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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

)	
STEFANO GRANATA, et al.,)	
)	
Plaintiffs,)	
)	Civil Action
v.)	No. 1:21-cv-10960-RWZ
)	
MAURA HEALEY, et al.,)	
)	
Defendants.)	
)	

BEFORE THE HONORABLE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

MOTION HEARING

November 18th, 2021
1:59 p.m.

John J. Moakley United States Courthouse
Courtroom No. 12
One Courthouse Way
Boston, Massachusetts 02210

Linda Walsh, RPR, CRR
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P R O C E E D I N G S

THE CLERK: This is Granata versus Healey, and it's Civil 21-10960.

Can I ask counsel please to identify themselves for the record.

THE COURT: For the plaintiffs.

MR. CHAMBERS: Good afternoon, Your Honor. May it please the Court, Richard Chambers on behalf of the plaintiff. I'm local counsel. And with me is co-counsel.

MR. DiGUISEPPE: Good afternoon, Your Honor. Raymond DiGuiseppe on behalf of all the plaintiffs.

THE COURT: I'm always curious to know how to pronounce your names. If you hadn't said so, I would have said DiGuiseppe.

MR. DiGUISEPPE: That's pretty close. Thank you.

THE COURT: Okay. And for the defendant?

MS. FISCHER-GROBAN: Good afternoon, Your Honor.

THE COURT: Wait a minute. I have to find my page first. Okay.

MS. FISCHER-GROBAN: Good afternoon. Phoebe Fischer-Groban on behalf of --

THE COURT: Can you speak up, please?

MS. FISCHER-GROBAN: Of course. And let me move the microphone closer to myself.

THE COURT: In fact, if you want to sit down, that's

1 fine. Then it's easier. Microphones are not geared for
2 standing. So just shout.

3 MS. FISCHER-GROBAN: Phoebe Fischer-Groban on behalf
4 of the defendants, the Attorney General and the Executive
5 Office of Public Safety and Security. And with me is my
6 colleague, Grace Gohlke.

7 THE COURT: Ms. Gohlke?

8 MS. GOHLKE: Yes.

9 THE COURT: Is that how you pronounce it?

10 MS. GOHLKE: That's correct. Yes.

11 THE COURT: Okay. Now, thank you for your good
12 briefs. And I guess, since it's the defendants' motion, I will
13 hear from the defendants first.

14 MS. FISCHER-GROBAN: Thank you, Your Honor. And
15 please do let me know if you can't hear me. I'll try to both
16 be loud and put the microphone close to me.

17 The Court --

18 THE COURT: Don't try to kill your back. Either sit
19 down or speak up.

20 MS. FISCHER-GROBAN: I'll speak up. I'm happy to
21 stand.

22 The Court should dismiss the plaintiffs' complaint
23 here, which has a single count for violation of the Second
24 Amendment under 19 -- Section 19 --

25 THE COURT: Let me interrupt you for a moment --

1 MS. FISCHER-GROBAN: Of course.

2 THE COURT: -- because I need to understand exactly
3 what the plaintiff is objecting to. What exactly in the
4 legislation and the rules, what is it that you're objecting to?

5 MR. DiGUISEPPE: Thank you, Your Honor. So what we're
6 objecting to is the prohibition against the commercial sale of
7 a vast majority of the firearms.

8 THE COURT: Leaving out the vast everything, it is the
9 fact that certain -- is it the fact that certain guns can only
10 be sold by certain kinds of dealers? Is that part of it?

11 MR. DiGUISEPPE: That's part of it, Your Honor.

12 THE COURT: And the problem with that is that the
13 people who want these guns don't necessarily want to go to the
14 dealer but find them in other places?

15 MR. DiGUISEPPE: Well, that assumes that they're
16 available in other places, but it is true that they would not
17 be able to acquire them from the sources where they would most
18 commonly be sought.

19 THE COURT: And they're able to acquire them from
20 where?

21 MR. DiGUISEPPE: From licensed dealers, those who have
22 the ability to sell these arms.

23 THE COURT: Why not?

24 MR. DiGUISEPPE: Well, because they are not allowed
25 under the roster and/or the regulations. So we're concerned

1 with the firearms that are prohibited from sale, even though
2 they are widely available and in wide circulation for multiple
3 purposes around the country.

4 THE COURT: Well, exactly. But here, too. There are
5 many places, I gather from the briefs, where they can be found
6 and purchased.

7 MR. DiGUISEPPE: I don't believe that's true. I think
8 the allegations we have in the complaint, Your Honor --

9 THE COURT: So the allegation is that it is the
10 limited number of sellers that is the reason for this action?

11 MR. DiGUISEPPE: Which then leads to the limited
12 number of arms that are available for the average person to
13 acquire. And --

14 THE COURT: What do you mean by the limited number of
15 arms?

16 MR. DiGUISEPPE: Because if we're talking about what
17 is actually available in the market to the average person, and
18 we're looking to what the AG itself says is controlled by the
19 roster and the regulations, that limits the number to a very
20 small fraction of that which is actually commercially available
21 and widely available throughout the country that are arms in
22 common use for lawful purposes.

23 THE COURT: Now I'm getting confused.

24 Are you concerned about particular kinds of firearms
25 not being available, or is it that they are not available in

1 particular kinds of stores?

2 MR. DiGUISEPPE: It's that they're not available
3 generally. They're not accessible.

4 THE COURT: And how does -- how do the regulations
5 under the Massachusetts statute make them unavailable?

6 MR. DiGUISEPPE: By significantly limiting that which
7 can be sold on the commercial market to an average person, and
8 that is by virtue of the roster and the regulations.

9 THE COURT: I don't understand how they do that, how
10 the legislation or the regulations do that.

11 MR. DiGUISEPPE: Well, as the Attorney General itself
12 acknowledges, what's available for commercial sale in the
13 market to the average person is that which is at least facially
14 available on the roster, those guns which are listed on the
15 roster, but that's actually illusory in and of itself because
16 even though there are a thousand or so on there, those and
17 only --

18 THE COURT: Excuse me. The roster means certain
19 features on the gun?

20 MR. DiGUISEPPE: The roster means that which has been
21 established under the Massachusetts General Law for purposes of
22 creating a list of firearms that can be lawfully sold at the
23 commercial market level to the average person. And on that
24 roster are a list of 1,038 firearms. However, as the Attorney
25 General says, that even that small number compared to the

1 overall --

2 THE COURT: A thousand plus is a small number?

3 MR. DiGUISEPPE: Even that small number compared to
4 the --

5 THE COURT: These are not guns but kinds of guns;
6 right?

7 MR. DiGUISEPPE: They are types of guns, that's
8 correct. However, the Attorney General is not even able to
9 commit to a statement that the 1,038 which are on the roster
10 are even themselves available because that is conditioned on
11 there being -- their satisfying the regulations which have
12 additional requirements. There are not even any clarifications
13 in the briefing whatsoever that most, all, or even any of those
14 firearms on the roster are actually lawfully available. So we
15 don't --

16 THE COURT: So it's a dual issue of available -- of
17 stores that are available to sell and the kinds of guns also
18 available for sale?

19 MR. DiGUISEPPE: That's right. Because the avenue for
20 purchase of such arms for the average person is by and large
21 through the licensed dealer. And so there's your avenue,
22 right? Yes.

23 THE COURT: Okay. I just wanted to understand --
24 because it wasn't very clear to me from the papers exactly what
25 was at issue here. So I'll come back to you when she finishes.

1 Thank you.

2 MR. DiGUISEPPE: Okay. Great. Thank you.

3 MS. FISCHER-GROBAN: Thank you, Your Honor.

4 I want to make two small points related to what
5 counsel for the plaintiffs just said. I don't understand them
6 to be challenging the number of stores that may sell guns
7 or -- in any way.

8 My understanding of their challenge is the number of
9 different types of models that individuals may lawfully
10 purchase in the Commonwealth, and that doesn't mean, to your
11 point, number of guns. It's the number of models. So you
12 could have an enormous number of a particular model that could
13 be sold, but the --

14 THE COURT: But that's not how the market works.

15 MS. FISCHER-GROBAN: The essence of their claim,
16 though, is that there are models of guns that are sold in other
17 states that do not satisfy Massachusetts's statutes and
18 regulations that prohibit guns that can't meet very basic
19 safety requirements.

20 And there are two types of safety requirements. The
21 first is that the guns themselves are merchantable; that is,
22 they won't explode when you fire them. They don't fire
23 randomly when you drop them by accident. When you try to shoot
24 one bullet, it doesn't shoot erratically multiple bullets. So
25 there's the merchantability.

1 And then there are requirements for additional basic
2 safety features, like a safety device or childproofing, which
3 is measures to ensure that a child of five years old cannot
4 fire the gun. And all --

5 THE COURT: Is that statute and regulation in
6 Massachusetts unique in the country?

7 MS. FISCHER-GROBAN: Well, we know, for example, that
8 a similar regulatory scheme exists in California because it was
9 recently upheld -- somewhat recently upheld by the Ninth
10 Circuit in the *Pena* decision in which under a claim quite
11 similar to the plaintiffs' claim in this case, the Ninth
12 Circuit in that case concluded that requirements for load
13 indicators and magazine detachment mechanisms, which
14 essentially ensure that the magazine containing the ammunition
15 is detached, a requirement that California has, they upheld
16 under intermediate scrutiny in that case. They didn't come
17 to -- they assumed without deciding that those requirements
18 implicated the scope of the Second Amendment right, and they
19 concluded that those requirements, which we have here in
20 Massachusetts, too, were -- withstood intermediate scrutiny,
21 that they were reasonably related to the very important
22 Government interest of preventing accidental shootings.

23 But in this case, the Court should dismiss this claim,
24 which, again, the gravamen of this claim is that while the
25 individual plaintiffs can purchase a variety of handguns in

1 Massachusetts, that they can't purchase all of the handguns
2 that are available for sale across the country. And what's
3 important about their complaint is they do not allege that they
4 cannot buy handguns in Massachusetts and they do not allege
5 that they cannot possess handguns in Massachusetts. In fact,
6 they can do both. And it's undisputed --

7 THE COURT: But they want to decide which ones.

8 MS. FISCHER-GROBAN: That does seem to be what they
9 want. However, the question here is does this law -- does this
10 law implicate the Second Amendment? And, first of all, as we
11 described in our brief, there are three independent reasons the
12 Court can dismiss this claim. The first is that in the *Heller*
13 decision, *Heller* specifically said that there are presumptively
14 lawful measures, that are presumptively lawful under the Second
15 Amendment, and one of those is conditions and qualifications on
16 the commercial sale of guns. And that's exactly what these
17 regulations are.

18 These regulations only apply to licensed dealers of
19 handguns. In other words, they don't apply to private sales of
20 handguns, which are sales of handguns under five a year. They
21 apply to licensed gun retailers.

22 THE COURT: In a private sale can any kind of a
23 handgun be bought, including those that are not available in
24 the store?

25 MS. FISCHER-GROBAN: Yes, yes. So these -- the

1 statutory scheme and the Attorney General's regulations, which,
2 by the way, overlap with the Attorney General's regulations
3 that then have additional requirements. So plaintiffs'
4 counsel's point is that we have an approved firearms roster
5 with over a thousand firearms, guns on them, that can be sold
6 by any gun store in Massachusetts, but those guns on that
7 roster also have to comply with the Attorney General's
8 regulations.

9 But, again, it's not disputed in this case that an
10 individual plaintiff, any of these individual plaintiffs that
11 have licenses to carry, which they allege that they do, can go
12 into a gun store and buy a handgun and take it home and possess
13 it in their home for self-defense.

14 And what the statutory and regulatory requirements do
15 here is that they ensure that when those individual gun owners
16 go into a gun store and buy a gun, the gun that they're
17 bringing home is not going to be unavoidably unsafe. It is
18 going to be merchantable. It does not explode. It does not
19 fire erratically. It does not fire when it's dropped or it
20 passes a basic performance test, and it ensures that that gun
21 has a safety device on it, can't be operated by a five-year-old
22 child, and has either a load indicator or magazine detachment
23 mechanism so that there won't be accidental shooting because
24 the person who's operating the handgun doesn't know that it is
25 in fact -- that it can still have a bullet in the chamber that

1 can shoot.

2 THE COURT: Now, if a user of a gun goes to New
3 Hampshire or Rhode Island or whatever and buys a gun that does
4 not fit these requirements, is that person in violation of the
5 Massachusetts rules?

6 MS. FISCHER-GROBAN: My understanding is that under
7 federal law, a purchaser of a firearm in a state -- it has to
8 be facilitated -- and I'm sure that plaintiffs' counsel can
9 confirm this -- it has to be facilitated by a Massachusetts
10 dealer. So a Massachusetts resident to buy a new handgun, I do
11 believe that purchase by federal law, not by state law, has to
12 be facilitated through a Massachusetts dealer.

13 THE COURT: But that's not -- the federal law is not
14 before us.

15 MS. FISCHER-GROBAN: Precisely. Right now it is about
16 the state laws that governs what Massachusetts gun retailers --
17 licensed gun retailers can sell.

18 THE COURT: But it's the federal law that ultimately
19 decides what can and cannot be done, then, according to what
20 you tell me?

21 MS. FISCHER-GROBAN: The federal law, again, is not
22 before the Court.

23 THE COURT: I understand that. I'm just trying to
24 understand the legal mechanisms.

25 MS. FISCHER-GROBAN: My understanding is that -- my

1 understanding is that a Massachusetts resident, if they're
2 going to buy a new gun and they want to buy it in another
3 state, that to bring that gun back into the United States --
4 United States -- Massachusetts, that purchase has to be
5 facilitated by a Massachusetts dealer.

6 THE COURT: By a dealer who may not have permission to
7 sell that particular kind of gun?

8 MS. FISCHER-GROBAN: I believe then that the -- that's
9 right. That's correct.

10 THE COURT: So a Massachusetts resident going to
11 another state to buy a gun that he can't buy here legally,
12 can't buy it elsewhere -- can buy it elsewhere legally but he
13 can't bring it into Massachusetts legally?

14 MS. FISCHER-GROBAN: I believe that he can't -- I
15 believe that he can't buy it new elsewhere and bring it -- the
16 purchase has to be of a new firearm that is bought by a
17 licensed dealer elsewhere by federal law would have to be
18 facilitated through a Massachusetts dealer.

19 THE COURT: But in any event, it's not before us, so
20 I'm going to stop.

21 MS. FISCHER-GROBAN: That's correct.

22 The first basis on which to dismiss this claim is that
23 these are conditions and qualifications on the commercial sale
24 of arms. There are product safety regulations that ensure that
25 the guns that are sold in Massachusetts, which they are --

1 there are, you know, many handguns that are sold in
2 Massachusetts and possessed by lawful possessors of those guns
3 for all sorts of lawful purposes, including self-defense --
4 that those guns are merchantable, that they are not defective,
5 and that they have basic safety features to ensure that they
6 don't accidentally --

7 THE COURT: Do the regulations allow one of these
8 dealers to sell any gun that fits the description of what is
9 appropriate in Massachusetts, that includes all the
10 requirements that Massachusetts requires, but that -- part of
11 what I don't understand is whether that dealer is limited in
12 particular guns to sell even if they -- even if they fit the
13 regulations; is that correct or not?

14 MS. FISCHER-GROBAN: The way that the process works by
15 state law is that the Executive Office of Public Safety and
16 Security maintains this approved firearms roster. In order for
17 a licensed dealer to sell a handgun, it has to be on that
18 roster. The way it appears on that roster is that the
19 manufacturer has to submit it to the roster. So in other
20 words, it's not true that merely if a gun satisfies the
21 requirements of Massachusetts law that it can be sold. It has
22 to be submitted to the state, to the Executive Office of Public
23 Safety and Security that then puts it on the roster.

24 THE COURT: If that's the case, then your imaginary
25 desire -- person desiring a gun can't really go to Rhode Island

1 and buy it and get it back through a merchant here.

2 MS. FISCHER-GROBAN: That's correct. The
3 Massachusetts merchants can only --

4 THE COURT: You can't buy it outside and bring it in,
5 nor can he buy it here because it's not available here?

6 MS. FISCHER-GROBAN: That's correct.

7 THE COURT: On the other hand, is it available if he
8 goes to his neighbor who happens to have the gun he likes and
9 he buys it but it's not on the list?

10 MS. FISCHER-GROBAN: Absolutely. If they were to
11 transact in a private transaction, so long as that neighbor
12 doesn't sell more than five firearms a year, of course he can
13 purchase that gun from his neighbor and possess it in his home.

14 THE COURT: Okay.

15 MS. FISCHER-GROBAN: The second independent basis for
16 dismissing the claims is that regulations like this are --
17 they're presumptively lawful, they impose only a de minimis
18 burden on Second Amendment rights because there are so many
19 handguns available for sale in Massachusetts, and there is the
20 availability for private transactions of any handguns.

21 But, also, these kinds of regulations are safety
22 regulations that are outside of the historical understanding of
23 the Second Amendment guarantee. On that basis we cited the
24 1821 Maine law, which is -- it's analogous to this type of
25 regulation because it's a firearm safety regulation. It

1 doesn't prohibit the possession of firearms, and it doesn't
2 prohibit the sale of firearms. It just ensures that when those
3 guns are sold that those guns are safe for the gun owner that
4 takes them.

5 So for these reasons, the claim can be dismissed
6 because it doesn't implicate the core Second Amendment right of
7 possessing a firearm in the home for self-defense because in
8 Massachusetts you can do that, and these regulations do not
9 prohibit you from doing that and do not prevent you from doing
10 that.

11 THE COURT: Okay.

12 MS. FISCHER-GROBAN: If the Court would like, then, I
13 can discuss the application of intermediate scrutiny if the
14 Court concludes that, assuming that the Second Amendment is
15 implicated here.

16 So assuming that the Second Amendment is implicated
17 here, which, again, there are two independent bases to conclude
18 that it's not, if the Second Amendment is implicated here, then
19 no more than intermediate scrutiny applies, and that's because
20 these regulations -- they don't approach that core Second
21 Amendment right of possessing a gun in your home, which, again,
22 you can do in Massachusetts lawfully. And any burden on that
23 core Second Amendment right is only de minimis because, again,
24 you can go into a gun store and buy a variety of handguns, or
25 the plaintiffs in this case can, and then they can take them

1 home and lawfully possess them in their home for lawful
2 purposes.

3 So for that reason, as the First Circuit concluded in
4 the *Gould* case and in the *Worman* case, no more than
5 intermediate scrutiny is appropriate here. And in this case,
6 these regulations are justified by, both parties agree, an
7 important Government interest. It's important that the state
8 be able to protect gun owners from guns that are either
9 shoddily made and are prone to explode or fire erratically or
10 fire when dropped, and to protect gun owners, and particularly
11 their families and unauthorized users of those guns, from guns
12 that don't have a safety mechanism or aren't childproof or
13 don't have a load indicator indicating that there is actually a
14 round in the chamber so the firearm will shoot if you pull the
15 trigger.

16 So this is an important Government interest, and in
17 this case, as we cite in our brief --

18 THE COURT: So the guns that satisfy Massachusetts
19 regulations wouldn't kill the director of a movie accidentally
20 because the regulations are such that you can tell whether it's
21 loaded or not?

22 MS. FISCHER-GROBAN: Well, I presume you are referring
23 to the Baldwin incident, and I don't know the details of that
24 incident.

25 But I can say that accidental shootings are an

1 incredibly serious problem that these regulations and laws are
2 designed to address. And we cite in our brief the GAO report
3 that contains this detailed study on accidental shootings that
4 cause both death and injuries, and that report is very
5 compelling evidence for the proposition that safety devices,
6 like are required in the Attorney General's regulations,
7 prevent deaths from accidental shootings that are caused by an
8 individual not knowing that the gun has a round in the chamber.
9 And so for that reason, these regulations satisfy intermediate
10 scrutiny.

11 So even assuming the Second Amendment is implicated,
12 which, again, these regulations are consumer safety regulations
13 that do not approach the core Second Amendment right and they
14 do not implicate the Second Amendment, but even assuming that
15 they do, they satisfy intermediate scrutiny under the tests
16 laid out in *Gould* and the subsequent gun cases.

17 THE COURT: Thank you.

18 MS. FISCHER-GROBAN: Thank you, Your Honor.

19 THE COURT: Mr. DiGuiseppe.

20 MR. DiGUISEPPE: Yes, Your Honor. Thank you.

21 So I think it's really important to look at what's
22 going on here. I mean, the theory of the Attorney General's
23 case is that they are targeting these guns which are inherently
24 defective and are prone to explode and may explode or blow up
25 in your face or fire uncontrollably or accidentally go off,

1 there's no evidence whatsoever that any of the guns at issue
2 here is that type of gun.

3 We're talking about guns that are commonly used
4 throughout the country for lawful purposes throughout all the
5 markets except in one or two or three states, this state and
6 California and maybe New York. It can't be the case and the
7 market wouldn't allow realistically that if these guns were to
8 do these terrible things, they would be commercially available
9 all around the country. They necessarily are not defective by
10 nature.

11 The authority that's invoked expressly by the Attorney
12 General for purposes of justifying these regulations is that
13 they have authority to prevent deceptive or unfair sale of
14 defective products that do not perform as warranted. Clearly,
15 the firearms that are at issue here are not that type. We're
16 talking about commercially available, widely available arms
17 that are used all over the place for lawful purposes.

18 THE COURT: Well, they may be, but they certainly do
19 damage.

20 MR. DiGUISEPPE: They do damage, but inherent
21 dangerousness is not the test. If that were the test, nothing
22 would be allowable. *Heller* made quite clear that the test for
23 purposes of whether an arm is protected is simply whether it is
24 dangerous and unusual and if it's commonly used for lawful
25 purposes. If it's not both --

1 THE COURT: Is your primary attack on the limited
2 number of stores that can sell or on the regulations that
3 pertain to the safety issues or both?

4 MR. DiGUISEPPE: It's both because of the impacts.
5 And it's, again, illusory to look just at the roster. I mean,
6 even we see the roster that's limited in and of itself, but
7 it's not the case that what's on the roster is actually
8 available. And if you look at the Attorney General's
9 arguments, they can't even say how many are actually lawful in
10 Massachusetts because of the operation of the regulations.
11 They don't make a commitment to a number at all.

12 And, again, we're getting away --

13 THE COURT: Would you want them to?

14 MR. DiGUISEPPE: Well, what I'm saying is it's not
15 accurate to portray a roster as even being something that is
16 allowed for those arms to be --

17 THE COURT: Well, if you limit the number of sellers,
18 don't you limit, at least theoretically, the number of buyers?

19 MR. DiGUISEPPE: Right, you do.

20 THE COURT: I mean, I don't know that that was the
21 object of this regulation.

22 MR. DiGUISEPPE: Right, the object of the regulations
23 and the law again was to go against and try to prohibit these
24 defective arms. We're not here -- nobody is here asking to be
25 able to possess defective arms or be able to purchase defective

1 products. These are arms which *Heller* says, and as confirmed
2 in *Caetano* and as also noted in the *Worman* case, that if it's
3 commonly used, widely available for lawful purposes, and it's
4 not dangerous and unusual, then that is a protected arm.
5 That's the beginning of the analysis. We're not asking for
6 defective products, and that doesn't make any sense. How could
7 it be that these arms that are widely available, which are the
8 ones of concern here, are defective?

9 THE COURT: Does widely available trump concerns about
10 whether a five-year-old child can set off the gun, for
11 instance?

12 MR. DiGUISEPPE: What trumps is the test that applies.

13 THE COURT: I'm sorry?

14 MR. DiGUISEPPE: What trumps is the tests that apply.
15 You have to look at --

16 THE COURT: I'm sorry. I'm not talking about a former
17 president. Does it supersede?

18 MR. DiGUISEPPE: Certainly. I think that we need to
19 look at what is the test that governs this analysis, and it's
20 the common use test. Is it protected? That's the first step
21 in the analysis is is the arm of the type protected by the
22 Constitution? If it is, then it's the state's or the
23 Commonwealth's burden to demonstrate that it can restrict it in
24 the manner that it's been restricted, and the justification has
25 to be tailored to some extent.

1 The justification they're using here is that we're
2 going after defective arms with no evidence whatsoever that any
3 of these arms, the ones that are listed in the complaint or any
4 of the other potentially thousands or certainly thousands of
5 firearms out there which are available, actually is defective
6 or would blow up or would fire repetitively or shoot off if it
7 were dropped. None of that has actually been shown at all.
8 And we have to look, too, and remember, importantly, that we're
9 talking about a 12(b)(6) contest.

10 THE COURT: Is Massachusetts the only state that has
11 these regulations that are designed purely for safety?

12 MR. DiGUISEPPE: You have California. And *Pena* is not
13 a great place to look as a comparison. Number one, it shows
14 that this is an outlier jurisdiction to begin with, and
15 severely then undermines the state's claim that this is
16 necessary to carry forward what they're trying to do,
17 particularly when what they say they are trying to do is to get
18 rid of defective arms when they're not showing any of these
19 arms, the ones at issue, are defective.

20 THE COURT: What do they need to show to show harm? I
21 mean, they point out that there are safety regulations that the
22 industry has come up with, as I understand the briefs, and that
23 they are saying that anything that doesn't meet those
24 requirements should not be capable of being sold. Why is that
25 wrong?

1 MR. DiGUISEPPE: Because of the implications there.
2 The consequence of that is to reduce the number of available
3 arms to a small fraction of that which are actually commonly
4 available and therefore protected by the Second Amendment.
5 They have to justify such a restriction --

6 THE COURT: Common availability in New York protects
7 people in Massachusetts?

8 MR. DiGUISEPPE: That's what the *Heller* test is. It's
9 just widely available for common -- for lawful purposes and
10 it's not dangerous and unusual.

11 THE COURT: Well, but you add not dangerous.

12 MR. DiGUISEPPE: Correct, and unusual. And dangerous,
13 remember, according to *Heller* and the cases that follow,
14 dangerous does not mean inherent propensity to cause harm.
15 Clearly all firearms can do that.

16 THE COURT: The gun that doesn't have the safety
17 mechanism that would allow a child not to be able to fire, is
18 that something that you think is necessary to have?

19 MR. DiGUISEPPE: I think given that all states, with
20 the exception of Massachusetts, California, and New York, do
21 not have this kind of regulation on those things shows that
22 they're getting by just fine. And it's not necessary or even a
23 reasonably tailored restriction to require across the board,
24 particularly when the consequence is to so severely reduce the
25 market of available arms when all those arms are technically

1 protected.

2 And the key for walking through this analysis, Your
3 Honor, if you will entertain me, is to keep in mind this is a
4 12(b)(6) motion. All of the facts and allegations have to be
5 construed in the light most favorable to the plaintiffs. We
6 have alleged throughout the complaint various allegations that
7 are either not contested or the response is not something
8 that's reasonable, or if there is a response, it sets up a
9 factual dispute which would be resolved via evidentiary
10 development, not a dismissal.

11 So if we look at, for example, the common use issue,
12 we have alleged throughout the complaint that these arms --
13 arms at issue are in common use for lawful purposes throughout
14 the country, and they are not dangerous or unusual. That's the
15 test. There's no response to that. The response is, well,
16 we're trying to make sure there aren't defective arms by virtue
17 of our own interpretation of what that is. The common use test
18 doesn't allow room for a state to come up with its own
19 interpretation of what's dangerous or unusual. It's the test
20 that's applied within the case law itself. Again, there's no
21 evidence that any of these arms that are actually at issue are
22 of the type that they stake their claim on, defective, blowing
23 up, randomly shooting. We don't have that in our case here.

24 You know, and the common use test is important
25 because, again, we allege that that's the case that they are of

1 this type. There's no response that rebuts that. That has to
2 be accepted as being true. You know, it distinguishes this
3 case from the *Worman* case, for example, because there the court
4 was considering assault -- semiautomatic assault weapons and,
5 you know, large-capacity magazines.

6 Those, the court basically got into an analysis would
7 suggest that they saw those arms as actually dangerous and
8 unusual, and its analysis was very much based upon that. And
9 they highlighted how there was no evidence that -- actually,
10 there was substantial evidence that these firearms or those
11 arms were of a particular dangerous nature and that sort of
12 thing, and that this was just a subset of an otherwise large
13 set of available arms. It's not the case here because we don't
14 have any evidence at all.

15 THE COURT: Well, it's not that they're unavailable,
16 is it?

17 MR. DiGUISEPPE: It -- essentially it is. And, again,
18 we're looking at the 12(b)(6) standards. We have alleged, we
19 have alleged factually, as a factual point, that because of the
20 operation of the regulations in the roster, there is a very
21 small and limited market of used firearms. And Mr. Chambers
22 pointed out -- made a good point that actually this used
23 sale/private sale market action is only applicable to used
24 firearms that are before October 21st, 1998. Those are the
25 only ones that could be sold privately, not just anything and

1 everything.

2 But -- you know, so it's important to remember that we
3 have alleged -- we have alleged that that's the case, that they
4 have a very limited market as a consequence of this. They have
5 shown nothing to the contrary. They come back and say, yes, we
6 are an outlier, we admit all of that, and that's great because,
7 look, we have a low gun death rate. But that's a distortion of
8 the facts as well to say that because they're including all
9 kinds of death related to guns, suicide and homicide,
10 everything else. It doesn't refer to just homicide or deaths
11 that occur by virtue of these accidental and defective problems
12 from arms that we are not even seeking to protect; right? We
13 are not even referring to that type of arm. So we've alleged
14 that. That allegation has to be accepted as true.

15 The situation is reversible of *Worman* in that we're
16 not talking about -- asking for a subset. We're talking about
17 a regulation that bans everything but a tiny subset. They're
18 trying to make it look like it's the opposite, that we're going
19 after a small group and trying to protect a small group of arms
20 when they have allowed this massive list, and it's the reverse.
21 That's not actually true. We've alleged further, over and over
22 in the complaint, that the state has less restrictive
23 alternatives.

24 THE COURT: I'm sorry. The state has what?

25 MR. DiGUISEPPE: Less restrictive alternatives.

1 That's another important part of the analysis. We've said
2 that. There is not a response to that other than that, well,
3 training and education of when that arm is sufficient, and
4 here's why we think that's the case. That's great if you want
5 to try to make a factual point about it, but that doesn't set
6 up a basis to dismiss a case. That sets up a basis for a fact
7 to be developed through evidence in a trial, not to boot the
8 whole case because there is a dispute between the parties about
9 the efficacy or availability of less restrictive alternatives.
10 We've alleged that they exist. That must be taken as true. To
11 the extent there's a response, it just creates some kind of
12 factual question that's to be resolved by this Court.

13 You know, and we pointed out as well that the safety
14 features which are at issue just aren't required on a vast
15 majority of these arms. That's why they're, you know,
16 commercially available all over the place, and to that extent,
17 it severely undermines the claimed interest here, you know, in
18 that this is really necessary at all as being helpful and
19 effective.

20 But then on top of that with the state's justification
21 being, specifically again, our authority is to regulate
22 defective products, their authority doesn't even fit with the
23 nature of the regulations because that's not what they're doing
24 here. They're targeting and prohibiting lots of arms that are
25 not defective by their very nature, and they work just fine and

1 they are otherwise protected under the constitutional test that
2 has to apply.

3 So their whole argument about the need for their rule
4 of their regulations is based on an assumption; right? It's
5 based on an assumption that by having these in place they're
6 eradicating defective products, and that is just a misportrayal
7 of the situation.

8 As I already mentioned before, we have alleged, and it
9 has to be taken true, that there is a vastly reduced and
10 limited private sale market so that it's not a realistic
11 alternative for people to turn to the nextdoor neighbor and try
12 to get the 1982 firearm that is available from him; right?
13 That's not a viable market.

14 We pointed out that they get used arms that are not --
15 don't have warranties, that are not of modern technology.
16 These people have the right to choose arms and be able to
17 acquire arms that are of the type that they feel work for them
18 from a self-defense perspective so long as, again, so long as
19 they are in common use for lawful purposes and they are not
20 dangerous and unusual, and that's all we're saying that they're
21 entitled to have here.

22 It's, you know -- I mean, the presumptively lawful
23 commercial regulations and whatnot, that whole angle of the
24 argument is also a real problem for the Commonwealth because
25 one of the cases that they highlight a number of times in their

1 brief is the *Marzzarella* case essentially. And in there, that
2 case, the Third Circuit specifically says that commercial
3 regulations on the sale of firearms do not fall outside the
4 scope of the Second Amendment. If we were to basically treat
5 all types of conditions and regulations that are of a
6 commercial nature as being presumptively lawful, that would
7 reduce to being able to prohibit all types of firearms
8 blanketly just by saying we'll put the label of a commercial
9 regulation on this. It doesn't work that way. That's not how
10 the test works. It can't operate to insulate that type of
11 regulation as the case on which they rely specifically says as
12 well.

13 You know, so we pointed out in the briefing -- right.
14 And also Mr. Chambers just noted to Your Honor's question
15 about, you know, does it matter or is it useful for purposes of
16 child safety to make sure that if that regulation of itself was
17 of significance, and he just made a good point that they already
18 have to have a trigger lock for child protection purposes.

19 And just to swing back to your earlier line of
20 questioning about out-of-state purchases, it's just not the
21 case that people have a remedy to be able to go to acquire
22 these things outside the state and bring them in. It's not
23 allowable. And effectively, it's the Massachusetts law that
24 does that because the reason why is they have to comply with
25 the actual end FFL, the person through whom the transaction has

1 to ultimately occur, has to comply with Massachusetts law but
2 for Massachusetts law and the regulations that prohibit the
3 nature of the arm because it doesn't have the conditions and
4 the features that they say are necessary to make it not
5 defective. They can't sell them. You know, that's the only
6 reason why it can't go forward.

7 I mean, for the reasons we already put out in the
8 briefs, we would say it's categorically unconstitutional or at
9 least restricts scrutiny. But even if we were to go to the
10 least or the most lenient version of the test and look at *Gould*
11 and look at *Worman*, fine, we'll look at those standards. Let's
12 take a look at them.

13 First of all, we're keeping in mind that this is a
14 12(b)(6) context. In those cases they were dealing actually
15 with motions for summary judgment, and so the evidence that
16 came in was of more significance. Here we just have to make
17 allegations that are taken as true and look at whether the law
18 would allow for the claim to proceed plausibly on its face in
19 light of what those facts establish. You know, when it comes
20 to intermediate scrutiny, it's true that *Gould* said the
21 legislature's chosen means need not be narrowly tailored to
22 achieve its end because the fit just needs to be substantially
23 related. But *Gould* went on to say specifically what that
24 means. They said that we find persuasive a certain type of
25 construction of that standard, and that was this, that the

1 state has to show a reasonable fit such that the law does not
2 burden more conduct than is reasonably necessary. That sounds
3 like an easy test to pass, but it's not in this situation
4 because --

5 THE COURT: Are there any safety regulations that you
6 think would fly?

7 MR. DiGUISEPPE: I'm sorry, Your Honor. I didn't hear
8 you.

9 THE COURT: Are there any safety regulations that you
10 would not deem to be in violation of the Second Amendment?

11 MR. DiGUISEPPE: I don't know that I can properly
12 answer that question, Your Honor, because I think we have to
13 look at them holistically. They come as a package, and we
14 can't piecemeal them out.

15 THE COURT: Is there any package of safety regulations
16 that would not offend the Second Amendment?

17 MR. DiGUISEPPE: I think the package of safety
18 regulations that would not offend them would be to ensure that
19 what you're precluding and what you're precluding is not within
20 the body of arms that *Heller* and the following -- cases
21 following have said are protected because they are in common
22 use for lawful purposes and they are not dangerous inherently
23 or unusual. I think that's the test that has to be applied.
24 I'm not making it up. It's what *Heller* said, and it's what
25 *Worman* recognized as being controlling.

1 THE COURT: Okay.

2 MR. DiGUISEPPE: So the reason why the Commonwealth --

3 THE COURT: Would you kindly conclude.

4 MR. DiGUISEPPE: I'm sorry?

5 THE COURT: Could you kindly come to the end.

6 MR. DiGUISEPPE: Yes. Sure. They can't survive that
7 test because of the reasons stated. The very basis for the
8 justification is there's a notion that's not even based in fact
9 because they're saying it's concerned about defective arms and
10 we're not even speaking about that. It's undermined by the
11 reality that it's one of three states that has these
12 regulations showing that it's not really that useful or
13 effective, and it's a distortion to say in point two
14 gun-related deaths because of the fact that it includes all
15 types of deaths.

16 So 12(b)(6) is the standard. Under that standard,
17 taking our facts as true, even under the most lenient test, the
18 case has to go forward at least into a trial that's set of
19 adjudication.

20 THE COURT: Thank you.

21 MR. DiGUISEPPE: Thank you.

22 THE COURT: Anything else, Ms. Groban? You have got
23 three minutes.

24 MS. FISCHER-GROBAN: Just a few quick comments. The
25 first comment I want to make is that I note that the plaintiffs

1 don't identify what's wrong with the requirements other than
2 the fact that it limits the number of guns that are available
3 for sale. The Attorney General's regulations have been upheld
4 by the SJC as a proper exercise of authority under Chapter 93A,
5 and the plaintiffs do not allege that the guns that they wish
6 to buy satisfy the criteria. That is to say, they don't allege
7 that they don't explode or don't fire when they're dropped.
8 They simply don't allege them.

9 They just say that those are weapons that do not
10 approve -- that do not appear on the approved firearms roster.
11 So they're not even making an argument that these requirements
12 are not -- they're not good as a public policy matter. They
13 are simply saying that they limit the number of guns and that
14 that's the problem. And they don't say that the guns that they
15 want to buy don't satisfy those criteria or do satisfy them.
16 There are no allegations related to why those guns are not
17 available for sale in Massachusetts.

18 And at the 12(b)(6) stage, what's important is they
19 simply don't allege that you can't buy handguns in
20 Massachusetts and you can.

21 I also want to address this argument about the common
22 use test. This is not a case about whether these types of
23 guns, handguns are so unusual or uncommon that they can be
24 completely prohibited because this is not a case about the
25 prohibition of handguns. There is no prohibition on handguns

1 in Massachusetts. You can buy handguns in Massachusetts. All
2 they allege is that you can only buy a fraction of the handguns
3 that are commercially available for sale across the country.
4 Even taking that as true, you can still buy handguns that
5 satisfy these products' safety requirements in the Commonwealth.

6 And I want to conclude with two points. The first is
7 that the fact that these regulations and requirements exist in
8 other states is not evidence that they don't work. And we
9 submitted evidence -- or rather, we cite to evidence from the
10 publicly available government report that we cite as the GAO
11 report showing that these types of mechanisms do work. And I
12 notice that plaintiffs' counsel, they don't identify any
13 particular of these requirements, like the childproofing
14 requirement or the requirement that the guns don't fire when
15 they're dropped, that are not -- they don't identify -- they
16 don't make an argument that many of these requirements are not
17 good as a public policy matter and don't meet the government's
18 need to keep its citizenry safe.

19 But I want to conclude with this point from *Heller*.
20 Essentially I understand plaintiffs' counsel to be saying
21 handguns are in common use. You can't prohibit people from
22 buying any model of handguns that is ever produced by any
23 manufacturer, and there is no authority for that proposition.
24 The Second Amendment doesn't protect your right to buy the
25 model of your choosing.

1 And I want to point to something that's in *Heller*,
2 which is *in Heller* at issue was a prohibition on possession of
3 handguns in the District of Columbia. And the Supreme Court
4 overturned that. But they said at the end, "We're aware of the
5 problem of handgun violence in this country, and we take
6 seriously the concerns raised by the many amici who believe
7 that prohibition of handgun ownership is a solution. The
8 Constitution leaves the District of Columbia a variety of tools
9 for combating that problem, including some measures regulating
10 handguns." And then they cite to the portion of their opinion
11 where they talk about, among other things, conditions and
12 qualifications on the commercial sale of guns. That is to say,
13 even in *Heller* they say to states, you cannot prohibit handguns
14 but you can regulate them, and that is what the Commonwealth
15 has done here. And for that reason, the plaintiffs' complaint
16 should be dismissed.

17 THE COURT: Thank you, all. I will take the papers.
18 And I much appreciated your good briefs.

19 MR. DiGUISEPPE: Thank you, Your Honor.

20 MR. CHAMBERS: Thank you, Your Honor.

21 MS. FISCHER-GROBAN: Thank you, Your Honor.

22 THE COURT: And Court is in recess I don't know until
23 when.

24 THE CLERK: Next week.

25 (Adjourned at 2:44 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Linda Walsh, Registered Professional Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing transcript is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter, to the best of my skill and ability.

Dated this 24th day of July, 2022.

/s/ Linda Walsh

Linda Walsh, RPR, CRR

Official Court Reporter