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

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

BRIEF OF *AMICI CURIAE* PROFESSORS OF SECOND AMENDMENT LAW, CATO INSTITUTE, SECOND AMENDMENT FOUNDATION, CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS, JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP, MILLENNIAL POLICY CENTER, & INDEPENDENCE INSTITUTE, IN SUPPORT OF APPELLANTS AND REVERSAL

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QUESTION PRESENTED

Does the Second Amendment prohibit a State from banning arms that are in common use by law-abiding citizens?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* make the following statements:

The **Cato Institute** is a non-profit corporation, incorporated in Kansas. It has no parent companies, nor is there any publicly held corporation that owns more than 10% of its stock.

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Supreme Court Cases

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554 U.S. 570 (2008) .... *passim*

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

Staples v. United States,
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United States v. Miller,
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Other Cases

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Ezell v. City of Chicago,
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Friedman v. City of Highland Park,
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Heller v. District of Columbia,
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Hollis v. Lynch,
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Kolbe v. Hogan,
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New York State Rifle & Pistol Ass'n, Inc. v. Cuomo,
804 F.3d 242 (2d Cir. 2015) 8, 10, 12

People v. Yanna,
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State v. DeCiccio,
105 A.3d 165 (Conn. 2014) 16

Worman v. Healey,
293 F. Supp. 3d 251 (D. Mass. 2018) 4, 14

Statutes and Regulations

1927 Mich. Pub. Acts ch. 372, § 3 31

1927 R.I. Pub. Laws 256, §§ 1, 4 31

1933 Cal. Laws ch. 450 32

1933 Minn. Laws ch. 190 31

1933 Ohio Laws 189 32

1934 Va. Acts ch. 96 s137, §§ 1(a), 4(d) 32

1959 Mich. Pub. Acts 249 32

1959 R.I. Acts & Resolves 260 32

1963 Minn. Sess. L. ch. 753 32

1965 Stats. of Calif. ch. 33 32

1972 Ohio Laws 1866 32

1975 R.I Pub. Laws 738 32

1975 Va. Acts, ch. 14 33

1990 N.J. Laws 217, Act of May 30, 1990, ch. 32,
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2008 D.C. Laws 17-372 (Act 17–708) 33

Cal. Penal Code § 30510 13

Cal. Penal Code § 30605 13

Cal. Stats. 1989, ch. 19, § 3 34

Conn. Gen. Stat. Ann. § 53-202c 13

H.R. 234, 2013–2014 Leg., 130th Sess. § 2 (Ohio 2014) 32

Mass. Gen. Laws ch. 140, § 131M 15, 16

Md. Code Ann., Crim. Law § 4-303 13

Md. Public Safety § 5-101(r)(2) 13

N.J. Stat. Ann. § 2C:39-1 13

N.J. Stat. Ann. § 2C:39-5 13

N.Y. Penal Law § 265.00 13

N.Y. Penal Law § 265.02(7) 13

Pub. L. No. 72-275, §§ 1, 8, 47 Stat. 650 33

Other Authorities

1 Shorter Oxford English Dictionary (1993) 34

16-Shot Wheel Lock, America's 1st Freedom, May 10, 2014 23

A New Gun Patent, Athens (Tenn.) Post, Feb. 25, 1853 27

Black's Law Dictionary (6th ed. 1990) 8

Brown, M.L., Firearms in Colonial America: The Impact on History and Technology, 1492-1792 .... 23, 24

Demeritt, Dwight, Maine Made Guns & Their Makers (rev. ed. 1997) 28

Dunlap, Jack, American British & Continental Pepperbox Firearms (1964) 26

Ellis, John, The Social History of the Machine Gun (1975) 29

Flayderman, Norm, Flayderman's Guide to Antique American Firearms and Their Values (9th ed. 2007) 26, 28

Garavaglia, Louis A. & Worman, Charles G., Firearms of the American West 1866-1894 (1985) 27

George, John Nigel, English Guns and Rifles (1947) 25

Johnson, Nicholas, et al., Firearms Law and the Second Amendment: Regulation, Rights and Policy (2d ed. 2017) 25

Kopel, David B. & Greenlee, Joseph G.S., *The Federal Circuits' Second Amendment Doctrines*, 61 St. Louis U. L.J. 193 (2017) 22

Kopel, David, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Albany L. Rev. 849 (2015) 33

Lewis, Meriwether and Clark, William, The Journals of the Lewis & Clark Expedition (Gary E. Moulton ed., 1983) 24

Meyer, David R., Networked Machinists: High-Technology Industries in Antebellum America (2006) 25

Model 1892 Rifles and Carbines, Winchester Repeating Arms, http://www.winchesterguns.com/products/rifles/model-1892.html 28

Newly Invented Muskets, N.Y. Evening Post, Apr. 10, 1822 25

Niles, Samuel, A Summary Historical Narrative of the Wars in New England, Massachusetts Historical Society Collections, Series No. 4, Vol. 5 (1837) 23

Peterson, Harold L., Arms and Armor in Colonial America 1526-1783 (Dover reprint 2000) (Smithsonian Inst. 1956) 23

Plaster, John L., The History of Sniping and Sharpshooting (2008) 24

Tilloch, Alexander, The Philosophical Magazine and Journal: Comprehending the Various Branches of Science, the Liberal and Fine Arts, Geology, Agriculture, Manufactures, and Commerce, Vol. 59 (Richard Taylor ed., 1822) 25

Williamson, Harold F., Winchester: The Gun that Won the West (1952) 27

Winant, Lewis, Firearms Curiosa (2009) 23, 26, 27, 28

Winant, Lewis, Pepperbox Firearms (1952) 26

STATEMENT OF *AMICI CURIAE*

Amici professors are 11 law professors who teach and write on the Second Amendment: Randy Barnett (Georgetown), Royce Barondes (Missouri), Robert Cottrol (George Washington), Nicholas Johnson (Fordham), Donald Kilmer (Lincoln), Joyce Malcolm (George Mason), George Mocsary (Southern Illinois), Michael O'Shea (Oklahoma City), Joseph Olson (Mitchell Hamline), Glenn Reynolds (Tennessee), and Gregory Wallace (Campbell).

As described in the Appendix, the above professors were cited extensively by the Supreme Court in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. Oft-cited by lower courts as well, these professors include the authors of the first law-school textbook on the Second Amendment, and many other books and law-review articles on the subject.

The Cato Institute is a think tank in Washington, D.C. The Independence Institute and the Millennial Policy Center are think tanks in Denver, Colorado.

The Second Amendment Foundation is a public interest litigation organization based in Bellevue, Washington. The Citizens Committee for

the Right to Keep and Bear Arms is a related organization that concentrates on grassroots organizing, while Jews for the Preservation of Firearms Ownership focuses on the history of gun control.

The case concerns *amici* because it goes to the heart of the constitutional right of law-abiding citizens to choose appropriate arms for lawful defense of self and others.

CONSENT TO FILE

All parties have consented to the filing of this brief.[1]

[1] No counsel for a party in this case authored this brief in whole or in part. No party or counsel for a party contributed money intended to fund the preparation and submission of this brief. No person other than *amici* and their members contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The issue here is whether a ban on arms in common use—arms that have traditionally been owned by law-abiding citizens and have historically not been banned—violates the Second Amendment.

Under Supreme Court precedent, analyzing arms prohibitions is straightforward. If arms are "in common use," they are constitutionally protected and cannot be banned. If arms are "dangerous and unusual," and thus not "in common use," they are not constitutionally protected.

The Supreme Court has addressed arms prohibitions more than any other Second Amendment issue—a total of four times. The Court has twice emphasized that Second Amendment protection is not limited to "only those weapons useful in warfare." *District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008); *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (per curiam). Conversely, that an arm might have military utility does not deprive it of Second Amendment protection.

Common use is the dispositive issue. As a concurring Justice Alito explained, "*Miller* and *Heller* recognized that militia members traditionally reported for duty carrying 'the sorts of lawful weapons that they possessed at home,' and that the Second Amendment therefore

protects such weapons as a class, *regardless of any particular weapon's suitability for military use*." *Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring) (quoting *Heller*, 554 U.S. at 627) (emphasis added).

Massachusetts bears the burden of proving that the banned arms are unprotected. But it offered no evidence and did not argue that the banned arms are not common. Indeed, the district court acknowledged that "the data [Appellants] proffer as to [the AR-15's] popularity appears unchallenged." *Worman v. Healey*, 293 F. Supp. 3d 251, 266 (D. Mass. 2018). The ban is therefore unconstitutional.

Massachusetts argues that the arms are not necessary for self-defense. But constitutionality does not depend on the number of times people need to shoot guns in self-defense, nor on government second-guessing of law-abiding citizens' self-defense choices. Constitutionality depends on how commonly the people select arms for self-defense and other lawful purposes.

The statute's exemption for all law enforcement (not just for SWAT teams) concedes that the banned arms promote the Second Amendment's "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. The arms of typical law enforcement officers are selected solely for defensive

purposes. They are especially suitable for defense of self and others in civil society. Indeed, the Massachusetts ban does not apply to retired law enforcement officers, whose possession is for lawful defense.

The Supreme Court has emphasized the importance of history and tradition in Second Amendment cases. It is "bordering on the frivolous" to argue that "only those arms in existence in the 18th century are protected." *Heller*, 554 U.S. at 582. But "historical tradition" can help identify limitations. *Id.* at 627 (finding that the protection of arms "'in common use at the time' ... is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'").

By the time the Fourteenth Amendment was adopted, repeating arms capable of firing more than ten rounds without reloading were in common use. They have existed since long before the Second Amendment was ratified. During Prohibition, a few states enacted (and later repealed) ammunition-capacity restrictions. None was as severe as Massachusetts's ban at issue here, and none is "longstanding."

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS SEMI-AUTOMATIC FIREARMS AND STANDARD-CAPACITY MAGAZINES

A. The Supreme Court held that the Second Amendment protects arms "in common use."

The Supreme Court specifically addressed "*what* types of weapons" the right to keep and bear arms protects. *Heller*, 554 U.S. at 624. The Court concluded that the right protects arms that are "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. In other words, as "[*United States v. Miller*] said … the sorts of weapons protected were those 'in common use at the time.'" *Heller*, 554 U.S. at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

In the Founding Era, "when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Heller*, 554 U.S. at 624 (quoting *Miller*, 307 U.S. at 179) (brackets omitted). Thus, "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. Because "weapons used by militiamen and weapons used in defense of person and home were one and the same," protecting arms in common

use is "precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface." *Id.* at 625 (citations omitted).

"[T]he pertinent Second Amendment inquiry is whether [the arms in question] are commonly possessed by law-abiding citizens for lawful purposes today." *Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring) (emphasis omitted).

B. The Supreme Court stated that the Second Amendment does not protect weapons "not typically possessed by law-abiding citizens," including "dangerous and unusual weapons."

Heller also defined what arms are *not* protected: "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." 554 U.S. at 625.

The Court clarified that this means "dangerous and unusual weapons." *Id.* at 627. A weapon that is "unusual" is the antithesis of a weapon that is "common." Thus, an arm "in common use" cannot be "dangerous and unusual." *See Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (if "the banned weapons are commonly owned … then they are not unusual.").

C. Semi-automatic firearms and standard-capacity magazines are "in common use."

"The Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Heller*, 554 U.S. at 582. "In other words, it identifies a presumption in favor of Second Amendment protection, which the State bears the initial burden of rebutting." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 n.73 (2d Cir. 2015) ("*NYSRPA*"); *see also Virginia v. Black*, 538 U.S. 343, 369 (2003) (Scalia, J., concurring in part and dissenting in part) (defining "prima facie evidence" as "sufficient to establish a given fact" and "if unexplained or uncontradicted … sufficient to sustain a judgment in favor of the issue which it supports") (quoting Black's Law Dictionary 1190 (6th ed. 1990)).[2]

The Supreme Court has not precisely defined "common use." In *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court struck handgun bans. It pointed out that handguns are "the most popular weapon chosen by Americans for self-defense in the home," making a detailed examination of their commonality unnecessary. *Heller*, 554 U.S.

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[2] In *NYSRPA*, the Second Circuit struck a ban on a pump-action rifle because the state focused exclusively on semi-automatic weapons and "the presumption that the Amendment applies remains unrebutted." 804 F.3d at 257.

at 629. *Caetano*'s concurring opinion declared that "[t]he more relevant statistic is that hundreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States." 136 S. Ct. at 1032 (Alito, J., concurring) (quotations and brackets omitted). Because "stun guns are widely owned and accepted as a legitimate means of self-defense across the country," they are protected by the Second Amendment. *Id.* at 1033.

In the federal circuits, "[e]very post-*Heller* case to grapple with whether a weapon is 'popular' enough to be considered 'in common use' has relied on statistical data of some form, creating a consensus that common use is an objective and largely statistical inquiry." *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (quotations omitted).

Here, the record shows that "[b]etween 1990 and 2015, Americans owned approximately 114,700,000" of the banned magazines, which is "approximately 50% of all magazines owned." JA Vol. 2 at 0695.

Additionally, "[i]n 2016, modern sporting rifles [i.e., some semi-automatic rifles] accounted for approximately 40% of all long gun sales" and "17.9% of all firearm sales." *Id.* at 0694–95. And "approximately 13,739,000 AR- and AK-platform rifles [were] manufactured in or

imported to the U.S. between 1990 and 2015." *Id.* at 0694. The statute and regulations also ban many firearms types that have nothing to do with the AR or AK designs, making the class of banned firearms even larger than the above numbers indicate.

"There is considerable variety across the circuits as to what the relevant statistic is and what threshold is sufficient for a showing of common use." *Hollis*, 827 F.3d at 449. Whatever the methodology, the numbers in this case exceed the numbers sister circuits deemed "common."

i. Total number test

"Some courts have taken the view that the total number of a particular weapon is the relevant inquiry." *Id.*

The Second Circuit found the banned arms "are 'in common use' as that term was used in *Heller*" because "Americans own millions of the firearms that the challenged legislation prohibits. The same is true of large-capacity magazines." *NYSRPA*, 804 F.3d at 255.[3]

[3] For simplicity, this brief sometimes uses the statutory term "large-capacity magazine." However, the term is a misnomer. The vast majority of banned magazines are the standard magazines supplied by the manufacturer of the firearm. If the statute applied only to unusually

The D.C. Circuit found the arms "indeed in 'common use'" because "[a]pproximately 1.6 million AR-15s alone have been manufactured since 1986."[4] And "approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000." *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*"). "There may well be some capacity above which magazines are not in common use but … that capacity surely is not ten." *Id.*

The Fourth Circuit decided it "need not answer" whether standard magazines are "in common use," but acknowledged "evidence that in the United States between 1990 and 2012, magazines capable of holding more than ten rounds numbered around 75 million." *Kolbe v. Hogan*, 849 F.3d 114, 129, 136 (4th Cir. 2017) (en banc).

The Ninth Circuit determined a district court did not abuse its discretion by finding that "at a minimum, [LCMs] are in common use." *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015). The plaintiff "presented sales statistics indicating that millions of magazines, some of which [] were magazines fitting Sunnyvale's definition of large-capacity

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large magazines, such as after-market magazines that turn a 13-round handgun into a 35-round handgun, the analysis would be different.

[4] "AR" is short for "ArmaLite," the original manufacturer of the rifle.

magazines, have been sold over the last two decades in the United States." *Id.*

ii. Percentage test

Some courts consider the percentage an arms type constitutes of the total nationwide arms stock. The Second Circuit found banned semi-automatics "in common use" even when they "only represent about two percent of the nation's firearms." *NYSRPA*, 804 F.3d at 255.

The D.C. Circuit held semi-automatic rifles and LCMs "in common use" because "in 2007 this one popular model [AR-15] accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market. As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds." *Heller II*, 670 F.3d at 1261.

iii. Jurisdictions test

The *Caetano* concurrence identified "the more relevant statistic" as the raw number of arms and the number of jurisdictions in which they are lawful. Whereas the concurrence in *Caetano* had determined stun guns were "in common use" because hundreds of thousands had been sold nationwide and they are lawful in 45 states, the Fifth Circuit determined

machine guns were unprotected: only 175,977 were owned by civilians and "34 states and the District of Columbia prohibit possessing machineguns." *Caetano*, 136 S.Ct. at 1032 (Alito, J., concurring); *Hollis*, 827 F.3d at 450.[5]

A California district court recently applied the jurisdictions test and determined that standard magazines over 10 rounds "are common" because they are "[l]awful in at least 43 states and under federal law." *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1118 (S.D. Cal. 2017), *aff'd,* No. 17-56081, 2018 WL 3433828 (9th Cir. July 17, 2018).

The rifles that Massachusetts bans are lawful in at least 44 states. The magazines are lawful in 43. And both are legal under federal law.[6] By any metric, the banned arms are "in common use." Indeed, no sister circuit has found to the contrary.

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[5] *Hollis*'s state law count was incorrect, but it demonstrates the use of state laws in assessing "common use."

[6] Only five other states ban some semi-automatic rifles: California (Cal. Penal Code §§30510, 30605), Connecticut (Conn. Gen. Stat. Ann. §53-202c), Maryland (Md. Code Ann., Crim. Law §4-303; Md. Public Safety §5-101(r)(2)), New Jersey (N.J. Stat. Ann. §§2C:39-1, 5), and New York (N.Y. Penal Law §§265.00, .02(7)).

D. Semi-automatic firearms and standard-capacity magazines are commonly used for self-defense.

Massachusetts did not argue that the banned arms are uncommon. For instance, the court below found that "the data [Appellants] proffer as to [the AR-15's] popularity appears unchallenged." *Worman*, 293 F. Supp. 3d at 266. Commonality data for other banned arms was similarly unchallenged. This concession alone should decide the case.

Rather, Massachusetts argued that the arms "are not appropriate or necessary for self-defense." JA Vol. 2 at 0931. Whether common arms are "appropriate or necessary" for self-defense and other lawful purposes is a decision that the Second Amendment reserves to the people, not to the government. As Justice Stevens explained, "The Court struck down the District of Columbia's handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their *popularity* for that purpose." *McDonald*, 561 U.S. at 890 n.33 (Stevens J., dissenting). "To limit self-defense to only those methods acceptable to the government is to effect an enormous transfer of authority from the citizens of this country to the government—a result directly contrary to our constitution and to our political tradition." *Friedman*, 784 F.3d at 413 (Manion, J., dissenting).

The right does not depend on how frequently arms are fired in self-defense. The bizarre result would be that the safer the country became, the less rights the people would have, because fewer arms would be fired defensively. The *Heller* Court did not attempt to quantify defensive handgun incidents; what mattered instead was that handguns were often the chosen arms kept for self-defense.[7]

Moreover, the banned arms are particularly appropriate for lawful defense of self and others. Law enforcement agencies across the country are equipped with such arms. This is why Massachusetts provides an exemption for law enforcement. *See* Mass. Gen. Laws ch. 140, §131M (exempting "the possession by a law enforcement officer for purposes of law enforcement").

Typical law enforcement arms are carefully selected for the lawful defense of innocents. The arms are not selected for "mass carnage." The arms are best for defense of self and others, including against multiple

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[7] Self-defense is not the only purpose for which arms possession is protected. The right includes hunting, target practice, and other lawful activities, according to every federal circuit court that has addressed the issue. *See* David Kopel & Joseph Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 St. Louis U. L.J. 193, 204–07 (2017).

attackers.[8] Widespread law enforcement use is further evidence that particular arms are common and typically used for lawful purposes, rather than "dangerous and unusual." *See State v. DeCiccio*, 105 A.3d 165, 200–01 (Conn. 2014) (police use shows that batons are Second Amendment arms); *People v. Yanna*, 824 N.W.2d 241, 245 (Mich. App. 2012) (Because "[h]undreds of thousands of Tasers and stun guns have been sold to private citizens, with many more in use by law enforcement officers," prohibition is unconstitutional.).

Notably, the Massachusetts ban exempts *retired* law enforcement officers. Mass. Gen. Laws ch. 140, §131M ("this section shall not apply to . . . 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."). The

[8] In a typical Sheriff's Office or Police Department, only a small number of officers possess offensive arms, such as machine guns or grenades. These arms are deployed for unusual situations, such as hostage scenarios or high-risk warrant service. These are not the arms that an officer would carry for standard foot, bicycle, or automobile patrol. The Massachusetts law enforcement exemption encompasses typical officers, and thus recognizes the broad defensive utility of the arms.

exemption further confirms that the arms are especially well-suited for lawful defense of self and family.

Law enforcement officers are presumably well-trained, and this case does not challenge a training requirement that Massachusetts might require for certain arms.

E. Semi-automatic firearms and standard-capacity magazines are not "dangerous and unusual."

To be "dangerous and unusual," a weapon must be both dangerous *and* unusual. As the Ninth Circuit explained, "To determine [whether a weapon is 'dangerous and unusual'], we consider whether the weapon has uniquely dangerous propensities *and* whether the weapon is commonly possessed by law-abiding citizens for lawful purposes." *Fyock*, 779 F.3d at 997 (emphasis added). Likewise, the Fifth Circuit in *Hollis* first analyzed whether machine guns are uniquely dangerous, and then analyzed whether machine guns are also unusual. 827 F.3d at 448–51.

The Supreme Court confirmed that this is the correct approach in *Caetano*. 136 S. Ct. at 1028. The Court declined to consider the dangerousness of stun guns because it had already determined that the lower court's unusualness analysis was flawed. *Id.* The concurrence elaborated:

> As the *per curiam* opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual. Because the Court rejects the lower court's conclusion that stun guns are "unusual," it does not need to consider the lower court's conclusion that they are also "dangerous."

Id. at 1031 (Alito, J., concurring).

As explained above, the banned arms are among the most popular arms in the country. Being "in common use," they are necessarily *not* unusual, and therefore not "dangerous and unusual."

II. A BAN ON CONSTITUTIONALLY-PROTECTED ARMS IS CATEGORICALLY UNCONSTITUTIONAL

Supreme Court precedent mandates that Massachusetts's ban be held categorically invalid. Bans on arms "in common use" are not to be reviewed under heightened scrutiny interest balancing or analyses of military utility. The bans are flatly unconstitutional. This is certain, because it is the approach taken by the Supreme Court when confronted with such bans.

Heller held a handgun ban categorically invalid. The Court explained that because handguns are constitutionally-protected arms, "a complete prohibition of their use is invalid." 554 U.S. at 629. Rather than conducting a tiered scrutiny analysis, the Court included no data on

handgun crime or defensive handgun use, or any other pro/con social science evidence. Nor did the Court examine whether handguns are or are not useful in military service.

In contrast, social science and analysis of military uses pervaded Justice Breyer's dissent. *Id.* at 693–713 (Breyer, J., dissenting). The *Heller* majority opinion, not the dissent, provides the controlling rules of judicial review.

In *McDonald*, the Supreme Court again held a handgun ban categorically unconstitutional, in the context of applying the Second Amendment right to the states. And the Court again refused to adopt an interest-balancing approach in a challenge to a ban on constitutionally-protected arms:

> Municipal respondents assert that, although most state constitutions protect firearms rights, state courts have held that these rights are subject to "interest-balancing" and have sustained a variety of restrictions. … In *Heller,* however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.

Id. at 785. Also conspicuously absent from *McDonald* was any examination of the usefulness of handguns in military service.

The Seventh Circuit recognized that "[b]oth *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are *categorically unconstitutional*." *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (emphasis added).

The *Caetano* concurrence confirmed this approach. In *Caetano*, the Court issued a *per curiam* opinion summarily reversing and remanding an opinion of the Massachusetts Supreme Judicial Court that upheld a ban on stun guns. Justice Alito's concurring opinion, joined by Justice Thomas, conveyed the correct approach to a ban on arms in common use: "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." 136 S.Ct. at 1033 (Alito, J., concurring). Dismissing the usefulness of the arms in military service as irrelevant, the concurrence added that "the Second Amendment … protects such weapons as a class, *regardless of any particular weapon's suitability for military use." Id.* at 1032 (Alito, J., concurring).

The Supreme Court has addressed arms prohibitions on four separate occasions, and it has never indicated that interest-balancing is appropriate. Instead, the Court has twice expressly rejected such an approach. *Heller,* 554 U.S. at 628–35; *McDonald*, 561 U.S. at 785.

Nor has the Court indicated that arms can be banned merely because they might be most useful in military service—as the decision below contends, even though none of the banned rifles is used by militaries.[9] To the contrary, in *Miller* the Court stated that "it is not within judicial notice that this weapon [a short-barreled shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense." *Miller*, 307 U.S. at 178. There being no evidence on the question (because the district court had quashed the indictment), the case was remanded. *Id.* at 177, 183.

Heller expounded on *Miller*'s methodology. Both cases held that prohibitions or near-prohibitions on particular arms are judged according

[9] The military does use handgun magazines over 10 rounds. For example, 15 or 17 round magazines for the Beretta pistol have long been standard. Like sturdy boots, standard magazines may be "most useful" for military purposes because of the possible risks of dangerous conditions.

Also like sturdy boots, standard magazines have much utility for civilian uses. That is why tens of millions of Americans use them.

to whether the arms meet a certain standard. If the arms do not meet the standard, then the prohibition stands.

Supreme Court precedent does not authorize arms bans simply because other arms are allowed. *Heller* and *McDonald* rejected the notion that handgun bans were permissible because other firearms were allowed. *Miller* did not suggest that the law could be upheld because it applied to only some shotguns and not to all shotguns. *Caetano* did not care that other non-lethal arms (e.g., pepper spray) were allowed. Prohibitions that fail the bright-line test are void, without regard to whatever arms are not prohibited. Similar categorical bright-line rules are common in constitutional jurisprudence. *See* Kopel & Greenlee, 61 St. Louis U. L.J. at 303–04 (providing examples for the First, Fifth, Sixth, Eighth, Tenth, and Fourteenth Amendments).

III. REPEATING ARMS WITH A CAPACITY OF MORE THAN 10 ROUNDS ARE TRADITIONAL AMERICAN ARMS.

A. Colonial Period

Repeating arms, as well as magazines with a capacity of greater than 10 rounds, predate the Second Amendment by over two centuries.

The first known repeating firearms—those that can fire multiple times without reloading—date back to between 1490 and 1530. M.L.

Brown, Firearms in Colonial America 50 (1980). Around 1580, a 16-round repeater was created. *See* Lewis Winant, Firearms Curiosa 168–70 (2009); *16-Shot Wheel Lock*, America's 1st Freedom, May 10, 2014, http://bit.ly/2tngSDD. The first repeater produced in bulk was a 1646 Danish long gun that fired 30 shots without reloading. Brown, *supra*, at 106–07.

In 1722, John Pim, of Boston, impressed some Indians with a repeater he had made. "[L]oaded but once," it "was discharged eleven times following, with bullets in the space of two minutes each which went through a double door at fifty yards' distance." 5 Samuel Niles, A Summary Historical Narrative of the Wars in New England, Massachusetts Historical Society Collections, Series No. 4, at 347 (1837). Pim's repeater was probably the same type that had become "popular in England from the third quarter of the 17th century" and that started being manufactured in Massachusetts decades later. Harold Peterson, Arms and Armor in Colonial America 1526–1783, at 215–17 (Dover reprint 2000) (Smithsonian Inst. 1956).

B. Founding Era and Early Republic

When the Second Amendment was ratified, the state-of-the-art repeater was the Girandoni air rifle—which was ballistically equal to a powder gun. John Plaster, The History of Sniping and Sharpshooting 69–70 (2008). The rifle was famously carried by Meriwether Lewis on the Lewis and Clark expedition.[10] It could consecutively shoot 21 or 22 rounds in .46 or .49 caliber, and it was powerful enough to take an elk with a single shot. Jim Supica et al., Treasures of the NRA National Firearms Museum 31 (2013).

Not all multi-shot firearms in the Founding Era were repeaters. The blunderbuss was available as a shoulder arm or a handgun. It could fire either one large projectile, or several at once. Most often it was loaded with about 20 large pellets. Brown, *supra*, at 143. In the 17th and 18th centuries, it was popular for close quarters self-defense (e.g., in the home,

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[10] Lewis demonstrated the rifle to impress various tribes encountered on the expedition. Meriwether Lewis & William Clark, The Journals of the Lewis & Clark Expedition (Gary Moulton ed., 1983) (13 vols.) (Aug. 3, 19, 1804; Oct. 10, 29, 1804; Aug. 17, 1805; Jan. 24, 1806; Apr. 3, 1806). The demonstrations may have made the point that although the expedition was usually outnumbered by any given band, the smaller group could defend itself.

or by stagecoach drivers and passengers). John Nigel George, English Guns and Rifles 80, 91, 98 (1947).

Repeaters became the most common arms in the 19th century, due to improvements in manufacturing technology. *See*, *e.g.*, David R. Meyer, Networked Machinists: High-Technology Industries in Antebellum America 81–84, 252–62, 279–80 (2006); Nicholas Johnson, et al., Firearms Law and the Second Amendment: Regulation, Rights and Policy 401–03 (2d ed. 2017).

In 1821, the *New York Evening Post* reported that New Yorker Isaiah Jennings produced a repeater whose "number of charges may be extended to fifteen or even twenty ... and may be fired in the space of two seconds to a charge." "[T]he principle can be added to any musket, rifle, fowling piece, or pistol" to make it capable of firing "from two to twelve times." *Newly Invented Muskets*, N.Y. Evening Post, Apr. 10, 1822, *in* 59 Alexander Tilloch, The Philosophical Magazine and Journal 467–68 (Richard Taylor ed., 1822), http://bit.ly/2tn4raZ.

C. Middle and Later 19th Century

In the 1830s, the pepperbox handguns were introduced. These popular pistols had multiple barrels that fired sequentially. Lewis

Winant, Pepperbox Firearms 7 (1952). Most models had four to eight barrels, but some models had 12, 18, and even 24 independently firing barrels. Jack Dunlap, American British & Continental Pepperbox Firearms 148–49, 167 (1964). That same decade, the Bennett and Haviland Rifle used the same concept as the pepperbox. It had 12 individual barrels that fired sequentially. Norm Flayderman, Flayderman's Guide to Antique American Firearms and Their Values 711 (9th ed. 2007).

Revolvers were introduced in the 1830s by Samuel Colt. Like the pepperbox, revolvers fire repeating rounds. While the pepperbox had multiple rotating barrels, the revolver has a single barrel, attached to a revolving cylinder to hold the ammunition.

Pin-fire revolvers with capacities of up to 21 rounds entered the market in the 1850s. Supica, *supra*, at 48–49; Winant, Pepperbox Firearms, *supra*, at 67–70. Also in the 1850s, Alexander Hall introduced a rifle with a 15-round rotating cylinder. Flayderman, *supra*, at 713, 716. Around that same time, Parry W. Porter created a rifle with a 38-shot canister magazine. The Porter Rifle could fire 60 shots in 60 seconds. *A*

New Gun Patent, Athens (Tenn.) Post, Feb. 25, 1853, http://bit.ly/2tmWUbS (reprinted from *N.Y. Post*).

In 1855, an alliance between Daniel Wesson (later, of Smith & Wesson) and Oliver Winchester led to a series of famous lever-action repeating rifles. First was the 30-shot Volcanic Rifle; an 1859 advertisement boasted it could be loaded and fired 30 times a minute. Harold Williamson, Winchester: The Gun that Won the West 26–27 (1952). Next came the 16-shot Henry Rifle of 1861. It evolved into the 18-shot Winchester Model 1866, which was advertised as being able to "be fired thirty times a minute." *Id.* at 49. The Winchester 1866 was touted to have a capacity of "eighteen charges, which can be fired in nine seconds." Louis Garavaglia & Charles Worman, Firearms of the American West 1866–1894, at 128 (1985). The earlier repeating rifles sometimes had reliability problems, but these were solved with the 1861 Henry and 1866 Winchester—and both models are still made today.

Also in 1866, the 20-round Josselyn belt-fed chain pistol entered the market. Other chain pistols had even greater capacities. *See, e.g.*, Winant, Firearms Curiosa, *supra*, at 204, 206.

Meanwhile, the first detachable box magazine for a handgun was patented in 1862. *Id.* at 244–45. By the turn of the century, such magazines would have a broad market.

The Winchester Model 1873 was dubbed “The Gun that Won the West.” It had a 15-round magazine. Dougherty, *supra*, at 62. So did its successor, the Model 1886, as well as the Model 1892, made legendary by Annie Oakley and later by John Wayne. *Model 1892 Rifles and Carbines*, Winchester Repeating Arms, http://bit.ly/2tn03IN.

In 1873, the Evans Repeating Rifle debuted an innovative rotary helical magazine with 34 rounds. Dwight Demeritt, Maine Made Guns & Their Makers 293–95 (rev. ed. 1997); Flayderman, *supra*, at 694.

While lever-action repeaters were popular, they were outpaced later in the century by pump-actions, bolt-actions, and semi-automatics. One iconic pump-action rifle of the 19th century was the Colt Lightning. It could fire 15 consecutive rounds. Flayderman, *supra*, at 122.

In 1885, the semi-automatic action was invented. Semi-automatics—like revolvers, lever-actions, pump-actions, and bolt-actions—fire one round with each pull of the trigger. The latter three require a short back-and-forth (or down-up) movement to load the next

round. In contrast, revolvers and semi-automatics do not require a separate step to load the next round.

Unlike the above firearms, automatic firearms (commonly called "machine guns") fire continuously when the trigger is pressed. This unique feature is the reason militaries around the world use automatic rifles.

The first automatics were huge, heavy, and very expensive. The relatively lower-cost Thompson submachine gun was introduced in the 1920s. But "[c]ommercially, then, the gun was a flop," and it was popular only with gangsters. John Ellis, The Social History of the Machine Gun 151–60 (1975).

Specifically describing the AR-15 semi-automatic rifle, the Supreme Court explained that it fires "only one shot with each pull of the trigger." The Court stated that the AR-15 is among the arms that "traditionally have been widely accepted as lawful possessions." In contrast, machine guns have the "quasi-suspect character we attributed to owning hand grenades." *Staples v. United States*, 511 U.S. 600, 603 n.1, 611–12 (1994).

The instant case is not about machine guns, but about ordinary firearms that since 1885 traditionally have been widely accepted as lawful possessions. Of all the semi-automatic firearms at issue, none fires faster than an ordinary semiautomatic pistol, such as those made by Glock, Ruger, or Smith & Wesson. "There is no basis in *Heller* for drawing a constitutional distinction between semi-automatic handguns and semi-automatic rifles." *Heller II*, 670 F.3d at 1286 (Kavanaugh, J., dissenting).

IV. THERE IS NO LONGSTANDING PROHIBITION OF THE BANNED ARMS

Heller considered whether a given gun control was "longstanding" and based on "historical tradition." 554 U.S. at 626–27. As the Court elucidated in *Heller* and *McDonald*, the most significant historical periods are when the Second and Fourteenth Amendments were ratified, because a core purpose of the Fourteenth Amendment was to make the individual right to keep and bear arms enforceable against state governments.

As noted in Part III.B, the state-of-the-art rifle in 1791 could fire 22 consecutive shots. By 1868, when the Fourteenth Amendment was ratified, firearms had become more accurate, reliable, and durable. Americans had seen 24-shot handguns, 12-shot rifles, 21-round

revolvers, 38-round canister magazines, 20-round belt fed pistols, and rifles capable of firing 60 shots in 60 seconds. As of 1868, two of the most popular firearms were the 16-shot Henry Rifle and the 18-shot Winchester 1866. Repeating arms able to fire more than 10 rounds were common.

By the end of the 19th century, semi-automatics and every other type of firearm available at present-day gun stores were on the market. Since that time, manufacturing improvements have reduced costs while increasing durability, accuracy, and reliability. But firearms' core operating systems have not changed much.

During a seven-year period of the alcohol prohibition era, six states enacted restrictions involving ammunition capacity. *See* 1927 R.I. Pub. Laws 256, §§1, 4 (banning sales of guns that fire more than 12 shots semi-automatically without reloading); 1927 Mich. Pub. Acts ch. 372, §3 (banning sales of firearms "which can be fired more than sixteen times without reloading"); 1933 Minn. Laws ch. 190 (banning "machine gun[s]" and including in the definition semi-automatics "which have been changed, altered or modified to increase the magazine capacity from the original design as manufactured by the manufacturers"); 1933 Ohio Laws

189, 189 (licensing for semi-automatics with capacity over 18); 1933 Cal. Laws ch. 450 (licensing for machine guns, defined to include semi-automatics with detachable magazines over 10 rounds); 1934 Va. Acts ch. 96 s137, §§ 1(a), 4(d) (prohibiting machine gun possession for an "offensive or aggressive purpose"; definition includes anything able to fire more than 16 times without reloading; presumption of offensive purpose when possessed outside one's residence or place of business, or possessed by an alien; registration required for "machine gun" pistols of calibers larger than .30 or 7.62mm).

All the above statutes were repealed, sometimes in stages. *See* 1959 Mich. Pub. Acts 249, 250 (sales ban applies only to actual machine guns); 1959 R.I. Acts & Resolves 260, 260, 263 (exempting .22 caliber and raising limit for other calibers to 14); 1975 R.I Pub. Laws 738, 738–39, 742 (sales ban applies only to actual machine guns); 1963 Minn. Sess. L. ch. 753, at 1229 (following federal law by defining "machine gun" as automatics only); 1965 Stats. of Calif. ch. 33, at 913 ("machine gun" fires more than one shot "by a single function of the trigger"); 1972 Ohio Laws 1866 (exempting .22 caliber; for other calibers, license required only for 32 or more rounds); H.R. 234, 2013–2014 Leg., 130th Sess. § 2 (Ohio 2014)

(full repeal); 1975 Va. Acts, ch. 14, at 67 (defining "machine gun" as automatics only).

None of the state laws prohibited possession of standard firearms and magazines. California and Ohio had licensing systems, but Ohio did not require a license to purchase any firearm or magazine—a license was needed only for the simultaneous purchase of the magazine and the relevant firearm. *See* David Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Albany L. Rev. 849, 865 (2015). Rhode Island and Michigan limited sales, but not possession. Minnesota's statute applied only to altering a firearm from the way it was manufactured. Virginia's law forbade carrying certain arms in public and registered some handguns.

The only place a ban on possession existed was the District of Columbia. A 1932 law banned any firearm that "shoots automatically or semiautomatically more than twelve shots without reloading." Pub. L. No. 72-275, §§1, 8, 47 Stat. 650, 650, 652.[11] So historically, only the

[11] Soon after Home Rule was granted, the District in 1975 prohibited functional firearms in the home and handguns altogether. When the Court ruled these prohibitions unconstitutional in *Heller*, the District enacted a new ban on magazines over 10 rounds. 2008 D.C. Laws 17-372 (Act 17-708).

District of Columbia banned the *possession* of arms, like Massachusetts does, and even that D.C. limit was 12 rounds. Only California's law went as low as 10 rounds, like Massachusetts's does—and California had a licensing system, not a prohibition.

None of the above laws is "longstanding," for all have been repealed. Something that is "longstanding" has two characteristics: being "long" and being "standing." *See* 1 Shorter Oxford English Dictionary 1625 (1993) ("*adj*. Of long standing; that has existed a long time, not recent.").

A law that is 33 years old is not "longstanding." The District of Columbia's handgun ban was that age when the Court ruled it unconstitutional in *Heller*. The earliest present-day ban on ordinary rifles is California's 1989 statute. Cal. Stats. 1989, ch. 19, §3, p. 64. The earliest modern magazine ban is New Jersey's 15-round statute of 1990. 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. §2C:39-1(y), -3(j)). Because current bans are newer than the *Heller* handgun ban, no current ban resembling the statutes and regulations at issue in this case can be considered longstanding.

CONCLUSION

The decision below should be reversed, and the bans should be held unconstitutional.

Respectfully submitted,

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APPENDIX

Glenn H. Reynolds is Beauchamp Brogan Distinguished Professor of Law at the University of Tennessee College of Law, where he teaches constitutional law and technology law. His constitutional scholarship has been published in the *Columbia Law Review*, *Virginia Law Review*, *University of Pennsylvania Law Review*, *Wisconsin Law Review*, and *Northwestern University Law Review*. His scholarship was cited by this Court in *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009). The Seventh Circuit cited his scholarship as a model of "originalist interpretive method as applied to the Second Amendment." *Ezell v. City of Chicago*, 651 F.3d 684, 699 n.11 (7th Cir. 2011). In addition to the above, his right to arms scholarship has been cited by the Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits; by federal district courts in Wisconsin, Illinois, and Texas; and by the Supreme Courts of Kentucky and Oregon.

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the "The Right to Bear Arms" entry for *The Oxford International Encyclopedia of Legal History* and on "The Second Amendment" in *The Oxford Companion to the Supreme Court of the United States*. His Second Amendment scholarship has been published in the *Yale Law Journal*, *Georgetown Law Journal*, and *Journal of American Legal History*.

Joyce Malcolm is Patrick Henry Professor of Constitutional Law and the Second Amendment at George Mason University, Antonin Scalia Law School. She is author of seven books on British and American history, most notably *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Harvard Univ. Pr. 1994). The book was cited by the majority opinions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, and by Justice Thomas's concurrence in *Printz v. United States*. It has also been cited by the D.C., Fourth, and Ninth Circuits; by federal district courts in Oregon, Pennsylvania, Texas, and West Virginia; and by the Oregon Supreme Court, Oregon Court of Appeals, and Washington Supreme Court.

Nicholas J. Johnson is Professor of Law at Fordham University, School of Law. He is co-author of the first law school textbook on the Second Amendment, *Firearms Law and the Second Amendment:*

Regulation, Rights, and Policy (Aspen Pub. 2d ed. 2017) (with David B. Kopel, George A. Mocsary, and Michael P. O'Shea). The casebook has been cited by *People v. Chairez* (Sup. Ct. Ill.), *Drake v. Filko* (3d Cir.) (Hardiman, J., dissenting), *Grace v. District of Columbia* (D.C. Cir.), and *Heller II* (Kavanaugh, J., dissenting). Prof. Johnson is also author of *Negroes and the Gun: The Black Tradition of Arms* (Prometheus 2014). His articles on the right to arms have been published by the *Hastings Law Review*, *Ohio State Law Journal*, and *Wake Forest Law Review*. Other courts citing his right to arms scholarship include the Seventh Circuit, Eastern District of New York, and Washington Court of Appeals.

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district courts in California, Florida, Illinois, New Mexico, Utah, and Wyoming.

The Cato Institute is a non-partisan public policy research foundation that advances the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was founded in 1989 to restore the principles of constitutional government that are the foundation of liberty.

The Second Amendment Foundation is a non-profit foundation dedicated to protecting the right to keep and bear arms through educational and legal action programs. SAF has over 650,000 members, in every State of the Union. SAF organized and prevailed in *McDonald v. City of Chicago*.

The Citizens Committee for the Right to Keep and Bear Arms is a national grass roots organization dedicated to preserving the individual right to keep and bear arms enumerated and codified under the Second Amendment and numerous state constitutions.

Jews for the Preservation of Firearms Ownership is a non-profit educational civil rights corporation. Its work centers on the history of gun control. JPFO has 6,400 members, 11,000 contributors, and 36,000

website subscribers. Based upon original historical research and analysis, JPFO has observed that the 70 million innocent civilians murdered in the 20th century's eight major genocides were victims of "gun control" laws and policies that disarmed them.

Millennial Policy Center is a research and educational center whose mission is to develop and promote policy solutions that advance freedom and opportunity for the Millennial Generation.

The Independence Institute is a non-profit Colorado public policy research organization founded on the eternal truths of the Declaration of Independence. The Institute's amicus briefs in *District of Columbia v. Heller* and *McDonald v. City of Chicago* (under the name of lead amicus Int'l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*). The arms law scholarship of the Independence Institute's Research Director, David Kopel, has been cited by the Supreme Courts of California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, New Hampshire, Oregon, Rhode Island, Washington, Wisconsin, and Wyoming. Kopel has also been cited by the D.C., Fourth, Fifth, Seventh, Ninth, and Tenth Circuit Courts of Appeals,

and by intermediate appellate courts of Alabama, California, Colorado, Washington, and Wisconsin.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,484 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point, proportionately spaced Century Schoolbook font.

Dated this 29th day of August 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2018, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the First Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 29th day of August 2018.

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