

No. 22-1478

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**In the  
United States Court of Appeals  
for the First Circuit**

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STEFANO GRANATA; JUDSON THOMAS; COLBY CANNIZZARO;  
CAMERON PROSPERI; GUNRUNNER, LLC; FIREARMS POLICY  
COALITION, INC.,

*Plaintiffs-Appellants,*

v.

MAURA HEALEY, in her official capacity as Attorney General of the  
Commonwealth of Massachusetts; THOMAS TURCO, in his official capacity  
as Secretary of Executive Office of Public Safety and Security of the  
Commonwealth of Massachusetts,

*Defendants-Appellees.*

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**Appeal from the United States District Court  
for the District of Massachusetts  
Case No. 1:21-cv-10960-RWZ (Hon. Rya W. Zobel)**

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**APPENDIX**  
—◆—

RAYMOND M. DIGUISEPPE  
THE DIGUISEPPE LAW FIRM, P.C.  
4320 Southport-Supply Road  
Suite 300  
Southport, NC 28461  
(910) 713-8804  
law.rmd@gmail.com  
*Counsel of Record*

JOSEPH G.S. GREENLEE  
FPC ACTION FOUNDATION  
5550 Painted Mirage Road  
Suite 320  
Las Vegas, NV 89149  
(916) 517-1665  
jgreenlee@fpclaw.org

*Counsel for Plaintiffs-Appellants*

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their fundamental constitutional right to keep and bear arms. Indeed, the number of handguns available for commercial sale to ordinary individuals in Massachusetts is a small fraction of the constitutionally protected handguns in common use and widely available throughout the county. The laws and regulations underlying this regulatory scheme consist of (i) sections 123, clauses 18 to 21, 128, 131K, 131  $\frac{3}{4}$  of chapter 140 of the Massachusetts General Laws (“M.G.L.”), (ii) sections 7.00 through 7.16 of Title 501 of the Code of Massachusetts Regulations (“CMR”), and (iii) sections 16.00 through 16.09 of Title 501 of CMR, as well as the related policies, practices, and customs, implemented and enforced through Defendants’ Executive Office of Public Safety and Security (“EOPSS”) (collectively referred to as the “Handgun Ban”).

2. Defendants’ Handgun Ban violates the Second and Fourteenth Amendments to the United States Constitution and must be declared unconstitutional and enjoined. The plaintiffs in this case seek this relief on behalf of themselves and all those similarly situated who have been and will otherwise continue to be deprived of their fundamental constitutional right to keep and bear handguns for self-defense and other lawful purposes.

#### **JURISDICTION AND VENUE**

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983.

4. This Court has personal jurisdiction over each of the Defendants because, *inter alia*, at all times relevant to the allegations in this Complaint, each has unconstitutionally acted, continues to act, and threatens to act under the color of laws, policies, customs, and/or practices of the Commonwealth of Massachusetts, and each has done so, continues to do so, and threatens to do so within the geographic confines of the Commonwealth of Massachusetts.

5. Venue is proper pursuant to 28 U.S.C. § 1391.

6. The Eastern Division of this Court is appropriate pursuant to Local Rule 40.1(d)(1)(C) because all parties that reside in the District reside in the Eastern Division.

#### **PARTIES**

7. Plaintiff Stefano Granata is a natural person residing in North Reading, Middlesex County, Massachusetts.

8. Plaintiff Judson Thomas is a natural person residing in Nantucket, Nantucket County, Massachusetts.

9. Plaintiff Colby Cannizzaro is a natural person residing in Granville, Hampden County, Massachusetts.

10. Plaintiff Cameron Prosperi is a natural person residing in Three Rivers, Hampden County, Massachusetts.

11. Plaintiff The Gunrunner, LLC is a limited liability company organized under Massachusetts law with its office in Middleborough, Plymouth County, Massachusetts. Plaintiff The Gunrunner, LLC is a firearms retailer licensed to sell and transfer firearms under federal law and the law of the Commonwealth.

12. Plaintiff Firearms Policy Coalition, Inc. (“FPC”) is a nonprofit organization incorporated under the laws of Delaware with a place of business in California. The purposes of FPC include defending and promoting the People’s rights—especially but not limited to Second Amendment rights—advancing individual liberty and restoring freedom. FPC serves its members and the public through legislative advocacy, grassroots advocacy, litigation and legal efforts, research, education, outreach, and other programs. FPC has members in the Commonwealth of Massachusetts, including Plaintiffs Granata, Thomas, Cannizzaro, Prosperi, and The Gunrunner, LLC. FPC represents its members and supporters—who include individual gun owners and other law-abiding persons who wish to purchase new from a licensed retailer, for self-defense and other

lawful purposes, handguns which are banned under the Handgun Ban, like Individual Plaintiffs, licensed Massachusetts firearm retailers like Retailer Plaintiff, shooting ranges, trainers and educators, and others—and FPC brings this action on behalf of itself, its members, supporters who possess all the indicia of membership, and similarly situated members of the public.

13. Defendant Maura Healey (“Defendant Healey”) is sued in her official capacity as Attorney General of the Commonwealth of Massachusetts, an independent constitutional officer responsible for regulating, implementing, and enforcing the Commonwealth’s laws and regulations related to the sales, transfer, possession, and ownership of firearms which collectively comprise the Handgun Ban and cause the injuries complained of herein. Defendant Healey has authority to cease such enforcement of the Handgun Ban consistent with the relief Plaintiffs seek through this action. *See* M.G.L. c. 12 § 1 and § 3. As detailed herein, Defendant Healey has enforced, is in fact presently enforcing, and threatening to enforce the challenged laws, regulations, policies, practices, and customs underlying the Handgun Ban, and in doing so is actively subjecting and will continue to subject Individual Plaintiffs, Retailer Plaintiff, the members and supporters of Institutional Plaintiff, and all those similarly situated to the constitutional injuries complained of in this action.

14. Defendant Thomas Turco (“Defendant Turco”) is sued in his official capacity as Secretary of the Commonwealth’s Executive Office of Public Safety and Security (EOPSS), an independent constitutional office within the Executive branch. *See* [https://budget.digital.mass.gov/bb/gaa/fy2019/app\\_19/ga\\_19/hcdefault.htm#agencies](https://budget.digital.mass.gov/bb/gaa/fy2019/app_19/ga_19/hcdefault.htm#agencies); [https://budget.digital.mass.gov/bb/gaa/fy2019/app\\_19/ga\\_19/hcnon.htm](https://budget.digital.mass.gov/bb/gaa/fy2019/app_19/ga_19/hcnon.htm) [https://budget.digital.mass.gov/bb/gaa/fy2019/app\\_19/ga\\_19/hcnon.htm](https://budget.digital.mass.gov/bb/gaa/fy2019/app_19/ga_19/hcnon.htm). Defendant Turco is responsible for overseeing the Firearms Records Bureau (FRB) through his Department of

Criminal Justice Information Services (DCJIS) and is thus responsible for regulating and enforcing the Commonwealth's laws and regulations related to the sales, transfer, possession, and ownership of firearms which collectively comprise the Handgun Ban and cause the injuries complained of herein. Defendant Turco has authority to cease such enforcement of the Handgun Ban consistent with the relief Plaintiffs seek through this action. *See* M.G.L. c. 6A § 2 and § 3. As detailed herein, Defendant Turco has enforced, is in fact presently enforcing, and threatening to enforce the challenged laws, regulations, policies, practices, and customs underlying the Handgun Ban, and in doing so is actively subjecting and will continue to subject Individual Plaintiffs, Retailer Plaintiff, the members and supporters of Institutional Plaintiff, and all those similarly situated to the constitutional injuries complained of in this action.

## STATEMENT OF FACTS

### *Constitutional Background*

15. The Second Amendment to the United States Constitution provides: "A well-regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

16. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

17. The Second Amendment is fully applicable to the States through the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010); *id.* at 805 (Thomas, J., concurring).

18. The Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). And it “elevates above all other interests”—including the Commonwealth’s claimed public safety and general welfare interests in the Handgun Ban—“the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 635.

19. The “central” holding of the Supreme Court in *Heller* is “that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.” *McDonald*, 561 U.S. at 780. And the “quintessential” firearm for self-defense in America is the handgun. *Heller*, 554 U.S. at 629.

20. “The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” *Heller*, 554 U.S. at 634 (emphasis original).

21. “Just as the First Amendment protects modern forms of communications, ... and the Fourth Amendment applies to modern forms of search, ... the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Heller*, 554 U.S. at 582 (internal citations omitted); *accord Caetano v. Massachusetts*, 577 U.S. 411, 416 (2016) (Alito, J., concurring). Thus, this protection extends to all firearms currently in common use that are not both “dangerous *per se*” and “unusual.” *Caetano* at 417 (“A weapon may not be banned unless it is both dangerous *and* unusual.”) (italics added).

22. “Dangerous *per se*” does not include the mere inherent propensity of a firearm to cause injury. *Caetano*, 577 U.S. at 418 (“firearms cannot be categorically prohibited just because they are dangerous” in the general sense of the term). Indeed, “the relative dangerousness of a



weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes.” *Id.* “*Heller* defined the ‘Arms’ covered by the Second Amendment to include “‘any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.’” *Id.* (quoting *Heller*, 554 U.S. at 581) (quoting 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)) (italics original in *Caetano*). And an arm is not “unusual” so as to fall outside the ambit of this protection so long as it is “commonly possessed by law-abiding citizens for lawful purposes *today*.” *Id.* at 420 (italics original). Handguns in this country are not only not “unusual” but are recognized as “the quintessential self-defense weapon.” *Heller*, 554 U.S. at 629.

23. Even “[c]ommercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment[.]” *United States v. Marzzarella*, 614 F.3d 85, 92, n. 8 (3d Cir. 2010). Indeed, “prohibiting the commercial sale of firearms . . . would be untenable under *Heller*.” *Id.*

24. Thus, law-abiding citizens in Massachusetts have a fundamental constitutional right to keep and bear arms, including but not limited to, buying, selling, transferring, transporting, carrying, and practicing safety and proficiency with, firearms—especially the handgun as the firearm “overwhelmingly chosen by American society” for self-defense, *Heller*, 554 U.S. at 628—as well as ammunition, magazines, and appurtenances, under the Second and Fourteenth Amendments.

25. And this right extends to *all* firearms in common use for self-defense and other lawful purposes. *Caetano*, 577 U.S. at 420. So, the fundamental, individual right to keep and bear firearms in Massachusetts and the rest of the country includes the right to acquire common, modern handguns in common use for self-defense and other lawful purposes—indeed, arms that are lawfully sold and possessed throughout the United States.

*Massachusetts' Handgun Ban*

26. The laws and regulations underlying Massachusetts' Handgun Gun, and the policies, practices, and customs designed to enforce the same, which are challenged in this action as in violation of the Second Amendment, prevent law-abiding citizens, including Individual Plaintiffs, the members and supporters of Institutional Plaintiff, and similarly situated members of the public, from purchasing, acquiring, and ultimately possessing numerous "instruments that constitute bearable arms" under the Second Amendment as arms in common use and widely available for self-defense and other lawful purposes. And they prevent licensed retailers, including Retailer Plaintiff, from selling or otherwise transferring numerous such arms to law-abiding citizens in otherwise lawful transactions, as part and parcel of the general scheme designed to outlaw these protected arms.

27. Specifically, in Massachusetts, the sale, transfer, rental, and lease of all "firearms" is strictly regulated. A "firearm" includes any pistol, revolver, or "other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches or 18 inches," i.e., all handguns. M.G.L. c. 140, § 121. It is generally unlawful for anyone except "licensed dealers" to "own or possess" a firearm without first applying for and being granted a Firearms Identification card ("FID") or a License to Carry Firearms ("LTC"). See M.G.L. c. 140, §§ 128, 129B-129C; *id.* c. 269, § 10(a).

28. And it is generally unlawful for anyone to sell, rent, lease, or otherwise transfer any handgun without first applying for and obtaining a license to engage in the commercial transaction of firearms under the provisions of M.G.L. c. 140, § 122. Even with such a license, the ability to actually engage in firearms transactions is strictly limited, as licensees are prohibited on pain of criminal and civil penalties from delivering, selling, renting, leasing, or otherwise transferring any

firearm to anyone who does not have *both* a valid permit to purchase a firearm issued pursuant to M.G.L. c. 140, § 131A, *and* an FID, unless the transferee happens to hold a LTC or happens to meet one of the narrow set of special exemptions to these general restrictions. M.G.L. c. 140, §§ 123, cl. 7-8, 131E(b).

29. On top of that, it is generally illegal for a licensee (and any other person or entity involved in the chain of commercial supply or distribution of firearms) to sell, rent, lease, transfer, or deliver any firearm that does not meet the specifications established from time to time by the Commonwealth’s “gun control advisory board” as being necessary for inclusion on the Massachusetts “Approved Firearms Roster” (“Handgun Roster”). M.G.L. c. 140, §§ 123, cl. 18-21, 131  $\frac{3}{4}$ ; 501 CMR 7.02 – 7.07. See <https://www.mass.gov/doc/approved-firearms-roster-7/download> (last visited April 29, 2021). Only firearms lawfully owned or possessed under a license issued before October 21, 1998 are exempted from this prohibition. M.G.L. c. 140, § 123. Licensees are further constrained in their ability to lawfully engage in the sale and transfer of firearms by the “Attorney General’s Handgun Sales Regulations,” i.e., 940 CMR 16.00, et seq., and “Enforcement Notices.”

30. As the disclaimer on the Handgun Roster itself declares:

Massachusetts licensed firearms dealers should note that the transfers of handguns are also subject to the Attorney General’s Handgun Sales Regulations, 940 CMR 16.00, et seq. Firearms on this Approved Firearms Roster do not necessarily comply with the requirements of the Attorney General’s Handgun Sales Regulations. Information about those regulations, as well as the Enforcement Notice may be obtained from the Office of the Attorney General and may be accessed on the website of the Attorney General ([www.ago.state.ma.us](http://www.ago.state.ma.us)) [www.ago.state.ma.us](http://www.ago.state.ma.us).

<https://www.mass.gov/doc/approved-firearms-roster-7/download>. Enforcement Notice #3, from February 2002, still featured on the Attorney General’s website, further declares that the legality of a licensee’s transfer of a firearm is contingent on the firearm’s having the child safety features

and tamper resistant serial numbers specified in 940 CMR 16.03 and 16.05, and, when it is a semiautomatic handgun, the load indicators and magazine safety disconnects specified in 940 CMR 16.05. The notice warns that “[i]f a handgun does not satisfy these three additional requirements, then it is a violation of the regulations for a handgun purveyor<sup>1</sup> to transfer that handgun even if the handgun is listed on the Approved Firearms Roster.”

[https://www.mass.gov/files/documents/2016/12/wg/ag-handgun-regulation-enforcement-  
notices.pdf](https://www.mass.gov/files/documents/2016/12/wg/ag-handgun-regulation-enforcement-<br/>notices.pdf) (last visited April 29, 2021).

31. A licensee’s violation of the restrictions imposed by this regulatory scheme is not only a crime, M.G.L. c. 140, § 128, but also constitutes an unfair and deceptive trade practice subjecting the violator to significant civil penalties, 940 CMR 16.01 – 16.06.

32. The sale, rental, lease, or other transfer of firearms by or to *non-licensed* individuals is subject to even greater restrictions. The general prohibition against the sale, rental, lease, or other transfer of firearms continues to apply, subjecting the transferor to the criminal penalties established under M.G.L. c. 140, § 128, unless the transaction fits within one of the following set of narrow exceptions for lawful transfers:

1. The transfer is to a dealer licensed under state or federal law;
2. The transfer is to a historical society, museum, or institutional collection open to the public; or
3. The transfer is to someone other than a licensed dealer, a historical society, museum, or institutional collection open to the public, and *all* of the following are true:

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<sup>1</sup> A “handgun purveyor” is defined as “any person or entity that transfers handguns to a customer located within the Commonwealth of Massachusetts,” excluding those who transfer fewer than five handguns per year. 940 CMR 16.01

- a. The transferor has a valid FID or LTC or is exempted from such requirements under M.G.L. c. 140, § 129C(4)(n), (o), (r), or (s) (which apply to transfers involving legatees, military or law enforcement officers, chartered veteran's organizations, or historical societies, museums, or institutional collections open to the public);
- b. The transferee has (i) a purchase permit *and* an FID, (ii) a purchase permit and is exempt from the FID requirement, or (iii) an LTC;
- c. The transferor makes no more than four such transfers of firearms, including rifles and shotguns, in any one calendar year; and
- d. The transferee reports the transfer to the Commonwealth department of justice within seven days of the firearm's receipt, which report must specifically identify both the transferor and the firearm.

M.G.L. c. 140, §§ 128A, 128B, 131E.

33. Consequently, licensed retailers are absolutely precluded from transferring any handguns not included on the Handgun Roster and any other handguns prohibited by the Defendant Healey's Handgun Sales Regulations (except grandfathered handguns from before October 21, 1998). All *unlicensed* individuals are precluded from transferring any handguns (whether on or off the Handgun Roster and whether approved or unapproved under the Handgun Sales Regulations) to any ordinary, law-abiding citizens who lack the necessary purchase permits, FID, or special exemptions, and even then, they are limited to four such transfers in any one year.

34. Obtaining a purchase permit, FID, or LTC for purposes of acquiring a handgun requires meeting specific statutory criteria based on the applicant's age, personal background, and satisfaction of mandated firearms training, and, even then, the granting of these statutory creatures

is discretionary. Purchase permits are subject to the licensing official’s subjective determination that the purchase, rental, or lease of the firearms “is for a proper purpose,” and the official “may revoke such permit at will.” M.G.L. c. 140, § 131A. Licensing officials may deny FIDs or LTCs based on their subjective determination that the applicant “could potentially create a risk to public safety” and is therefore “unsuitable.” M.G.L. c. 140, §§ 129B, 129B(1½), 131A, 131(d)(i)-(x).

35. As a result of this stringent regulatory scheme, ordinary law-abiding citizens of Massachusetts are left with very limited opportunity to lawfully acquire *any* handgun, including any handgun approved for commercial sale under the Approved Handgun Roster and the Handgun Sales Regulations, much less one *excluded* from the Handgun Roster or prohibited by the Sales Regulations. Indeed, because licensed retailers are prohibited from transferring any off-Roster or otherwise unapproved handguns (except whatever decades-old, grandfathered handguns may still exist in the market), all ordinary law-abiding citizens—even those bearing the coveted purchase permits, FIDs, and LTCs—are relegated to a secondary market of non-licensed transferors who may transfer no more than four firearms, including shotguns and rifles, in an entire year, and thus who necessarily deal in limited supplies.

36. On information and belief, the handguns approved for commercial sale to ordinary law-abiding citizens under Defendants’ Handgun Roster and Handgun Sales Regulations represent a small fraction of the total number of commercially available handgun makes and models which are constitutionally protected arms in common use for self-defense and other lawful purposes throughout all or the vast majority of the United States. And ordinary law-abiding Massachusetts residents cannot simply look outside the Commonwealth borders to purchase or acquire any of these handguns banned by the Handgun Roster and the Handgun Sales Regulations because federal law requires the use of an in-state licensed dealer to facilitate any purchase or delivery of a handgun

from an out-of-state seller, 18 U.S.C. §§ 922(a)(3), 922(a)(5), and, of course, the in-state dealer must fully comply with Massachusetts law which precludes engaging in the transfer of any handguns not included on the Handgun Roster and otherwise prohibited under the Handgun Sales Regulations.

37. Thus, ordinary law-abiding citizens seeking to exercise their constitutional right to keep and bear arms with a handgun—“the quintessential self-defense weapon” in America, *Heller*, 554 U.S. at 629—are generally relegated a secondary market of inherently limited supply, and largely consisting of used handguns having no manufacturer’s warranty, with sellers who cannot offer the warranties or guarantees licensed dealers can offer. And that market is also beyond the reach of the regulations designed to protect consumers against unfair and deceptive practices, including the protections against the sale of defective or unsafe firearms.<sup>2</sup>

38. Ultimately then, ordinary law-abiding citizens in Massachusetts are left with little, if any, realistic means of lawfully acquiring any of the numerous handguns banned under the Handgun Roster and Handgun Sales Regulations which are otherwise in common use and widely available outside their Commonwealth for purposes of lawfully exercising their constitutional right to keep and bear arms.

39. By outright banning the commercial sale of any handgun not included on the Handgun Roster and not otherwise prohibited by the Handgun Sales Regulations, including the many handguns otherwise in common use for self-defense and other lawful purposes, and also severely limiting—if not cutting off entirely—any other opportunity for ordinary law-abiding

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<sup>2</sup> See 940 CMR 16.01 – 16.06. These regulations only apply to “handgun purveyors,” who expressly do not include those who “transfer[] less than five handguns per year.” 940 CMR 16.01.

citizens to lawfully acquire any such firearm, Defendants' Handgun Ban effectively operates as a bar to the exercise of the fundamental right to bear protected arms.

40. Defendants' Handgun Ban represents a policy choice of the Commonwealth regarding which protected arms in common use *it* believes should and should not be made available to its citizens—a choice that “the enshrinement of constitutional rights” under the Second Amendment has taken “off the table.” *Heller*, 554 U.S. at 636.

41. And such a blanket set of prohibitions against a class of protected arms is categorically unconstitutional; that is the essence of the ban the Supreme Court struck down as categorically unconstitutional in the seminal *Heller* case. *Heller*, 554 U.S. at 628 (striking down a handgun ban where it “amount[ed] to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society” for self-defense purposes).

42. Moreover, even setting aside its categorically unconstitutional nature and entertaining the Commonwealth's claimed interest in promoting public safety and general welfare, the ban sweeps far too broadly, as any such interest in handgun safety could be adequately achieved through readily available and easily implemented less restrictive alternatives, including producing, providing, and encouraging education, training, and public outreach regarding basic rules of firearm safety, storage, and use.

43. Indeed, the Commonwealth maintains a website on which it has posted what it calls the “basic rules of firearm safety” and advises its citizens to “[f]ollow these procedures to stay safe.” <https://www.mass.gov/service-details/firearms-safety> (last visited May 6, 2021). These rules, as the Commonwealth presents them, concern nothing more than the manner in which people store, handle, and discharge firearms. *Id.* They make no mention of any special features or devices as necessary or even helpful for law-abiding gunowners “to stay safe” in the use of firearms, much



less any of the “childproofing protection” features, magazine safety disconnect mechanisms, or other devices mandated for inclusion on the Handgun Roster. This undermines any claimed interest in maintaining the Handgun Ban to ensure “safe” firearm use and underscores the reality that less restrictive alternatives, in the way of proper education and training, do in fact exist.

44. Indeed, all the safety devices and features required for inclusion on the Handgun Roster and approval under the Handgun Sales Regulations are subject to failure and thus cannot be relied upon independently as consistent means of ensuring safe and proper firearm operation. So, it is irresponsible, unsafe, and ultimately ineffective to rely on such “safety” devices. Significantly, on information and belief, the safety features that the Commonwealth mandates are not present on many of the handguns otherwise in common use and widely available around the country, including for example, loaded chamber indicators, “childproofing protection” features, and/or magazine safety disconnect mechanisms. Additionally, on information and belief, handguns that have not passed the Commonwealth’s “Handgun Drop Test” are constitutionally protected arms in common use for self-defense and other lawful purposes throughout the United States.

45. Ironically, some of Massachusetts’ “safety” requirements, such as the mandated 10-lb. trigger pull—which is nearly double the weight of many widely used law enforcement-issued duty handguns, *see e.g.*, [https://projects.nfstc.org/firearms/module07/fir\\_m07\\_t05\\_03.htm](https://projects.nfstc.org/firearms/module07/fir_m07_t05_03.htm)—make handguns so outfitted *more* difficult to operate effectively and thus *more* difficult to operate safely.

46. The attributes, systems, and “safety” devices required under Massachusetts’ Handgun Ban simply cannot replace safe and responsible gun handling or education based on the fundamental rules of firearm safety, and, for the same reason, the absence of such features cannot justify their outright ban under the Handgun Roster and Handgun Sales Regulations, especially when the handguns are constitutionally protected arms and numerous such handguns are otherwise

in common use and widely available. And, fundamentally, such arms simply cannot be banned, particularly not without any reasonable degree of tailoring—much less narrow tailoring—in relation to the claim interest. *See Packingham v. North Carolina*, \_\_ U.S. \_\_, 137 S. Ct. 1730, 1736 (2017) (even under intermediate scrutiny, a law must be “narrowly tailored to serve a significant governmental interest”).

### *Injury to the Plaintiffs*

47. Plaintiff Granata currently holds a valid LTC in the Commonwealth. Plaintiff Granata desires to purchase one or more handguns that are unlawful for sale and transfer to him under the Handgun Ban being enforced by Defendants. But for the Handgun Ban and Defendants’ enforcement thereof, Plaintiff Granata would purchase new from a licensed retailer, for self-defense and other lawful purposes, one or more of the following handguns which are prohibited from commercial sale by the Handgun Ban: a fifth generation Glock 19, a Sig Arms Model 1911 “We the People” edition, and/or a Sig Arms Model 1911 “TacOps” edition. All these handguns are in common use for self-defense and other lawful purposes, are widely sold and possessed outside of Massachusetts, and are thus constitutionally protected arms under the Second Amendment that cannot be banned. Plaintiff Granata is a member of Firearms Policy Coalition.

48. Plaintiff Thomas holds a valid LTC in the commonwealth. Plaintiff Thomas desires to purchase one or more handguns that are unlawful for sale and transfer to him under the Handgun Ban being enforced by Defendants. But for the Handgun Ban and Defendants’ enforcement thereof, Plaintiff Thomas would purchase new from a licensed retailer, for self-defense and other lawful purposes, one or more of the following handguns which are prohibited from commercial sale by the Handgun Ban: a fifth generation Glock 19 and/or 17, CZ-USA DW Kodiak 10mm, CZ-USA 75 Compact 9mm, CZ-USA P-10 9mm, Magnum Research Desert Eagle XIX .50AE, Kimber Ultra carry II .45, Kimber KHX custom .45, Kimber Desert Warrior .45, and/or a Nighthawk

Custom Heinie Signature Recon. All these handguns are in common use for self-defense and other lawful purposes, are widely sold and possessed outside of Massachusetts, and are thus constitutionally protected arms under the Second Amendment that cannot be banned. Plaintiff Thomas is a member of Firearms Policy Coalition.

49. Plaintiff Cannizzaro holds a valid LTC in the commonwealth. He has honorably served six years in the Air Force reserves, he has served as a law enforcement officer for four years, and he has completed numerous hours of law enforcement firearms training. Plaintiff Cannizzaro desires to purchase one or more handguns that are unlawful for sale and transfer to him under the Handgun Ban being enforced by Defendants. But for the Handgun Ban and Defendants' enforcement thereof, Plaintiff Cannizzaro would purchase new from a licensed retailer, for self-defense and other lawful purposes, one or more of the following handguns which are prohibited from commercial sale by the Handgun Ban: a Kimber Ultra Carry 2 1911, CZ P-09, and/or a Sig P365XL. All these handguns are in common use for self-defense and other lawful purposes, are widely sold and possessed outside of Massachusetts, and are thus constitutionally protected arms under the Second Amendment that cannot be banned. Plaintiff Cannizzaro is a member of Firearms Policy Coalition.

50. Plaintiff Prosperi holds a valid LTC in the Commonwealth. He has served in law enforcement, as a Campus Police Officer for Holyoke Community College, and is currently enrolled in the Western Massachusetts Police Academy. Plaintiff Prosperi desires to purchase one or more handguns that are unlawful for sale and transfer to him under the Handgun Ban being enforced by Defendants. But for the Handgun Ban and Defendants' enforcement thereof, Plaintiff Prosperi would purchase new from a licensed retailer, for self-defense and other lawful purposes, one or more of the following handguns which are prohibited from commercial sale by the Handgun

Ban: a CZ Tactical Sport, CZ Tactical Sport Orange, Beretta 92X Performance, and/or a CZ P-10F. All these handguns are in common use for self-defense and other lawful purposes, are widely sold and possessed outside of Massachusetts, and are thus constitutionally protected arms under the Second Amendment that cannot be banned. Plaintiff Prosperi is a member of Firearms Policy Coalition.

51. Plaintiff The Gunrunner, LLC, is a state and federally licensed handgun-purveyor that would, but for the Handgun Ban and Defendants' enforcement thereof, make available for sale to all of its law-abiding customers all the commercially available handguns in common use for self-defense and other lawful purposes that are widely sold and possessed outside of Massachusetts but are banned under Defendants' Handgun Roster and Handgun Sales Regulations, and Plaintiff The Gunrunner, LLC would sell and transfer them to law-abiding customers, including, but not limited to, those off-Roster and unapproved handguns sought by Individual Plaintiffs, members and supporters of Institutional Plaintiff, and all similarly situated individuals. Plaintiff The Gunrunner, LLC brings this action on behalf of itself and all such would-be law-abiding purchasers, including Individual Plaintiffs, as well as on behalf of all similarly situated licensed retailers who are prevented from conducting such transactions.

52. FPC brings this action on behalf of itself, its members, including the named Plaintiffs herein, supporters who possess all the indicia of membership, and similarly situated members of the public.

53. FPC's members and supporters, and those similarly situated, have been adversely and directly harmed by Defendants' enforcement of the laws, regulations, policies, practices, and customs challenged herein.

54. FPC reasonably fears the prosecution of its members and supporters, and those similarly situated, by and through the credible threat of Defendants' ongoing enforcement of the laws, regulations, policies, practices, and customs challenged herein.

55. FPC has expended and diverted resources because of Defendants' enforcement and resultant policies, practices, and customs challenged herein.

**COUNT I  
DEPRIVATION OF CIVIL RIGHTS  
RIGHT TO KEEP AND BEAR ARMS  
U.S. CONST., AMENDS. II AND XIV, 42 U.S.C. § 1983**

56. Plaintiffs incorporate herein by reference the foregoing paragraphs as if fully set forth herein.

57. Defendants' laws, regulations, policies, practices, and customs establishing, implementing, and enforcing the Handgun Ban through their Handgun Roster and Handgun Sales regulations are unconstitutional under the Second Amendment because they ban the commercial sale and transfer of numerous handguns which are protected arms in common use and otherwise widely available for self-defense and other lawful purposes throughout the country, thereby leaving all ordinary law-abiding individuals with little to no other means of lawfully acquiring any of these protected arms in the exercise of their fundamental constitutional right to keep and bear arms for self-defense and other lawful purposes.

58. Upon information and belief, Defendants are individually and collectively responsible for the formulation, issuance, and/or implementation of the laws, policies, practices, and customs underlying the Handgun Ban at issue in this case.

59. Defendant Attorney General Healey has enforced and continues to enforce the Handgun Ban through the criminal and civil penalties established under the laws and regulations controlling the sales, transfer, possession, and ownership of firearms—specifically, M.G.L. c. 140

§ 123, cl. 18 – 21; M.G.L. c. 140 § 128; M.G.L. c. 140 § 131K; M.G.L. c. 140 § 131 ¾; 501 CMR 7.00 through 7.16; and 940 CMR 16.00 through 940 CMR 16.09—and the related policies, practices, and customs designed to implement and enforce the same, which collectively comprise the Handgun Ban and are challenged in this action as causing the injuries of concern.

60. Defendant Turco, through his oversight of the Firearms Records Bureau within the Department of Criminal Justice Information Services, has enforced and continues to enforce the laws, regulations, and related policies, practices, and customs designed to implement and enforce the same.

61. By Defendants' enforcement of the laws, regulations, policies, practices, and customs underlying the Handgun Ban, they have prevented and are continuing to prevent law-abiding individuals from purchasing, selling, transferring, and otherwise acquiring for self-defense and other lawful purposes handguns that are constitutionally protected arms categorically in common use for self-defense and other lawful purposes, in violation of Plaintiffs' and similarly situated persons' fundamental rights protected under the Second and Fourteenth Amendments to the United States Constitution.

62. By preventing responsible, law-abiding individuals from purchasing, selling, transferring, and otherwise acquiring for self-defense and other lawful purposes constitutionally protected firearms, as they are entitled to do under the Constitution, Defendants have violated Plaintiffs' rights, and the rights of those similarly situated, under the Second and Fourteenth Amendments.

63. Again, “[t]he very enumeration of the [Second Amendment] right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” *Heller*, 554 U.S. at 635 (emphasis in original).

64. The Second Amendment is not a “second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,” *McDonald*, 561 U.S. 742, 780, and it cannot “be singled out for special—and specially unfavorable—treatment,” *id.* at 778–79.

65. Massachusetts’ claimed interests in public safety certainly cannot and do not take priority over the Constitution’s textual enshrinement of a fundamental right that “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home,” *Heller*, 554 U.S. 570 at 635, especially when the Commonwealth has not even considered or attempted to implement any less restrictive alternatives to its outright prohibition of these arms.

66. States do not have the power to prohibit the purchase, possession, transfer, or other acquisition of handguns that Defendants’ Handgun Ban prevents law-abiding people from purchasing, selling, transferring, and acquiring for self-defense and other lawful purposes.

67. As to all claims made in a representative capacity herein, there are common questions of law and fact that substantially affect the rights, duties, and liabilities of many similarly situated Massachusetts residents and visitors who knowingly or unknowingly are subject to the Massachusetts statutes, regulations, policies, practices, and customs in question.

68. Considerations of necessity, convenience, and justice justify relief to Individual, Retailer, and Institutional Plaintiff in a representative capacity.

69. Defendants have enforced and will continue to enforce their unconstitutional laws, laws, policies, practices, and customs against Individual Plaintiffs, Retailer Plaintiff and its customers, Institutional Plaintiff’s members and supporters, and similarly situated persons unless and until enjoined by this Court as Plaintiffs request herein.

70. Plaintiffs and Plaintiffs' members, supporters, and customers reasonably fear that Defendants will enforce against them their laws and related enforcement policies, practices, and customs that implement and are designed to implement Massachusetts' Handgun Ban.

71. Defendants' active enforcement of the Handgun Ban is evidenced by the prosecution of Massachusetts resident Michael A. Wheelock, who faced criminal charges stemming from the alleged sale of firearms not approved for sale in Massachusetts. (<https://www.metrowestdailynews.com/article/20130404/NEWS/304049215>) (last visited 5/6/2021).

72. Defendants' laws, policies, practices, customs, and ongoing enforcement against Plaintiffs, Plaintiffs' members, supporters, and customers, and similarly situated members of the public, which prevent them from exercising their rights, including the purchase, sale, transfer, and other acquisition of constitutionally protected arms for self-defense and other lawful purposes, are thus causing injury and damage that is actionable under 42 U.S.C. § 1983.

73. Plaintiffs thus seek declaratory and permanent injunctive relief.

#### **PRAYER**

WHEREFORE, Plaintiffs pray for the following relief:

1. A declaratory judgment that the Commonwealth's laws, and Defendants' regulations, policies, practices, and customs underlying the Handgun Ban, and enforcement thereof, individually and collectively prohibit the purchase, sale, possession, transfer, and other acquisition for self-defense and other lawful purposes of constitutionally protected handguns in common use for self-defense and other lawful purposes, and thus violate the Second and Fourteenth Amendments;



2. A permanent injunction restraining Defendants and their officers, agents, servants, employees, and all persons in concert or participation with them, and all who have notice of the injunction, from enforcing the Commonwealth's laws, and Defendants' regulations, policies, practices, and customs underlying the Handgun Ban, and enforcement thereof, that individually and collectively prohibit the purchase, sale, possession, transfer, and other acquisition for self-defense and other lawful purposes of constitutionally protected handguns in common use for self-defense and other lawful purposes;

3. Such other and further relief, including injunctive relief, against all Defendants, as may be necessary to effectuate the Court's judgment, or as the Court otherwise deems just and equitable; and

4. Attorney's fees and costs (including incidental costs such as expert witness fees) pursuant to 42 U.S.C. § 1988 and any other applicable law.

DATED: June 8, 2021

Respectfully submitted,  
The Plaintiffs,

/s/ Richard C. Chambers, Jr., Esq.

Richard C. Chambers, Jr., Esq.

BBO#: 651251

Chambers Law Office

220 Broadway, Suite 404

Lynnfield, MA 01940

Office: (781) 581-2031

Cell: (781) 363-1773

Fax: (781) 581-8449

[Richard@chamberslawoffice.com](mailto:Richard@chamberslawoffice.com)

Jason A. Guida (BBO# 667252)

PRINCIPE & STRASNICK, P.C.

17 Lark Avenue

Saugus, MA 01906

(617) 383-4652

[jason@lawguida.com](mailto:jason@lawguida.com)

Raymond DiGuiseppe  
THE DIGUISEPPE LAW FIRM, P.C.  
4320 Southport-Supply Road Suite 300  
Southport, NC 28461  
P: 910-713-8804  
E: law.rmd@gmail.com  
*Pro Hac Vice Application Forthcoming*

William Sack  
FIREARMS POLICY COALITION  
1215 K Street, 17<sup>th</sup> Floor  
Sacramento, CA 95814  
P: 916-596-3492  
E: wsack@fpclaw.org  
*Pro Hac Vice Application Forthcoming*

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on June 8, 2021.

/s/ Richard C. Chambers, Jr., Esq.  
Richard C. Chambers, Jr., Esq.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

STEFANO GRANATA, JUDSON THOMAS, COLBY  
CANNIZZARO, CAMERON PROSPERI, THE GUN  
RUNNER, LCC, and FIREARMS POLICY COALITION,  
INC.,

Plaintiffs,

v.

MAURA HEALEY, in her official capacity as Attorney  
General of Massachusetts, and THOMAS TURCO, in his  
official capacity as Secretary of Executive Office of Public  
Safety and Security of Massachusetts,

Defendants.

CIVIL ACTION  
NO. 1:21-CV-10960-RWZ

**DEFENDANTS’ MOTION TO DISMISS PLAINTIFFS’ COMPLAINT**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants, Attorney General Maura Healey in her official capacity as the Attorney General of Massachusetts, and Thomas Turco, in his official capacity as Secretary of the Executive Office of Public Safety and Security, move to dismiss Count I of Plaintiffs’ Complaint.

In support of their motion, Defendants state as follows:

1. Plaintiffs bring a single claim under 42 U.S.C. § 1983 and the United States Constitution, alleging that the statutory requirements for the commercial sale of handguns established by Mass. Gen. Laws ch. 140, § 123, the Approved Firearms Roster established by Mass. Gen. Laws ch. 140, § 131-3/4, and its related regulations, 501 Code Mass. Regs. §§ 7.00 *et seq.*, and the Attorney General’s handgun sales regulations, 940 Code Mass. Regs. §§ 16.00 *et seq.*, (collectively, the “handgun safety regulations”), deprive them of their right to keep and bear arms under the Second Amendment.

2. This claim should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted because the handgun safety regulations do not implicate the Second Amendment, and, even assuming that the handgun safety regulations implicate Second Amendment rights, they are valid under intermediate scrutiny.

WHEREFORE, for these reasons and the reasons set forth in their supporting memorandum of law, Defendants respectfully request that the Court dismiss Count I of the Complaint and close the case.

Respectfully submitted,

MAURA HEALEY, ATTORNEY GENERAL,  
and SECRETARY THOMAS TURCO,

By their attorneys,

/s/ Phoebe Fischer-Groban

Phoebe Fischer-Groban, BBO No. 687068

Grace Gohlke, BBO No. 704218

Assistant Attorneys General

Office of the Attorney General

Government Bureau

One Ashburton Place, 20th Floor

Boston, MA 02108

(617) 963-2589

Phoebe.Fischer-Groban@mass.gov

Grace.Gohlke@mass.gov

Dated: August 20, 2021

**CERTIFICATE PURSUANT TO LOCAL RULE 7.1(A)(2)**

I hereby certify that, on August 20, 2021, I and Assistant Attorney General Grace Gohlke conferred with counsel for the Plaintiffs, and we were unable to resolve the issues presented in this motion.

/s/ Phoebe Fischer-Groban  
Phoebe Fischer-Groban  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I certify that this document filed through the CM/ECF system will be sent electronically to registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on August 20, 2021.

/s/ Phoebe Fischer-Groban  
Phoebe Fischer-Groban  
Assistant Attorney General

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

STEFANO GRANATA *et al.*,

Plaintiffs,

v.

MAURA HEALEY, in her official capacity as  
Attorney General of the Commonwealth of  
Massachusetts; and THOMAS TURCO, in his  
official capacity as Secretary of Executive Office of  
Public Safety and Security of the Commonwealth of  
Massachusetts,

Defendants.

CIVIL ACTION  
NO. 1:21-cv-10960

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

MAURA HEALEY  
ATTORNEY GENERAL

Phoebe Fischer-Groban (BBO No. 687068)  
Grace Gohlke (BBO No. 704218)  
Assistant Attorneys General  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108  
617-963-2589  
Phoebe.Fischer-Groban@mass.gov  
Grace.Gohlke@mass.gov

Dated: August 20, 2021

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## INTRODUCTION

Massachusetts law protects consumers from the sale of unsafe handguns that are prone to malfunction or accidental discharge during normal use or are not equipped with basic safety features. Together, the statutory requirements for the commercial sale of handguns established by Mass. Gen. Laws ch. 140, § 123, and the Attorney General’s handgun sales regulations codified at 940 Code Mass. Regs. (“CMR”) §§ 16.00 *et seq.* (together, the “handgun safety regulations”), ensure that handguns sold in the Commonwealth are not defective and protect handgun users and their families against accidental injury or death. In this case, Plaintiffs claim that Massachusetts’ handgun safety regulations infringe their Second Amendment rights because, even though there are hundreds of handgun models that Plaintiffs can lawfully buy in Massachusetts, the handgun safety regulations prevent Plaintiffs from buying additional handguns that are not compliant with the Commonwealth’s handgun safety regulations. In effect, Plaintiffs claim that they have “a right to keep and carry any weapon whatsoever,” in contravention of *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

The Court should dismiss Plaintiffs’ Complaint because it fails to state a claim upon which relief can be granted for three independent reasons. First, the challenged handgun safety regulations are valid because they are conditions and qualifications on the commercial sale of arms that are presumptively lawful under *Heller*. Second, the handgun safety regulations are valid because they do not burden conduct falling within the scope of the Second Amendment. Third, even assuming that the handgun safety regulations touch upon Second Amendment rights, they do not impose a substantial burden on those rights and easily survive intermediate scrutiny.

## STATUTORY AND REGULATORY BACKGROUND

### **I. Massachusetts Handgun Safety Regulations**

To protect Massachusetts consumers and their families, two sets of safety requirements

establish minimum standards for handguns sold by licensed retailers in the Commonwealth: (1) regulations promulgated pursuant to the Attorney General’s authority under Mass. Gen. Laws ch. 93A, § 2(c), and codified at 940 CMR §§ 16.00 *et seq.*, and (2) statutory requirements at Mass. Gen. Laws ch. 140, § 123, that form the basis for the Approved Firearms Roster.

**A. Origination of Attorney General’s Regulations**

Under Mass. Gen. Laws ch. 93A, § 2(c), the Attorney General has the authority to “prevent the deceptive or unfair sale or transfer of defective products which do not perform as warranted.” *See Am. Shooting Sports Council, Inc. v. Attorney Gen.*, 429 Mass. 871, 875 (1999). Pursuant to this authority, in October 1997, the Attorney General of Massachusetts promulgated a set of regulations to ensure that handguns transferred<sup>1</sup> within the Commonwealth by retailers meet minimum safety and performance standards. 940 CMR §§ 16.00 *et seq.* (the “Attorney General’s regulations”); *see also* Enforcement Notice: Attorney General’s Handgun Safety Regulations.<sup>2</sup> The Attorney General’s regulations “are intended to protect responsible gun owners and their families from firearms<sup>3</sup> that are unsafe by design or manufacture.” July 16, 2004 Consumer Advisory on Glock Handguns (“Consumer Advisory”).<sup>4</sup>

The Attorney General’s regulations came in the wake of national research on preventing fatalities from accidental firearm discharges. In 1991, the United States General Accounting Office (“GAO”) conducted a study at the request of Congress that found two basic safety features—child

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<sup>1</sup> “Transfer” is defined as “sell, rent, or lease” and excludes sales to firearm wholesalers who do not intend to sell the handguns to Massachusetts retailers or consumers. 940 CMR § 16.01.

<sup>2</sup> *See* <https://www.mass.gov/doc/attorney-generals-handgun-regulation-enforcement-notices/download>, at 1-2. The Attorney General’s Enforcement Notices, as well as other sources cited in this section, are “official public records” that the Court may properly consider on a motion to dismiss. *See Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993).

<sup>3</sup> Massachusetts law defines the term “firearm” such that it encompasses all handguns. *See* Mass. Gen. Laws ch. 140, § 121.

<sup>4</sup> *See* <https://www.mass.gov/doc/attorney-generals-handgun-regulation-enforcement-notices/download>, at 8.

proofing and a load indicator—could prevent one third of all accidental gun deaths in the United States. *See* U.S. General Accounting Office, Report to the Chairman, Subcommittee on Antitrust, Monopolies, and Business Rights, Committee on the Judiciary, U.S. Senate, ACCIDENTAL SHOOTINGS: MANY DEATHS AND INJURIES CAUSED BY FIREARMS COULD BE PREVENTED 3 (1991) (“GAO Report”).<sup>5</sup> The report noted that the two studied features would not prevent deaths caused by a gun that “discharge[d] when it [was] accidentally dropped or [fell] from its storage location[.]” *Id.* at 4. At the time, firearms were the fourth leading cause of accidental deaths among children aged 5 to 14 and third among 15- to 24-year-olds. *Id.* at 2. The GAO Report recommended that “all possible efforts be made to reduce the number of accidental shootings” in light of the devastating “human, economic, and public health costs of these shootings to the victims, their families, and society[.]” *Id.* at 5.

The Attorney General’s regulations make it an unfair and deceptive practice, and therefore a violation of state law, for a retailer to sell a handgun that is defective or lacks certain safety features. First, handguns sold by retailers cannot be “made from inferior materials.” 940 CMR § 16.04. To satisfy this requirement, a handgun must be made of materials that meet a specified minimum melting point, tensile strength, and density, or the gun must pass a performance test to show it can be fired repeatedly with only a limited number of malfunctions and without breaking. *Id.* §§ 16.01; 16.04(1), (3). Next, the handgun must not be “prone” to either repeated firing upon a single trigger pull or explosion upon firing. *Id.* § 16.04(2). The handgun must also pass a “drop test” to show it is not “prone to accidental discharge.” *Id.* §§ 16.01; 16.04(2). Further, the handgun must have a “safety device,” as defined by statute, that prevents unauthorized use of the gun, i.e., an approved lock. *Id.* § 16.05(1) (citing Mass. Gen. Laws ch. 140, § 131K). The handgun must

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<sup>5</sup> *See* <http://www.gao.gov/assets/160/150353.pdf>.

also have a form of childproofing, defined as any mechanism that “effectively precludes an average five year old child from operating the handgun when it is ready to fire.” *Id.* § 16.05(2). Examples of adequate child-proofing mechanisms include a ten-pound trigger pull or a firing mechanism that cannot be operated by the smaller hands of an average five-year-old. *Id.* A “hammer deactivation device” also meets the child-proofing requirement. *Id.* § 16.05(4). For semi-automatic handguns, the regulations further require either a load indicator or a magazine safety disconnect. *Id.* §§ 16.05(3); 16.05(4). Finally, handguns must have a tamper resistant serial number. *Id.* § 16.03.<sup>6</sup>

The Attorney General’s regulations do not apply to all handgun sales in Massachusetts. The regulations apply only to transfers by “handgun-purveyors.”<sup>7</sup> *See generally* 940 CMR § 16.00. A “handgun-purveyor” is defined as “any person or entity that transfers handguns to a customer located within the Commonwealth of Massachusetts,” subject to a list of exceptions. *Id.* § 16.01. Among the exceptions are sellers who transfer fewer than five handguns per year. *Id.* These private sales are therefore not subject to the Attorney General’s regulations.<sup>8</sup> Furthermore, most of the regulations do not apply to handguns that were manufactured on or before October 21, 1998. *Id.* § 16.07; Enforcement Notice #2: Attorney General’s Handgun Safety Regulations.<sup>9</sup>

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<sup>6</sup> In addition to these safety features, the Attorney General’s regulations also require licensed retailers to make certain safety disclosures at the time of sale. First, retailers must include a provided written safety warning to customers about certain risks associated with owning a handgun. 940 CMR § 16.06(1). Next, retailers must explain to customers how to load, unload, and store the handgun, explain how to operate all safety devices, and note whether the handgun has a load indicator, magazine safety disconnect, or internal safety. *Id.* § 16.06(2). Finally, for short-barreled handguns, retailers must disclose specific test data regarding the handgun’s accuracy. *Id.* § 16.06(3).

<sup>7</sup> Because Plaintiffs use the term “licensed retailer” in their Complaint, this motion uses that term interchangeably with “handgun-purveyor,” as well as “dealer,” another term commonly used in guidance related to these regulations.

<sup>8</sup> The regulations also do not apply to handgun sales to law enforcement or military personnel for their official duties, sales to museums or educational collectors, sale of antique firearms, and sale of handguns designed specifically for formal target shooting competition. 940 CMR § 16.01.

<sup>9</sup> *See* <https://www.mass.gov/doc/attorney-generals-handgun-regulation-enforcement-notice/download>, at 3-4.

## B. Codification of Section 123 and Approved Firearms Roster

In 1998, soon after the Attorney General’s regulations were promulgated, the Legislature codified several overlapping provisions at Mass. Gen. Laws ch. 140, § 123, cl. 18-21 (“Section 123”). Specifically, the Attorney General’s regulations and Section 123 share minimum safety standards relating to: the material composition of the handgun, Mass. Gen. Laws ch. 140, § 123, cl. 18; whether the handgun is prone to accidental discharge, *id.* § 123, cl. 19; and whether the handgun is prone to repeated firing or explosion, *id.* § 123, cl. 20. Both the Attorney General’s regulations and Section 123 additionally require that, for short-barreled handguns, the seller must disclose the gun’s accuracy. *Id.* § 123, cl. 21. It is unlawful for a retailer to sell a handgun that does not comply with Section 123’s safety requirements. Mass. Gen. Laws ch. 140, § 128.

In conjunction with Section 123, the Legislature directed the Secretary of the Executive Office of Public Safety and Security (the “Secretary”) to “compile and publish a roster” of handguns that meet Section 123’s requirements. Mass. Gen. Laws ch. 140, § 131 3/4. This roster is known as the “Approved Firearms Roster.” 501 CMR § 7.00; *see also* Enforcement Notice #3: Attorney General’s Handgun Sales Regulations (940 CMR 16.00), February 2002.<sup>10</sup>

As of its June 2021 update, the Approved Firearms Roster lists over one thousand handgun models that have been shown by independent testing<sup>11</sup> to meet Section 123’s requirements. *See* Approved Firearms Roster: 06/2021 (“June 2021 Roster”).<sup>12</sup> The roster includes handguns from twenty-nine manufacturers, often with multiple models for each manufacturer. *See id.* For

<sup>10</sup> *See* <https://www.mass.gov/doc/attorney-generals-handgun-regulation-enforcement-notice-3/download>, at 5-7.

<sup>11</sup> A handgun may be placed on the Approved Firearms Roster “only after the Secretary has received a final test report from an approved independent testing laboratory” certifying that the handgun make and model meets the requirements of Section 123. 501 CMR § 7.03(1). To have a particular handgun placed on the roster, a manufacturer or other entity can submit the handgun for testing at an approved laboratory and then send the final test report to the Secretary and the Gun Control Advisory Board. *Id.* § 7.04(1).

<sup>12</sup> *See* <https://www.mass.gov/doc/approved-firearms-roster-7/download>.

example, sixty-six Sig Arms models appear on the roster, representing numerous styles across six different calibers. *See id.* at 10-12.

Like the Attorney General’s regulations, Section 123 does not regulate private sales. Only “firearms dealer[s] licensed in Massachusetts” are prohibited from selling handguns that do not appear on the Approved Firearms Roster. 501 CMR § 7.02. In addition, licensed retailers may sell handguns that do not appear on the Approved Firearms Roster if the gun was lawfully owned or possessed in Massachusetts prior to October 21, 1998. *Id.* § 7.05.<sup>13</sup>

The Attorney General’s regulations related to childproofing, load indicators, and tamper-resistant serial numbers have not been codified at Section 123 and so are not tested for inclusion on the Approved Firearms Roster. To be sold by a retailer in Massachusetts, a handgun that appears on the roster also must comply with the Attorney General’s regulations.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The present complaint was filed on June 8, 2021, by four individuals, one gun retailer, and one organization. Plaintiffs bring a single claim under 42 U.S.C. § 1983 and the United States Constitution, alleging that Massachusetts’ handgun safety regulations deprive them of their right to keep and bear arms under the Second Amendment. Compl. ¶¶ 56-73.

#### **I. Individual Plaintiffs**

All four individual plaintiffs allege that they have a valid license to carry (“LTC”). Compl. ¶¶ 47-50. Among other things, an LTC authorizes the holder to purchase handguns and carry handguns in public. Mass. Gen. Laws ch. 269, § 10(a); Mass. Gen. Laws ch. 140, §§ 131, 131E(b), 131F. These four plaintiffs together identify eighteen models of handguns they would purchase “new from a licensed retailer” but for Massachusetts’ handgun safety regulations. Compl. ¶¶ 47-

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<sup>13</sup> A separate roster lists handguns that may be sold for formal target shooting and that are subject to a separate set of requirements. *Id.* §§ 7.12-7.15.

50.<sup>14</sup> The Complaint does not deny that the individual plaintiffs own handguns, nor does it indicate what handguns, if any, they already own pursuant to their LTCs.

Of the eighteen models the individual plaintiffs seek to purchase, two of the models—both manufactured by Glock—appear on the Approved Firearms Roster. *See* Compl. ¶¶ 47-48; June 2021 Roster, *supra*. Those models nonetheless cannot be sold by retailers in Massachusetts because they fail to comply with the Attorney General’s regulation that requires either a load indicator or magazine safety disconnect on semi-automatic handguns. *See* Consumer Advisory, *supra*; 940 CMR §§ 16.05(3), (4). In an earlier constitutional challenge, the First Circuit upheld the Attorney General’s load indicator requirement as applied to Glock handguns. *See Draper v. Healey*, 827 F.3d 1, 5 (1st Cir. 2016).

The remaining sixteen models the individual plaintiffs desire to purchase do not appear on the Approved Firearms Roster. *See* Compl. ¶¶ 47-50; June 2021 Roster, *supra*. Plaintiffs make no factual allegations as to why these models are not on the roster. There are no allegations about whether, for example, the manufacturers have failed to submit the models for independent testing to ensure they meet the minimum safety and performance standards of Section 123. Conversely, there are no allegations that the models were submitted for testing but failed one or more of the required safety and performance tests. Further, the individual plaintiffs make no allegations about what features, if any, are unique to these sixteen models and cannot be found in one or more of the hundreds of models that do appear on the Approved Firearms Roster.

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<sup>14</sup> The makes and models of these eighteen handguns are: Beretta 92X Performance (¶ 50), CZ-USA DW Kodiak 10mm (¶ 48), CZ-USA 75 Compact 9mm (¶ 48), CZ P-09 (¶ 49), CZ P-10F (¶ 50), CZ-USA P-10 9mm (¶ 48), CZ Tactical Sport (¶ 50), CZ Tactical Sport Orange (¶ 50), fifth generation Glock 19 (¶¶ 47-48) or 17 (¶ 48), Kimber Ultra carry II .45 (¶¶ 48-49), Kimber KHx custom .45 (¶ 48), Kimber Desert Warrior .45 (¶ 48), Magnum Research Desert Eagle XIX.50AE (¶ 48), Nighthawk Custom Heinie Signature Recon (¶ 48), Sig Arms Model 1911 “We the People” edition (¶ 47), Sig Arms Model 1911 “TacOps” edition (¶ 47), and Sig P365XL (¶ 49).

## II. Retailer and Organizational Plaintiffs

The retailer plaintiff, The Gunrunner, LLC (“The Gunrunner”), alleges that but for Massachusetts’ handgun sales regulations, it would “make available for sale to all of its law-abiding customers all the commercially available handguns in common use for self-defense and other lawful purposes that are widely sold and possessed outside of Massachusetts.” Compl. ¶ 51. Beyond this general allegation, The Gunrunner makes no allegation of concrete harm to its business due to Massachusetts’ handgun safety regulations. Neither does The Gunrunner allege that it is unable to sell operational handguns to properly licensed Massachusetts consumers.<sup>15</sup>

The organizational plaintiff, the Firearms Policy Coalition, Inc. (“FPC”), alleges harm to itself and on behalf of its members, which include the four individual plaintiffs. Compl. ¶ 52. FPC does not allege that any of its members who are properly licensed in Massachusetts are unable to purchase or possess an operational handgun for self-defense or other lawful purposes.

### ARGUMENT

#### I. The Handgun Safety Regulations Do Not Implicate the Second Amendment.

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In *District of Columbia v. Heller*, the Supreme Court struck down the District of Columbia’s “near-complete ban on keeping operable handguns in the home,” holding that “the Second Amendment protects the right of an individual to keep and bear arms (unconnected to service in the militia).” *Gould v. Morgan*, 907 F.3d 659, 667 (1st Cir. 2018) (citing *Heller*, 554

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<sup>15</sup> In any case, there is no textual or historical basis upon which to suggest that the Second Amendment protects a right to *sell* firearms. See *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 683-87 (9th Cir. 2017) (en banc) (conducting exhaustive textual and historical analysis of the Second Amendment). The Second Amendment guarantees only an “*individual* right to *possess* and *carry* weapons in case of confrontation.” *Heller*, 554 U.S. at 592 (emphasis added). It “does not confer a freestanding right, wholly detached from any customer’s ability to acquire firearms, upon a proprietor of a commercial establishment to sell firearms.” *Teixeira*, 873 F.3d at 682; accord *United States v. Chafin*, 423 Fed. App’x 342, 344 (4th Cir. 2011). Thus, any claim that the challenged regulations impinge upon a purported right of dealers to *sell* firearms must be rejected.



U.S. at 592). The Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *McDonald v. Chicago*, 561 U.S. 742, 791 (2010).

But “the right secured by the Second Amendment is not unlimited,” *Heller*, 554 U.S. at 626, and it “does not confer ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,’” *Worman v. Healey*, 922 F.3d 26, 33 (1st Cir. 2019) (quoting *Heller*, 554 U.S. at 626). The First Circuit employs a two-step approach to evaluate a claim that a challenged law infringes Second Amendment rights. *Gould*, 907 F.3d at 668-69. First, the court asks “whether the challenged law burdens conduct that falls within the scope of the Second Amendment’s guarantee.” *Id.* at 668. This “backward-looking inquiry” “seeks to determine whether the regulated conduct was understood to be within the scope of the right at the time of ratification.” *Id.* at 669 (internal quotation marks omitted). If the challenged law does not burden such conduct, “it is valid.” *Id.* If it does, “the court then must determine what level of scrutiny is appropriate and must proceed to decide whether the challenged law survives that level of scrutiny.” *Id.*

**A. The Handgun Safety Regulations Do Not Burden Conduct Falling Within the Scope of the Second Amendment.**

**1. The Handgun Safety Regulations are Presumptively Lawful Under *Heller*.**

Plaintiffs’ Second Amendment claim fails as a matter of law because the handgun safety regulations<sup>16</sup> are presumptively lawful conditions and qualifications on the commercial sale of

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<sup>16</sup> Plaintiffs allege no injuries related to the Massachusetts licensing scheme for handguns or the safety warnings and disclosures section of the Attorney General’s regulations, 940 CMR § 16.06. *See* Compl. ¶¶ 47-50 (alleging that individual plaintiffs hold valid LTCs and but for the Approved Firearms Roster and the Attorney General’s regulations would purchase eighteen specifically identified handgun makes and models); *id.* ¶ 51 (alleging that The Gunrunner would make available for sale to its “law-abiding customers” handguns that are not on the Approved Firearms Roster or do not satisfy the Attorney General’s regulations). Because Plaintiffs have not alleged that they have been injured or will imminently be injured by the Massachusetts licensing scheme for handguns or the safety warnings and disclosures section of the Attorney General’s regulations, Plaintiffs lack standing to challenge them. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (plaintiff must establish standing by showing it has suffered an “injury (footnote continued)

firearms. *Heller* and *McDonald* “firmly disavowed any notion that an individual has a constitutional right ‘to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’” *Powell v. Tompkins*, 783 F.3d 332, 347 (1st Cir. 2015) (quoting *Heller*, 554 U.S. at 626); *see also McDonald*, 561 U.S. at 786 (*Heller* “does not imperil every law regulating firearms”). *Heller* set forth non-exhaustive categories of “presumptively lawful regulatory measures” that are “presumed to be consistent with the historical scope of the Second Amendment,” *Pena v. Lindley*, 898 F.3d 969, 975 (9th Cir. 2018), such as “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,” *Heller*, 554 U.S. at 626-27 & n.26; *see also McDonald*, 561 U.S. at 786 (repeating the same passage).

The handgun safety regulations fall squarely within the category of “laws imposing conditions and qualifications on the commercial sale of arms” that *Heller* identified as “presumptively lawful regulatory measures.” *See Heller*, 554 U.S. at 626-27 & n.26. *See also Gould*, 907 F.3d at 668 (“nothing in *Heller* impugn[s] legislative designs that comprise . . . public welfare regulations aimed at addressing perceived inherent dangers and risks surrounding the public possession of loaded, operable firearms”) (alteration in original) (internal quotation marks omitted). Indeed, this Court (Gorton, J.) has already held that the requirement in 940 CMR § 16.05(3), that handguns transferred by handgun-purveyors contain load indicators or magazine safety disconnects, “fits comfortably among the categories of regulation that *Heller* suggested would be ‘presumptively lawful’ because it ‘impos[es] conditions and qualifications on the

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in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical”) (citations and internal quotation marks omitted). Accordingly, Defendants will not address these aspects of the regulatory framework in this motion.

commercial sale of arms.” See *Draper v. Healey*, 98 F. Supp. 3d 77, 85 (D. Mass. 2015), *aff’d on other grounds*, 827 F.3d 1 (1st Cir. 2016) (alteration in original) (quoting *Heller*, 554 U.S. at 626-27). The other aspects of the handgun safety regulations Plaintiffs challenge fit equally comfortably within this presumptively lawful category, as they are consumer product regulations that require that firearms commercially sold in Massachusetts (1) are not defective; (2) contain safety mechanisms; (3) have childproofing features; and (4) have tamper-resistant serial numbers. And all of these requirements apply only to dealers offering firearms for sale in commerce, not to individual gun owners. 940 CMR § 16.01; Mass. Gen. Laws ch. 140, § 123. The regulations do not prohibit possession in any way. These handgun safety regulations are therefore “presumptively lawful” commercial regulations under *Heller*. See *Heller*, 554 U.S. at 626-27 & n.26.

This presumption of validity is not rebutted because the handgun safety regulations impose only a *de minimis* burden on any Second Amendment rights. See *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (“*Heller II*”) (plaintiff may rebut presumption of lawfulness of regulation “by showing the regulation does have more than a *de minimis* effect upon his right”). Plaintiffs attempt to characterize the handgun safety regulations as a “handgun ban,” which is simply untrue. Plaintiffs identify no more than eighteen guns that they cannot purchase from dealers in Massachusetts because of the challenged handgun safety regulations. Compl. ¶¶ 47-51. But there are over one thousand models of handguns on the Approved Firearms Roster spanning twenty-nine different manufacturers. See *supra* pp. 5-6; see also *Draper*, 98 F. Supp. 3d at 84 (940 CMR § 16.05(3) “permits the purchase of a variety of handguns with appropriate safety devices”). If these makes and models also satisfy the Attorney General’s additional requirements, they may be sold by any licensed retailer in Massachusetts. Plaintiffs do not—and cannot—allege that they cannot currently purchase or possess operable handguns in the Commonwealth. Indeed, Plaintiffs have their choice of a diverse range of hundreds of handguns that retailers may sell.

Nor are the handgun safety regulations a “blanket set of prohibitions against a class of protected arms.” Compl. ¶ 41. In *Worman*, the First Circuit rejected any “suggestion that whatever group of weapons a regulation prohibits may be deemed a class” because “[b]y this logic—which we squarely reject—virtually any regulation could be considered an ‘absolute prohibition’ of a class of weapons.” 922 F.3d at 32 n.2. And in contrast to the law at issue in *Worman*, which proscribed the sale, transfer, and possession of certain semi-automatic assault weapons and large-capacity magazines, the handgun safety regulations do not prohibit the sale of any particular type of weapon at all. So long as a handgun meets the safety requirements necessary for inclusion on the Approved Firearm Roster and satisfies the Attorney General’s additional regulations, it can be sold in commerce in Massachusetts. Thus, the handgun safety regulations have, at most, a *de minimis* impact on Second Amendment rights and are valid conditions on the commercial sale of firearms. See *Heller*, 554 U.S. at 626-27 & n.26.

**2. The Handgun Safety Regulations Do Not Burden Conduct Within the Scope of the Second Amendment.**

Plaintiffs’ Second Amendment claim also fails because the challenged handgun safety regulations do not burden conduct that “was understood to be within the scope of the right at the time of ratification.” *Gould*, 907 F.3d at 669 (internal quotation marks omitted). “The historical record shows that gun safety regulation was commonplace in the colonies.” *Nat’l Rifle Ass’n of Am., Inc. v. Bur. of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012).

[A]round the time of the founding, a variety of gun safety regulations were on the books; these included safety laws regulating the storage of gun powder, laws keeping track of who in the community had guns, laws administering gun use in the context of militia service (including laws requiring militia members to attend “musters,” public gatherings where officials would inspect and account for guns), laws prohibiting the use of firearms on certain occasions and in certain places, and laws disarming certain groups and restricting sales to certain groups.

*Id.* As the Fifth Circuit explained, “when the fledgling republic adopted the Second Amendment,

an expectation of sensible gun safety regulation was woven into the tapestry of the guarantee.” *Id.* *Heller* too discussed the historical tradition of safety laws regulating gunpowder storage, noting that its analysis in that case did not “suggest the invalidity of laws regulating the storage of firearms *to prevent accidents.*” 554 U.S. at 632 (emphasis added). *See also Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 84 (2d Cir. 2012) (“By 1785, New York had enacted laws regulating when and where firearms could be used, as well as restricting the storage of gun powder.”).

In the early 19th century, some states required that firearms pass safety and quality inspections. For example, an 1821 Maine law appointed a “prover of gun barrels,” who would “try the strength” of firearms and mark the firearms that passed inspection. 1821 Me. Laws 685, ch. 162, § 1. *See also Nat’l Rifle Ass’n of Am.*, 700 F.3d at 196 (“*Heller* demonstrates that a regulation can be deemed ‘longstanding’ even if it cannot boast a precise founding-era analogue.”); *Silvester v. Harris*, 843 F.3d 816, 831 (9th Cir. 2016) (Thomas, C.J., concurring) (“[t]he term ‘longstanding’ is not restricted to the time of the founding of the Republic” because the categories of firearm restrictions explicitly identified as “presumptively lawful” in *Heller* were not codified until the 20th century). Thus, the handgun safety regulations do not implicate the Second Amendment at all, and Plaintiffs have failed to state a Second Amendment claim.

## **B. The Handgun Safety Regulations Easily Withstand Heightened Scrutiny.**

### **1. No More Than Intermediate Scrutiny is Appropriate.**

Should this Court nevertheless assume that the handgun safety regulations implicate Second Amendment rights, it should uphold them under intermediate scrutiny. The “appropriate level of scrutiny must turn on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right.” *Gould*, 907 F.3d at 670-71. “[I]ntermediate scrutiny is appropriate as long as a challenged regulation either fails to implicate the core Second Amendment right or fails to impose a substantial burden on that right.” *Worman*,

922 F.3d at 38.

The handgun safety regulations neither implicate the core Second Amendment right nor impose a substantial burden on the right. The core Second Amendment right “is limited to self-defense in the home.” *Gould*, 907 F.3d at 671. The handgun safety regulations do not implicate this core Second Amendment right because they apply only to commercial sales, not to possession of handguns in the home. *See Pena*, 898 F.3d at 977 (applying intermediate scrutiny because California’s similar handgun safety statute “does not restrict *possession* of handguns in the home or elsewhere”); *Nat’l Rifle Ass’n of Am.*, 700 F.3d at 206-07 (applying intermediate scrutiny to federal law imposing age qualification on commercial firearm sales because the law is “[f]ar from a total prohibition on handgun possession and use”); *Heller II*, 670 F.3d at 1262 (applying intermediate scrutiny to the District of Columbia’s “prohibition of semi-automatic rifles and large-capacity magazines” because it “does not effectively disarm individuals or substantially affect their ability to defend themselves”). The handgun sales regulations also do not restrict, in any way, private sales of handguns, leaving open this channel for the lawful transfer of handguns that cannot satisfy performance tests and do not contain basic safety features.

The handgun safety regulations also do not impose a substantial burden on the core Second Amendment right. *See Pena*, 898 F.3d at 979 (applying intermediate scrutiny to California’s chamber load indicator and magazine detachment mechanism requirements because they do not substantially burden the core Second Amendment rights). The handgun safety regulations merely “regulate the manner in which individuals may exercise their Second Amendment right”; they do not prohibit firearm possession. *Id.* at 977-78; *see also Silvester*, 843 F.3d at 827 (“laws which regulate only the *manner* in which persons may exercise their Second Amendment rights are less burdensome than those which bar firearm possession completely” (internal quotation marks omitted)). And, while the individual Plaintiffs allege that they cannot buy eighteen particular guns

identified in their Complaint, they can lawfully buy hundreds of other models of handguns that appear on the Approved Firearms Roster and that meet the Attorney General’s safety regulations. *See Draper*, 98 F. Supp. 3d at 85 (940 CMR § 16.05(3) “does not substantially burden the right to bear arms in self-defense in one’s home” because the regulation “in no way prevents citizens from obtaining a wide array of firearms”). Thus, any burden the handgun safety regulations may impose on Second Amendment rights is insignificant, as “being unable to purchase a subset of semiautomatic weapons, without more, does not significantly burden the right to self-defense in the home.” *Pena*, 898 F.3d at 978; *see Heller*, 554 U.S. at 626 (“[T]he right secured by the Second Amendment is not unlimited. . . . [T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”).

Plaintiffs make no allegation that the eighteen identified handguns are more effective for self-defense than the hundreds of other handguns they could buy, or may already possess, for self-defense or other lawful purposes. *See Pena*, 898 F.3d at 978 (observing plaintiffs had “adduced little evidence that the handguns unavailable for purchase in California are materially more effective for self-defense than handguns currently for sale in the state.”). Nor do Plaintiffs make any allegation that the hundreds of handguns available for purchase in Massachusetts are inadequate for self-defense at home. If anything, the firearms that may be sold by licensed dealers pursuant to the handgun safety regulations are *better* suited for self-defense because they are not defective and cannot be accidentally discharged by children and other unauthorized users. *See Pena*, 898 F.3d at 978 (observing that a load indicator and magazine safety disconnect requirement “not only prevents accidental discharges—which itself protects ‘hearth and home’—but also informs the owner when the gun is loaded so that the weapon may be fired in self-defense”). Thus, the handgun sales regulations do not impose a substantial burden on the core of the Second Amendment right, and intermediate scrutiny is appropriate. *See id.* at 979.

## 2. The Handgun Safety Regulations Satisfy Intermediate Scrutiny.

The handgun sales regulations easily survive intermediate scrutiny. Intermediate scrutiny requires that the challenged regulation substantially relates to one or more important government objectives. *Worman*, 922 F.3d at 38. When considering the Legislature’s and the Attorney General’s justifications for the regulatory scheme, the Court may consider “the legislative history of the enactment as well as studies in the record or cited in pertinent case law.” *Pena*, 898 F.3d at 979 (internal quotation marks omitted).

Protecting handgun purchasers and their families from handguns that are defective, and preventing accidental firearm injuries and fatalities, are critically important governmental interests. Indeed, “[i]t cannot be gainsaid that Massachusetts has compelling governmental interests in both public safety and crime prevention. In point of fact, few interests are more central to a state government than protecting the safety and well-being of its citizens.” *Gould*, 907 F.3d at 673 (citations omitted); *Worman*, 922 F.3d at 39 (“We have said before, and today reaffirm, that ‘few interests are more central to a state government than protecting the safety and well-being of its citizens.’” (quoting *Gould*, 907 F.3d at 673)). As the First Circuit recognized in *Worman*, “Massachusetts indubitably ‘has compelling governmental interests in both public safety and crime prevention.’” 922 F.3d at 39 (quoting *Gould*, 907 F.3d at 673). *See also Pena*, 898 F.3d at 980 (“There is no doubt that the governmental safety interests identified for the [load indicator] and [magazine safety disconnect] requirements are substantial.”). And so “the only question that remains is whether [the challenged regulations are] substantially related to those interests. The answer to this question depends on whether the fit between those interests and the [challenged regulations] is reasonable.” *Worman*, 922 F.3d at 39. A “reasonable” fit between the challenged law and the asserted governmental interests means that the law “does not burden more conduct than is reasonably necessary.” *Gould*, 907 F.3d at 674 (internal quotation marks omitted).



There is a reasonable fit between the Commonwealth's interest in protecting gun purchasers from defective firearms and the regulation of the commercial sale of handguns that are not fit for ordinary use because they malfunction, break, or explode with ordinary use, or fire when dropped. Both Section 123 and the Attorney General's regulations require that firearms that are sold commercially (1) are not made of inferior materials or, alternatively, are made of inferior materials but nonetheless pass a performance test; (2) are not prone to uncontrolled firing or exploding during normal use; and (3) are not prone to discharging accidentally when dropped. 940 CMR § 16.04; Mass. Gen. Laws ch. 140, § 123, cls. 18-20. Plaintiffs explicitly acknowledge in their Complaint that these regulations are "designed to protect consumers against unfair and deceptive practices including the protections against the sale of defective or unsafe firearms." Compl. ¶ 37 (citing 940 CMR §§ 16.01 – 16.06).

*Especially* because consumers purchase and rely on handguns for their own safety and the safety of their families, it is essential that the handguns they purchase do not malfunction, fire erratically, or explode in ordinary use, particularly in a self-defense situation. And, similarly, consumers that purchase handguns for self-defense or other lawful purposes expect that the handguns they buy will not discharge if the handgun is accidentally dropped. Thus, there is a reasonable relationship between the important governmental interest in protecting firearm consumers from defective or avoidably unsafe firearms and the requirements in Section 123 and 940 CMR §16.04.

There is also a reasonable fit between the critically important governmental interest in protecting children from avoidable firearm fatalities and the Attorney General's childproofing requirements. The childproofing requirements are well supported by the GAO Report, which found that *all* of the accidental firearms fatalities caused by children under the age of six could have been prevented had the firearms been equipped with childproofing features like those required by the

Attorney General’s regulations. GAO Report at 3, 34. Although Plaintiffs allege that equipping a firearm with a ten-pound trigger pull “makes handguns so outfitted *more* difficult to operate effectively and thus *more* difficult to operate safely,” Compl. ¶ 45, the Attorney General’s regulations do not require a ten-pound trigger pull. The childproofing requirement can be satisfied by any mechanism that “effectively precludes an average five-year old child from operating the handgun when it is ready to fire.” 940 CMR § 16.05(2). And “such mechanisms shall include, but are not limited to: raising trigger resistance to at least a ten pound pull, altering the firing mechanism so that an average five year old child’s hands are too small to operate the handgun, or requiring a series of multiple motions in order to fire the handgun,” as well as a hammer deactivation device. *Id.*; *id.* § 16.05(4). The Attorney General’s requirement that handguns sold by handgun-purveyors contain safety devices, 940 CMR § 16.05(1), is also well supported by evidence that one in three of the accidental firearm deaths in 1988 and 1999 could have been prevented by the addition of a firearm safety device. GAO Report at 3, 36.

The requirement that semi-automatic pistols contain either a load indicator or a magazine safety disconnect, 940 CMR § 16.05(3), also fits reasonably with the Commonwealth’s interest in public safety. This Court (Gorton, J.) held in *Draper* that the Attorney General’s load indicator or magazine safety disconnect requirement “passes constitutional muster under any standard of scrutiny” because the Attorney General “has demonstrated a strong showing of a ‘substantial relationship’ between the restrictions imposed by the regulation and the important government objective of protecting the safety of its citizens.” *Draper v. Healey*, 98 F. Supp. 3d 77, 85 (D. Mass. 2015). The Ninth Circuit has likewise concluded that California’s load indicator and magazine safety disconnect requirements “reasonably fit with California’s interest in public safety.” *Pena*, 898 F.3d at 980. And the GAO Report found that 23% of the accidental firearms fatalities occurred because individuals shot themselves or others with firearms they incorrectly

believed were unloaded. GAO Report at 3. The Report concluded these deaths could have been prevented by a load indicator. *Id.* A 1997 report by the National Opinion Research Center found that only 65% of Americans knew that a pistol can fire when the magazine is removed because a round of ammunition can remain in the chamber; 35% incorrectly believed that the gun could not fire or said that they did not know either way. T. Smith, National Opinion Research Ctr., 1997-98 NATIONAL GUN POLICY SURVEY 17 (Sept. 1998).<sup>17</sup> Of those surveyed, 39% lived in a household with a gun. *Id.* at 28, Table 6. 940 CMR § 16.05(3) is designed to reduce injuries and fatalities caused by this potentially fatal misconception. *Id.*

Finally, the requirement that handguns have a tamper-resistant serial number, 940 CMR § 16.03, fits reasonably with the Commonwealth’s “compelling governmental interests in both public safety and crime prevention.” *Gould*, 907 F.3d at 673. Serial numbers serve “a law enforcement interest in enabling the tracing of weapons via their serial numbers.” *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010) (affirming Second Amendment challenge to conviction for possessing a handgun with an obliterated serial number in violation of federal law under intermediate scrutiny). And, “there would appear to be no compelling reason why a law-abiding citizen would prefer an unmarked firearm” which “have value primarily for persons seeking to use them for illicit purposes.” *Id.* at 95. Thus, 940 CMR § 16.03 is “properly designed to remedy the problem of untraceable firearms.” *See id.* at 101.

Plaintiffs contend that the handgun safety regulations “sweep[] far too broadly,” because the Commonwealth’s “interest in handgun safety could be adequately achieved through readily available and easily implemented less restrictive alternatives, including producing, providing, and encouraging education, training, and public outreach regarding basic rules of firearm safety,

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<sup>17</sup> See [http://www.norc.org/PDFs/publications/SmithT\\_Nat\\_Gun\\_Policy\\_199798.pdf](http://www.norc.org/PDFs/publications/SmithT_Nat_Gun_Policy_199798.pdf).

storage, and use.” Compl. ¶ 42. But “education, training, and public outreach regarding basic rules of firearm safety, storage, and use” do not protect against the serious danger posed by defective firearms that malfunction, fire uncontrollably, or explode during normal use, or firearms that fire when accidentally dropped. Nor will education or training for handgun purchasers protect unauthorized users of firearms who have not received education and training on firearm safety, such as the family members of gun purchasers, or subsequent transferees or other third parties. And “proper education and training” is not an alternative to childproofing features because children under the age of five cannot understand or follow “basic rules of firearm safety, storage, and use.” Compl. ¶¶ 42-43.

Ultimately, it is the Legislature and the Attorney General’s “prerogative . . . to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments.” *Worman*, 922 F.3d at 40 (alteration in original) (internal quotation marks omitted). “The role of a reviewing court is limited to ensuring that in formulating its judgments,” the Legislature or the Attorney General “has drawn reasonable inferences based on substantial evidence.” *Id.* (internal quotation marks omitted). The handgun safety regulations are well supported and reasonable. And, the Legislature and the Attorney General’s measures have worked: “Massachusetts consistently has one of the lowest rates of gun-related deaths in the nation.” *Gould*, 907 F.3d at 674-75. Because the handgun safety regulations withstand intermediate scrutiny, the Court should dismiss Plaintiffs’ Complaint.

### **CONCLUSION**

For these reasons, Defendants respectfully request that the Court dismiss the Plaintiffs’ Complaint, ECF No. 1, with prejudice.

Respectfully submitted,

MAURA HEALEY, ATTORNEY GENERAL,  
and SECRETARY THOMAS TURCO,

By their attorneys,

/s/ Phoebe Fischer-Groban

Phoebe Fischer-Groban, BBO No. 687068

Grace Gohlke, BBO No. 704218

Assistant Attorneys General

Office of the Attorney General

Government Bureau

One Ashburton Place, 20th Floor

Boston, MA 02108

(617) 963-2589

Phoebe.Fischer-Groban@mass.gov

Grace.Gohlke@mass.gov

Dated: August 20, 2021

**CERTIFICATE OF SERVICE**

I certify that this document filed through the CM/ECF system will be sent electronically to registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on August 20, 2021.

/s/ Phoebe Fischer-Groban  
Phoebe Fischer-Groban  
Assistant Attorney General

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

<b>STEFANO GRANATA;</b>	:	Civil Rights Complaint
<b>JUDSON THOMAS,</b>	:	42 U.S.C. § 1983
<b>COLBY CANNIZZARO;</b>	:	
<b>CAMERON PROSPERI;</b>	:	
<b>THE GUN RUNNER, LLC;</b>	:	
and <b>FIREARMS POLICY</b>	:	
<b>COALITION, INC.</b>	:	
Plaintiffs	:	CIVIL ACTION NO.
	:	1:21-CV-10960-RWZ
	:	
	:	
v.	:	
	:	
<b>MAURA HEALEY</b> , in her official	:	
capacity as Attorney General of the	:	
Commonwealth of Massachusetts; and	:	
<b>THOMAS TURCO</b> , in his official	:	
capacity as Secretary of Executive	:	
Office of Public Safety and Security	:	
of the Commonwealth of	:	
Massachusetts,	:	
Defendants	:	

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**PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS**

Richard C. Chambers, Jr., Esq.  
BBO#: 651251  
Chambers Law Office  
220 Broadway, Suite 404  
Lynnfield, MA 01940  
Office: (781) 581-2031  
Cell: (781) 363-1773  
Fax: (781) 581-8449  
Richard@chamberslawoffice.com

*Attorneys for Plaintiffs*

## INTRODUCTION

The Second Amendment “individual right to possess and carry weapons in case of confrontation” extends to all arms “in common use at the time for lawful purposes like self-defense”—and it certainly applies to common handguns, “the most popular weapon chosen by Americans for self-defense in the home.” *District of Columbia v. Heller*, 554 U.S. 570, 592, 624, 629 (2008) (quotation marks omitted). Yet Defendants have limited the right to keep and bear arms to an arbitrary, abbreviated list of “approved” firearms that excludes the vast majority of common, commercially available handguns. The Commonwealth asserts that the restrictions in question—its “Approved Firearm List” and associated handgun design and manufacturing requirements—are necessary to ensure its residents do not select “unsafe” handguns (with “unsafe” defined in a way that excludes all but a small fraction of commercially available and commonly owned handguns nationwide for lawful purposes. Complaint ¶ 36 (June 8, 2021), Doc. 1 (“Compl.”)). But under the Second Amendment, it is up to *the People*—not Government bureaucrats—to choose, after weighing the “many reasons” to prefer one type of firearm over another, *Heller*, 554 U.S. at 692, which model is best suited to their particular lawful purposes. This Court would not sanction a government list dictating which medium of communication its citizens may use to express their political views—including Facebook and radio ads, say, as “approved” media, but excluding Twitter and yard signs. Under the Second Amendment, the Court can no more bless Defendants’ attempt to dictate which common arms the People are allowed to keep and bear.

The Commonwealth has not shown that its restrictions pass constitutional muster under the “two-step approach” to Second Amendment challenges adopted by the First Circuit, and its motion to dismiss must be denied. *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018). The Second Amendment right to keep and bear arms plainly must encompass a right to *acquire those arms in*



*the first place*. And *Heller* itself makes clear that this right extends to all arms “in common use at the time for lawful purposes like self-defense.” 554 U.S. at 624 (quotation marks omitted). Because Plaintiffs have alleged that the firearms at issue in this case—handguns that they wish to acquire but are barred from doing so by the Commonwealth’s challenged restrictions—are in common use for lawful purposes, there can simply be no dispute, especially at the motion-to-dismiss stage, that the challenged restrictions “burden[ ] conduct that falls within the scope of the Second Amendment’s guarantee.” *Gould*, 907 F.3d at 668–69. The Commonwealth invokes *Heller*’s dicta indicating that “conditions and qualifications on the commercial sale of arms” may be “presumptively lawful,” *Heller*, 554 U.S. at 627 & n.26, but the restrictions challenged here are not “conditions and qualifications,” they are a *de facto ban* on the sale of the handguns at issue. Nor does the Commonwealth’s meager historical evidence—consisting of a single Maine law enacted 30 years after the Second Amendment’s ratification—suffice to show any Founding-Era historical tradition of accepting draconian restrictions like the ones at issue here.

Because the challenged restrictions severely burden the Second Amendment “right of law-abiding, responsible citizens to use arms in defense of hearth and home,” *Heller*, 554 U.S. at 635—by virtually banning them from *even acquiring* common, constitutionally protected handguns for constitutionally protected purposes—the “appropriate level of scrutiny,” *Gould*, 907 F.3d at 670, is strict scrutiny. But even if this Court concludes otherwise, the challenged restrictions cannot survive intermediate scrutiny, either. Massachusetts has not shown that its handgun design and manufacturing requirements actually advance its claimed interest in gun safety. Indeed, its principal piece of evidence—a 1991 report by the Government Accountability Office—actually concludes that the safety measures at issue would *at best* be effective in *less than a third* of accidental firearm deaths. And the same report also repeatedly explains there are other means of

advancing this interest—such as improving firearm safety education and training and increasing the use of other safety devices such as gun safes and trigger locks. The Commonwealth has not even come close to showing these alternative measures—less burdensome to the Second Amendment interests at stake—are not sufficient to advance its safety interests.

## BACKGROUND

### I. Massachusetts’s Ban on Common Handguns.

Massachusetts strictly regulates the purchase and acquisition of handguns in the Commonwealth. With minor exceptions not applicable here, all handgun sales in the Commonwealth must go through a licensed dealer (or “handgun-purveyor,” *id.*), who is governed by a variety of stringent requirements. Two sets of requirements are relevant to this challenge.

#### A. The Approved Firearms Roster.

First, all handguns sold or transferred in Massachusetts must be listed on the Commonwealth’s “Approved Firearms Roster.” *See* M.G.L. c. 140, § 123; 501 C.M.R. § 7.05 (except for a small number of grandfathered firearms owned by a licensed dealer before 1998, *id.* § 7.05(a)). The Roster is compiled and published by the Executive Office of Public Safety and Security and includes only those firearms that have been shown by “an approved independent testing laboratory,” 501 CMR § 7.03(1), to meet a variety of onerous statutory requirements establishing, in granular detail, the metal that may be used to manufacture the firearm, the design of the handgun, and the types of quality-control tests that must be conducted during the manufacturing process, *see* M.G.L. c. 140, § 123, cl. 18–21. The roster includes around 1,000 handgun makes and models by twenty-nine manufacturers.<sup>1</sup> That is a small fraction of available models, Compl. ¶ 36, and it does not include any handguns at all from such well-known

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<sup>1</sup> Executive Office of Public Safety & Security, *Approved Firearms Roster* (June 2021), <https://bit.ly/3tG257M>.

manufacturers as Colt, Nighthawk, and Armalite.

**B. The Attorney General’s Regulations.**

Second, and ironically, even if a handgun appears on the Commonwealth’s “approved firearms roster,” that does not mean it is approved for sale. Instead, a handgun must *also* comply with a separate set of regulatory requirements established by the Attorney General. 940 C.M.R. ch. 16.00. These regulations require handguns to include, for example, a child-safety mechanism such as a “trigger resistance [of] at least a ten pound pull” or a design that “require[es] a series of multiple motions in order to fire the handgun.” *Id.* § 16.05(2). Defendant’s regulations also require any magazine-fed handgun to include either a “magazine safety disconnect,” which prevents the handgun from being fired when the magazine is detached, or a “load indicator” that “plainly indicates that a cartridge is in the firing chamber.” *Id.* §§ 16.05(3), 16.01.

Taken together, the combined effect of the Attorney General’s regulations and the approved firearms roster requirement is to foreclose virtually any sale, within Massachusetts, of the vast majority of commercially available handguns—including many makes and models that are lawfully sold and commonly owned throughout the United States. Compl. ¶ 36.

**II. The Impact on Plaintiffs.**

Because of these restrictions banning the sale of most common handguns, Plaintiffs have been unable to purchase (or sell) handguns that the Second Amendment entitles them, and all similarly situated individuals, to keep and to bear. Individual Plaintiffs Granata, Thomas, Cannizzaro, and Prosperi are all law-abiding citizens qualified to purchase firearms, and they all wish to purchase common handguns that do not meet one or both of the restrictions just described. Compl. ¶¶ 47–50. They cannot do so because of the challenged restrictions. *Id.* ¶¶ 61, 69–72. Many other members of associational Plaintiff Firearm Policy Coalition likewise wish to purchase common handguns that do not meet one or both of the challenged sets of restrictions. *Id.* ¶¶ 12,

52–54. Finally, retailer Plaintiff The Gunrunner, LLC, wishes to sell to its qualified customers common, commercially available handguns that do not meet one or both of the challenged restrictions and would do so were those restrictions not in force. *Id.* ¶¶ 51.

## ARGUMENT

When deciding a motion to dismiss under Rule 12(b)(6), a court must “construe all factual allegations in the light most favorable to the non-moving party to determine if there exists a plausible claim upon which relief may be granted.” *Tomasella v. Nestle USA, Inc.*, 962 F.3d 60, 70 (1st Cir. 2020). The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. This provision “guarantee[s] the individual right to possess and carry weapons in case of confrontation,” *Heller*, 554 U.S. at 592, a right that applies to Massachusetts via the Fourteenth Amendment, *McDonald v. City of Chicago*, 561 U.S. 742, 778, 791 (2010) (plurality opinion). The First Circuit has adopted a “two-step approach” to Second Amendment challenges, asking first “whether the challenged law burdens conduct that falls within the scope of the Second Amendment’s guarantee,” and second “what level of scrutiny is appropriate and . . . whether the challenged law survives that level of scrutiny.” *Gould v.*, 907 F.3d at 668–69.

### **I. Massachusetts’s ban on common handguns restricts rights within the scope of the Second Amendment.**

#### **A. The Second Amendment protects the right to acquire all handguns in common use.**

Defendants’ challenged restrictions “burden[ ] conduct that falls within the scope of the Second Amendment’s guarantee.” *Gould*, 907 F.3d at 669. That conclusion inescapably follows from two propositions: the Second Amendment protects a right to acquire firearms, and that right extends to all firearms that are in common use by Americans for lawful purposes.

The Second Amendment “protect[s] an individual right to use arms for self-defense,”

taking “off the table” any “absolute prohibition of handguns held and used for self-defense in the home.” *Heller*, 554 U.S. at 616, 636. As federal courts have repeatedly recognized, that unassailable “right to possess firearms for protection implies . . . corresponding right[s]” without which “the core right wouldn’t mean much.” *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (addressing right to train with firearms). And the right to keep and bear arms would mean little indeed without the corresponding right *to acquire arms in the first place*. Indeed, “constitutional rights necessarily protect the prerequisites for their exercise” and “thus implicitly protect those closely related acts necessary to their exercise.” *Luis v. U.S.*, 578 U.S. \_\_\_, 136 S. Ct. 1083, 1097-98 (2016) (Thomas, J. concurring). So if the core right to possess a firearm “operable for the purpose of immediate self-defense,” *Heller*, 554 U.S. at 635, is to have any meaning, it necessarily “must also include the right to *acquire* a firearm”—making the right of acquisition the “*most fundamental prerequisite of legal gun ownership*,” *Illinois Ass’n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930, 938 (N.D. Ill. 2014). It follows then that generally “prohibiting the commercial sale of firearms . . . would be untenable under *Heller*.” *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010).

These conclusions are consistent with the traditional understanding and practices of the People of this Nation, as “[t]he right to keep arms, necessarily involves the right to purchase them . . . and to purchase and provide ammunition suitable for such arms.” *Andrews v. State*, 50 Tenn. 165, 178 (1871); *see also Heller*, 554 U.S. at 583 n.7 (“What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece . . . ?” (quoting *Some Considerations on the Game Laws* 54 (1796))). There can thus be no doubt that the Second Amendment generally protects the right to purchase an operative firearm.

Nor can there be any doubt about what firearms this protection encompasses. *Heller* itself

answered that question, holding that while the Second Amendment does not protect “dangerous and unusual weapons,” it *does* extend to any “arms in common use at the time for lawful purposes like self-defense,” 554 U.S. at 624, 627 (quotation marks omitted). As the First Circuit held in *Worman v. Healey*, “the sorts of weapons protected” by the Second Amendment are “those in common use at the time.” 922 F.3d 26, 34 (1st Cir. 2019) (quoting *Heller* at 627). And whatever other types of arms might fall within that category, the First Circuit has explained, “*Heller* made plain that handguns, which the Court described as ‘the most popular weapon chosen by Americans for self-defense in the home,’ are protected.” *Id.* at 35 (quoting *Heller* at 629).

Defendants do not—and, under Rule 12(b)(6), *cannot*—dispute that the models of firearms Plaintiffs wish to purchase “are widely sold and possessed outside of Massachusetts” and “are in common use for self-defense and other lawful purposes.” Compl. ¶ 47; *see also id.* ¶¶ 48–50. And they admit that the challenged restrictions ban their commercial sale within Massachusetts—with respect to two of the handgun models, because they do not include either a load indicator or magazine safety disconnect, Motion to Dismiss 7 (Aug. 20, 2021), Doc. 15 (“MTD”) (citing 940 CMR § 16.05(3), (4)), and with respect to the remaining models, because they do not appear on the Approved Firearms Roster, *id.* It follows that the challenged restrictions burden conduct protected by the Second Amendment.

**B. Massachusetts’s restrictions are not presumptively constitutional.**

Massachusetts resists this conclusion based on two arguments: that the challenged restrictions fall within a supposed historical exception to the Second Amendment’s protections for “gun safety regulation,” *id.* at 12, and that they are “presumptively lawful conditions and qualifications on the commercial sale of firearms,” *id.* at 9–10. Neither argument has merit.

1. Because the Second Amendment “codified a *pre-existing* right,” its protections were “enshrined with the scope they were understood to have when the people adopted them.”

*Heller*, 554 U.S. at 634–35. That means that the Second Amendment is subject to those “longstanding” “regulatory measures” that were “known to ordinary citizens in the founding generation.” *Id.* at 577, 626, 627 n.26. Massachusetts asserts that the restrictions here pass muster under this reasoning because, it says, “gun safety regulation was commonplace in the colonies” when the Second Amendment was ratified in 1791. MTD 12. This argument fails.

The only Founding-Era regulations the Commonwealth actually points to are “safety laws regulating the storage of gun powder, laws keeping track of who in the community had guns, laws administering gun use in the context of militia service . . . , laws prohibiting the use of firearms on certain occasions and in certain places, and laws disarming certain groups and restricting sales to certain groups.” *Id.* (quoting *NRA v. BATFE*, 700 F.3d 185, 200 (5th Cir. 2012)). None of these restrictions is remotely analogous to the ones at issue here. The challenged ban on purchasing common handguns does not concern “who in the community ha[s] guns,” is not limited to “certain occasions,” has nothing to do with “militia service,” and does not target “certain groups.” *Id.* Nor does it merely require gun owners to store their firearms in a particular place or manner. Rather, as discussed, it *virtually forecloses* citizens from *acquiring these common handguns at all*.

To be sure, viewed from the highest level of generality, all of these historical restrictions concerned “gun safety” in some way. MTD 12. But the government cannot justify a ban on common handguns merely by invoking an amorphous historical exception for “gun safety” regulations. If that trick worked, *every* gun-control measure would be automatically *exempt from constitutional scrutiny* under the purported Second Amendment exception for “gun safety” regulations. *Heller* disclaimed such an approach—and in fact *expressly held* that the very historical safety regulations relied upon by Massachusetts “provide no support for the severe restriction” at issue in that case, since “they do not remotely burden the right of self-defense as much as an

absolute ban on handguns.” 554 U.S. at 632. That is the end of this argument.

Unable to find any serious Founding-Era support for its restrictions, Massachusetts points to an 1821 Maine law that required inspectors to “try the strength” of firearm barrels. MTD 13. That single law is far too slender a reed to support the Commonwealth’s argument. For one, it comes too late: while *Heller* found post-ratification historical evidence “instructive,” 554 U.S. at 614, that is only because it *confirmed* the Founding-Era evidence establishing what the Second Amendment meant in 1791. And the Court has since removed all doubt about this, clarifying that the value of post-ratification historical evidence is limited to “mere confirmation” of “the public understanding in 1791 of the right codified by the Second Amendment,” *Gamble v. United States*, 139 S. Ct. 1960, 1975 (2019). The Commonwealth does not explain how the out-of-circuit cases looking to historical restrictions decades after the Founding—in some cases, dating back no further than the 20th century, MTD 13—can be squared with the Supreme Court’s intervening clarification in *Gamble*. For another, the challenged laws do much more than “try the strength” of handguns—they ban the sale of numerous models that do not meet the Commonwealth’s detailed specifications but which are nevertheless protected as arms in common use for lawful purposes. And in any event, even if post-Founding laws *could* be used to contradict the evidence from the Founding-Era itself concerning the scope of the Second Amendment, *one Maine law standing alone* obviously would not suffice. *See Heller*, 554 U.S. at 632.

2. In *Heller*, the Supreme Court also identified a handful of “presumptively lawful regulatory measures” that, based on its reading of the Second Amendment’s text and history, it took to be *prima facie* outside “the full scope of the Second Amendment.” 554 U.S. at 626–27 & n.26. Those presumptive exceptions include “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626–27. But whatever the scope of this category of presumptively



lawful regulations, it simply cannot create a blanket exception for “commercial”-type restrictions that a State may exploit by casting all manner of restrictions on the right to keep and bear arms as restrictions on their “commercial sale.” After all, “[i]f there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*.” *Marzzarella*, 614 F.3d at 92 n.8; *see also Ill. Ass’n of Firearms Retailer*, 961 F. Supp. 2d at 930, 937.

For three separate reasons, this presumptively constitutional category cannot justify Massachusetts’s ban. First, Massachusetts’s restrictions, as applied to the common firearms at issue in this case, are not “condition[s]” or a “qualification[s]” on their sale, *Heller*, 554 U.S. at 627—they effectively constitute a complete ban. This “commercial” category might encompass such measures as mandating background checks at the point of sale or requiring firearm dealers to keep adequate records, but the Commonwealth cites no authority—apart from a non-precedential decision from another judge on this Court, *see Draper v. Healey*, 98 F. Supp. 3d 77 (D. Mass. 2015), *aff’d on other grounds*, 827 F.3d 1 (1st Cir. 2016)—for the proposition that the category extends to a *flat ban* on the purchase of common firearms. Second, *Heller*’s presumption applies only to “longstanding” laws. *See* 554 U.S. at 626–27. And as just shown, restrictive firearm design and testing requirements—that are so onerous that they outlaw the sale of all but a fraction of common, commercially available handguns—are not longstanding; they are novel and rare.

Third, even if the restrictions at issue *did* qualify under this category, that would not be the end of the analysis. Rather, as the Commonwealth concedes, a plaintiff may *rebut* the presumption of constitutionality that applies to a restriction in one of these categories by showing that “the regulation does have more than a de minimis effect upon his right.” MTD 11 (quoting *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244, 1253 (D.C. Cir. 2011)). And contrary to

Defendants’ arguments, the effect of Massachusetts’s ban on the sale of common handguns is plainly not “de minimis.” Plaintiffs, as shown above, clearly have a Second Amendment right to acquire the common handguns in question, but the challenged ban *all but forecloses* them from doing so. That is not “de minimis” by any conceivable measure.

Citing *Worman*, the Commonwealth insists that the ban’s effect is de minimis because the handguns in question do not make up a discrete “class of weapons.” MTD 12. That is a non sequitur. *Worman* analyzed whether the restricted category of firearms (there, certain semi-automatic firearms and magazines) “may be deemed a class” *under the second prong* of this Circuit’s two-step test, for purposes of determining whether the ban in that case should be struck down categorically, like the handgun ban in *Heller*, rather than analyzed under a form of means-ends scrutiny. 922 F.3d at 32 n.2. Plaintiffs believe *Worman* gave the wrong answer to that question, and reserve the right to argue, before a court empowered to revisit the decision, that *Heller* requires a categorical test, *see Tyler v. Hillsdale County Sheriff’s Department*, 837 F.3d 678, 688 (6th Cir. 2016) (Sutton, J., concurring in most of the judgment) (quoting *Heller*, 554 U.S. at 635) (“What determines the scope of the right to bear arms are the ‘historical justifications’ that gave birth to it. . . . Tiers of review have nothing to do with it.”); *Heller II*, 670 F.3d at 1271–85 (Kavanaugh, J., dissenting). But whether or not the banned firearms make up a “class of weapons,” *id.*, has no bearing on the question, under *prong one* of this two-step test, whether the challenged restriction has a more than de minimis effect on conduct protected by the Second Amendment. The handgun ban challenged in this case plainly does, so attempting to invoke *Heller*’s category of commercial conditions and qualifications simply does not suffice.

Defendants are not entitled to dismissal under the first part of the First Circuit’s test.

## **II. Massachusetts’s ban fails any level of heightened constitutional scrutiny.**

Because the challenged ban on common handguns restricts conduct “understood to be

within the scope of the right at the time of ratification,” *id.*, the Court must proceed to determine “the appropriate level of scrutiny,” *Gould*, F. 3d at 670. Here, the challenged restrictions should be analyzed under strict scrutiny. And they cannot survive even intermediate scrutiny.

**A. Strict scrutiny applies.**

Under the approach adopted by the First Circuit, the appropriate level of scrutiny depends on “how closely [the challenged restriction] approaches the core of the Second Amendment right and how heavily it burdens that right.” *Id.* at 670–71. The restrictions at issue in this case directly regulate the “core” of the Second Amendment as the First Circuit has defined it.

Neither the text or history of the Second Amendment nor the Supreme Court’s decision in *Heller* divides the right to keep and bear arms, like an onion, into a “core” and various outer layers. The constitutional text simply provides that the “right of the people to keep and bear Arms, shall not be infringed”—full stop. U.S. CONST. amend. II. And while *Heller* explains that the “core lawful purpose” of the Second Amendment’s protection is “self-defense,” and that this interest is “most acute” in the home, 554 U.S. at 628, 630, it says nothing to establish any hierarchy or scale of Second Amendment rights. Nonetheless, the First Circuit has held that the Second Amendment does have a “core,” and that this “core” protects “self-defense in the home on the part of responsible, law-abiding individuals.” *Worman*, 922 F.3d at 36 (quotation marks omitted). Because the challenged restrictions effectively prevent law-abiding Massachusetts residents from using the handguns at issue for self-defense in the home—by barring them from *acquiring those handguns in the first place*—it directly impinges upon this core right.

The Commonwealth disputes this, arguing that the challenged limits “apply only to commercial sales, not to possession of handguns in the home.” MTD 14. But it never explains how one can possess and use a handgun in the home if one is barred from *acquiring it in the first place*. See *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (“[T]he core Second

Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms." (quotation marks omitted)). The out-of-circuit precedents Defendants cite, MTD 14, likewise fail to come to grips with this obvious point. The challenged ban on purchasing common handguns thus "implicates the core of the Second Amendment right."

The burden Defendants' limits inflict upon that core right is severe, since, as discussed above, they serve to virtually foreclose law-abiding citizens from obtaining the constitutionally protected firearms at issue. The Commonwealth advances two arguments attempting to diminish the severity of the impact, but neither is persuasive. First, the Commonwealth points out that neither the "Approved Firearm Roster" nor the Attorney General's handgun regulations "restrict, in any way, private sales of handguns, leaving open this channel for the lawful transfer of handguns." MTD 14. The exception for private sales does precious little to lessen the severity of the Commonwealth's general ban. Defendants admit that these private sellers are limited to *four sales each year*, *id.* at 4; *see* 940 C.M.R. § 16.01, making the private market a totally unviable alternative to the commercial market. Indeed, Plaintiffs' complaint alleges that the private market is plagued by "inherently limited supply" and principally consists of "used handguns having no manufacturer's warranty," leaving law-abiding citizens in Massachusetts with "little, if any, realistic means of lawfully acquiring any of the [banned] handguns." Compl. ¶¶ 37-38.

The Commonwealth also repeatedly claims that the challenged restrictions pose no "substantial burden" on the Second Amendment because Plaintiffs "can lawfully buy hundreds of other models of handguns that appear on the Approved Firearms Roster." MTD 15. *Heller* itself forecloses this line of attack. The Supreme Court could not have been clearer: "*It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.*" *Id.* (emphasis added). The Commonwealth's attempt to

diminish the severity of its ban on most common handguns by pointing to the continued availability of the small fraction of handguns it *does* allow fails under the very same reasoning.

The logic behind the Supreme Court’s rejection of this line of argument is obvious. For if a government could defend a ban on *one* type of firearm by pointing out that it does not extend to *other* types of firearms, it could ultimately eclipse the Second Amendment entirely by degrees. Moreover, the whole point of the Second Amendment is to *leave it to law-abiding citizens* to determine which of the common and available types of firearms they wish to keep and to bear. The courts would not countenance the Commonwealth’s be-happy-with-what-we’ve-left-you type of reasoning in the context of any other Constitutional right. Massachusetts could not justify a ban on *televising* a particular political viewpoint by pointing to the continued availability of print and online media, nor could it ban certain speech on MSNBC and CNN so long as Fox and C-SPAN were left unrestricted. The argument is no more persuasive under the Second Amendment.

The same reasoning disposes of Defendants’ contention that Plaintiffs have not alleged that the banned firearms at issue “are more effective for self-defense.” MTD 15. Again, it was the judgment of those who framed and ratified the Second Amendment that *the People themselves*—not the Government—are in the best position to determine which firearms in common use best suit their lawful purposes. And again, this point would be too obvious to even require argument in the context of any other constitutional right. The advent of more efficient and effective media of communications, such as TV and the internet, does not mean that the Government may now ban other more cumbersome methods such as leafletting, radio broadcasting, or pamphleteering.

The Commonwealth’s restrictions should be subjected to strict scrutiny.

**B. The challenged restrictions fail even intermediate scrutiny.**

In any event, the challenged restrictions also fail intermediate scrutiny. To survive intermediate scrutiny, a restriction must be “substantially related to the achievement” of the

government's objective. *United States v. Virginia*, 518 U.S. 515, 533 (1996). A government defending a law challenged as a violation of the Second Amendment “must supply actual, reliable evidence to justify” the restriction, and it “cannot get away with shoddy data or reasoning.” *Ezell*, 651 F.3d at 709 (7th Cir. 2011) (citations and quotation marks omitted). “The burden of justification is demanding, and it rests entirely on the State.” *Virginia*, 518 U.S. at 533. Public safety and preventing accidental firearm injuries are important government interests, but the Commonwealth has failed to show the Complaint’s allegations that the challenged restrictions do not substantially further that interest, Compl. ¶¶ 42–46, are so implausible that the Court may disregard them on a motion to dismiss. And they are not implausible.

Consider first the requirement that all magazine-fed handguns include “a load indicator or magazine safety disconnect.” 940 CMR 16.05(3). Massachusetts has failed to show that this outlier requirement substantially advances its safety interests. It touts a 1991 study by the General Accounting Office, but it is hard to see why, since that study in fact concluded these design requirements would have had *no effect* on *over three-quarters* of accidental deaths. United States General Accounting Office, *Accidental Shootings* 17 (1991), <https://bit.ly/3nyJ3zk> (“1991 GAO Report”). And even as to the 23% of deaths that the GAO concluded *might* have been prevented, this conclusion was based *solely* on the GAO’s assessment that “the shooter believed the weapon was unloaded,” *id.* at 16—and the analysis simply *blindly assumed* that a load indicator would have prevented the accident. The 1991 GAO Report proves nothing.

Similar problems infect the 1997 opinion poll relied upon by Massachusetts. As the Commonwealth’s own description of this poll shows, *only 13.7 %* of the respondents both (1) did not know that a firearm can be discharged with the magazine removed, and (2) actually lived in a household with a gun. MTD 19. The notion that this small minority of such individuals would be

effectively prevented from accidentally discharging a firearm by the presence of the required “load indicator” strains credulity; after all, as the GAO itself explained, load indicators have little value unless users are “educated to understand their use and to recognize the indication that the firearms [are] loaded.” 1991 GAO Report at 35.

The Commonwealth’s failure to justify its requirement is underscored by the fact that *only two States*—Massachusetts and California—have seen fit to mandate load indicators and/or safety disconnects. See Giffords Law Center, *Design Safety Standards*, <https://bit.ly/3k8nCCR>.<sup>2</sup> In the rest of the States—*96% of the States in the Union*—handguns need not include these unusual, outlier mechanisms. It is “hard to persuasively say that the government has an interest sufficiently weighty to justify a regulation that infringes constitutionally guaranteed Second Amendment rights if the Federal Government and the states have not traditionally imposed—and even now do not commonly impose—such a regulation.” *Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting).

The Commonwealth invokes the earlier decision by another judge of this Court upholding the load-indicator requirement under intermediate scrutiny. MTD 18 (citing *Draper*, 98 F. Supp. 3d 77). That trial-court decision is not binding, so its only authority comes from whatever persuasive value it may have. It has little, since the entirety of *Draper*’s analysis of the issue consists of a single, conclusory sentence asserting that “defendant has demonstrated a strong showing of a ‘substantial relationship’ between the restrictions imposed by the regulation and the important government objective of protecting the safety of its citizens.” 98 F. Supp. 3d at 85. Massachusetts claims that the First Circuit, on appeal, “upheld the Attorney General’s load indicator requirement as applied to Glock handguns,” MTD 7, but it neglects to mention that the

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<sup>2</sup> New York, the only other state to mandate specific design features, requires only the inclusion of a “safety” switch. N.Y. Comp. Codes R. & Regs. tit. 9, § 482.5(f).

Court of Appeals only resolved a vagueness challenge to the requirement and *expressly declined to address* any Second Amendment claim on the merits, 827 F.3d at 4–5.

Defendants also point to the Ninth Circuit’s decision in *Peña v. Lindley*, 898 F.3d 969 (9th Cir. 2018). That decision is not binding here, and it dealt with California’s requirement of *both* a load indicator and magazine disconnect feature, so its conclusion that this dual requirement “reasonably fit with California’s interest in public safety” does not entail a similar conclusion regarding Massachusetts’s requirement of one feature or the other. *Id.* at 981. In all events, *Peña*’s abbreviated analysis has little more persuasive value than *Draper*’s. *Peña*’s discussion of the issue consists of merely a sentence describing how a load indicator “acts as a red flag for those handling the gun who may have forgotten that it was loaded” and a sentence explaining that a disconnect mechanism “prevents a firearm from shooting unless a magazine is inserted.” *Id.* at 980. Simply *describing how the required features operate* cannot satisfy the judicial duty, under intermediate scrutiny, to ensure through “independent judgment of the facts” that the government “has drawn reasonable inferences based on substantial evidence.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994).<sup>3</sup> *Peña* also adverts to unspecified “studies” purportedly supporting California’s requirement and asserts that Plaintiffs “do not provide any reliable evidence that these studies are incorrect.” 898 F.3d at 980. But the burden is on *the Government*. *Virginia*, 518 U.S. at 533.

Massachusetts has also failed to show that the required child-safety features substantially advance public safety. Here too it principally relies on the 1991 GAO report, but this report in fact concludes that requiring a child-safety device would *not* have prevented *fully 92%* of the accidental

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<sup>3</sup> The free speech cases, like *Turner* and *McCullen*, are proper analogues, as the Supreme Court itself has repeatedly analogized to the First Amendment in analyzing challenges under the Second Amendment. *Heller*, 554 U.S. at 582, 591, 595, 606, 625-26, 635; *McDonald*, 561 U.S. at 759, 779, 782; *Caetano v. Mass.*, 577 U.S. 411, 417-18 (Alito, J., concurring).



fatalities the GAO studied, given research indicating that available child-safety mechanisms “can be reasonably expected to prevent only children up to about age 6 from discharging a firearm.” 1991 GAO Report at 16. As to the remaining eight percent, Massachusetts claims that the GAO “found that *all* of the accidental firearms fatalities caused by children under the age of six could have been prevented” by the required features. MTD 17-18. But once again, that was not a *finding* of the GAO’s report, it was an *assumption* of its analysis. The GAO determined “the number of deaths that could have been prevented by a child-proof device” *solely* by looking at “the age of the child firing the weapon” and assuming that if they were under 6, the device would have been effective. 1991 GAO Report at 16.

Moreover, the Complaint credibly alleges that one of the Commonwealth’s listed child-safety measures—requiring a 10-pound trigger pull—would in fact “make handguns so outfitted *more* difficult to operate effectively and thus *more* difficult to operate safely.” Compl. ¶ 45. The Commonwealth must accept that allegation as true under 12(b)(6)—and plainly, a law that *frustrates* the safe operation of firearms is not properly tailored under intermediate scrutiny.

Finally, the Commonwealth fails to show that its roster of “approved” handgun models sufficiently furthers its interest to withstand heightened scrutiny. Defendants do not and cannot dispute that their list of approved firearms excludes all but a “small fraction” of available, commonly used handguns, Compl. ¶ 36, including the common and constitutionally protected handguns Plaintiffs wish to purchase, MTD 7. And once again, Massachusetts’s use of a “roster” of pre-approved handguns is an extreme, outlier measure—only three States and the District of Columbia impose such a requirement, Giffords, *supra*, <https://bit.ly/3k8nCCR>, undermining any claim that it is somehow necessary or even effective in ensuring gun safety.

The Commonwealth’s only defense of this restrictive list is that *Plaintiffs* have not alleged

“why the[ ] models [at issue] are not on the roster.” MTD 7. That gets the matter precisely backwards. Again, because Second Amendment rights are at stake, the “demanding” burden of showing that the Commonwealth’s exclusion of these constitutionally protected firearms from its list furthers public safety “rests *entirely on the State*.” *Virginia*, 518 U.S. at 533 (emphasis added). Massachusetts cannot meet that burden by (1) admitting that the firearms are in common use, (2) admitting that they are not on its “approved” list, and then (3) throwing up its hands and saying it *doesn’t know why* these common, constitutionally protected handguns did not make the cut.

Massachusetts’s failure to justify the challenged restrictions is all the more glaring in light of the readily available, less-restrictive alternatives. Even under intermediate scrutiny, a challenged restriction cannot burden substantially more constitutionally protected conduct than necessary to achieve the State’s interest. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). In *McCullen*, for example, the Supreme Court struck down a Massachusetts “buffer zone” law forbidding certain types of speech outside of abortion clinics, reasoning that the State had failed to show that measures substantially less restrictive than such an extreme prophylactic measure were not just as “capable of serving its interests.” *Id.* at 494. Massachusetts’s law, the Court noted, was “truly exceptional,” and the State was able to “identify no other [ ] law” that was comparable, raising the “concern that the Commonwealth has too readily forgone options that could serve its interests just as well.” *Id.* at 490. And even in the context of intermediate scrutiny, the Court concluded, the State must “show[ ] that it seriously undertook to address the problem with less intrusive tools readily available to it,” or at the least, “that it considered different methods that other jurisdictions have found effective.” *Id.* at 494. This requirement, the Court explained, “prevents the government from too readily sacrificing speech for efficiency.” *Id.* (cleaned up).

*McCullen* dooms the restrictions challenged here. As the Complaint alleged—and, under

Rule 12(b)(6), the Court must presume—the Commonwealth’s “interest in handgun safety could be adequately achieved through readily available and easily implemented less restrictive alternatives, including producing, providing, and encouraging education, training, and public outreach regarding basic rules of firearm safety, storage, and use.” Compl. ¶ 42. Indeed, adequate safety training, the Complaint plausibly alleges, is *more* effective than the safety features at issue, which “are subject to failure.” *Id.* ¶ 44. The keystone of the Commonwealth’s attempt to justify the challenged restrictions—the 1991 GAO Report—in fact clinches the point. As the GAO repeatedly explained, “[o]ther options are available” to further gun safety, including “locking storage cases, trigger guards, combination locks that can be built into the weapon, and a variety of other mechanisms for securing firearms of different types,” as well as “proper education in the use and handling of firearms.” 1991 GAO Report at 35–36. The Commonwealth responds with the tautological assertion that gun-safety education does not protect those “who have not received education,” MTD 20, but that is merely an argument in favor of a more robust public outreach and education program. Massachusetts also argues that education and training “is not an alternative to childproofing features,” *id.*, but it utterly fails to address the availability of such alternative mechanisms as gun safes and trigger locks—not to mention “the simple expedient of keeping firearms unloaded, with ammunition stored separately.” 1991 GAO Report at 35.

“In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it,” *McCullen*, 573 U.S. at 494—so its onerous restrictions cannot pass intermediate scrutiny.

### CONCLUSION

The Commonwealth’s motion to dismiss should be denied.

DATED: September 17, 2021

Respectfully submitted,

/s/ Richard C. Chambers, Jr., Esq.  
Richard C. Chambers, Jr., Esq.  
BBO#: 651251  
Chambers Law Office  
220 Broadway, Suite 404  
Lynnfield, MA 01940  
Office: (781) 581-2031  
Cell: (781) 363-1773  
Fax: (781) 581-8449  
[Richard@chamberslawoffice.com](mailto:Richard@chamberslawoffice.com)

Raymond M. DiGuiseppe  
THE DIGUISEPPE LAW FIRM, P.C.  
4320 Southport-Supply Road Suite 300  
Southport, NC 28461  
P: 910-713-8804  
E: law.rmd@gmail.com  
Appearing *Pro Hac Vice*

Jason A. Guida (BBO# 667252)  
PRINCIPE & STRASNICK, P.C.  
17 Lark Avenue  
Saugus, MA 01906  
(617)383-4652  
[jason@lawguida.com](mailto:jason@lawguida.com)

William Sack  
FIREARMS POLICY COALITION  
1215 K Street, 17th Floor  
Sacramento, CA 95814  
P: 916-596-3492  
E: [wsack@fpclaw.org](mailto:wsack@fpclaw.org)  
Appearing *Pro Hac Vice*

**Certificate of Service**

I certify that this document was served electronically to counsel for the Defendants September 17, 2021, as the ECF system is currently shut down for maintenance. It will be filed electronically with the Court on Monday, September 20, 2021, if possible; otherwise, it will be filed with the Court in person.

/s/ Richard C. Chambers, Jr., Esq.  
Richard C. Chambers, Jr., Esq.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

STEFANO GRANATA; JUDSON THOMAS;  
COLBY CANNIZZARO; CAMERON PROSPERI;  
THE GUN RUNNER, LLC; and FIREARMS  
POLICY COALITION, INC.,

Plaintiffs,

v.

MAURA HEALEY, in her official capacity as  
Attorney General of the Commonwealth of  
Massachusetts; and THOMAS TURCO, in his  
official capacity as Secretary of Executive Office of  
Public Safety and Security of the Commonwealth of  
Massachusetts,

Defendants.

CIVIL ACTION  
NO. 1:21-cv-10960-RWZ  
(Leave to file granted 11/2/21)

**DEFENDANTS’ REPLY IN SUPPORT OF MOTION TO DISMISS**

**I. The Handgun Safety Regulations Permit the Individual Plaintiffs to Acquire a Variety of Operable Handguns**

At most, the handgun sales regulations<sup>1</sup> constitute only a *de minimis* burden on the ability of Massachusetts residents to acquire operable handguns. Currently, Massachusetts residents with a license to carry may purchase hundreds of different makes and models of handguns from retailers in Massachusetts, like Plaintiff The Gunrunner, LLC. *See Draper v. Healey*, 98 F. Supp. 3d 77, 84 (D. Mass. 2015), *aff’d on other grounds*, 827 F.3d 1 (1st Cir. 2016) (the Attorney General’s load indicator or magazine safety disconnect requirement nonetheless “permits the purchase of a variety of handguns with appropriate safety devices”). What Plaintiffs cannot purchase are a subset of

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<sup>1</sup> The statutory requirements for the commercial sale of handguns established by Mass. Gen. Laws ch. 140, § 123, and the Attorney General’s handgun sales regulations codified at 940 Code Mass. Regs. (“CMR”) §§ 16.00 *et seq.* (together, the “handgun sales regulations”).

guns that do not satisfy the quality and safety requirements for inclusion on the Approved Firearms Roster or that do not include the additional safety features required by the Attorney General's regulations.

There is no authority for the proposition that the Second Amendment guarantees a right to purchase a specific handgun model when hundreds of other handgun models are available for sale. The cases on which Plaintiffs rely involved completely different regulations that precluded individuals from possessing or acquiring *any* firearms. In *District of Columbia v. Heller*, the Court invalidated Washington D.C.'s laws banning possession of any handgun in the home. 554 U.S. 570, 635 (2008). In *Ezell v. City of Chicago*, the U.S. Court of Appeals for the Seventh Circuit invalidated requirements in Chicago that dramatically limited the ability to site a publicly accessible shooting range in Chicago, so much so that no shooting range existed in the city, and where the city required training at a shooting range to purchase a firearm. 846 F.3d 888, 890 (7th Cir. 2017).<sup>2</sup> And in *Illinois Association of Firearms Retailers v. City of Chicago*, the U.S. District Court for the Northern District of Illinois invalidated a Chicago ordinance that barred the sale, acquisition, or transfer—including gifts—of any firearm in that city, except through inheritance. 961 F. Supp. 2d 928, 931 (N.D. Ill. 2014). Recognizing that the “acquisition right is far from absolute” because “there are many restrictions on the sales of arms (for example, licensing requirements for commercial sales),” the court nonetheless concluded that a complete ban on the transfer of firearms did not survive heightened, but “not quite strict” scrutiny. *Id.* at 930, 939, 946-47.

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<sup>2</sup> And, unlike here, Chicago “raised only speculative claims of harm to public health and safety” to support the restriction. *Id.*

In Massachusetts there is simply no ban on the acquisition or possession of handguns. The individual Plaintiffs do not allege that they cannot buy an operational handgun in Massachusetts. And The Gunrunner does not allege that it cannot sell operational handguns to its properly licensed Massachusetts customers. While the Plaintiffs cannot buy specific models of handguns that lack safety features that prevent users from accidentally killing or injuring themselves or their family members, the Plaintiffs *can* buy hundreds of other handguns. *See* Approved Firearms Roster: 06/2021.<sup>3</sup> Thus, the handgun safety regulations are not remotely comparable to the restrictions struck down in *Heller*, *Ezell*, and *Illinois Association of Firearms Retailers*.

In the end, Plaintiffs' claim is that "they have a constitutional right to purchase a particular handgun." *Pena v. Lindley*, 898 F.3d 969, 973 (9th Cir. 2018). This is the precise claim rejected by the Ninth Circuit in *Pena*. Another version of this claim was likewise rejected in *Teixeira v. County of Alameda*, another case on which Plaintiffs rely. In *Teixeira*, would-be gun store owners brought a Second Amendment claim on behalf of their potential customers challenging the county's ordinance that, in effect, prohibited any new gun stores from opening, which, they claimed, impeded their potential customers' ability to acquire firearms. 873 F.3d 670, 676 (9th Cir. 2017) (en banc). Affirming the dismissal of their Second Amendment claim, the court explained that the plaintiffs "did not adequately allege . . . that Alameda County residents cannot purchase firearms within the County as a whole, or within the unincorporated areas of the County in particular." *Id.* at 678. Because there were ten existing gun stores in Alameda County, its "residents [could] freely purchase firearms within the County" and their access to guns was "not meaningfully constrained." *Id.* at 679-80. The constitutional challenge accordingly failed, because

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<sup>3</sup> *See* <https://www.mass.gov/doc/approved-firearms-roster-7/download>.



“the Second Amendment does not elevate convenience and preference over all other considerations.” *Id.* at 680.

So too here. Plaintiffs may freely purchase handguns within Massachusetts. Because their access to handguns is “not meaningfully constrained” by Massachusetts law and Plaintiffs do not have a right to purchase a particular subset of defective or unsafe handgun makes and models, Plaintiffs’ Second Amendment claim fails. *See id.* at 680.

## II. Massachusetts’ Handgun Safety Regulations Prevent Deaths and Injuries

The GAO Report,<sup>4</sup> among other things, amply establishes the “reasonable fit” between the Commonwealth’s public safety objectives and the Attorney General’s load indicator or magazine safety disconnect and childproofing requirements. *Gould v. Morgan*, 907 F.3d 659, 674 (1st Cir. 2018). Plaintiffs concede that the government has an important interest in promoting public safety and preventing accidental firearm injuries, but contend they have sufficiently alleged in their Complaint that the handgun safety regulations do not substantially further this important government interest. Opp’n at 15. They only address the evidence supporting the requirements that: (1) handguns that have a mechanism to load cartridges via a magazine must include either a load indicator or a magazine safety disconnect, 940 CMR § 16.05(3); and (2) handguns must contain a mechanism that precludes an average five-year-old child from operating the handgun when it is ready to fire, 940 CMR § 16.05(2).

Plaintiffs argue that the load indicator and childproofing requirements do not satisfy intermediate scrutiny because the GAO Report concluded that a load indicator would only prevent twenty-three percent of accidental deaths. GAO Report at 2-3. In effect, Plaintiffs argue that these

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<sup>4</sup> U.S. General Accounting Office, Report to the Chairman, Subcommittee on Antitrust Monopolies, and Business Rights, Committee on the Judiciary, U.S. Senate, Accidental Shootings, MANY DEATHS AND INJURIES CAUSED BY FIREARMS COULD BE PREVENTED 3 (1991) (“GAO Report”). *See* <http://www.gao.gov/assets/160/150353.pdf>

safety measures cannot survive heightened scrutiny because they only prevent *some* deaths. That premise is contrary to every decision upholding firearms safety laws under heightened constitutional scrutiny. The Commonwealth’s ban on assault weapons and large-capacity magazines, for example, satisfied intermediate scrutiny because it outlawed weapons that are commonly used in mass shootings and that exacerbate the likelihood of death, and the severity of injury, in the event of such shootings. *See Worman v. Healey*, 922 F.3d 26, 39-40 (1st Cir. 2019). The First Circuit did not require the Commonwealth to demonstrate that the statute would prevent *all* mass shootings or *all* deaths and injuries attributable to the proscribed weapons. *See id*; *see also Gould*, 907 F.3d at 674-75 (Commonwealth’s requirements for obtaining a license to carry a firearm outside the home satisfied intermediate scrutiny because states with more restrictive firearm licensing regimes have lower rates of gun-related homicides and other violent crimes).

And the public safety benefits identified in the GAO Report are compelling. The GAO Report concluded that in 1988 alone, out of the 1,501 accidental firearm deaths, *458 deaths* could have been prevented by a load indicator or a childproofing device. GAO Report at 4. This includes *all* gun accidents in which children under six killed themselves or others. GAO Report at 3, 34. Moreover, the GAO Report estimated that there are approximately 157,600 non-fatal accidental firearm injuries per year, some portion of which also could be prevented by a load indicator or childproofing. GAO Report at 4, 30. Based on this substantial evidence, the Attorney General reasonably concluded that these two safety features would prevent the “considerable” “human, economic, and public health costs of these [accidental] shootings to the victims, their families and society.” GAO Report at 5.

Plaintiffs’ attempts to undercut the persuasiveness of the GAO Report are contradicted by the GAO Report itself. Plaintiffs contend that the GAO Report does not *prove* that a load indicator would have prevented a portion of the accidental deaths. Opp’n at 15. Yet the GAO Report explains

that it relied on actual evidence in the case file to arrive at its conclusion that the fatality occurred because the gun user did not know the gun was loaded. GAO Report at 16. Plaintiffs also argue that the GAO Report merely assumed that childproofing would prevent all of the accidental deaths caused by children. Opp'n at 18. But the GAO Report again explains that this starting premise was based on the advice of pediatrics experts and experts on deaths and firearm injuries. GAO Report at 15-16. (Not to mention common sense; if a child cannot operate a handgun, the child cannot shoot herself or another person.) And, if a gun manufacturer concludes that a 10-pound trigger pull will prevent a child from operating the firearm but will also make it more challenging for adults to fire the gun, the Attorney General's regulations expressly permit the manufacturer to equip its gun with an alternative safety feature. *See* 940 CMR § 16.05(2). In sum, the Attorney General's safety requirements are substantially, and directly, related to preventing deaths caused by accidental gunshots and easily survive intermediate scrutiny.<sup>5</sup>

Plaintiffs contend that Massachusetts could adequately address its interest in public safety solely through "education, training, and public outreach regarding basic rules of firearm safety, storage, and use." *See* Opp'n 20; Compl. ¶ 42. But the First Circuit has made clear that intermediate scrutiny does not require a narrow tailoring analysis or consideration of less restrictive alternatives in the Second Amendment context. *See Gould*, 907 F.3d at 674 (in the intermediate scrutiny analysis, "a legislature's chosen means need not be narrowly tailored to achieve its ends"). Ultimately, the GAO Report provides substantial evidence that a load indicator and childproofing features will save lives, and the Legislature and the Attorney General reasonably decided to require these safety features to protect gun owners and the public. This is more than adequate to satisfy

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<sup>5</sup> Although the Plaintiffs do not argue this point, the GAO Report also concluded that almost half of all accidental firearm deaths occurred because the firearm discharged when it fell or was knocked to the ground. GAO Report at 18. These accidental deaths are directly addressed by Mass. Gen. Laws ch. 140, § 123, cl. 19, and 940 CMR § 16.04(2), which require that handguns sold in commerce in Massachusetts must pass an accidental drop test.

intermediate scrutiny. *See Worman*, 922 F.3d at 40 (“[t]he role of a reviewing court is limited to ensure that in formulating its judgments” the Attorney General “has drawn reasonable inferences based on substantial evidence”).

Finally, Plaintiffs argue that Massachusetts’ Approved Firearms Roster is an outlier and that it must be unnecessary and ineffective because only a small number of other states have imposed similar requirements. Opp’n at 16, 18. Whether other states have imposed a particular product safety requirement is not germane to whether it satisfies intermediate scrutiny. Indeed, Massachusetts *is* an outlier in the number of gun deaths in the state. Because of Massachusetts’ laws regulating guns, “Massachusetts consistently has one of the lowest rates of gun-related deaths in the nation.” *Gould*, 907 F.3d at 674-75; *see also* Centers for Disease Control and Prevention, National Center for Health Statistics, Firearm Mortality by State<sup>6</sup> (showing Massachusetts had lowest gun death rate in the nation in 2019). This statistic demonstrates that Massachusetts’ firearm safety measures effectively reduce firearm fatalities, while still allowing Massachusetts citizens to exercise their Second Amendment rights. Because Plaintiffs have failed to state a claim that the handgun safety regulations infringe their Second Amendment rights, the Court should dismiss their Complaint with prejudice.

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<sup>6</sup> [https://www.cdc.gov/nchs/pressroom/sosmap/firearm\\_mortality/firearm.htm](https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm)

Respectfully submitted,

MAURA HEALEY, ATTORNEY GENERAL,  
and SECRETARY THOMAS TURCO,

By their attorneys,

/s/ Phoebe Fischer-Groban

Phoebe Fischer-Groban, BBO No. 687068

Grace Gohlke, BBO No. 704218

Assistant Attorneys General

Office of the Attorney General

Government Bureau

One Ashburton Place, 20th Floor

Boston, MA 02108

(617) 963-2589

Phoebe.Fischer-Groban@mass.gov

Grace.Gohlke@mass.gov

Dated: November 3, 2021

**CERTIFICATE OF SERVICE**

I certify that this document filed through the CM/ECF system will be sent electronically to registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 3, 2021.

/s/ Phoebe Fischer-Groban  
Phoebe Fischer-Groban  
Assistant Attorney General

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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  
Official Court Reporter  
John J. Moakley United States Courthouse  
One Courthouse Way, Room 5205  
Boston, Massachusetts 02210  
lwalshsteno@gmail.com

1 APPEARANCES:

2 On Behalf of the Plaintiffs:

3 CHAMBERS LAW OFFICE  
4 By: Richard Cullin Chambers, Jr., Esq.  
5 220 Broadway, Suite 404  
6 Lynnfield, Massachusetts 01940  
7 781-581-2031  
8 richard@chamberslawoffice.com

9 THE DIGUISEPPE LAW FIRM, P.C.  
10 By: Raymond DiGuiseppe, Esq.  
11 4320 Southport-Supply Road, Suite 300  
12 Southport, North Carolina 28461  
13 910-713-8804  
14 law.rmd@gmail.com

15 On Behalf of the Defendants:

16 MASSACHUSETTS ATTORNEY GENERAL'S OFFICE  
17 By: Phoebe Fischer-Groban, Esq.  
18 One Ashburton Place  
19 Boston, Massachusetts 02108  
20 617-963-2589  
21 phoebe.fischer-groban@mass.gov

22 MASSACHUSETTS ATTORNEY GENERAL'S OFFICE  
23 By: Grace Gohlke, Esq.  
24 One Ashburton Place  
25 Boston, Massachusetts 02108  
617-963-2527  
grace.gohlke@mass.gov

Proceedings reported and produced  
by computer-aided stenography.



1 P R O C E E D I N G S

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

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

6 THE COURT: For the plaintiffs.

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

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

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

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

16 THE COURT: Okay. And for the defendant?

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

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

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

22 THE COURT: Can you speak up, please?

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

25 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

1 Richard C. Chambers, Jr. (BBO# 651251)  
2 CHAMBERS LAW OFFICE  
3 220 Broadway, Suite 404  
4 Lynnfield, MA 01940  
5 Office: (781) 581-2031  
6 Cell: (781) 363-1773  
7 Fax: (781) 581-8449  
8 [Richard@chamberslawoffice.com](mailto:Richard@chamberslawoffice.com)

Jason A. Guida (BBO# 667252)  
PRINCIPE & STRASNICK, P.C.  
17 Lark Avenue  
Saugus, MA 01906  
(617) 383-4652  
[jason@lawguida.com](mailto:jason@lawguida.com)

7 Raymond M. DiGuiseppe\*  
8 THE DIGUISEPPE LAW FIRM, P.C..  
9 4320 Southport-Supply Road Suite 300  
10 Southport, NC 28461  
11 (910) 713-8804  
12 [law.rmd@gmail.com](mailto:law.rmd@gmail.com)  
13 \*Pro Hac Vice

William A. Sack\*  
FIREARMS POLICY COALITION  
1215 K Street, 17th Floor  
Sacramento, CA 95814  
(916) 596-3492  
[wsack@fpclaw.org](mailto:wsack@fpclaw.org)  
\*Pro Hac Vice

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MASSACHUSETTS**

16 STEFANO GRANATA; JUDSON  
17 THOMAS; COLBY CANNIZZARO;  
18 CAMERON PROSPERI; THE GUN  
19 RUNNER, LLC; and FIREARMS  
20 POLICY COALITION, INC.,

Plaintiffs,

v.

22 MAURA HEALEY, in her official  
23 capacity as Attorney General of the  
24 Commonwealth of Massachusetts; and  
25 THOMAS TURCO, in his official  
26 capacity as Secretary of Executive Office  
27 of Public Safety and Security of the  
28 Commonwealth of Massachusetts,

Defendants.

Case No. 1:21-CV-10960-RWZ

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**NOTICE OF APPEAL**

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PLEASE TAKE NOTICE that the above-named Plaintiffs hereby appeal to the United States Court of Appeals for the First Circuit from the Court's Order entered on May 19, 2022 (ECF Doc. 24) and the related Judgment entered the same day (ECF Doc. 25). A copy of the Order and Judgment are attached.

Dated: June 15, 2022

*/s/ Richard C. Chambers, Jr.*  
ATTORNEY FOR PLAINTIFFS  
RICHARD C. CHAMBERS, JR.  
CHAMBERS LAW OFFICE  
220 BROADWAY, SUITE 404  
LYNNFIELD, MA 01940

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**CERTIFICATE OF SERVICE**

I, Richard C. Chambers, hereby certify that I served a copy of the *Notice of Appeal* through the Court’s ECF system to all registered users.

Dated: June 15, 2022

By:

/s/ Richard C. Chambers, Jr.  
Richard C. Chambers  
Chambers Law Office  
220 Broadway, Suite 404  
Lynnfield, MA 01940

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APPEAL

**United States District Court  
District of Massachusetts (Boston)  
CIVIL DOCKET FOR CASE #: 1:21-cv-10960-RWZ**

Granata et al v. Healey et al  
Assigned to: Judge Rya W. Zobel  
Case in other court: USCA - First Circuit, 22-01478  
Cause: 42:1983 Civil Rights Act

Date Filed: 06/08/2021  
Date Terminated: 05/19/2022  
Jury Demand: None  
Nature of Suit: 440 Civil Rights: Other  
Jurisdiction: Federal Question

**Plaintiff**

**Stefano Granata**

represented by **Raymond DiGuiseppe**  
The DiGuiseppe Law Firm, P.C.  
4320 Southport-Supply Road  
Suite 300  
Southport, NC 28461  
910-713-8804  
Fax: 910-672-7705  
Email: law.rmd@gmail.com  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Richard Cullin Chambers , Jr.**  
Chambers Law Office  
Suite 404  
220 Broadway  
Lynnfield, MA 01940  
781-581-2031  
Fax: 781-581-8449  
Email: richard@chamberslawoffice.com  
*ATTORNEY TO BE NOTICED*

**William Sack**  
FIREARMS POLICY COALITION  
1215 K Street, 17th Floor  
Sacramento, CA 95814  
(916) 596-3492  
Email: wsack@fpclaw.org  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**Judson Thomas**

represented by **Raymond DiGuiseppe**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Richard Cullin Chambers , Jr.**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**William Sack**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**Colby Cannizzaro**

represented by **Raymond DiGuiseppe**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Richard Cullin Chambers , Jr.**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**William Sack**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**Cameron Prosperi**

represented by **Raymond DiGuiseppe**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Richard Cullin Chambers , Jr.**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**William Sack**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**The Gunrunner, LLC**

represented by **Raymond DiGuiseppe**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Richard Cullin Chambers , Jr.**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**William Sack**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*



**Plaintiff**

**FIREARMS POLICY COALITION, INC.**

represented by **Raymond DiGuiseppe**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Richard Cullin Chambers , Jr.**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**William Sack**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**Maura Healey**  
*In her official capacity as Attorney General of the Commonwealth of Massachusetts*

represented by **Phoebe Fischer-Groban**  
Massachusetts Attorney General's Office  
McCormack Building  
One Ashburton Place  
Boston, MA 02108  
617-963-2589  
Email: phoebe.fischer-groban@mass.gov  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Grace Gohlke**  
Massachusetts Attorney General's Office  
McCormack Building  
One Ashburton Place  
Boston, MA 02108  
617-963-2527  
Email: grace.gohlke@mass.gov  
*ATTORNEY TO BE NOTICED*

**Defendant**

**Thomas Turco**  
*In his official capacity as Secretary of Executive Office of Public Safety and Security of the Commonwealth of Massachusetts*

represented by **Phoebe Fischer-Groban**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Grace Gohlke**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

Email All Attorneys  
Email All Attorneys and Additional Recipients

Date Filed	#	Docket Text
06/08/2021	<a href="#">1</a>	COMPLAINT against All Plaintiffs Filing fee: \$ 402, receipt number 0101-8810702 (Fee

		Status: Filing Fee paid), filed by Stefano Granata. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Supplement Civil Action Cover Form)(Chambers, Richard) (Entered: 06/08/2021)
06/08/2021	<u>2</u>	ELECTRONIC NOTICE of Case Assignment. Judge Rya W. Zobel assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Judith G. Dein. (Danieli, Chris) (Entered: 06/08/2021)
06/08/2021	<u>3</u>	Summons Issued as to All Defendants. <b>Counsel receiving this notice electronically should download this summons, complete one for each defendant and serve it in accordance with Fed.R.Civ.P. 4 and LR 4.1. Summons will be mailed to plaintiff(s) not receiving notice electronically for completion of service.</b> (Vieira, Leonardo) (Entered: 06/08/2021)
06/30/2021	<u>4</u>	NOTICE of Appearance by Phoebe Fischer-Groban on behalf of Maura Healey, Thomas Turco (Fischer-Groban, Phoebe) (Entered: 06/30/2021)
06/30/2021	<u>5</u>	Assented to MOTION for Extension of Time to August 20, 2021 to File Answer re <u>1</u> Complaint, by Maura Healey, Thomas Turco.(Fischer-Groban, Phoebe) (Entered: 06/30/2021)
07/01/2021	<u>6</u>	Judge Rya W. Zobel: ELECTRONIC ORDER entered granting <u>5</u> Motion for Extension of Time to Answer re <u>1</u> Complaint, Maura Healey answer due 8/2/2021; Thomas Turco answer due 8/2/2021. (Urso, Lisa) (Entered: 07/01/2021)
07/01/2021	<u>7</u>	Set/Reset Deadlines: Maura Healey 8/20/2021; Thomas Turco 8/20/2021. (Urso, Lisa) (Entered: 07/01/2021)
07/13/2021	<u>8</u>	Assented to MOTION for Leave to Appear Pro Hac Vice for admission of Raymond DiGuiseppe Filing fee: \$ 100, receipt number 0101-8856990 by Colby Cannizzaro, FIREARMS POLICY COALITION, INC., Stefano Granata, Cameron Prosperi, The Gunrunner, LLC, Judson Thomas. (Attachments: # <u>1</u> Affidavit Affidavit of counsel, # <u>2</u> Certification)(Chambers, Richard) (Attachment 1 replaced on 7/13/2021 - Document filed with wrong affidavit and replaced with correct one provided by counsel) (Currie, Haley). (Entered: 07/13/2021)
07/13/2021	<u>9</u>	Assented to MOTION for Leave to Appear Pro Hac Vice for admission of William Sack Filing fee: \$ 100, receipt number 0101-8857073 by Colby Cannizzaro, FIREARMS POLICY COALITION, INC., Stefano Granata, Cameron Prosperi, The Gunrunner, LLC, Judson Thomas. (Attachments: # <u>1</u> Affidavit Affidavit of counsel, # <u>2</u> Certification) (Chambers, Richard) (Entered: 07/13/2021)
07/13/2021	<u>10</u>	Judge Rya W. Zobel: ELECTRONIC ORDER entered granting <u>8</u> Motion for Leave to Appear Pro Hac Vice Added Richard DiGuiseppe; granting <u>9</u> Motion for Leave to Appear Pro Hac Vice Added William Sack. <b>Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at <a href="http://www.mad.uscourts.gov">www.mad.uscourts.gov</a>. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.</b> (Currie, Haley) (Entered: 07/13/2021)
08/03/2021	<u>11</u>	SUMMONS Returned Executed Maura Healey served on 6/17/2021, answer due 8/20/2021. (Chambers, Richard) (Entered: 08/03/2021)
08/03/2021	<u>12</u>	SUMMONS Returned Executed Thomas Turco served on 7/1/2021, answer due 8/20/2021. (Chambers, Richard) (Entered: 08/03/2021)
08/19/2021	<u>13</u>	NOTICE of Appearance by Grace Gohlke on behalf of Maura Healey, Thomas Turco (Gohlke, Grace) (Entered: 08/19/2021)

08/20/2021	<a href="#">14</a>	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Maura Healey, Thomas Turco.(Fischer-Groban, Phoebe) (Entered: 08/20/2021)
08/20/2021	<a href="#">15</a>	MEMORANDUM in Support re <a href="#">14</a> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Maura Healey, Thomas Turco. (Fischer-Groban, Phoebe) (Entered: 08/20/2021)
08/31/2021	<a href="#">16</a>	Assented to MOTION for Extension of Time to September 17, 2021 to File Response/Reply to <i>Defendants' Motion to Dismiss</i> by Colby Cannizzaro, FIREARMS POLICY COALITION, INC., Stefano Granata, Cameron Prosperi, The Gunrunner, LLC, Judson Thomas.(Chambers, Richard) (Entered: 08/31/2021)
09/08/2021	17	Judge Rya W. Zobel: ELECTRONIC ORDER entered granting <a href="#">16</a> Motion for Extension of Time to File Response/Reply re <a href="#">14</a> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM - Responses due by 9/17/2021. (Currie, Haley) (Entered: 09/08/2021)
09/17/2021	<a href="#">18</a>	Opposition re <a href="#">14</a> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Colby Cannizzaro, FIREARMS POLICY COALITION, INC., Stefano Granata, Cameron Prosperi, The Gunrunner, LLC, Judson Thomas. (Currie, Haley) (Entered: 09/18/2021)
10/08/2021	<a href="#">19</a>	MOTION for Leave to File <i>Reply Memorandum</i> by Maura Healey, Thomas Turco. (Attachments: # <a href="#">1</a> Exhibit A - Defendants' Reply in Support of Motion to Dismiss) (Fischer-Groban, Phoebe) (Entered: 10/08/2021)
10/28/2021	20	ELECTRONIC NOTICE Setting Hearing on Motion <a href="#">14</a> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM : Motion Hearing set for 11/18/2021 02:00 PM in Courtroom 12 (In person only) before Judge Rya W. Zobel. (Urso, Lisa) (Entered: 10/28/2021)
10/28/2021	21	Judge Rya W. Zobel: ENDORSED ORDER entered granting <a href="#">19</a> Motion for Leave to File Document ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Urso, Lisa) (Entered: 11/02/2021)
11/03/2021	<a href="#">22</a>	REPLY to Response to <a href="#">14</a> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Maura Healey, Thomas Turco. (Fischer-Groban, Phoebe) (Entered: 11/03/2021)
11/18/2021	23	Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Motion Hearing held on 11/18/2021 re <a href="#">14</a> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Thomas Turco, Maura Healey. Judge hears counsel and takes the matter under advisement; (Court Reporter: Linda Walsh at lwalshsteno@gmail.com.)(Attorneys present: Chambers, DiGuissepe, Groben & Gohlke) (Urso, Lisa) (Entered: 11/18/2021)
05/19/2022	<a href="#">24</a>	Judge Rya W. Zobel: MEMORANDUM AND ORDER entered. Defendants' Motion to Dismiss Plaintiffs' Complaint (Docket No. <a href="#">14</a> ) is <b>ALLOWED</b> . (Warnock, Douglas) (Entered: 05/19/2022)
05/19/2022	<a href="#">25</a>	Judge Rya W. Zobel: ORDER entered. ORDER DISMISSING CASE (Warnock, Douglas) (Entered: 05/19/2022)
06/15/2022	<a href="#">26</a>	NOTICE OF APPEAL re <a href="#">24</a> MEMORANDUM AND ORDER, <a href="#">25</a> ORDER OF DISMISSAL by Colby Cannizzaro, FIREARMS POLICY COALITION, INC., Stefano Granata, Cameron Prosperi, The Gunrunner, LLC, Judson Thomas Filing fee: \$ 505, receipt number AMADC-9370591 Fee Status: Not Exempt. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at <a href="http://www.ca1.uscourts.gov">http://www.ca1.uscourts.gov</a> MUST be completed and submitted to the Court of Appeals. <b>Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at <a href="http://pacer.psc.uscourts.gov/cmecf">http://pacer.psc.uscourts.gov/cmecf</a>. Counsel shall also review the</b>

		<p><b>First Circuit requirements for electronic filing by visiting the CM/ECF Information section at <a href="http://www.ca1.uscourts.gov/cmecf">http://www.ca1.uscourts.gov/cmecf</a>. US District Court Clerk to deliver official record to Court of Appeals by 7/5/2022. (Attachments: # <u>1</u> Memorandum &amp; Order, # <u>2</u> Order of Dismissal)(Chambers, Richard)</b></p> <p><b>Modified on 6/15/2022 to Correct Docket Text and Add CM/ECF Document Links to Orders Being Appealed as Counsel Failed to Follow the CM/ECF NextGen Prompts When Filing the Notice of Appeal. (Paine, Matthew).</b></p> <p><b>(Entered: 06/15/2022)</b></p>
06/15/2022	<u>27</u>	Certified and Transmitted Abbreviated Electronic Record on Appeal to US Court of Appeals re <u>26</u> Notice of Appeal. (Paine, Matthew) (Entered: 06/15/2022)
06/16/2022	28	USCA Case Number 22-1478 for <u>26</u> Notice of Appeal, filed by Judson Thomas, Stefano Granata, Cameron Prosperi, FIREARMS POLICY COALITION, INC., The Gunrunner, LLC, Colby Cannizzaro. (Paine, Matthew) (Entered: 06/16/2022)
07/01/2022	<u>29</u>	TRANSCRIPT ORDER FORM by Colby Cannizzaro, FIREARMS POLICY COALITION, INC., Stefano Granata, Cameron Prosperi, The Gunrunner, LLC, Judson Thomas for proceedings held on 111822 Judge Judge Rya W. Zobel.. (Chambers, Richard) (Entered: 07/01/2022)
07/25/2022	<u>30</u>	Transcript of Motion Hearing held on November 18, 2021, before Judge Rya W. Zobel. COA Case No. 22-1478. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Linda Walsh at lwalshsteno@gmail.com. Redaction Request due 8/15/2022. Redacted Transcript Deadline set for 8/25/2022. Release of Transcript Restriction set for 10/24/2022. (Coppola, Katelyn) (Entered: 08/02/2022)
07/25/2022	31	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at <a href="http://www.mad.uscourts.gov/attorneys/general-info.htm">http://www.mad.uscourts.gov/attorneys/general-info.htm</a> (Coppola, Katelyn) (Entered: 08/02/2022)

<b>PACER Service Center</b>			
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10/30/2022 07:41:04			
<b>PACER Login:</b>	rmdllp1749	<b>Client Code:</b>	
<b>Description:</b>	Docket Report	<b>Search Criteria:</b>	1:21-cv-10960-RWZ
<b>Billable Pages:</b>	6	<b>Cost:</b>	0.60

## CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2022, an electronic PDF of the Appendix was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Dated this 17th day of November 2022.

*/s/ Raymond M. DiGuiseppe  
Counsel for Appellants*