UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION FOR GUN RIGHTS, and JOSEPH R. CAPEN, Plaintiffs,

vs.

MAURA HEALEY, in Her Official Capacity As Attorney General of the Commonwealth Of Massachusetts, Defendant

No. 22-11431-FDS

BEFORE: CHIEF JUDGE F. DENNIS SAYLOR

MOTION HEARING VIA ZOOM

John Joseph Moakley United States Courthouse
Courtroom No. 10
1 Courthouse Way
Boston, MA 02210

May 30, 2023
11:00 a.m.

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APPEARANCES:

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PROCEEDINGS

THE CLERK: Court is now in session in the matter of Capen, et al. vs. Healey, et al, Civil Action Number 22-11431.

Participants are reminded that photographing, recording or rebroadcasting of this hearing is prohibited and may result in sanctions.

Would counsel please identify themselves for the record, starting with the plaintiff.

MR. HARVEY: Thomas Harvey for the plaintiffs.

11:00AM THE COURT: Good morning.

MR. HARVEY: Good morning, your Honor. I think Barry Arrington should be on also for the plaintiffs.

THE CLERK: Attorney Arrington, I think you're on moot.

MR. ARRINGTON: I was on moot. I'm sorry. This is Barry Arrington appearing for the plaintiffs.

THE COURT: Good morning.

MR. ARRINGTON: Good morning.

THE COURT: And for the Commonwealth?

11:01AM MS. GREEN: Good morning, your Honor. Assistant Attorney General Julia Green for the Commonwealth, and with me is Grace Gohlke but off camera.

THE COURT: Good morning. This is a hearing on plaintiff's motion for a preliminary injunction. As you know, it is something of an unusual preliminary injunction motion in

the sense that the case is not three days old and there has not been extensive briefing, or there has been extensive briefing, I should say, but I do want to keep this argument within reasonable time boundaries. This may or may not be the main event, so why don't we see if we can't keep the argument on both sides to let's say a half hour or 45 minutes, and with that, who is taking the lead for the plaintiffs?

MR. ARRINGTON: Your Honor, this is Barry Arrington. I'll be arguing for the plaintiffs today.

11:02AM THE COURT: All right, go ahead.

MR. ARRINGTON: So I'll start from the beginning, which is we're dealing with the Second Amendment here, which we know from *McDonald* is a fundamental right and incorporated as applicable to the states under the Fourteenth Amendment as one of the core liberties necessary for our ordered system of liberty, and I think that one of the undercurrents of *Bruen* from last summer was that the inferior courts had not been recognizing that sufficiently, for example, there was in the *Duncan* case out of the Ninth Circuit, the dissent there went

11:03AM back and looked at all of the Ninth Circuit cases, and the government was 53 and 0 in the Ninth Circuit.

And so what other incorporated right does the government always win? And, of course, the answer is none, and I think that one of the things that Justice Thomas writing for the court was emphatic about is that the way that the inferior

courts have been treating the rights since McDonald has not been consonant with the court's intent in *Heller* and *McDonald*, and that was one of the things that *Bruen* was clarifying.

And so as we know, *Bruen* did not establish a new test for the Second Amendment, it simply said this is the test that we announced in *Heller* that you guys have been kind of ignoring, and now we want you to really start applying it, and it abrogated a number of cases, including the cases in the First Circuit that had not followed the *Heller* precedent faithfully and reiterated the *Heller* test, which is a two-step test, text in history and tradition.

11:04AM

Under the text prong, all that is necessary is for the plaintiffs to show that their conduct is protected by the text of the Second Amendment, and in the context of a bearable arm, that's an extraordinarily light burden, because all they have to show, look, we want to possess these bearable arms, this law prohibits us from possessing these bearable arms, therefore, text is met.

The *Bruen* court said that it is presumptively

11:05AM

protected by the Constitution, the right to hold, possess in the bearable arm is presumptively protected by the Constitution.

Another way of saying that is that the states under a faithful application of *Bruen*, the state law at issue here is presumptively under the Constitution. If the Constitution

presumptively protects it, the arms that it has banned, then it is presumptively in the Constitution.

That's not, of course, where the analysis ends. The next step is if the state -- the plaintiffs have met their burden, as they have in this case, the state may rebut that presumption of unconstitutionality by showing that its law is consistent with the nation's history and tradition of firearm regulation. And in the way that it does that, it goes back to the founding era and shows analogous statutes from the founding era.

11:06AM

In this case, that's impossible, and why do we know that that's impossible? Because in *Heller*, the courts have said that absolute bans of commonly-owned arms, there's nothing in the founding era remotely, where the court used "remotely" analogous to that, and, therefore, the state is not able to bear its burden under the history and tradition test. It's just that simple.

In the materials that we provided, the plaintiffs have shown the court that these arms are owned by literally millions of law-abiding citizens for lawful purposes, and I think it's significant that in the *Friedman* case, which I cited in the briefs, Justice Thomas, the author of *Bruen*, and Justice Scalia, the author of *Heller*, talk about what that means, and the course of state is right, the *Friedman* dissent is from denial of certiorari is not binding precedent, but it's

11:06AM

certainly, the author of *Bruen* and the author of *Heller* are speaking about what *Heller* meant. It's sufficient for the court to set up a tight notice about what Justice Scalia and Justice Thomas were saying, and Justice Thomas said something very, very simple. He said it's what? These type of rifles, AR-15-type rifles are owned by millions of law-abiding Americans for lawful purposes, and here's the main thing that he said, "That is all that is necessary for the Second Amendment to protect them under our precedence."

11:07AM THE COURT: Let me stop you there. So, as I understand it, the issue is or one of the issues is are these weapons in common use for lawful purposes? That test requires or for something to not be covered by that, it has to be dangerous and unusual, as I understand it. It's conjunctive. They have to prove it's both dangerous and unusual, and I think we're talking about here what is unusual.

But it seems odd to me that this standard is driven by the market. In other words, that the constitutionality depends on cash register receipts. That's bizarre to me, particularly

11:08AM since we're now looking at what's happening in 2023 as opposed to what happened in 1791 or 1868, so, you know, the more of a particular type of weapon that someone buys, the more constitutional it becomes.

I just -- I don't think the Supreme Court said that, and, I mean, if that winds up being the standard, then we live

with that, but it seems to me bizarre to say that all you need to show is that lots of people have these things. I mean, you know, lots of people have fentanyl, millions of people probably, you know, have illegal drugs. That's not the standard for whether or not you can ban it.

MR. ARRINGTON: It's also not protected by the Second Amendment, your Honor.

THE COURT: Well, all right, let's talk about the word is "unusual," I think, right? What does it mean to be unusual? Would you agree that the government can regulate sawed-off shotguns?

11:09AM

MR. ARRINGTON: Certainly, *Heller* said as much.

THE COURT: Okay. And why?

MR. ARRINGTON: And it said because -- it specifically -- they said that because sawed-off shotguns fall within the category of dangerous and unusual weapons.

THE COURT: But why? That's circular, but the question is why. What is it about sawed-off shotguns that makes them usual.

11:10AM

MR. ARRINGTON: They're not commonly possessed by common citizens for lawful purposes. That's what *Heller* says.

THE COURT: It's as simple as that, if someone designs a surface to air missile that like an iPhone is cheap and commonly available and lots of people say, hey, that's cool, I want to buy one, it now becomes constitutional because a lot of

people have bought it. In ten years now if the technology changes, things become constitutional that are not now constitutional?

MR. ARRINGTON: So I will say two things: One, I don't have anything to say about science fiction scenarios in the distant future, but --

THE COURT: Well, in 1791, this would have been science fiction, the idea you have an automatic weapon that is readily purchasable, right, I think people would have thought that was science fiction in 1791.

11:10AM

MR. ARRINGTON: First of all, we're not talking about automatic weapons, we're talking about semiautomatic weapons.

THE COURT: Okay, same.

MR. ARRINGTON: Huh?

THE COURT: Same, a semiautomatic weapon to the founding fathers who were, you know, familiar with muskets and pistols and fouling guns, a semiautomatic pistol would have been science fiction to them.

MR. ARRINGTON: So both *Heller* and *Bruen* talked about that, the fact that they were science fiction to the founders means -- I mean, the Internet would have been science fiction to the founders. Does that mean that you don't have a right to free speech on the Internet? Telephones, TVs, radios, those all would have been science fiction to the founders.

11:11AM

Bruen, *Caetano* and *Heller* all specifically addressed

the fact it would have been science fiction to the founders, and they said just as those things, which were not imaginable to the founders but protected by the First Amendment, weapons that were not imaginable to the founders are protected by the Second Amendment.

Now, the issue with respect to semiautomatic weapons, I hope the court would agree that semiautomatic handguns are protected by the Second Amendment. That's what *Heller* held, right? And those same semiautomatic handguns, the argument the court just made would have been addressed to those. Semiautomatic handguns would have been science fiction to the founders. The court specifically held in *Heller* that handguns, which includes semiautomatic handguns, are protected by the First Amendment or Second Amendment.

11:12AM

And, by the way, the context in which the court held that these semiautomatic handguns are protected by the Second Amendment is very, very important because what had happened mere months prior to the time *Heller* was argued, at that time the largest mass shooting in the history of the nation, Virginia Tech mass shooting had occurred, and that attack occurred with semiautomatic handguns, and D.C., as I pointed out in my brief, pointed that out to the court, said, look, these semiautomatic handguns that are issued in this case were just used in a mass shooting, and the court said, yeah, we understand that that's a problem, but you can't ban them.

11:12AM

THE COURT: Let me back up. The question in my mind or one of the questions is what does it mean to be dangerous and unusual? And I'll come back to dangerous in a moment. Unusual. You say it's market driven, if millions of people have them, boom, done.

MR. ARRINGTON: I don't say that. This is what *Heller* said, that the weapons that are commonly possessed by law-abiding citizens are protected by the Second Amendment. It's not my view, it's what *Heller* said.

11:13AM THE COURT: Commonly possessed or commonly possessed for legitimate purposes, like defense of hearth and home, hunting or shooting.

MR. ARRINGTON: For lawful purposes is what it said, commonly possessed for lawful purposes.

THE COURT: So, again, it's just simply commonly possessed for all practical purposes is the end of the story, either it's common or it's not? Sawed-off shotguns --

MR. ARRINGTON: Justice Thomas and Justice Scalia specifically said in their *Friedman* dissent, the fact they're

11:14AM owned by millions of people, that's all that's necessary. We don't need to guess about what Justice Thomas and Justice Scalia meant by common.

THE COURT: If they're possessed by 10,000 people, is that enough? 100,000? Is it a numerical standard?

MR. ARRINGTON: Well, if we're talking about 10,000 or

100,000 instead of tens of millions or over 150 million, we might want to indulge in those sorts of hypotheticals, but whatever commonly possessed meant, it certainly applies in this case where tens of millions of people own these weapons.

THE COURT: All right. Let me turn to the dangerous part. All weapons are dangerous, right? A BB gun is dangerous in context, right, by design and intent of purpose? Firearms are dangerous, that's the point of them. Does that word mean anything? Does it mean things that are unreasonably or unusually dangerous or present an unusual hazard to, you know, bystanders or others when used for lawful purposes, does that have any meaning?

11:15AM

MR. ARRINGTON: So I will go to Justice Alito's concurrence in *Caetano*, who said if *Heller* tells us anything, it's that a weapon may not be banned merely because it's dangerous. As you're saying, all weapons are dangerous, and if the court --

THE COURT: The standard is dangerous and unusual, right, so it can't be that every weapon is dangerous, or that standard has no meaning, right?

11:15AM

MR. ARRINGTON: That's why Justice Alito said it was a conjunctive. If you say dangerous weapons are not protected, that means no weapons are protected.

THE COURT: Right, and if you just say unusual --

MR. ARRINGTON: You also have to prove they're

unusual.

THE COURT: But you have to prove they're dangerous and you have to prove they are unusual, and since all weapons are dangerous, it can't be a tautology. That word has to mean something. It has to be a dangerous weapon. A kitchen knife can be dangerous, so it has to mean something, right? Unusually or unreasonable dangerous in the context of lawful purposes, how about that?

MR. ARRINGTON: Well, the sentence conjunctive, I mean, plaintiffs will stipulate that all firearms are dangerous, and so that part of it, the conjunctive part of it is met. We stipulate that all firearms are dangerous. We don't stipulate that these firearms are unusual because they're plainly not.

11:16AM

THE COURT: So the first part of the standard effectively means nothing because all firearms fall within it?

MR. ARRINGTON: The first part of the standard is -- so what you have to realize about the dangerous and unusual standard is that it said -- it didn't necessarily talk about a category of weapons, what it said is that the *Heller*'s common use test in which weapons that are in common use at the time is supported by the historical tradition of banning dangerous and unusual arms, and so under *Heller*, it is impossible to de-link the dangerous and unusual arms test from the *Miller* common use test because that's what *Heller* said.

11:17AM

Heller said that the tradition of the Second Amendment protecting weapons that are "in common use at the time," quote unquote, is supported by the historical tradition of banning dangerous and unusual arms.

Heller was talking about those at the same time. It was not limiting the common use at the time's formulation, it was explaining why it was historically justified. Common use at the time is the *Heller* test.

THE COURT: So let me try it this way. So one way of approaching, you know, thinking about this is there are firearms that people can possess for lawful purposes, most prominently, hunting, shooting, and defense of hearth and home or personal defense on the sidewalk, I guess we can include that as well, and I think I hear you saying that at least in this context, if millions of people own a particular weapon, that is enough to say that they are not -- that that weapon is not dangerous and unusual whether or not it is commonly used for hunting, shooting, defense of hearth and home or personal defense, it doesn't have to be connected to any of those lawful purposes, just because people think it's cool, or, you know, whatever, they like it, that's good enough, as long as --

MR. ARRINGTON: So it doesn't matter what I say.

THE COURT: Okay, well, tell me what is the standard.

MR. ARRINGTON: My opinion is irrelevant. What Justice Thomas and what Justice Scalia said is the fact that

millions of people own AR-15 type weapons for a variety of lawful purposes is sufficient for them to be protected.

THE COURT: But, again, even assuming that that's the opinion of the court, this is tautological, you just keep saying since they own them for lawful purposes, that's enough. Okay. Well, what are the lawful purposes? I've identified four: Hunting, shooting, defense of hearth and home, personal defense. Does it have to be tied in any way to those things? Are they reasonable to be used for those purposes? There is no limitation as long as enough people own them, it doesn't matter whether it's cumbersome, you can't carry it down the street, you know, no matter how heavy or large the weapon is, it doesn't matter as long as enough people own them, that's kind of what you're saying.

11:19AM

MR. ARRINGTON: So what you're saying is should we make empirical judgments about whether or not these things are suitable for lawful purposes, and that's specifically what *Bruen* said this court is not allowed to do.

The state urges the court to say, to come in and say these weapons are not suitable, we, the state, have come in and brought in a bunch of experts, and in their judgment it is an empirical fact that these weapons are not suitable for self-defense.

11:20AM

THE COURT: Then why can't we buy surface to air missiles? Why can that be regulated?

MR. ARRINGTON: Because surface to air missiles are not -- are not commonly held by lawful, law-abiding citizens for lawful purposes.

THE COURT: Because they're expensive, right? Or whatever, they're hard to get. Again, you keep saying as long as enough people own them, the standard is satisfied. I'm saying is there any limitation to that? Sawed-off shotguns, not enough people own them, you say, bazookas, not enough people own them.

11:21AM MR. ARRINGTON: That's what *Heller* says. *Heller* says sawed-off shotgun, you can ban them because they fit within the category of dangerous and unusual weapons.

THE COURT: And that's tautological, it is what it is, that's what you're saying, there's no objective standard there other than cash register receipts? There are lots of regular shotguns, fewer sawed-off shotguns, ergo, sawed-off shotguns are not usual, they are unusual, and, therefore, they can be regulated, and there's no objective reasonable principle there of any kind?

11:21AM MR. ARRINGTON: Justice Thomas and Justice Scalia, and Justice Alito, let's bring Justice Alito into the mix with the stun guns. He said that the fact that they're commonly used for lawful purposes is sufficient for them, and it was a numbers game. He didn't ask for an empirical study about how many times they were used in a particular self-defense

instance. *Heller* didn't ask for an empirical study about how many times they were used in self-defense situations. *Bruen* didn't say, well, you guys never ran out and did a study about whether these were actually used. None of that is necessary because, again, under Justice Thomas, Justice Alito, Justice Scalia have told us that the issue is whether they are commonly possessed for lawful purposes, and commonly possessed means just that, there's a lot of them.

THE COURT: And so it doesn't matter whether the magazine can fire 10 bullets or a hundred or a thousand, it doesn't matter whether or not that's reasonably necessary for any lawful purpose?

MR. ARRINGTON: Reasonably necessary. What is that, your Honor? That's an empirical judgment, right?

THE COURT: Sure.

MR. ARRINGTON: *Bruen* specifically said you can't do. *Bruen* said that the court is out of the business of making difficult empirical judgments for which it is not qualified. *Bruen* said we, as judges, don't know what the answer to these empirical questions, and we're not going to answer them, all that is necessary for a weapon to be protected by the Second Amendment, it is commonly possessed for lawful purposes.

THE COURT: All right. Let's talk about the consistent with historical tradition of firearm regulation analysis.

MR. ARRINGTON: Okay. So we've just talked about it. The historical tradition, according to *Bruen*, is that there is nothing in the historical tradition remotely as burdensome as an absolute ban on a commonly-used firearm, and so the state would have you say that it's the plaintiff's burden to show that these are commonly used. It is not. Plaintiff's burden is only to show that they're bearable arms, which they have, therefore, they're presumptively protected by the Second Amendment, and the law is presumptively unconstitutional.

11:24AM Now, the state could come in and say, well, they are even though we've rebutted the presumption of unconstitutionality by showing they are analogous to founding era regulations.

Well, *Heller* has already foreclosed that argument and *Bruen* has already foreclosed that argument in the context of absolute bans.

Now, this is something that the Seventh Circuit made explicit in its *Ezell* decision, and I'll just read briefly from that. "The city's firearm ban is not merely regulatory. It

11:25AM prohibits the law-abiding citizens of Chicago from engaging in target practice in a controlled environment at a firing range. This is a serious encroachment on the right to maintain proficiency in firing use, an important corollary to the meaningful exercise of the right to possess firearms for self-defense."

In other words, and that it goes on to say that *Heller* and *McDonald* differentiated between regulatory measures and absolute bans, which are categorically unconstitutional, and we would just ask the court to follow in this respect the Supreme Court Judicial Court in Massachusetts. In Massachusetts, it is already illegal, it is already categorically illegal to ban commonly-held weapons under the *Ramirez* case, which was in response to the *Caetano* case. The court looked at these stun guns, the commonly used for lawful purposes, and held that the state's absolute ban on those was unconstitutional.

11:26AM

If the stun gun, which is owned in the hundreds of thousands, meet that test, then a fortiori, these semiautomatic rifles and magazines meet that test, which were owned in the tens of millions, if not the hundreds of millions.

Now, the state comes in and said, well, we've shown a bunch of regulations from its founding era. That should be enough. *Heller* has specifically said we looked at those regulations. That's not enough. Regulations are different from bans.

11:26AM

So to go on with some of the things that the state says -- your Honor, I'm just curious about how much time I have left?

THE COURT: I'll give you a few more minutes here.

MR. ARRINGTON: Okay. Before I go on and use those

three minutes in things that the court isn't interested in, is there any other particular questions that the court has?

THE COURT: One question I have is does it -- obviously, whether we're talking about a stun gun or a semiautomatic rifle or anything, these weapons did not exist in 1791. First off, is 1791 the relevant date as opposed to 1868?

MR. ARRINGTON: That's what *Heller* -- so, in *Bruen*, the court noted that founding era is the relevant time period. It also noted that there's some sort of academic debate about whether, you know, post-reconstruction era regulations are also relevant.

The problem is it doesn't matter, just as in *Bruen*, there were no absolute bans. Absolute bans on firearms is a product of the 20th Century, and any absolute ban is inconsistent with founding era precedent whether you measure that at 1791 or 1868.

There were no absolute bans on commonly possessed arms in either of those eras, so it doesn't matter, but which is why the plaintiffs urge the court to follow *Bruen's* lead, which said that if a 20th Century precedent conflicts with prior precedent from the founding era measured in either the 18th or 19th century, it's ignored.

The state's entire case depends upon ignoring *Bruen* in that respect and relying upon these 20th Century analogs, and so the answer is the founding era means 1791, but even if it

means also 1868, it doesn't matter in this case because there were no bans.

THE COURT: So I think I hear you saying --

MR. ARRINGTON: By the way, the state admits this, the state does not deny that it cannot identify any bans.

THE COURT: Any ban on any kind of weapon as of 1791, nothing whatsoever, no regulation at all?

MR. ARRINGTON: I would just point the court to page 15 of the state's sur-reply. In fact, the evidence in the record explains why 18th century legislature did not employ weapon-specific bans. The state admits in the founding era, they did not employ weapon-specific bans.

And you know what, your Honor, as we point out, far from banning commonly-used weapons, in the founding era, men were required to use commonly owned, commonly used weapons. All the militia acts were common throughout the colonies, and the area states required all abled-body men to own commonly possessed weapons.

THE COURT: Right. But, obviously, we're talking about the development of technology, and I'm just curious about going forward. Again, if someone invents a Star Wars-type laser gun that unlike a stun gun is capable of tremendous damage, let's say, to bystanders, property, everything else, as long as enough people like them and acquire them, since, obviously, there was no regulation of any kind in 1791

concerning laser-type weapons, we're stuck, right, and no one can do anything to regulate them?

MR. ARRINGTON: So --

THE COURT: That's basically what you're saying, it doesn't matter where technology develops, as long as it becomes commonly used, we're stuck, the Constitution is in effect a suicide pact, it doesn't matter what kind of weapon technology becomes developed in the future, there is nothing anyone can do about it because there was no analogous regulation in 1791.

11:31AM MR. ARRINGTON: I decline to speculate, your Honor, about the future because I don't think constitutional law is based upon, you know, musings, contemplations, and hypotheticals about science fiction.

What I will say, it's based upon the facts on the ground that these weapons are owned by tens of millions of people for lawful purposes, and, therefore --

THE COURT: You know, on that fact, on that fact alone, the constitutionality of this ban depends, basically as long as tens of millions of people own them, you keep saying

11:32AM it, you keep coming back to the same point, that is enough, done, over, doesn't matter the historical tradition, dangerous, unusual, it doesn't matter, that one fact governs the constitutionality of this statute that lots of people own these things.

MR. ARRINGTON: That's what Justice Scalia and

Justice Thomas said in so many words.

THE COURT: Okay, let me hear from Ms. Green and then I'll give you a chance to respond.

MS. GREEN: Good morning, your Honor. I'd like to spend some time on the common use test that you've been asking about, but let me just start by giving you my road map.

This case is about the right of the people acting through the democratic process to protect their communities against certain specific combat-style weapons that are exceptionally dangerous, that are increasingly used for mass murder but rarely, if ever, used for self-defense.

Six out of the seven courts to have faced preliminary injunction motions in challenges like this one have denied the motion, and this court should do the same for three reasons:

First, the plaintiffs have failed to carry their burden at Step 1, the text of the Constitution, because they have not established that assault weapons or large capacity magazines are in common use for self-defense. And, in fact, large capacity magazines, LCMs, are not even arms at all within the meaning of the Second Amendment.

Second, at Step 2 of the *Bruen's* test, even if these weapons are covered by the Second Amendment, the act stands in a long tradition of restricting certain specific weapons that are exceptionally dangerous in relation to their self-defensive use.

And, finally, the preliminary injunction should be denied because the plaintiffs have failed to show any irreparable harm.

So, with that, let me turn to the common use issue that you were discussing with Mr. Arrington. The plaintiffs are asserting in this case that common use boils down to simple numbers. That is not consistent with the Supreme Court's -- what the Supreme Court has said about Step 1, and it's not consistent with the way the First Circuit has examined the constitutional text.

11:34AM

I think what step 1 looks at is not simple numbers, it asks whether the arm in question is a bearable arm in common use for self-defense, and self-defense is a critical component of the Step 1 test.

The best way of illustrating this is to look at the Supreme Court's own application of Step 1 in *Bruen*. This is part 3A of the *Bruen* decision at pages 2134 to 35. If you look at what the Supreme Court there says about weapons, about whether the Second Amendment covers the weapons in question, what it says is, "Nor does any party dispute that handguns are weapons in common use today for self-defense."

11:35AM

If you look at the entirety of the discussion in Section 3A, which is all about whether the conduct in question is within the Second Amendment, it is all about use in self-defense.

The word "self-defense" appears six times in six paragraphs in that discussion. More broadly, the Supreme Court was very clear in *Bruen*, and it was clear in *Heller* as well that self-defense is the central component of the Second Amendment, right, the word "self-defense" appears 49 times in *Bruen* and 32 times in *Heller*, and I think, you know, in a sort of more fundamental sense, the Supreme Court has told us in *Heller* that the Second Amendment codified a pre-existing right, and that pre-existing right was a right to self-defense. It is not a right to sporting or hunting. Self-defense is at the core at what the Second Amendment was codifying, so that's my answer to -- oh, sorry, let me move to Mr. Arrington's point about the simple numbers calculation.

11:36AM

The First Circuit made an observation about that issue in footnote 5 in the *Worman* case, in which it commented on how that test is essentially illogical because it would allow the Constitution's scope to be determined by basically market practices, so manufacturers could flood the market with a particular new weapon, you know, your example of shoulder-mounted missile launchers or some yet to be invented, like a handheld laser.

11:37AM

Manufacturers could flood the market before legislatures had time to react, and if the plaintiffs were correct, that weapon would then become constitutionally immuned to any prohibition, like the act. That can't be what the

framers had in mind with the Second Amendment, and that's what the First Circuit said in *Worman* at footnote 5.

The plaintiff's position on this issue really is relying entirely on concurrences and dissents, a dissent by two justices from a denial of certiorari, which has never garnered a vote of the full court. The sheer numbers approach has never been adopted by the Supreme Court, and nor do I expect that it ever will.

So if you don't have any questions about the test, let me just go quickly.

11:38AM

THE COURT: One thing that I can't say I think is particularly workable is this notation of, you know, it's a combat-style weapon or designed for military purposes. It seems to me that's not a particularly workable standard, doesn't seem to be the standard, and one of the issues that I have with that is probably at heart, probably every firearm was designed at some level for military purposes. Go back to Colt 45 revolvers or whatever, I mean, it just doesn't get us very far.

11:38AM

It's easy to say that a surface to air missile was designed for military purposes or an atomic bomb, but for ordinary handguns, rifles, shotguns, you know, there's no clear dividing line there, what is military, what is not. These things developed, the technology develops, and it strikes me that whatever the standard is, that that is not really a

helpful metric maybe is the way I'm thinking about it, but...

MS. GREEN: I think I understand what you're asking, and we are not relying on its military pedigree, we're really focused on its utility for self-defense, and there we're relying on the evidence that we've put into the record, which is largely unrebutted that neither assault weapons or LCMs are suitable for self-defense nor are they actually used for self-defense, and that's really what I wanted to walk through now.

11:39AM THE COURT: All right. So let me hear you.

MS. GREEN: Okay. So I particularly -- I think one of the salient characteristics is the nature of the wounds they create. This is a feature specific to these weapons. It has to do with the high velocity at which bullets leave the muzzle and the nature of the .223 calibre rounds that are fired.

These weapons cause catastrophic wounds that don't leave clean bullet holes, they destroy entire organs, and in particular we've put in statements from pediatricians saying that the types of wounds they create are practically

11:40AM unsurvivable for children. That is not a self-defensive utility. It's designed to kill enemy soldiers.

Similarly, the high velocity is designed to kill a lot of people at great distances, but it's not a self-defensive application. You're not defending yourselves from people of hundreds of yards away.

The high velocity has particularly lethal characteristics that are -- that render it unsuitable for self-defense, which are that because -- which are that essentially the bullets are so powerful that they penetrate walls. They're highly likely to hit bystanders nearby, to injure family members, so they're really not a good weapon of choice for the sort of close range, self-protective weapons that are covered by the Second Amendment.

They also, the high velocity, high kinetic energy is enough to penetrate the typical body armor worn by law enforcement. The weapons also allow criminals to engage with law enforcement from great distances, preventing engagement and subduing of mass shooters.

The capacity to accept a detachable magazine, which is one of the defining features under the Massachusetts Act allows soldiers to fire many rounds rapidly to hit a larger number of targets. That, too is not a self-defensive, it has no self-defensive utility.

The pistol grips and the barrel shrouds that are also part of the defining features test also allow for more accurate rapid sustained and more lethal fire, again, to kill more people as rapidly as possible.

With regard to LCMs specifically, having large numbers of rounds available for firing without reloading has little self-defensive utility, and, in fact, is harmful to

self-defense because there is sort of a documented tendency to fire indiscriminately in stressful situations until the magazine is empty, which has the tendency to injure bystanders and family members, whereas it's of great use in criminal mass shootings because it eliminates the gap of time necessary to reload, which is typically when victims have a chance to flee and law enforcement has a chance to take down a shooter, so for that reason, the First Circuit on a full summary judgment record concluded that it's not surprising that AR-15s equipped with LCMs have been the weapons of choice in many of the deadliest mass shootings in recent history.

11:42AM

THE COURT: Do you agree that the standard is objective? I mean, one problem I have with the statistics about how often this actually happens is it's kind of like the sales, numbers, you know, it's based on facts that, you know, can change as opposed to an objective standard. I wonder what your reaction to that is. In other words, not how the guns are designed, high velocity, to actual magazines and so forth or maybe how heavy they are, how difficult they are to use as a practical matter, you know, carrying them on the street. All that is more or less subjective but the fact that people don't ever use them for self-defense.

11:43AM

Well, what's your reaction to that? That's a statistic that I'm concerned about, again, for the same reason the constitutionality might vary depending on behavioral things

in the field.

MS. GREEN: I think the constitutionality can vary based on the nature of the weapon and the features of the weapon, and everything that I've recited is essentially evidence that they are not in common use for self-defense. That evidence consists of -- it's really twofold evidence, it's evidence of their features, and it's evidence of the actual use in self-defense, so I would say that the court does look at evidence to determine whether a weapon is in common use for self-defense, but it's both statistics on usage and the features of the weapon.

11:44AM

THE COURT: Okay.

MS. GREEN: I think the court has to look sensitively at the nature of the weapon and not simply sweep in weapons based on share ownership numbers. I think the plaintiffs essentially agree that evidence has to be taken into account in Step 1, at least insofar as you're looking at evidence of ownership statistics.

THE COURT: Okay.

11:45AM

MR. ARRINGTON: Plaintiffs don't agree to that.

THE COURT: Please continue, Ms. Green.

MS. GREEN: I'm sorry, I was going to comment briefly on LCMs and then move to history unless you'd like to direct me elsewhere.

THE COURT: Go ahead.

MS. GREEN: Just briefly, I would say that LCMs are not even arms at all, and I say that because of *Bruen's* most recent -- *Bruen* and *Heller* both spoke about the actual definition of the term "arms" being weapons of offense or armor of defense or anything that a man wears for his defense or takes into his hands or use if in raft to cast at or strike at another. LCMs are plainly not arms under either of those definitions.

The plaintiffs are relying on case law that has spoken about extending the Second Amendment to cover certain accessories that are necessary for the operation of firearms. And what I say to that is that just because the Second Amendment may confer some degree of protection on accessories, that doesn't necessarily mean that every single type of accessory out there is entitled to the full measure of Second Amendment protection.

What the Second Amendment prohibits is for the Commonwealth to come in and outlaw every type of magazine so that firearms, so that semiautomatic firearms become inoperable, but that's not what the act does. It simply acts as a size restriction on certain categories, certain magazines.

Let me be clear. We've put in evidence in the record, and our evidence is unrebutted, that there is no firearm that is rendered inoperable without a large capacity magazine. Every firearm can operate with a magazine of 10 rounds or

fewer.

So, and those are the declarations of James Yurgealitis and Ryan Busse, so I'm going to move to Step 2 in the history, unless you have any questions on those.

THE COURT: No, go ahead.

MS. GREEN: All right. As the courts that have already ruled on preliminary injunction motions in this context have held, the act stands in a long tradition of firearms regulations going back to the time of the founding and beyond that have restricted specific types of firearms that pose an extreme danger to public safety but that have limited self-defensive futility.

Specifically, there is a pattern of longstanding that when the first dangerous new weapon is introduced into society, it then begins to proliferate to the point where it is used in violent crime and only then does it get regulated by legislatures.

And sort of at the outset, I want to emphasize that unlike the laws under review in *Bruen* and *Heller*, the act here does not address a social problem that has existed since the time of the founding, but *Bruen* and *Heller* were clear that they were applying an analysis on the assumption that the problem at issue had existed since the time of the founding.

The act here is, was enacted specifically to address the problem of mass shooters of a lone individual who is able

to pick up a weapon and cause multiple fatalities in a single act of violence. This is a problem, it is a societal problem that was unprecedented at the time of the founding and that has been made possible only by dramatic technological developments such that under *Bruen*, the court applies the more nuanced analysis, and it is not required to find a historical twin.

Nevertheless, why don't I just sort of quickly give you some highlights of the historical tradition that I'm relying on. I think most importantly I point to the very earliest restrictions calling out weapons by name, which are the bowie knife restrictions of the early, early 19th century beginning almost as soon as those weapons were invented in the 1830's. This is within the living memory of the founding generation.

11:49AM

These regulations were extensive and ubiquitous. I also want to be clear that bowie knives were clearly in common use in terms of sheer numbers at the time that these restrictions were all enacted, and for that reason, I'd emphasize that the notion that weapons cannot be restricted if they're in common use is clearly debunked by historical tradition.

11:50AM

And the one example I think that is more salient from the historical tradition is Alabama's 1837 Act, which was called an act to suppress the use of bowie knives, which sought to suppress bowie knives by imposing a prohibitive sales tax of

$100, so my point being it wasn't an outright ban, but it was a sales tax designed to be so prohibitive that it would act to suppress bowie knives altogether.

States acted through a variety of different modes, including prohibitive taxes, and at least eight jurisdictions excluded bowie knives from the public sphere altogether by prohibiting public carry. By the end of the 19th century, 49 states had anti-bowie knife legislation.

The other type of weapon that I want to highlight are pocket pistols. Regulations restricting pocket pistols go back to 1686 with New Jersey's prohibition on concealed carry, and I particularly want to emphasize in the 1870s, and this is sort of contemporaneous with the 1868 Enactment of the Fourteenth Amendment, both Arkansas and Tennessee outright prohibited the sale of pocket pistols.

And then finally on the historical side, I want to draw your attention to the prohibitions on semiautomatic and automatic weapons in the early 20th Century. Semiautomatic weapons, as well as automatic weapons, were widely regulated, including being banned outright almost as soon as they began to proliferate in society in the early 1920's and 1930's.

The Supreme Court has recognized that these early 20th Century bans on fully automatic weapons were constitutional, and I want to draw your attention to the bans on semiautomatic weapons were part and parcel of the same legislation that

banned fully automatic weapons in that period.

So between 8 and 11 jurisdictions banned semiautomatic weapons altogether, and at least 23 jurisdictions restricted magazine capacity size in some way.

And I think that the single best example is that Congress in 1932 for the District of Columbia banned the possession of any firearm which shoots automatically or semiautomatically more than 12 shots without reloading.

Let me just respond to plaintiff's argument, the 20th
11:52AM Century, that you should disregard 20th Century history. The Supreme Court has never said that 20th Century history is irrelevant. In fact, on the contrary, what it said is that post-ratification history is relevant to liquidate and settle the meaning of constitutional texts.

It's only when the later history contradicts earlier testimony that the Supreme Court has disregarded it, as in *Bruen*, and I would urge you to regard 20th Century history here
11:53AM as uniquely prohibitive because it reflects really the first time that legislatures faced the particular societal problem and the technological change that is at issue in this case, and it's clear that they acted swiftly to enact legislation exactly like the act that banned the possession and sale of such weapons.

And then just before I close on the history, I want to draw your attention to the gunpowder regulations of the

founding era because I think they're particularly relevant to large capacity magazines. In particular, the statute in Massachusetts that banned the possession of loaded weapons in buildings of all sorts, including in the home, was far more restrictive of the right of armed self-defense than is ban on large capacity magazines, which does not restrict anybody's ability to keep a loaded weapon, to keep as much ammunition as they want, or to keep as many magazines they want, it only restricts the size of the container of the rounds.

11:54AM And the last point I wanted to address is irreparable harm, unless if you have any other questions on the history, I'll address irreparable harm.

THE COURT: No, go ahead.

MS. GREEN: The long and short of it is the plaintiffs haven't put in any evidence of irreparable harm at all. They haven't even made the attempt. They rely entirely on their legal claim that they are of a constitutional violation. Leaving aside the question of whether that legal claim alone is sufficient, I'd emphasize that they haven't shown a likelihood

11:55AM of success on the merits of that claim.

If they did have evidence that their right of self-defense were meaningfully impacted by the act, I think they would have put in that evidence, and they haven't, and I think on a motion for preliminary injunction, that's very significant in the analysis.

THE COURT: But normally with constitutional rights, assuming you get past Step 1 and show that your constitutional right is -- you can't exercise it, obviously, normally it's an issue of undue burden, but they're saying that this is a constitutional right to do certain things is effectively prohibited.

Do they really need to show much in the way of irreparable harm? I mean, suppose, you know, Massachusetts passed a statute prohibiting the reading of books written by people whose last name begins with the letter G, you wouldn't have to show much in the way of irreparable harm, right, you prove it's unconstitutional, and, you know, the PI more or less follows.

Why is this any different, assuming, you know, that, again, they show likelihood of success on the merits?

11:55AM

MS. GREEN: In terms of the law, I'd say the First Circuit has emphasized even in the First Amendment context that each case should be evaluated on its facts, that the presumption of irreparable harm is very limited. It's probably limited to the First Amendment context, although I appreciate the analogy to the Second Amendment context, but even in the First Amendment context, the First Circuit has emphasized that the preliminary injunction motions should be evaluated on the facts and the evidence, and here there plainly is no evidence of any impact on the plaintiff's right of armed

11:56AM

self-defense, and I think that's sort of intuitive because it's clear that plaintiffs have ample avenue of self-defense, and that assault weapons and LCMs are not genuinely useful for self-defense.

THE COURT: All right. Mr. Arrington, quick response.

MR. ARRINGTON: Sure, I'll pick up with the last issue first. *Ezell* held exactly as the court just indicated, that a ban as opposed to a regulation cannot be compensated by damages. Infringement of the Second Amendment right cannot be compensated by damages when we're talking about an absolute ban, and it was relying exactly on the analogy to *Elrod vs. Burns* in the First Amendment context.

A number of other courts have held the exact same thing in the context of bans: *Koons vs. Platkin*, which is '23, Westlaw 3478604; *Spencer vs. Nigrelli*, '22, Westlaw 17985966; and others have held that exact same thing that when you're talking about a ban on a Second Amendment right or any constitutional right, an absolute prohibition just establishing that it has occurred is sufficient.

So let's talk about this suitability issue. I think it's interesting, in *D.C. vs. Heller*, the government was arguing, well, we've left them the ability to have all these long guns, they don't need handguns, and they're just not suitable, the government said they're not suitable, they should go out and get a bunch of long guns, and the court said, well,

the fact that you've left open long guns does not rescue the fact that you have prohibited a commonly-used arm chosen overwhelmingly by the American people.

Now, here's the -- the semiautomatic handguns are the most popular weapon in American. The weapons that we're talking about right now, the semiautomatic rifles that are banned by the state are the second most popular weapon in America, so the court has a very stark decision to make. Is *Heller* in terms of ban cabined to its facts because that is the effect of what the state is arguing that, yes, we can't ban the most popular weapon in America but we sure can ban the second most popular weapon in America, and I would suggest that is obviously foreclosed by *Heller* and *Bruen*, and I would also point the court to then Judge Kavanaugh's dissent in *Heller* II where it says it makes absolutely no sense to say that semiautomatic handguns are banned or it's unconstitutional to ban them and not to say the same thing about semiautomatic rifles. Why? Because, if anything, the public safety concerns that animate the state's regulations are more concentrated with respect to semiautomatic handguns.

Again, it was making an a fortiori argument, if public safety is what you are worried about, we should be banning semiautomatic weapons because they are used to kill not dozens but tens of thousands of people, and the court said no, we can't ban those.

And why? Because they're over -- here is the essence of *Heller*, *Caetano* and *Bruen*, we will not allow the bad acts of a tiny minority to affect the constitutional rights of an overwhelming majority.

So, yes, it is beyond dispute that a few dozen maniacs have used these weapons to commit some horrific crimes, but millions of Americans use them for lawful purposes, so the issue before the court is do those few dozen maniacs, does the state get to rely upon that to basically outlaw the rights of millions of others? And the resounding answer to that from *Heller*, *Caetano*, and *Bruen* is no.

The measure of constitutionality of a weapon is its common possession for lawful purposes by law-abiding citizens, and that's what we have here.

The state gives away the store on its argument with respect to large capacity feeding devices. It admits that it can't ban them all, and I commend the state for its candor for that because it can't. And why can't it? Because they're arms that are protected by the Second Amendment. They're protected by the text of the Second Amendment. They're instruments that facilitate self-defense, magazines, as a general class of arm.

So does that mean that the courthouse can, the state can ban a thousand round magazine? Well, that's a different question, and just as not all firearms that are presumptively protected by the text of the Second Amendment are actually

protected because they are dangerous and unusual, and the sawed-off shotgun was the example that was used. Just because all magazines are presumptively protected because they are arms, they are necessary for the vast majority of weapons that are sold now to operate, does that mean that they can't ban the large capacity? The court might be -- my answer is not necessarily. They may be able to ban them. Well, how can they ban them? What can they do to ban them? Well, it says they're protected by the text. If they can show that there is a historical tradition of banning these analogous weapons, then they can ban these weapons.

12:04PM

Well, the problem is there are over 150 million of these out there, and, again, we're at the common use test. The state cannot demonstrate that there is a historical -- under the history and tradition of firearm regulations in this nation that magazines of 15, over 15 rounds or 10 rounds are banned by the nation.

And so, yes, so in this instance, Step 1, text, they're necessary for semiautomatic firearms to use, to operate, therefore, they're protected by the text, history and tradition, they're in common use by law-abiding citizens, therefore, the history and tradition to show that they're dangerous and unusual is precluded by that fact, and so the state's argument that they can ban magazines fails for that simple reason.

12:04PM

I'll also go to all of the empirical data that the state talked about. It talked about wounds and about their expert saying that they're not really good, useful, their experts saying that other weapons are better for self-defense. That is a lot of empirical data. And in *Bruen*, the court said that it is not legitimate for judges to make, quote, "difficult and empirical judgments about the cost and benefits of firearms restrictions." That's at 142 Supreme Court 2130.

That's exactly what the state is asking the court to do. It's asking it to make empirical judgments about the costs and benefits of its regulation. It's saying, well, the cost is public safety.

There's a lot of public safety issues that are issue here, and the benefit, well, there's not -- they have a lot of other things that they can use, and our experts say they don't really need them, and so we weigh the costs and benefits for us, Judge, and you can trust us. The benefits of our regulation would far outweigh the costs. It's exactly kind of an astonishing argument because that's exactly what the court in *Bruen* said you can't do.

The court asked about shoulder-mounted SAMS, so to speak. Well, obviously, that's a military weapon, most useful in military service, and they're highly unusual in society at large. And in *Heller*, the court gave two examples of weapons that can be banned. The first weapon, the first example is

dangerous and unusual weapons, and we talked about sawed-off shotguns.

THE COURT: Which a sawed-off shotgun I have to say is quite useful for self-defense. You know, it's unlike a shotgun, it's not a long gun, it's very short, and is capable of a large amount of damage and is quite useful it seems to me for self-defense and yet states can ban it.

MR. ARRINGTON: Because it's unusual.

THE COURT: It's unusual because it's been banned, but, okay, yeah.

MR. ARRINGTON: Well, at the time of the -- *Heller* held that it fell within the category of dangerous and unusual arms, and there weren't tens of millions of them out there, like there are of this one.

Now, we can talk about shoulder-mounted weapons. That comes within the second example of arms that can be banned, and that's any sophisticated military arms, and the examples that *Heller* gave were machine guns, bombers, and tanks, and we can go on and say bazookas and air surface missiles and that sort of thing.

Those can be banned because they're not in common use, and we have to go back to what was the purpose of the common use test from *Miller* to *Heller* to *Bruen*? It is the arms that are commonly used by law-abiding citizens, and going back to the founding era, those arms were available to be picked up and

used for militia service and what they had available.

And the fact of the matter is, if we go back to the founding era and you look at all of the militia laws, if AR-15s had existed in the founding era, apart from being banned, states would have required them to be available because they were the types of arms that were commonly available for self-defense in militia service, so there's simply no historical analogous regulation here. As a matter of fact, the historical record is directly to the contrary.

12:09PM The state's entire case, your Honor, the state's entire case absolutely depends upon saying that a ban, an absolute categorical ban is analogous to a regulation, but *Heller* told us it's not. *Heller* absolutely said that a categorical ban is not remotely analogous to any of the regulations.

And amazingly the very regulation that *Heller* said is not analogous, the state just trotted out a myth, and that is the gunpowder storage regulation. The state examined that very statute and said it's not analogous to a ban on a

12:10PM commonly-possessed firearm, but the state is here saying to you that it is, and that's the reason you should uphold these bans. It's not. And unless the court has any other questions.

THE COURT: That's fine. Ms. Green, last word.

MS. GREEN: Thank you, your Honor. Just three points, and I'll be very quick.

First, sawed-off shotguns, the reason that sawed-off shotguns are not common is because they were banned, and they were banned for the same reasons that semiautomatic weapons were banned in the early 20th Century and the reason that assault weapons are banned today, which is that legislatures at the time recognized that they were used, they were exceptionally dangerous, and they were used for criminal purposes but rarely, if ever, for self-defense. The same rationale applies equally here.

12:11PM Second, Mr. Arrington was emphasizing that *Heller* and *Bruen* already decided this case by saying that bans are not permissible. That is not what *Heller* and *Bruen* said. *Heller* and *Bruen* emphasized that the legislation they were reviewing was too great a burden on the right of armed self-defense. That's what it was considering. It was considering whether an outright prohibition on the most possible self-defensive weapons was what degree of burden on the right of armed self-defense, and it said that the degree of burden was far greater than any of the historical statutes that the states in

12:12PM those cases were pointing to.

Here, we have a very different situation because the burden on the right of armed self-defense is minimal, as the First Circuit concluded on a full record in *Worman*, the burden is minimal because the weapons themselves are not used for armed self-defense, and, therefore, the legislation beyond

simple outright bans is more relevant, and in the two metrics that the Supreme Court emphasized in *Bruen*, the degree of burden, how it burdens the right of armed self-defense and why it burdens the right of armed self-defense.

And with that, that brings me to my third point, which is the state is not engaged in impermissible needs and balancing here. What we're saying is at Step 1, assault weapons and LCMs are not in common use for self-defense, and, second, that the act stands in a long tradition of prohibiting, restricting, including prohibiting weapons that are exceptionally dangerous with little self-defensive use, and I want to be clear, there is no balancing involved.

12:13PM

THE COURT: All right. Thank you. I'm going to take it under advisement. Okay. All right, thank you, all.

MR. ARRINGTON: Thank you, your Honor.

(Whereupon, the hearing was adjourned at 12:14 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing transcript, Pages 1 through 47 inclusive, was recorded by me stenographically at the time and place aforesaid in Civil Action No. 22-11431-FDS, NATIONAL ASSOCIATION FOR GUN RIGHTS, and JOSEPH R. CAPEN vs. MAURA HEALEY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

Dated June 5, 2023.

s/s Valerie A. O'Hara

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VALERIE A. O'HARA

OFFICIAL COURT REPORTER