 at 0080–81) (defining "copies and duplicates" to include firearms whose "operating system and firing mechanism . . . are based on or otherwise substantially similar to one of the Enumerated Weapons"). A "large capacity feeding device" is "a fixed or detachable magazine . . . capable of accepting, or that can be readily converted to accept, more than ten rounds of ammunition . . . ." (G. L. c. 140 § 121, Add. at A-19). The Challenged Laws impose severe penalties, including large fines and imprisonment, for the transfer and possession of Banned Firearms and Magazines acquired after September 13, 1994. (G. L. c. 140 § 131M, Add. at A-22).

The Challenged Laws operate to ban many if not most semiautomatic rifles and magazines in the Commonwealth of Massachusetts. The Challenged Laws do not provide an exception for the acquisition and possession of Banned Firearms and Magazines by law-abiding, responsible citizens for self-defense in the home. (SUF JA Vol. 1 at 0082).

2. The Banned Firearms and Magazines are in common use by law-abiding, responsible citizens across the country.

The Challenged Laws ban some of the most commonly owned firearms and magazines in the country. Specifically, the Challenged Laws target firearms that are

semiautomatic, meaning they can fire only one shot with each pull of the trigger (*Id.* at 0087–88). Repeating firearms are hardly novel. The Founders were familiar with multiple shot repeating firearms at the time the Second Amendment was drafted and ratified. (*Id*. at 0088). These semiautomatic firearms have been commercially available for over a century. (*Id*.).

The firearms banned by the Challenged Laws are in common use. They include the most frequently sold long guns in America. (*Id*. at 0089). AR- and AK-platform rifles, which are specifically banned by the Challenged Laws, have been sold to civilians in the United States since the 1950s. (*Id*. at 0088). Often referred to collectively as "Modern Sporting Rifles," these semiautomatic firearms have become wildly popular. (*Id*. at 0088–89). Between 1990 and 2015, approximately 13.7 million rifles based on these platforms were manufactured in or imported into the United States. (*Id*. at 0088). As of 2013, more than 4,800,000 people own at least one Modern Sporting Rifle. (*Id*. at 0089). In 2015 alone, more than 1,500,000 Modern Sporting Rifles were manufactured in or imported into the United States—nearly double the production of the most commonly sold motor vehicle in the United States (the Ford F-series pick-up trucks). (*Id*.).

Ammunition magazines capable of holding more than ten rounds of ammunition are also in common use. (*Id*.). Limiting the necessity to reload has

always been a goal of firearm development. (Pls.' Resp. to Def.'s SUF, JA Vol. 8 at 3301–02). Throughout the 17th and 18th centuries, many commercially available firearms had a capacity of more than ten rounds. (SUF, JA Vol. 1 at 0096). Between 1990 and 2015, Americans owned approximately 115 million magazines holding more than ten rounds, accounting for approximately half of all magazines during this time. (*Id*. at 0089). Many more such magazines were likely purchased in the United States prior to 1990 because magazines holding more than ten rounds have long been provided as standard equipment for many semiautomatic rifles and pistols sold in the United States. (*Id*. at 0090).

By any conceivable metric, the Banned Firearms and Magazines are common.

3. The Banned Firearms and Magazines are common because they are useful for many lawful purposes, including self-defense.

The Banned Firearms and Magazines are kept for a variety of lawful purposes, including self-defense and hunting, as well as recreational and competitive target shooting. (*Id*.). The record includes many reports of citizens using the Banned Firearms for self-defense. (Pls.' Resp. to Def.'s SUF, Vol. 8 at 3308–10). The Banned Magazines are so ubiquitous that their defensive use is too frequent to count.

AR-platform rifles are ideal home-defense firearms. They are ergonomic, safe, reliable, and especially effective for civilian defensive use, which requires

stopping one or more human aggressors as quickly as possible. (SUF, JA Vol. 1 at 0090–91). These and other Banned Firearms offer superior accuracy, less recoil, greater effective range, faster reloading, potentially reduced downrange hazard from over penetration, and a larger ammunition capacity than other firearms. (*Id*.). The Banned Firearms are also relatively lightweight, have a vertical pistol grip, and can be used with one hand, making them easy to use accurately in close-quarter encounters, or to free a hand for other purposes (such as turning on a light or calling the police). (*Id*. at 0091). Law enforcement, including the FBI, choose the Banned Firearms and Magazines for their personnel to use in self-defense and in defense of others, and recommend them to civilians for the same uses. (*Id*. at 0092–93).

The Banned Firearms are superior to handguns and shotguns for use in defensive situations. (*Id*. at 0092). Handguns are more difficult to use accurately than semiautomatic rifles, especially under the stress of an attack, because they are less accurate, harder to steady, absorb less recoil, and are more sensitive to deficiencies in a user's technique. (*Id*.). Shotguns have significantly more recoil than semiautomatic rifles, which makes it more difficult to fire repeat shots accurately. (*Id*.). Also, the "spread" of shotgun pellets increases the likelihood that some projectiles will miss the intended target and penetrate others, critically compounding

the problem of inaccuracy already inherent to shotguns. The Banned Firearms do not present the same risks. (*Id.*).

The ammunition used in the Banned Firearms is also superior for use in self-defense. (*Id.* at 0091–92). This ammunition is more effective and reliable at stopping human attackers. (*Id.* at 0091). The Banned Firearms fire projectiles of intermediate power that are less likely to over-penetrate their targets or surrounding buildings, thereby endangering bystanders, when compared to common handguns, shotguns, and even so-called traditional hunting rifles. (*Id.* at 0092).

Many semiautomatic firearms, including the Banned Firearms, are designed for and sold with standard magazines with capacities greater than ten rounds. (*Id.* at 0093). Higher capacity magazines allow individuals to better protect themselves, their families, and their homes. (*Id.* at 0095). Higher capacity magazines reduce the need to reload in defensive situations requiring more than ten rounds of ammunition to stop one or more attackers. (*Id.* at 0093–95). Even if additional ammunition is available, very few defensive situations afford the victim the time necessary to reload his or her weapon (*id.*), which is a time-consuming process that is especially onerous if the victim is disabled or injured. (*Id.* at 0094–95). The time to reload is negatively affected by many factors—including noise, distractions, multiple assailants, poor lighting, nervousness, and fatigue. (*Id.*). The reloading process

requires both hands, limiting the victim's ability to escape, fend off an attacker, call 911, or give physical aid and direction to others. (*Id*. at 0095). Even trained law enforcement officers often require more than ten rounds of ammunition in defensive situations, so virtually all law enforcement agencies, including the FBI, typically issue their officers firearms with standard magazines holding more than ten rounds. (*Id*. at 0094).

The Banned Firearms are distinct from military weapons like M-16 rifles, which are fully automatic (meaning multiple shots are fired with only one pull of the trigger) and are restricted by the National Firearms Act of 1934 (the "NFA"). (*Id*. at 0096). Automatic fire is the critical feature that makes a firearm military in nature (Pls.' Resp. to Def.'s SUF, JA Vol. 8 at 3299), as Congress recognized by drawing a bright line between automatic and semiautomatic firearms in the NFA. No military force in the world uses semiautomatic rifles, including the Banned Firearms, as its standard service rifles. (*Id*. at 3290). Defendants concede that the semiautomatic AR-15 is the "civilian version" of the military's M-16 rifle. (SUF, JA Vol. 1 at 0096). Although semiautomatic rifles may bear some cosmetic similarities to fully automatic rifles, they are dissimilar in their basic modes of operation. (*Id*. at 0097). Because semiautomatic firearms fire only as quickly as the operator can pull the trigger, the Banned Firearms fire no more quickly than any other semiautomatic

firearms, including handguns and rifles expressly exempted by the Challenged Laws. (*Id.*). In other words, all semiautomatic firearms, including handguns, shotguns, Banned Firearms, and rifles fire at the same rate: one shot per pull of the trigger. (Pls.' Resp. to Def.'s SUF, JA Vol. 8 at 3291).

SUMMARY OF THE ARGUMENT

At the heart of this case is the straightforward question the United States Supreme Court has already answered in *Heller*, *McDonald*, and *Caetano*: Can the government ban an entire class of arms commonly kept by law-abiding, responsible citizens for lawful purposes? The Supreme Court painstakingly examined the text, history, and tradition of the Second Amendment, including two hundred years of judicial interpretations, and concluded the government cannot ban from the homes of law-abiding, responsible citizens bearable arms that are in common use. This Court should answer this question as the Supreme Court repeatedly has and hold the Challenged Laws unconstitutional.

ARGUMENT

I. Supreme Court precedent makes clear that the Second Amendment protects the Banned Firearms and Magazines.

In *Heller*, the Supreme Court applied a text, history, and tradition analysis to conclude that the Second Amendment protects the right of law-abiding, responsible citizens to choose, acquire, and possess bearable arms in common use typically kept

for lawful purposes. The Court's analysis and holding in *Heller* was affirmed in *McDonald* and *Caetano*. These three cases demonstrate that a ban of commonly kept arms from the homes of law-abiding, responsible citizens is a policy choice that is "off the table." *See Heller*, 554 U.S. at 636.

Applying that principle to modern semiautomatic rifles and standard capacity magazines in this case, the Second Amendment protects the right of law-abiding, responsible citizens to own the Banned Firearms and Magazines. There is no dispute that the Banned Firearms and Magazines are commonly kept for lawful purposes, including self-defense in the home. The Challenged Laws cannot survive any more than the similar firearm bans in *Heller* and *McDonald* or the stun gun ban in *Caetano*.

A. The Supreme Court held in *Heller* that handguns—including semiautomatic handguns with standard magazines holding more than ten rounds—cannot be banned from the homes of law-abiding, responsible citizens.

In *Heller*, the Supreme Court struck down as unconstitutional a handgun ban that included within its sweep many popular semiautomatic firearms. In doing so, the Court engaged in an extensive text, history, and tradition analysis that established a process for determining the scope of Second Amendment protection as well as the clear principle that the Second Amendment protects, prima facie, all bearable arms

commonly kept by law-abiding citizens for lawful purposes. *See Heller*, 554 U.S. at 625.

The Supreme Court declared that the scope of the Second Amendment is grounded in history and is free from the interest balancing of "future legislatures or [ ] even future judges." *Heller*, 554 U.S. at 634–35 (declining to adopt either Justice Breyer's explicit interest-balancing inquiry or the enhanced intermediate or strict scrutiny often applied in the First Amendment area); *see also McDonald*, 561 U.S. at 789, 790–91 (plurality opinion) (rejecting the notion that judges will be forced to make difficult empirical judgments because doing so is precluded by the Court's holding in *Heller* regarding text, history, and tradition of the Second Amendment). The Court held that such interest balancing is inappropriate because the Second Amendment is "the very product of an interest balancing" at the time of its enactment, and the right of law-abiding, responsible citizens to use arms is elevated above all other interests. *Heller*, 554 U.S. at 635.[4] Consistent with the Court's text,

[4] This approach to analyzing constitutional rights is not novel; several other individual rights are subject to "categorical constitutional guarantees" rather than open-ended balancing tests. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1283 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (citing *Crawford v. Washington*, 541 U.S. 36, 67–68 (2004) (recognizing a categorical constitutional guarantee under the Sixth Amendment for the accused "to be confronted with the witness against him")).

history, and tradition analysis, the Second Amendment excludes only those arms that are not "in common use" and, therefore, are both "dangerous and unusual." *See id.* at 627 ("*Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.' [*United States v. Miller*, 307 U.S. 174, 179 (1939).] We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'").[5]

The Supreme Court held that the District of Columbia's handgun ban violated the Second Amendment because it was a "prohibition of an entire class of arms" commonly kept by law-abiding, responsible citizens for lawful purposes, including self-defense. *Heller*, 554 U.S. at 628–29; *see also McDonald*, 561 U.S. at 767–68. The Court reached that conclusion under its text, history, and tradition analysis notwithstanding evidence that handgun violence presents a serious problem in the United States. *Heller*, 554 U.S. at 634, 635. There is simply no historical support, however, for a handgun ban. *Id.* at 629. While governments are free to take other measures, a ban of a common firearm kept for lawful purposes is per se unconstitutional because it conflicts with the text, history, and tradition of the

[5] *See also Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring) (noting that an arm must be both "dangerous" and "unusual" in order to be outside the Second Amendment).

Second Amendment. *Heller*, 554 U.S. at 629; *see also McDonald*, 561 U.S. at 791 (plurality opinion). As discussed in Section II.A below, the district court in this case erred when it disregarded this core holding of *Heller* and its progeny, instead holding that these common firearms and magazines are wholly exempted from Second Amendment protection.

B. *McDonald* and *Caetano* affirmed that the Second Amendment extends prima facie to all instruments that constitute bearable arms.

The Supreme Court's post-*Heller* decisions in *McDonald* and *Caetano* are significant here for two reasons. First, the Court affirmed the text, history, and tradition analysis it set out in *Heller* as the framework for evaluating the constitutionality of bans like the Challenged Laws. *See McDonald*, 561 U.S. at 767–68; *Caetano*, 136 S. Ct. at 1027–28. Second, the Court affirmed the principle that bans of bearable arms commonly kept for lawful purposes are per se unconstitutional.

The Supreme Court did not stray from either the analysis or the principle established in *Heller*, but reinforced them both. The Court asked the same question in both *McDonald* and *Caetano*: Does the law ban a class of arms commonly kept by law-abiding, responsible citizens for lawful purposes? The Court did not engage in any form of interest balancing, but merely applied this straightforward "in

common use" test. *See, e.g.*, *McDonald*, 561 U.S. at 785–86, 790–91 (reaffirming the Court's rejection of interest balancing in *Heller* and affirming that a ban on common arms in the home is unconstitutional). The Court's rejection of any interest-balancing approach is particularly evident in *Caetano*, which concerned a wholly modern arm entirely unrelated to the handguns at issue in *Heller* and *McDonald*. Like the handgun bans before it, however, the stun gun ban did not survive. *See Ramirez v. Commonwealth*, 479 Mass. 331, 332, 336–37 (2018) (applying *Caetano* to hold "that the absolute prohibition against civilian possession of stun guns . . . is in violation of the Second Amendment").[6]

Taken together, *Heller*, *McDonald*, and *Caetano* are unequivocal. The only framework of analysis for a ban of common bearable arms is *Heller*'s text, history, and tradition approach, which demonstrated that a ban of bearable arms commonly kept for lawful purposes is per se unconstitutional. Government restrictions failing this "in common use" test cannot survive constitutional challenge.

[6] *See Caetano*, 136 S. Ct. at 1032–33 (Alito, J., concurring) ("While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment.")

C. *Heller*, *McDonald*, and *Caetano* demonstrate that the Second Amendment includes the Banned Firearms and Magazines and they cannot be banned.

This Court should apply the analysis set forth in *Heller*, *McDonald*, and *Caetano*. That text, history, and tradition analysis resulted in a straightforward standard: Are the Banned Firearms and Magazines commonly possessed by law-abiding, responsible citizens for lawful purposes? This is the simple and straightforward holding of *Heller*. Like the handguns in *Heller* and *McDonald* and the stun guns in *Caetano*, there is no dispute that the Banned Firearms and Magazines are commonly kept for lawful purposes, including self-defense in the home. And, like the bans rejected in *Heller*, *McDonald*, and *Caetano*, the Challenged Laws violate the Second Amendment.

Massachusetts' prohibitions make it illegal to acquire some of the most common firearms and magazines on the market today. (SUF, JA Vol. 1 at 0088). Millions of law-abiding Americans own these rifles. (*Id*. at 0088–89). Magazines capable of holding more than ten rounds of ammunition are even more common. (*Id.* at 0089–90). There is no dispute that Massachusetts prohibits firearms and magazines in common use. *See* (Opinion, Add. at A-11) (". . . Plaintiffs [argue] the AR-15 is an extraordinarily popular firearm. Indeed, the data they proffer as to its popularity appears unchallenged by the Defendants.").

Likewise, the commonly owned Banned Firearms and Magazines are used for lawful purposes, *see Heller*, 554 U.S. at 625–27, including self-defense. (SUF, JA Vol. 1 at 0090). These firearms offer unique advantages compared to handguns and other long guns, including better control and greater accuracy (*Id*. at 0092), and ease of use in a self-defense situation (*Id*. at 0094–95). Not surprisingly, semiautomatic rifles, like the AR-15, have long been widely accepted as "lawful possessions." *See Staples v. United States*, 511 U.S. 600, 612 (1994).

Nothing in *Heller* or its progeny supports drawing arbitrary distinctions between semiautomatic handguns and semiautomatic rifles, or between handguns with magazines that hold more than ten rounds and those that hold ten or less. *See Heller*, 554 U.S. at 629 (foreclosing the argument that prohibition of an entire class of arms can be justified due to the existence of alternatives). Under the Court's text, history, and tradition analysis, all such prohibitions are subject to the same inquiry. *See, e.g.*, *Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring) (rejecting the evaluation of a weapon's dangerousness alone in order to determine whether it falls within the Second Amendment).

The Challenged Laws, like the laws in *Heller* and *McDonald*, ban firearms protected by the Second Amendment. Because the Banned Firearms and Magazines were not banned at the time of the Second Amendment, have not historically been

banned, and are not "dangerous" and "unusual" because they are "'the sorts of lawful weapons that' citizens typically 'possess [ ] at home,'" *see Heller II*, 670 F.3d at 1271–72 (Kavanaugh, J., dissenting) (quoting *Heller*, 554 U.S. at 627), Massachusetts cannot ban them now.

II. The district court erred in upholding the Challenged Laws.

The district court abandoned *Heller*'s text, history, and tradition analysis and "in common use" test in favor of a "two-part approach" and a "most useful in military service test" to exclude the Banned Firearms and Magazines from the Second Amendment and uphold the Challenged Laws. Had the district court followed Supreme Court precedent and applied the correct analysis and test, it would have held the Challenged Laws unconstitutional. Even under some form of heightened constitutional scrutiny, however, the Challenged Laws would still fail because a ban cannot be adequately tailored. This Court should correct the district court's departure from Supreme Court precedent and hold the Challenged Laws unconstitutional.

A. The district court misread the Supreme Court's controlling precedent to exclude the Banned Firearms and Magazines from the Second Amendment and uphold the Challenged Laws.

The district court erroneously excluded the Banned Firearms and Magazines from the Second Amendment—even though there is no dispute that they are

commonly owned for lawful purposes (Opinion, Add. at A-5 n.3 (accepting Plaintiffs' recitation of the facts as true; *see supra* at 6–13))—by relying on an unsupported test in direct conflict with *Heller* and its progeny. This error allowed the district court to uphold the Challenged Laws.

The district court's mistake lies in its reading of *Heller* to create a civilian/military firearm dichotomy to define the scope of the Second Amendment. No such dichotomy exists. Following the Fourth Circuit's *Kolbe* opinion, the district court framed this test as whether the Banned Firearms and Magazines are "most useful in military service." But the Supreme Court has never adopted that test in any form. The Court emphasized in *Heller* that the Second Amendment does not prioritize any class of common arms over any other. *See Heller*, 554 U.S. at 629; *see also Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring). Classes of common arms are treated the same, regardless of their usefulness in military service, so long as they are arms commonly kept by law-abiding, responsible citizens for lawful purposes.[7] There is no constitutionally cognizable difference between the Banned Firearms and

[7] *See Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas & Scalia, JJ., dissenting from denial of cert.) (noting that the distinction *Heller* draws is between commonly owned firearms and weapons specially adapted to unlawful and uncommon uses like short-barreled shotguns).

protected semiautomatic handguns, or between the Banned Magazines and protected magazines holding ten rounds or less. *See supra* at 12–13.[8]

Following the Fourth's Circuit's *Kolbe* opinion, the district court claimed to root its "most useful in military service" test in *Heller*. When the Supreme Court observed that firearms "like M-16s" may be restricted under the NFA, *Heller*, 554 U.S. at 624, it referred to other automatic firearms that, like M-16 rifles, are defined as machine guns by virtue of their automatic fire capability and have long been restricted under the NFA. That Court was referring to automatic firearms subject to an existing restriction, not to the semiautomatic AR-15 and other semiautomatic firearms that have long been widely accepted as "lawful possessions." *Staples*, 511 U.S. at 612.

The district court's test also cannot be squared with pre- or post-*Heller* jurisprudence. In *Heller*, the Court clarified that the operative test set out in *United*

[8] Even if this Court were to engage in an unnecessary comparison of the Banned Firearms and Magazines to those protected in *Heller* and *McDonald*, however, the record does not support the district court's disparate treatment. *See supra* at 19–21. The majority of handguns are semiautomatic. *See* (SUF, JA Vol. 1 at 0097). Semiautomatic firearms, whether a handgun or rifle, operate identically: one shot fired per each pull of the trigger. (*Id.*). Many of these semiautomatic handguns are designed for and sold with the Banned Magazines. *See* (*id*. at 0090). And, to the extent that they differ materially, firearm violence in this country is overwhelmingly perpetrated with handguns, not the Banned Firearms. (Declaration of Gary Kleck ("Kleck Decl."), Ex. C., JA Vol. 1 at 0256).

States v. Miller for determining whether a firearm is protected by the Second Amendment is not its usefulness in military service, but whether the arms are "'of the kind in common use at the time.'" *Heller*, 554 U.S. at 624–25 (quoting *Miller*, 307 U.S. at 179). The Court further explained that the "historical understanding of the scope of the right" was that the firearms "'used by militiamen and weapons used in defense of person and home were one and the same.'" *Id.* at 624–25 (quoting *State v. Kessler*, 614 P.2d 94, 98 (Or. 1980)). The Court concluded that the ban on short-barreled shotguns survived in *Miller* because the firearms were not the sort used in defense of person and home that would have been "part of ordinary military equipment" brought to a militia assembly. *See id.* at 622, 624. In other words, they were not the kind of firearms commonly kept for lawful purposes by law-abiding, responsible citizens. The district court's test ignores this historical understanding and would ban firearms commonly kept in defense of person and home because they might also be useful in military service—like the personal defense arms "in common use" at the time of the founding. The district court's reasoning would turn both *Miller* and *Heller* upside down.

Caetano provides further support for *Heller*'s reading of *Miller* and also undermines the district court's "most useful in military service" test. The Massachusetts Supreme Judicial Court did not consider whether the stun guns were

commonly owned for lawful purposes, focusing instead on an analysis of their military usefulness, as the district court did here. *Caetano*, 136 S. Ct. at 1028. In a per curiam decision, the Supreme Court summarily dismissed that approach as inconsistent with *Heller*, *id*. (citing *Heller*, 554 U.S. at 624–25 (setting out the 'in common use" test)), demonstrating that the Second Amendment protects both arms that are useful in military service and those that are not.

The "most useful in military service" test is at odds with these cases because it infringes upon the fundamental principle the Supreme Court found enshrined in the Second Amendment's text, history, and tradition: The Second Amendment extends, prima facie, to all instruments that constitute bearable arms. As long as the arms are commonly owned by law-abiding, responsible citizens for lawful purposes, they are protected by the Second Amendment and cannot be banned. *See Heller*, 554 U.S. at 626–27, 634–35; *supra* at 14–18. The district court's "most useful in military service" test lacks objective standards for appropriately limiting the sort of ad hoc judicial assessments rejected by the Supreme Court. *See Heller*, 554 U.S. at 635 ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."); *McDonald*, 561 U.S. at 791 (plurality opinion). For example, is the Colt 1911 pistol, the standard sidearm of the United States armed forces from World War I until the mid-1980s, not protected by the Second

Amendment because it was designed for and used in military service? Consistent with the district court's analysis, the answer may be yes. But excluding such a firearm from Second Amendment protection—as well as the many copies and duplicates of its iconic design—directly contradicts both *Heller* and *McDonald*. *Heller*'s "in common use" test avoids the uncertainty and inevitable inconsistency that the district court's approach invites. *See McDonald*, 561 U.S. at 789 (plurality opinion).

The district court erred by substituting its preferred "most useful in military service" test in direct conflict with the "in common use" test that the Court established in *Heller* and reiterated in *McDonald* and *Caetano*. This is not a matter of discretion, however, and the district court failed to follow the law of the land as clearly articulated by the Supreme Court. The Banned Firearms and Magazines are covered by the Second Amendment, and bans like the Challenged Laws are "off the table" and per se unconstitutional. *Heller*, 554 U.S. at 636.

The district court's validation of the Challenged Laws is in direct conflict with controlling Supreme Court precedent. Under the *Heller* analysis, there can be no justification for this disfavored treatment of Plaintiffs' Second Amendment rights. *See McDonald*, 561 U.S. at 778–79 (rejecting the suggestion that "the Second Amendment should be singled out for special—and specially unfavorable—

treatment"). The only holding consistent with *Heller*, *McDonald*, and *Caetano* is that the Challenged Laws are unconstitutional.

B. The Challenged Laws fail any heightened scrutiny analysis because a ban is not adequately tailored.

In adopting its categorical test forbidding a ban of common firearms, the Supreme Court expressly disavowed the balancing analysis required by the district court's "two-part approach" here. *See supra* at 14–18; *Heller*, 554 U.S. at 634–35; *see Jackson v. City & Cnty. of S.F.*, 135 S. Ct. 2799, 2801–02 (2015) (Thomas, J., dissenting from denial of cert.).[9] Consistent with *Heller*, this Court has yet to adopt the "two-part approach" embraced by other Circuits and the district court here. *See Powell v. Thompkins*, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (identifying those courts that have adopted the "two-part framework" and declaring that this Court has "hewed closely and cautiously to *Heller*'s" analysis). This Court should not adopt the "two-part approach" now.

If this Court were to apply heightened scrutiny under a two-step approach, however, strict scrutiny is the only appropriate standard of review. The Challenged Laws prohibit citizens from keeping common firearms in their homes for self-

[9] Justice Breyer's interest-balancing test is nothing more than heightened scrutiny in disguise. *See Heller II*, 670 F.3d at 1276–77 & n.8 (Kavanaugh, J., dissenting).

defense. The Challenged Laws thus impose a severe restriction that infringes on the core Second Amendment right. To survive constitutional scrutiny, the Challenged Laws must be narrowly tailored to achieve a compelling government interest. *See United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813 (2000). But the Challenged Laws are not narrowly tailored. Nor could any ban be. *Cf. Heller*, 554 U.S. at 629, 634–35 (rejecting the argument "that it is permissible to ban the possession of handguns so long as the possession of other firearms . . . is allowed" and holding that the ban fails under any level of scrutiny); *see also Jackson*, 135 S. Ct. at 2801 (Thomas, J., dissenting from the denial of cert.). The government cannot meet its burden under strict scrutiny here.

Similarly, bans, by their very nature, infringe upon the constitutional right at the core of the Second Amendment and lack the tailoring required even under intermediate scrutiny. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (holding "buffer zones" invalid because they burden substantially more speech than is necessary). Intermediate scrutiny requires that a law impacting a fundamental right be narrowly tailored to serve a substantial government interest. *See id.* at 2534; *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 662 (1994). The government must demonstrate the ban does not "burden substantially more [protected conduct] than is necessary to further that interest." *Turner Broad. Sys.*,

Inc. v. FCC (Turner II), 520 U.S. 180, 2113–14 (1997) (quoting *Turner I*); *see McCullen*, 134 S. Ct. at 2534–41. The record demonstrates that the Challenged Laws do just that here. The Challenged Laws address far more than the criminal use of the Banned Firearms and Magazines, reaching as well into the homes of law-abiding, responsible citizens who wish to exercise their core Second Amendment right to self-defense. A law that substantially restricts a core Second Amendment right cannot be narrowly tailored to satisfy intermediate scrutiny.

This Court need look no further than the Supreme Court's consistent rejection of Justice Breyer's balancing test to see that heightened scrutiny analysis is entirely inconsistent with the Supreme Court's holdings. *See Heller*, 554 U.S. at 634–35. In any event, heightened scrutiny cannot save the Challenged Laws, which "would fail constitutional muster" "[u]nder any of the standards of scrutiny . . . applied to enumerated constitutional rights," *id.* at 628; *see also McDonald*, 561 U.S. at 790–91 (plurality opinion).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the district court and declare the Challenged Laws unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,480 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman font size 14.

This, the 22nd day of August, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2018, I filed the foregoing with the Clerk of the Court via CM/ECF, which will serve the following individuals:

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ADDENDUM TO BRIEF OF APPELLANTS

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

David Seth Worman et al

Plaintiff

V.

Maura Healey et al

Defendant

CIVIL ACTION

NO. 17cv10107-WGY

JUDGMENT

YOUNG, D. J.

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

Judgment for the DEFENDANTS.

By the Court,

April 6, 2018

/s/Matthew A. Paine

Date

Deputy Clerk

293 F.Supp.3d 251
United States District Court, D. Massachusetts.

David Seth WORMAN, Anthony Linden, Jason William Sawyer, Paul Nelson Chamberlain, Gun Owners' Action League, Inc., On Target Training, Inc., and Overwatch Outpost, Plaintiffs,
v.
Maura HEALEY, in her official capacity as Attorney General of the Commonwealth of Massachusetts; Daniel Bennett, in his official capacity as the Secretary of the Executive Office of Public Safety and Security; and Colonel Kerry Gilpin, in her official capacity as Superintendent of the Massachusetts State Police, Defendants.

CIVIL ACTION NO. 1:17–10107–WGY
|
Filed 04/05/2018

Synopsis
Background: Firearm owners, dealers, and advocacy association brought action against Attorney General of Massachusetts and other state officials, challenging statute that banned the transfer or possession of assault weapons and large capacity magazines under Second and Fourteenth Amendments. Parties filed cross-motions for summary judgment.

Holdings: The District Court, William G. Young, J., held that:

[1] plaintiff's claim that Attorney General's enforcement notice explaining what a "copy" was for purpose of statute banning assault weapons and copies or duplicates of those weapons constituted a retroactive enlargement of scope of statute in violation of Due Process Clause, was not ripe for judicial review;

[2] assault weapons and large capacity magazines that were banned by statute fell outside the scope of the Second Amendment; and

[3] phrase "copies or duplicates" in statute banning certain assault weapons or copies or duplicates of those weapons was not unconstitutionally vague.

Dismissed in part, and defendants' motion for summary judgment granted in part.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

WILLIAM G. YOUNG, DISTRICT JUDGE

*254 *SECOND AMENDMENT, U.S CONSTITUTION*

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

I. THE CONTROLLING LAW

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

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

upheld. See United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001).

Eventually, the issue found its way to the Supreme Court. In District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), the Supreme Court struck down a District of Columbia provision that made it illegal to possess handguns in the home, holding that the core right guaranteed by the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at 635, 128 S.Ct. 2783. Justice Scalia wrote for the five-member majority and his opinion is a tour de force example of his "original meaning" jurisprudence. [1] The Second Amendment, he explained, is comprised of a prefatory clause, "[a] well regulated Militia, being necessary to the security of a free State, ..." and an operative clause, "... the right of the people to keep and bear Arms, shall not be infringed." Speaking for the Supreme Court, he went on to offer extensive historical grounding for this interpretation. Id. at 579–600, 128 S.Ct. 2783.

Well aware that he was writing more than two centuries after the words the Supreme Court was interpreting had been adopted as part of our Constitution, Justice Scalia carefully defined the words "bear" and "arms," giving them the meaning those words bore at the time of the Second Amendment's adoption. Id. at 581–92, 128 S.Ct. 2783.

Speaking for the Supreme Court and focusing on the word "arms," he clarified that "the right secured by the Second Amendment is not unlimited." Id. at 626, 128 S.Ct. 2783. It is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id. For example, it is constitutional to prohibit "the possession of firearms by felons and the mentally ill." Id. "[L]aws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" are also presumptively proper ***255** under the Second Amendment. Id. at 626–27, 128 S.Ct. 2783 & n.26. Another important limitation articulated by the Supreme Court is that the weapons protected under the Second Amendment "were those 'in common use at the time.' " Id. at 627, 128 S.Ct. 2783 (quoting United States v. Miller, 307 U.S. 174, 179, 59 S.Ct. 816, 83 L.Ed. 1206 (1939)). More specifically, Justice Scalia explained that "weapons that are most useful in military service—M–16 rifles and the like" are not protected under the Second Amendment and "may be banned." Id.

Justice Scalia well recognized that interpreting the Second Amendment such that military style weapons fell beyond its sweep could lead to arguments that "the Second Amendment right is completely detached from the prefatory clause." Id. He explained, however, that the Supreme Court's interpretation did not belie the prefatory clause because the consonance of the two clauses must be assessed "at the time of the Second Amendment's ratification," when "the conception of the militia ... was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty." Id. "Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks." Id. Yet the Supreme Court ruled that "the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right" could not "change [its] interpretation of the right." Id. at 627–28, 128 S.Ct. 2783.

When looking at the prohibition against possession of handguns in the home in Heller, the Supreme Court ruled it unconstitutional because the ban extended "to the home, where the need for self, family, and property is most acute." Id. at 628, 128 S.Ct. 2783. The ban also troubled the Supreme Court because "[t]he handgun ban amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." Id. Accordingly, "[u]nder any of the standards of scrutiny that [the Supreme Court has] applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster." Id. at 628–29, 128 S.Ct. 2783 (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).

Following Heller, the Supreme Court decided two other landmark Second Amendment cases. In McDonald v. City of Chicago, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), the Supreme Court extended the reach of the Second Amendment and stated that "the Second Amendment right is fully applicable to the States" via the Due Process Clause of the Fourteenth Amendment. Id. at 744, 130 S.Ct. 3020. In Caetano v. Massachusetts, —— U.S. ——, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016) (per curiam), the Supreme Court

reaffirmed its holding in Heller, reiterating that the Second Amendment "extends ... to ... arms ... that were not in existence at the time of the founding" and does not protect only "those weapons useful in warfare." Id. at 1028 (quoting Heller, 554 U.S. at 582, 624, 128 S.Ct. 2783).

Since Heller, circuit courts have wrestled with the proper standard of review to apply to Second Amendment claims. Most circuit courts apply a two-part approach. See, e.g., Kolbe v. Hogan, 849 F.3d 114, 138–47 (4th Cir. 2017) (en banc); New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015); GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1322 (11th Cir. 2015); Jackson v. City and Cty. of San Francisco, 746 F.3d 953, 962–63 (9th Cir. 2014); United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013); ***256** Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 874–75 (4th Cir. 2013); National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 701–04 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

Under the two-part approach, courts first consider whether the law "imposes a burden on conduct that falls within the scope" of the Second Amendment. Powell v. Tompkins, 783 F.3d 332, 347 n.9 (1st Cir. 2015); see Kolbe, 849 F.3d at 133. If the answer is no, the analysis ends. If the answer is yes, the next step is to "determine the appropriate form of judicial scrutiny to apply (typically, some form of either intermediate scrutiny or strict scrutiny)" to test the constitutionality of the law. Powell, 783 F.3d at 347 n.9. Under strict scrutiny, "the government must prove that the challenged law is 'narrowly tailored to achieve a compelling governmental interest.' " Kolbe, 849 F.3d at 133 (quoting Abrams v. Johnson, 521 U.S. 74, 82, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997)). Under intermediate scrutiny, the government must "show that the challenged law 'is reasonably adapted to a substantial governmental interest' " Id. (quoting United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011)).

II. THE CASE AT BAR

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

On January 23, 2017, a group comprised of Massachusetts firearm owners, prospective firearm owners, firearm dealers, and a firearm advocacy association (collectively, the "Plaintiffs") filed suit against Charles Baker, the Governor of the Commonwealth of Massachusetts; Maura Healey, the Attorney General of the Commonwealth of Massachusetts (the "Attorney General"); Daniel Bennett, the Secretary of the Executive Office of Public Safety and Security; Colonel Richard McKeon, the Superintendent of the Massachusetts State Police; and the Massachusetts State Police (collectively, the "Defendants"). [2]

The Plaintiffs filed this action against the Defendants alleging violations of their constitutional rights and seeking declaratory and injunctive relief. Compl. Decl. & Inj. Relief ("Compl."), ECF No. 1. Specifically, the Plaintiffs claim that the Act infringes their Second Amendment rights and violates their rights to due process ***257** afforded to them through the Fourteenth Amendment. Id. ¶¶ 72–107.

On December 15, 2017, both parties cross-moved for summary judgment on all counts. Pls.' Mot. Summ. J. ("Pls.' Mot."), ECF No. 57; Pls.' Mem. Supp. Mot. Summ. J. ("Pls.' Mem."), ECF No. 58; Pls.' Statement of Undisputed Material Facts ("Pls.' Statement of Facts"), ECF No. 59; Defs.' Mot. Summ. J. ("Defs.' Mot."), ECF No. 61; Mem. Supp. Defs.' Mot. Summ. J. ("Defs.' Mem."), ECF No. 62; Defs.' Statement Material Facts ("Defs.' Statement of Facts"), ECF No. 63. The Plaintiffs also moved to strike certain witness declarations and expert opinions proffered by the Defendants. See Pls.' Mot. Strike Undisclosed Witness Decls., ECF No. 68; Pls.' Mot. Strike Ops. Defs.' Experts, ECF No. 75. On January 22, 2017, the Court allowed in part the

motion to strike the witness declarations, ruling that the Defendants cannot rely on them in pressing their motion for summary judgment, but denied the motion as to all other purposes. See Elec. Order, ECF No. 85. The Court denied the motion to strike the challenged expert opinions "insofar as [they] are proffered in opposition to the Plaintiffs' motion for summary judgment," expressing no opinion on whether the challenged affidavits may be considered in support of the Defendants' motion for summary judgment. Elec. Order, ECF No. 84.

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

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For a movant to prevail, it "bears the initial responsibility" of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then "shifts to the nonmoving party, who must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "An issue is 'genuine' if the evidence of record permits a rational factfinder to resolve it in favor of either party." Id. at 4.

[1] **[2]** In evaluating a motion for summary judgment, the Court must consider "all of the record materials on file, including the pleadings, depositions, and affidavits," but it is not permitted to "evaluate the credibility of witnesses nor weigh the evidence." Ahmed v. Johnson, 752 F.3d 490, 495 (1st Cir. 2014). All inferences, however, are to be drawn in favor of the nonmoving party. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

III. THE UNDISPUTED FACTS [3]

A. The Development of the AR–15 Rifle

In 1957, after the United States Army had adopted the M14, a select fire full-auto military rifle, it "began searching for a .22 (centerfire) caliber lightweight select fire rifle" to best meet the needs of the military. Pls.' Statement of Facts, Ex. 13 at A–15, ECF No. 59–12. "Since the mid–1950's Armalite [a gun manufacturer] had been developing gas-operated rifles that differed substantially from traditional wood ***258** stock designs in the use of modern materials and ergonomics." Id. The Armalite Rifle ("AR")–10 was developed in 1956 for a 7.62×51 mm cartridge. Id. A smaller version designed for the military, with its specifications in mind, was developed and named the AR–15. The AR–15 was a scaled down version of the AR–10, with a .223 Remington (5.56×45mm) cartridge. Id. In 1964, the Army adopted the AR–15 and renamed it the M16. Id. Colt manufactured the M16 and also created a semi-automatic version of the weapon and named it the AR–15. Id.

B. The Federal Ban and the Act

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

Four years later, Massachusetts enacted the Act, which tracked the language of the federal ban and adopted the same definition of "assault weapon." Mass. Gen. Laws ch. 140, § 121. The Act makes it a crime to sell or possess a number of assault weapons, including Colt AR–15s, and copies and duplicates of those weapons. Id. § 131M. It also makes it a crime to sell or possess a fixed or detachable large capacity magazine that is capable of holding more than ten rounds of ammunition. Id.; see id. § 121. The Act makes an exception for weapons otherwise lawfully owned on September 13, 1994. Id. § 131M.

On July 20, 2016, the Attorney General issued an "Enforcement Notice" to the public to "provide a framework to gun sellers and others for understanding

the definition of 'Assault weapon' contained in [the Act]." Pls.' Statement of Facts, Ex. 25 ("Enforcement Notice") at 1. The Enforcement Notice explained that a weapon is a "copy" or "duplicate" of an Enumerated Weapon if (i) the weapon's "internal functional components are substantially similar in construction and configuration to those of an Enumerated Weapon," or (ii) the weapon "has a receiver that is the same as or interchangeable with the receiver of an Enumerated Weapon." Id. at 3–4.

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

IV. APPLYING THE LAW TO THE FACTS

This Court begins with a description of the Plaintiffs' claims, which provides helpful context for its analysis. The Plaintiffs make three challenges to the Act. In Count One, they bring a Second Amendment challenge to the Act. Arguing that the Act ***259** "prohibits an entire class of firearms ... commonly kept by law-abiding, responsible citizens for lawful purposes," Compl. ¶ 74, the Plaintiffs allege that this prohibition "extend[s] into the home[ ]," where Second Amendment protections are "at their zenith," id. ¶ 76, and that the Act thus unconstitutionally infringes on their Second Amendment right to bear arms, id. ¶ 77.

Count Two alleges that the Notice of Enforcement unforeseeably and "retroactively criminalizes the transfers of tens of thousands of Massachusetts Compliant Firearms," id. ¶ 4, "retroactively expos[ing] ... Plaintiffs[ ] to criminal penalty" and violating their right to due process, id. ¶ 70. The Plaintiffs acknowledge the Enforcement Notice's limitation on retroactive application to individuals, but they maintain that it "provides no exception to its application to dealers for transfers made before July 20, 2016." Id. ¶ 64. Consequently, they assert, the Enforcement Notice's novel interpretation of the Act constitutes an unconstitutional retroactive enlargement of the Act's scope, similar to "an Ex Post Facto law passed by a legislature or a retroactive decision issued by a state supreme court." Id. ¶ 96.

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

A. Ripeness

[3] Though the Defendants have not raised the issue of ripeness, this Court sees fit to do so. Ripeness "may be considered on a court's own motion." National Park Hosp. Ass'n v. Department of Interior, 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003). Because ripeness implicates "the question of whether this court has jurisdiction to hear the case," Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 89 (1st Cir. 2013), the Court addresses it first.

1. Legal Standard

[4] "[T]he doctrine of ripeness has roots in both the Article III case or controversy requirement and in prudential considerations." Id. (quoting Mangual v. Rotger–Sabat, 317 F.3d 45, 59 (1st Cir. 2003)). It "seeks to prevent the adjudication of claims relating to 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " Reddy v. Foster, 845 F.3d 493, 500 (1st Cir. 2017) (quoting Texas v. United States, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)). "The requirement of ripeness is 'particularly relevant in the context of actions for preenforcement review of statutes,' because it 'focuses on the timing of the action.' " Gun Owners' Action League, Inc. v. Swift, 284 F.3d 198, 205 (1st Cir. 2002) (quoting Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997)). In determining whether an issue is ripe, the Court ought consider "both the fitness of the issue[ ] for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs.

v. Gardner, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), abrogated on other grounds by Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). Typically, "both factors must be present." Doe v. Bush, 323 F.3d 133, 138 (1st Cir. 2003).

*260 [5] [6] The fitness determination "typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." Gun Owners' Action League, 284 F.3d at 206 (quoting Rhode Island Ass'n of Realtors, Inc., v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999)). "The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." McInnis–Misenor v. Maine Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003) (quoting Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 536 (1st Cir. 1995)). Cases that are "largely hypothetical ... are seldom fit for federal judicial review." Ernst & Young, 45 F.3d at 538.

[7] [8] The hardship inquiry asks "whether the challenged action creates a direct and immediate dilemma for the parties." Gun Owners' Action League, 284 F.3d at 206 (quoting Rhode Island Ass'n of Realtors, 199 F.3d at 33). To demonstrate that this hardship exists, a party must show that it is put "between a rock and a hard place" without pre-enforcement review, forced either to "forego possibly lawful activity because of her well-founded fear of prosecution" or intentionally to commit a violation, "thereby subjecting herself to criminal prosecution and punishment." Navegar, 103 F.3d at 998 (citing Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298–99, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). "The greater the hardship, the more likely a court will be to find ripeness." McInnis–Misenor, 319 F.3d at 70.

2. Analysis

[9] Whereas Counts One and Three challenge the constitutionality of the Act itself, Compl. ¶¶ 72–77, 97–107, Count Two alleges that the **Enforcement Notice** is unconstitutional, Compl. ¶ 96. It further alleges that the Plaintiffs' due process rights are violated from **retroactive application** of the Enforcement Notice, rather than through the possibility of prospective enforcement (Counts One and Three). These two distinctions underpin the conclusion that unlike Counts One and Three, Count Two is not ripe for adjudication.

[10] Several factors weigh against the fitness of Count Two for judicial resolution. To start, the Enforcement Notice lacks the binding effect and force of law and does not constitute a "final" agency action. The First Circuit has explained that "[a]n agency action ... is not 'final' or ripe for review if it makes no change in the status quo itself, but rather requires 'further administrative action other than the possible imposition of sanctions,' before rights, obligations or duties arise." Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1034, 1040 (1st Cir. 1982) (quoting Northeast Airlines, Inc. v. C.A.B., 345 F.2d 662, 664 (1st Cir. 1965)). An action that "merely explains how the agency will enforce a statute or regulation" is not generally subject to pre-enforcement judicial review, National Min. Ass'n v. McCarthy, 758 F.3d 243, 252 (D.C. Cir. 2014); the agency must have "rendered its last word on the matter," Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 46 (1st Cir. 2009) (quoting Harrison v. PPG Indus., Inc., 446 U.S. 578, 586, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980)).

[11] Here, the agency action is, as the Defendants describe, "a prosecutor's advisory to the public of her interpretation of a criminal law committed to her enforcement."[4] Defs.' Mem. 14. The mere existence *261 of the Enforcement Notice, which was not directed at any particular individual or entity and contemplates that it may be "alter[ed] or amend[ed]," Enforcement Notice at 4, does not bring about a change in rights or obligations. Rather, it is the decision to initiate enforcement actions under this guidance that would constitute the Attorney General's "last word on the matter" and give rise to any real effect on the Plaintiffs' rights and obligations.[5] See Roosevelt Campobello Int'l Park Comm'n, 684 F.2d at 1039–40 (holding that agency actions were not "sufficiently 'final' to call for judicial review" where they did not confer rights until another agency action, which had been proposed but not executed, took place); Kemler v. Poston, 108 F.Supp.2d 529, 542 (E.D. Va. 2000) (concluding that challenge to state ethics committee's advisory opinion was not fit for review where the opinion could have "[n]o concrete effect" until enforced by the appropriate state commission or court); cf. Northeast Airlines, 345 F.2d at 664 (explaining that judicial review is appropriate where agency "determination is not a mere advisory or

interpretive opinion"), To conclude otherwise would be to exalt form over substance and discourage a desirable practice: If any comment on a law's interpretation by the Attorney General could be considered to have binding effect just because citizens may accord it considerable weight, the Attorney General would forever remain silent, providing citizens with **less** notice and creating a higher risk that their rights to due process may someday be violated.

Further, the actual threat of an enforcement action to activate those rights is minimal. In contrast to Counts One and Three, which anticipate the possibility of enforcement for prospective transactions, Count Two's alleged deprivation of due process rests on the notion that the Enforcement Notice "retroactively criminalizes" prior conduct. Compl. ¶ 4. Yet the Attorney General declared in the Enforcement Notice itself that her interpretation of the Act would **not** be enforced retroactively against individuals. Enforcement Notice at 4. While her language concerning dealers is arguably more ambiguous, it implies that the same principle applies to dealers, and the Attorney General's office has since confirmed that it does. See Defs.' Mem. 14; Dec. Supp. Defs.' Mot. Summ. J., Ex. 1 at 162:5–10, 163:17–23, ECF No. 65–1. Thus, the Plaintiffs' claim of lack of due process due to retroactive enforcement of the Enforcement Notice is "largely hypothetical," ***262** weighing against a determination that the issue is fit for review. [6] Ernst & Young, 45 F.3d at 538; see McInnis–Misenor, 319 F.3d at 72 ("[T]hat the future event may never come to pass augurs against a finding of fitness.").

Even if the Attorney General were to decide to enforce the Act under the Enforcement Notice's interpretation with respect to transactions occurring prior to July 20, 2016, she may exercise her discretion to revise her understanding as laid out in the Enforcement Notice, or to bring prosecutions under a different theory of liability. Review at this point thus may deprive her "of the opportunity to refine, revise or clarify the particular rule or other matter at issue" or "of the opportunity to resolve the underlying controversy on other grounds." Roosevelt Campobello Int'l Park Comm'n, 684 F.2d at 1040. Alternatively, a court may choose not to give effect to the Enforcement Notice's interpretation. See Matamoros v. Starbucks Corp., 699 F.3d 129, 135 (1st Cir. 2012) (explaining that while the Massachusetts Attorney General's interpretation of a law that she is charged with enforcing is "entitled to 'substantial deference' " by a court interpreting that law, it also must be "reasonable" (quoting DiFiore v. American Airlines, Inc., 454 Mass. 486, 910 N.E.2d 889, 897 n.11 (2009))). Consequently, allowing adjudication of Count Two at this time would "be setting in motion a constitutional adjudication that not only could have a thunderous impact on important state interests but that might well prove to be completely unnecessary." Ernst & Young, 45 F.3d at 538.

[12] Nor have the Plaintiffs demonstrated sufficient hardship [7] with respect to Count Two. Courts have consistently pointed to the government's express intent to prosecute or express disavowal of that intent as a major factor in the determination of whether a credible threat of prosecution exists. See Poe v. Ullman, 367 U.S. 497, 507, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (plurality opinion) ("If the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here."); SOB, Inc. v. County of Benton, 317 F.3d 856, 865–66, (8th Cir. 2003) (determining fear of prosecution to be unrealistic where alleged fear was based on unreasonable interpretation of ordinance and county attorney had publicly declared that ordinance did not prohibit activity in question); cf. Babbitt, 442 U.S. at 302, 99 S.Ct. 2301 (concluding that reasonable fear of prosecution was shown where statute's criminal prohibition was clear and the state had not "disavowed any intention" of invoking it against the plaintiffs); Presbytery of N.J. of Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1468 (3d Cir. 1994) (observing that state's pointed refusal to forswear future prosecution "indicates ... a real threat of prosecution"). ***263** As discussed supra, the Attorney General expressly disavowed her intention to enforce the Enforcement Notice's interpretation as to transactions that took place before the Enforcement Notice was issued. [8] That fact, together with the Plaintiffs' failure to provide this Court with any other reason to believe that they face imminent prosecution for these past transactions, weighs heavily against concluding that there is a credible threat of prosecution. See Fortuna Enterprises, L.P. v. City of Los Angeles, 673 F.Supp.2d 1000, 1015 (CD. Cal. 2008) (dismissing as not ripe claim seeking declaration that ordinance cannot be applied retroactively, where there was "no reason to believe that the Ordinance will be applied retroactively").

Further, the Plaintiffs do not face the same kind of dilemma with respect to this retroactivity claim as they do with respect to their other claims, because they cannot retroactively forgo lawful activity. Whereas the threat of prosecution for future transactions may pressure them not to engage in those future transactions, the threat of prosecution for past transactions has no reasonable bearing on their future activity. The Plaintiffs thus suffer from no coercive effect of the remote threat of prosecution for these past transactions. See Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 507, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972) (noting the Poe plurality's observation that "a justiciable controversy does not exist where 'compliance with (challenged) statutes is uncoerced by the risk of their enforcement' " (quoting Poe, 367 U.S. at 508, 81 S.Ct. 1752)); Marine Equip. Mgmt. Co. v. United States, 4 F.3d 643, 647 (8th Cir. 1993) ("To present an actual controversy ... the threat of enforcement must have some sort of immediate coercive consequences."). The Plaintiffs may fear prosecution for these past transactions, but given that this fear is unreasonable and does not produce a coercive effect, there is little "hardship to the parties of withholding court consideration," Abbott Labs., 387 U.S. at 149, 87 S.Ct. 1507.

Because the potential deprivation of due process asserted in Count Two depends entirely on "uncertain and contingent events that may not occur as anticipated, or indeed may not occur at all," W.R. Grace & Co. v. Environmental Protection Agency, 959 F.2d 360, 364 (1st Cir. 1992) (quoting Lincoln House, Inc. v. Dupre, 903 F.2d 845, 847 (1st Cir. 1990)), and the Plaintiffs do not face a "direct and immediate dilemma" with respect to Count Two, Count Two is not ripe for adjudication. ***264** The Court therefore DISMISSES that claim for lack of subject matter jurisdiction.

B. The Scope of the Second Amendment

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

The Act in this case makes it a crime to possess assault weapons or LCMs after September 13, 1994. Mass. Gen. Laws ch. 140, § 131M. Assault weapons include:

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

Id. § 121.

As noted supra, the Supreme Court explained in Caetano that "Heller rejected the proposition 'that only those weapons useful in warfare are protected.' " Caetano, 136 S.Ct. at 1028 (quoting Heller, 554 U.S. at 624, 128 S.Ct. 2783). Heller did not make such a rejection, however, in order to conclude that **all** weapons useful in warfare are protected. On the contrary, Heller rejected that premise because it would lead to the "startling" conclusion that "the National Firearms Act's restrictions on machineguns ... might be unconstitutional, machine guns being useful in warfare in 1939." Heller, 554 U.S. at 624, 128 S.Ct. 2783. Thus, as Heller concluded, it cannot be that "only those weapons useful in warfare are protected," because some of those weapons are not protected. Id. Weapons that are most useful in military service, as Justice Scalia later observed, fall outside the scope of the Second Amendment and may be banned. Id. at 627, 128 S.Ct. 2783.

Consequently, "Heller ... presents us with a dispositive and relatively easy inquiry: Are the banned assault weapons and large-capacity magazines 'like' 'M–16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?" Kolbe, 849 F.3d at 136 (quoting Heller, 554 U.S. at 627, 128 S.Ct. 2783). The undisputed facts in this record convincingly demonstrate that the AR–15 and LCMs banned by the Act are "weapons that are most useful in military service."[9] As matter of law, these weapons and LCMs thus fall outside the scope of the Second Amendment and may be banned.

The Plaintiffs argue that the AR–15 is the civilian version of the M16 because it cannot fire in fully automatic mode like the M16 and therefore cannot be considered a military weapon. As the Plaintiffs also point out in their undisputed facts, however, "[i]mprovements in firearms technology tend to be adopted for both military and civilian use" and so "[f]irearms designers and manufacturers have historically marketed new developments for both military and civilian uses." Pls.' Statement of Facts Ex. 13, ¶ 9. As a result, the AR–15 design is versatile and adaptable "for **military**, ***265** law enforcement, civilian self-defense, hunting, target shooting, and other sporting purposes." Pls.' Statement of Facts, Ex. 11 at A–9 (emphasis added); see Ex. 13 at A–18. The AR–15 design is almost identical to the M16, except for the mode of firing.

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

AR–15s are "weapons that are based on designs of weapons that were first manufactured for military purposes" and "ha[ve] most of the features[,] other than [the automatic mode], of the military weapon." Pls.' Statement of Facts, Ex. 17 at 153:20–154:4. Some characteristics of a military weapon include: (1) the "ability to accept a large detachable magazine," (2) "folding/telescoping stocks," advantageous for military purposes, (3) pistol grips designed to allow the shooter to fire and hold the weapon, or "aid in one-handed firing of the weapon in a combat situation," [10] (4) flash suppressors, (5) bipods, (6) grenade launchers, (7) night sights, (8) the ability for selective fire, and (9) the ability to accept a centerfire cartridge case of 2.25 inches or less. Pls.' Statement of Facts, Ex. 28 at 6–8. Like the M16, the AR–15 is "available with a telescoping/adjustable stock," a "vertical pistol grip" that allows for the weapon to be "fired with one hand," and "utilize[s] magazines with a standard capacity of 20 or 30 rounds." Pls.' Statement of Facts ¶ 42. The AR–15 is also lightweight, a characteristic important for the military. See Pls.' Statement of Facts Ex. 12, at A–10; Ex. 8, ¶¶ 7–8. Other similarities between the M16 and the AR–15 include "the ammunition," "[t]he way in which it is fired and the availability of sighting mechanisms, ... [t]he penetrating capacity, ... [and] [t]he velocity of the ammunition as it leaves the weapon." Pls.' Statement of Facts, Ex. 17 at 154:17–23.

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

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

"Simply put, AR–15–type rifles are 'like' M16 rifles," and fall outside the scope of the Second Amendment. Kolbe, 849 F.3d at 136. The features of a military style rifle ***266** are "designed and intended to be particularly suitable for combat rather than sporting applications." Pls.' Statement of Facts, Ex. 28 at 12. The AR–15 and the M16 were designed and manufactured simultaneously for the military and share very similar features and functions. Therefore, because the undisputed facts convincingly demonstrate that AR–15s and LCMs are most useful in military service, they are beyond the scope of the Second Amendment. But see New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 257 (2nd Cir. 2015) (proceeding "on the assumption" that laws banning the AR–15 are subject to scrutiny under the Second Amendment); Friedman v. City of Highland Park, 784 F.3d 406, 416 (7th Cir. 2015) (concluding that because AR–15s are "commonly used and are not unusual ... they are covered by the Second Amendment"); Fyock v. Sunnyvale, 779 F.3d 991, 998 (9th Cir. 2015)

(holding that "a regulation restricting possession of certain types of magazines burdens conduct falling within the scope of the Second Amendment"). The Defendants are entitled to summary judgment on Count One—the Act is constitutional on Second Amendment grounds.

But wait, argue the Plaintiffs, the AR–15 is an extraordinarily popular firearm. Indeed, the data they proffer as to its popularity appears unchallenged by the Defendants. Pls.' Mem. at 6–7, 10; Pls.' Statement of Facts ¶¶ 30–32, 35–37; Defs.' Statement of Facts ¶ 61; see Ali Watkins, John Ismay, & Thomas Gibbons–Neffmarch, Once Banned, Now Loved and Loathed: How the AR–15 Became 'America's Rifle', N.Y. Times (Mar. 3, 2018), https://nyti.ms/2CWFS9m. They thus argue that the Act must fall as unconstitutional as it "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [a] lawful purpose." Heller, 554 U.S. at 628, 128 S.Ct. 2783.

[14] Yet the AR–15's present day popularity is not constitutionally material. See Kolbe, 849 F.3d at 141–42. But see Friedman, 784 F.3d at 416. This is because the words of our Constitution are not mutable. They mean the same today as they did 227 years ago when the Second Amendment was adopted. The test is not the AR–15's present day popularity but whether it is a weapon "most useful in military service." Heller, 554 U.S. at 627, 128 S.Ct. 2783. Indeed as Justice Scalia was most fond of reminding his audiences:

> Our attitude today is that if something *ought* to be so, why then the Constitution, that embodiment of all that is good and true and beautiful, *requires* it. And we fight out these battles about what ought to be ... not in the democratic forum but in the law courts. The major issues that shape our society are to be decided for the whole nation by a committee of nine lawyers.... There is a certain irony in the fact that the society which takes all these issues out of the democratic process, and require them to be decided as constitutional absolutes, prides itself upon (of all things) its *toleration.* It is willing to tolerate anything, apparently, except disagreement and divergence and hence the need for continuing democratic debate and democratic decision-making, on an ever-increasing list of social issues.

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

> I urge you not to embrace the living Constitution—for a number of reasons. The most important one is that only the traditional view that the meaning of the Constitution does not change places any real constraints upon the decisions of future members of Congress or future ***267** judges. Since I accept that view, I am hand-cuffed. Show me what the original understanding was, and you got me.... There is no other criterion that is not infinitely manipulable. Unless you conduct a national opinion poll, the "evolving standards of decency ... of a maturing society" tend to be whatever you (or I) care passionately about.... To leave that visceral call to the unelected Supreme Court is to frustrate democratic self-government; and to leave it to the current Congress is to make the Constitution superfluous. We do not need a Constitution to change according to the desires of current society; all we need is a legislature and a ballot box. The whole function of a Constitution is to prevent future majorities from doing certain things, and if you turn over the identification of those things to the future majorities themselves, you have accomplished nothing.

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

C. Vagueness

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

[15] "[F]acial challenges are typically disfavored because they 'often rest on speculation,' which lead to the risk of premature interpretation of statutes and regulations." Draper v. Healey, 98 F.Supp.3d 77, 82 (D. Mass. 2015) (Gorton, J.) (quoting Washington State Grange

v. Washington State Republican Party, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)). Even more unfortunate for the Plaintiffs here, however, are the Supreme Court's suggestions that facial vagueness challenges to statutes not implicating First Amendment rights are **never** appropriate. See Maynard v. Cartwright, 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) ("Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis."); United States v. Mazurie, 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975) (observing that vagueness challenges that "do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand").

The First Circuit has similarly recognized that even "where an enactment is alleged to be 'impermissibly vague in all of its applications,' ... it is clear that such an allegation must first be considered in light of the facts of the case—i.e., on an as-applied basis." Love v. Butler, 952 F.2d 10, 13 (1st Cir. 1991) (quoting Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)); Draper v. Healey, 827 F.3d 1, 3 (1st Cir. 2016) ("We now turn to the dealers' claim that the load indicator requirement is vague in violation of due process, a constitutional claim eligible only for as-applied, not facial, review."). In Love, the First Circuit noted that "a facial challenge was inappropriate" where the petitioner, who was convicted under the challenged statute, conceded that the statute was not vague as applied to him but "instead insist[ed] only that it is facially vague." Love, 952 F.2d at 13.

At the same time, it appears that the First Circuit has tended not to dismiss these challenges out of hand, instead opting to base its ruling on an as-applied analysis. See, e.g., id. (noting that facial challenge was "inappropriate" yet needed not be addressed because the statute was not unconstitutionally vague as applied); Draper, 827 F.3d at 3 (addressing only the ***268** plaintiffs' as-applied challenge). In both of these cases, however, there was reason to conduct an as-applied analysis: in Love, the petitioner had been convicted under the statute, and in Draper, the plaintiffs challenged the regulation on both a facial and as-applied basis. Here, the Plaintiffs do not claim that the Act is unconstitutionally vague as applied, and because this is a pre-enforcement challenge, such a claim would indeed be inappropriate. [11]

Two courts faced with circumstances more similar to these, where the plaintiffs have not made any as-applied challenge, have, however, addressed a facial vagueness challenge on the merits. In Kolbe v. Hogan, the en banc Fourth Circuit addressed a challenge to Maryland's assault weapons ban on the basis of unconstitutional vagueness (among other grounds). Kolbe, 849 F.3d at 148. The plaintiffs in that case brought only a facial challenge to the statute, and the district court had noted that whether such a challenge was available was unclear. See Kolbe v. O'Malley, 42 F.Supp.3d 768, 799 n.40 (D. Md. 2014) (Blake, J.), aff'd en banc sub nom. Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017). The district court concluded that it need not decide whether such a challenge was appropriate because in any event the statute was not unconstitutionally vague, and both the Fourth Circuit panel and the Fourth Circuit en banc seemed to endorse that approach, analyzing the claim on the merits and affirming the district court's holding that the statute in question was not unconstitutionally vague. [12] See id. at 148–149.

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

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

[16] **[17]** "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement ...' and a statute that flouts it 'violates the first essential of due process.' " Johnson v. United States, —— U.S. ——, 135 S.Ct. 2551, 2556–57, 192 L.Ed.2d 569 (2015) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). For a long time, it appeared to be settled that to succeed in a facial challenge to a statute,

"the challenger must establish that no set of circumstances exists under which the Act would be valid." ***269** United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Recently, however, in Johnson, the Supreme Court clarified that a vague law is not constitutional "merely because there is some conduct that clearly falls within the provision's grasp." Johnson, 135 S.Ct. at 2561. Nonetheless, the "threshold for declaring a law void for vagueness is high." Id. at 2576. A statute will be held unconstitutionally vague "only if it wholly 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.' " Id. (quoting United States v. Williams, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)).

[18] As the Defendants point out, another session of this Court has already rejected a vagueness challenge to the Act's definition of "assault weapon" (within which the phrase "copies or duplicates" is found). [13] See Defs.' Mem. 18–19; Decl. Supp. Defs.' Mot. Summ. J., Exs. 19–20. In an order granting the defendants' motion to dismiss, Judge O'Toole concluded that "it is patently apparent that the definitions, even if they might be unclear at the margins, are not impermissibly vague in all applications, especially in light of the amendments to the Act which addressed some of the potential uncertainty." Mem. & Order, Gun Owner's Action League, Inc. v. Cellucci, No. 98–12125–GAO, slip op. at 2 (D. Mass. Sept. 28, 2000) (O'Toole, J.). Though Judge O'Toole's assessment employed the higher pre-Johnson standard, this Court agrees with his reasoning and concludes that the phrase "copies or duplicates" is not impermissibly vague even by the lower Johnson standard.

Though the Act does not define "copies or duplicates," the phrase's plain meaning provides a person of ordinary intelligence fair notice as to what is prohibited under the Act. The commonly understood meaning of "copy," as described by the Merriam–Webster dictionary, is "an imitation, transcript, or reproduction of an original work." Copy, Merriam–Webster, https://www.merriam-webster.com/dictionary/copy (last updated Mar. 21, 2018). A "duplicate" is "either of two things exactly alike and usually produced at the same time or by the same process." Duplicate, Merriam–Webster, https://www.merriam-webster.com/dictionary/duplicate (last updated Mar. 17, 2018). The combined term "copies and duplicates," in the context of the list of enumerated firearms, thus plainly refers to exact replicas of the enumerated firearms as well as firearms that may not be identical to the enumerated firearms but are nevertheless "imitations." While citizens may need to apply their own interpretation of this language "at the margins," this obligation does not render the language impermissibly vague because " '[f]air' notice is understood as notice short of semantic certainty." Draper, 827 F.3d at 4.

Further, both the Second and Fourth Circuits have rejected vagueness challenges to similar or identical language. In New York State Rifle & Pistol Ass'n, the Second Circuit held the phrase "copies or duplicates" within the context of an assault weapons ban not to be unconstitutionally vague because the statute "provided not only an itemized list of prohibited models but also [a] military-style features test," therefore providing citizens with another reference point for what may constitute a "copy or duplicate." ***270** New York State Rifle & Pistol Ass'n, 804 F.3d at 267. The Fourth Circuit upheld a statute's ban on "copies" of enumerated assault weapons in Maryland's assault weapons ban, relying heavily on the fact that notices issued by the Maryland Attorney General and the Maryland State Police "explain how to determine whether a particular firearm is a copy of an identified assault weapon." Kolbe, 849 F.3d at 149. The Sixth Circuit sustained a vagueness challenge to an ordinance banning certain firearms, but emphasized that the ordinance "outlaws assault weapons only by outlawing certain brand names without including within the prohibition similar assault weapons of the same type, function or capability," "permits the sale and possession of weapons which are virtually identical to those listed if they are produced by a manufacturer that is not listed," and defines "assault weapon" by naming various individual models and then adding "other models ... that have slight modifications or enhancements of firearms listed." Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 252 (6th Cir. 1994). In reasoning that the statute could easily be corrected, the Sixth Circuit noted that "[o]ther gun control laws which seek to outlaw assault weapons provide a general definition of the type of weapon banned." Id. at 253.

Though the Second, Fourth, and Sixth Circuits do not set controlling precedent for this Court, this Court is persuaded by their analyses, all of which bolster the conclusion that the phrase "copies or duplicates" is

sufficiently clear. Here, the Act lists certain individual models that qualify as "assault weapons" but also incorporates the now-expired federal ban's general definition of "semiautomatic assault weapon." See Mass. Gen. Laws ch. 140, § 121; 18 U.S.C. § 921(a)(30) (1994) repealed by Pub. L. No. 103–322, § 110105(2), 108 Stat. 1796, 2000 (1994). This general definition contains both a list of enumerated weapons and several features-style tests that citizens may use as a second data point if they are uncertain as to what constitutes a "copy or duplicate." See 18 U.S.C. § 921(a)(30). The Attorney General also issued a notice to the public (the Enforcement Notice) providing further guidance on how to determine whether a firearm is a "copy or duplicate" and thus prohibited. All of these characteristics conform with those of the statutes upheld in New York State Rifle & Pistol Ass'n and Kolbe, and with the characteristics that the Sixth Circuit indicated would have saved the ordinance in Springfield Armory.

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

These arguments, which center on the Enforcement Notice, have no merit. As the Defendants note, the First Circuit "has already rejected an attempt to invoke a prosecutor's interpretation of a criminal statute in support of a facial attack on that statute." Mem. Opp'n Pls.' Mot. Summ. J. 19, ECF No. 72. In McGuire v. Reilly, 386 F.3d 45 (1st Cir. 2004), the First Circuit addressed an argument that an interpretation of law issued by the Massachusetts ***271** Attorney General (then Thomas Reilly) "set up a new ground for facial unconstitutionality." Id. at 58. The First Circuit roundly rejected this argument, explaining that while a federal court evaluating a challenge to state law must "consider any limiting construction that a state court or enforcement agency has proffered," this rule is intended to help "save a statute that would otherwise be facially unconstitutional." Id. (first quoting Ward v. Rock Against Racism, 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). The court concluded that "[l]ogically, there is no way ... that an authority's non-binding and non-authoritative interpretation of a facially valid statute can make it more facially constitutionally vulnerable than it would be otherwise." Id. (footnote omitted). Though this statement is dicta, its reasoning is persuasive. Here too, the Act is facially valid, and the Enforcement Notice's interpretation—even if it were construed as expanding the Act's scope—cannot render it unconstitutionally vague. See McCullen v. Coakley, 571 F.3d 167, 183 (1st Cir. 2009) ("It is difficult to understand ... how or why a challenger can mount a facial attack on a statute that is itself not vague simply because an enforcement official has offered an interpretation of the statute that may pose problems down the road. As a matter of logic, we do not believe that an official's interpretation can render clear statutory language vague so as to make the statute vulnerable to a facial (as opposed to an as-applied) attack." (citations omitted)), overruled on other grounds, —— U.S. ——, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014); Cutting v. City of Portland, Maine, 802 F.3d 79, 84 (1st Cir. 2015).

Finally, the Plaintiffs argue that the phrase "copies or duplicates" is unconstitutionally vague because it allows for the possibility of "arbitrary and subjective enforcement." Pls.' Mem. 19. The Plaintiffs provide no further detail or evidence as to how the Act has been or can be enforced on a discriminatory basis. Courts consistently reject pre-enforcement, facial vagueness challenges where "no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner." Village of Hoffman Estates, 455 U.S. at 503, 102 S.Ct. 1186 (1982); see also Gonzales v. Carhart, 550 U.S. 124, 150, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) (rejecting pre-enforcement challenge based on claim of arbitrary or discriminatory enforcement, noting that the arguments "are somewhat speculative"); Richmond Boro Gun Club, Inc. v. City of New York, 97 F.3d 681, 686 (2d Cir. 1996) (declining to entertain "premature" pre-enforcement vagueness challenge based on "speculative threat of arbitrary enforcement," in part because the government "may choose to limit enforcement ... to weapons clearly proscribed by the law"); cf. New York State Rifle & Pistol Ass'n, 804 F.3d at 266 ("Should such [an unfair] prosecution ever

occur, the defendant could bring an 'as applied' vagueness challenge .... That improbable scenario cannot, however, adequately support the facial challenge plaintiffs attempt to bring here."). The Plaintiffs offer no reason to believe that the threat of arbitrary enforcement is not purely speculative. As a result, the Court remains convinced that the phrase "copies or duplicates" as used in the Act is not impermissibly vague.

V. CONCLUSION

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

SO ORDERED.

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

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

Justice Scalia would be proud.

All Citations

293 F.Supp.3d 251

Footnotes

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

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

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

4 That the agency in question here is a prosecuting authority weighs against fitness more so than it might in the context of most other administrative agencies, because "the decision to prosecute is particularly ill-suited to judicial review." Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). Rather than issue the Enforcement Notice, the Attorney General could have decided simply to initiate a prosecution under her interpretation of the Act. Absent a showing of discriminatory or arbitrary enforcement, that exercise of prosecutorial discretion would be "shielded from intense judicial review" in both federal and Massachusetts courts. United States v. Bernal–Rojas, 933 F.2d 97, 99 (1st Cir. 1991); see Commonwealth v. Latimore, 423 Mass. 129, 136, 667 N.E.2d 818 (1996). Thus, reviewing a manifestation of that discretion here might well upset the traditional principle that "[i]n our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." Wayte, 470 U.S. at 607, 105 S.Ct. 1524 (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982)); see Commonwealth v. Taylor, 428 Mass. 623, 629, 704 N.E.2d 170 (1999) ("[0]ur decisions uniformly uphold a prosecutor's wide discretion in deciding whether to prosecute a particular defendant.").

5 This Court notes, however, that another Judge of this Court, addressing a similar challenge, has recently disagreed, ruling that the Enforcement Notice itself has the effect of a regulation and is reviewable. See Pullman Arms Inc. v. Healey, No. 16-CV-40136-TSH, 301 F.Supp.3d 227, ——, 2018 WL 1319001, at *2 (D. Mass. Mar. 14, 2018) (Hillman, J.).

6 The Plaintiffs allege that in addition to the threat of state prosecution, because federal law criminalizes the sale of firearms in any state prohibiting the purchase or possession of such a firearm, the Enforcement Notice also causes them to face a credible threat of federal prosecution for these previous transactions. Compl. ¶ 92. While there has been no similar disavowal by federal prosecutors, the Plaintiffs have not pointed to the initiation of any such prosecutions and have failed

to demonstrate beyond a hypothetical possibility that federal prosecutors will now bind themselves to the Enforcement Notice's guidance, yet reject its limits on retroactive enforcement. Further, as explained infra, this threat—like the threat of state prosecution—does not create a sufficiently "direct and immediate dilemma" to demonstrate hardship. Gun Owners' Action League, 284 F.3d at 206 (quoting Rhode Island Ass'n of Realtors, 199 F.3d at 33).

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

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

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

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

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

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

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

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XX. Public Safety and Good Order (Ch. 133-148a)
Chapter 140. Licenses (Refs & Annos)

M.G.L.A. 140 § 121

§ 121. Firearms sales; definitions; antique firearms; application of law; exceptions

Effective: August 17, 2018
Currentness

<[Introductory paragraph of first paragraph effective until August 17, 2018. For text effective August 17, 2018, see below.]>

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

<[Introductory paragraph of first paragraph as amended by 2018, 123, Sec. 1 effective August 17, 2018. See 2018, 123, Sec. 18. For text effective until August 17, 2018, see above.]>

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

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

"Assault weapon", shall have the same meaning as a semiautomatic assault weapon as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921(a)(30) as appearing in such section on September 13, 1994, and shall include, but not be limited to, any of the weapons, or copies or duplicates of the weapons, of any caliber, known as: (i) Avtomat Kalashnikov (AK) (all models); (ii) Action Arms Israeli Military Industries UZI and Galil; (iii) Beretta Ar70 (SC-70); (iv) Colt AR-15; (v) Fabrique National FN/FAL, FN/LAR and FNC; (vi) SWD M-10, M-11, M-11/9 and M-12; (vi) Steyr AUG; (vii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and (viii) revolving cylinder shotguns, such as, or similar to, the Street Sweeper and Striker 12; provided, however, that the term assault weapon shall not include: (i) any of the weapons, or replicas or duplicates of such weapons, specified in appendix A to 18 U.S.C. section 922 as appearing in such appendix on September 13, 1994, as such weapons were manufactured on October 1, 1993; (ii) any weapon that is operated by manual bolt, pump, lever or slide action; (iii) any weapon that has been rendered permanently inoperable or otherwise rendered permanently unable to be designated a semiautomatic assault weapon; (iv) any weapon that was manufactured prior to the year 1899; (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable assault weapon; (vi) any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition; or (vii) any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine.

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

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

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

<[Definition of "Court" inserted following definition of "Conviction" in first paragraph by 2018, 123, Sec. 2 effective August 17, 2018. See 2018, 123, Sec. 18.]>

"Court", as used in sections 131R to 131Y, inclusive, the division of the district court department or the Boston municipal court department of the trial court having jurisdiction in the city or town in which the respondent resides.

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

<[Definitions of "Extreme risk protection order" and "Family or household member" inserted following definition of "Deceptive weapon device" in first paragraph by 2018, 123, Sec. 3 effective August 17, 2018. See 2018, 123, Sec. 18.]>

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

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

<[Definition of "Firearm" in first paragraph effective until July 3, 2018. For text effective July 3, 2018, see below.]>

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

<[Definition of "Firearm" in first paragraph as amended by 2018, 123, Sec. 4 effective July 3, 2018. For text effective until July 3, 2018, see above.]>

"Firearm", a stun gun or a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun as originally manufactured; provided, however, that the term firearm shall not include any weapon that is: (i)

constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to, covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette-packages; or (ii) not detectable as a weapon or potential weapon by x-ray machines commonly used at airports or walk- through metal detectors.

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

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

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

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

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

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

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

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

<[Definitions of "Petition" and "Petitioner" inserted following definition of "Machine gun" in first paragraph by 2018, 123, Sec. 5 effective August 17, 2018. See 2018, 123, Sec. 18.]>

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

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

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

<[Definition of "Respondent" inserted following definition of "Purchase" in first paragraph by 2018, 123, Sec. 6 effective August 17, 2018. See 2018, 123, Sec. 18.]>

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

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

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

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

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

<[Definitions of "Stun gun" and "Substantive dating relationship" inserted following definition of "Shotgun" in first paragraph by 2018, 123, Sec. 7 effective July 3, 2018.]>

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

"Substantive dating relationship", a relationship as determined by the court after consideration of the following factors: (i) the length of time of the relationship; (ii) the type of relationship; (iii) the frequency of interaction between the parties; and (iv) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship.

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

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

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

"Weapon", any rifle, shotgun or firearm.

Where the local licensing authority has the power to issue licenses or cards under this chapter, but no such licensing authority exists, any resident or applicant may apply for such license or firearm identification card directly to the colonel of state police and said colonel shall for this purpose be the licensing authority.

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

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

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

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

Credits

Amended by St.1934, c. 359, § 1; St.1957, c. 688, § 4; St.1959, c. 296, § 1; St.1960, c. 186; St.1968, c. 737, § 1; St.1969, c. 799, § 1; St.1971, c. 456, § 1; St.1973, c. 892, § 1; St.1983, c. 516, § 1; St.1984, c. 116, § 1; St.1989, c. 433; St.1990, c. 511, § 1; St.1996, c. 151, §§ 300, 301; St.1998, c. 180, § 8; St.1999, c. 1, § 1; St.2004, c. 150, §§ 1 to 3, eff. Sept. 13, 2004; St.2014, c. 284, §§ 19, eff. Jan. 1, 2015; St.2014, c. 284, §§ 20, 21, eff. Aug. 13, 2014; St.2017, c. 110, §§ 18 to 20, eff. Feb. 1, 2018; St.2018, c. 123, §§ 1 to 3, 5, 6, eff. Aug. 17, 2018; St.2018, c. 123, §§ 4, 7, eff. July 3, 2018.

Notes of Decisions (105)

M.G.L.A. 140 § 121, MA ST 140 § 121
Current through Chapter 155, except Chapter 154 of the 2018 2nd Annual Session

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Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XX. Public Safety and Good Order (Ch. 133-148a)
Chapter 140. Licenses (Refs & Annos)

M.G.L.A. 140 § 131M

§ 131M. Assault weapon or large capacity feeding device not lawfully possessed on September 13, 1994; sale, transfer or possession; punishment

Effective: August 13, 2014
Currentness

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

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

Credits
Added by St.1998, c. 180, § 47. Amended by St.2014, c. 284, § 65, eff. Aug. 13, 2014.

M.G.L.A. 140 § 131M, MA ST 140 § 131M
Current through Chapter 155, except Chapter 154 of the 2018 2nd Annual Session

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