Assault on the Second Amendment: The Attorney General's Attempt to Unilaterally Ban Assault Rifles in Massachusetts

"A sword by itself does not slay; it is merely the weapon used by the slayer."[1]

I. INTRODUCTION

On July 20, 2016, the Attorney General of Massachusetts issued a new interpretation (Enforcement Notice) of the Massachusetts Assault Weapons Ban of 1998, emphasizing the illegality of "copy" and "duplicate" assault rifles, which effectively banned the sale of all assault rifles in Massachusetts.[2] Before the Enforcement Notice, Massachusetts substantively adopted the Federal Assault Weapons Ban of 1994, which forbid the sale of certain assault rifles if the rifle met particular specifications.[3] The Massachusetts Assault Weapons Ban specifies that selling "copies or duplicates" of assault weapons is forbidden.[4] In light of recent, devastating acts of terror involving AR-15's and similar semiautomatic rifles across the country, the Massachusetts Attorney General set out new guidelines for what constitutes a "copy" or "duplicate" weapon under the Massachusetts Assault Weapons Ban, closing a longstanding

1. *Lucius Annaeus Seneca Quote*, IZQOUTES, http://izquotes.com/quote/265939 [https://perma.cc/VUA6-QAAJ].

2. *See* Maura Healey, Opinion, *The Loophole in the Mass. Assault Weapons Ban*, BOS. GLOBE (July 20, 2016), https://www.bostonglobe.com/opinion/2016/07/20/the-loophole-mass-assault-weapons-ban/eEvOBklTriWcGznmXqSpYM/story.html [https://perma.cc/K4D9-HUJU] (arguing "copycat" and "duplicate" weapons possess components substantially similar to banned assault rifles). Attorney General Maura Healey argues that despite the plain language of the Massachusetts Assault Weapons Ban, which already outlaws copies or duplicates of AR-15s and AK-47s, gun manufacturers took it upon themselves to define what would qualify as a "copycat" or "duplicate" weapon. *See id.*

3. *See* OFFICE OF THE MASS. ATTORNEY GEN., ENFORCEMENT NOTICE: PROHIBITED ASSAULT WEAPONS 1-3 (2016), http://www.mass.gov/ago/public-safety/assault-weapons-enforcement-notice.pdf [https://perma.cc/5CZY-FLTS] [hereinafter ENFORCEMENT NOTICE] (recognizing incorporation of federal "features test" under Massachusetts law); *see also* 27 C.F.R. § 478.11 (2017) (establishing "features list" defining semiautomatic weapons and creating loophole). The Federal Assault Weapons Ban outlawed both a list of nineteen specific weapons and all assault rifles that accepted detachable magazines with at least two of the following features: folding or telescoping stock, a pistol grip, a bayonet mount, a flash suppressor, and a grenade launcher. *See* Brian Roth, Article and Survey, *Reconsidering a Federal Assault Weapons Ban in the Wake of Aurora, Oak Creek, and Portland Shootings: Is It Constitutional in a Post-*Heller *Era?*, 37 NOVA L. REV. 405, 414 (2013) (outlining broad definition of "assault rifles"). This list of five different weapon attachments constitutes the features list, which the Massachusetts legislature eventually incorporated into the Massachusetts Assault Weapons Ban. *See id.* (noting many states adopting similar weapons ban); *see also* MASS. GEN. LAWS ch. 140, § 121 (2016) (stating "assault weapon" defined in same way under federal and Massachusetts bans).

4. *See* MASS. GEN. LAWS ch. 140, § 121 (listing weapons banned by statute).

loophole that allowed for the sale of assault weapons.[5] These new guidelines eliminated the loophole, and essentially outlawed the sale of assault rifles in Massachusetts.[6]

In *District of Columbia v. Heller*,[7] the United States Supreme Court first recognized that the Framers formulated the Second Amendment to protect the militia's right to use firearms, but also to protect other lawful purposes, such as self-defense.[8] Despite the right to bear arms enumerated in the Second Amendment, many states established assault weapons bans in response to acts of terror nationwide, such as the 2016 Pulse Nightclub shooting in Orlando, Florida, and the 2015 shooting in San Bernardino, California.[9] Although the AR-15 is now recognized as a weapon of mass destruction often employed by terrorists, Federal Bureau of Investigation (FBI) crime statistics reveal that while mass shootings generally involve rifles, the vast majority of gun deaths nationwide do not.[10] Even though many states successfully pass such bans by alleging that AR-15s are "dangerous and unusual," many firearms rights

5. *See* ENFORCEMENT NOTICE, *supra* note 3, at 3-4 (establishing two tests to define copycat weapons); Healey, *supra* note 2 (identifying loophole); *see also, e.g.*, *Everything We Know About the San Bernardino Terror Attack Investigation So Far*, L.A. TIMES (Dec. 14, 2015), http://www.latimes.com/local/california/la-me-san-bernardino-shooting-terror-investigation-htmlstory.html [https://perma.cc/72YL-NZ6F] [hereinafter *San Bernardino Investigation*] (tracing events leading up to San Bernardino shooting); *Orlando Nightclub Shooting: How the Attack Unfolded*, BBC (June 15, 2016), http://www.bbc.com/news/world-us-canada-36511778 [https://perma.cc/ADK7-2G9E] [hereinafter *Orlando Nightclub Shooting*] (recalling events of Orlando Pulse Nightclub shooting); Steve Vogel et al., *Sandy Hook Elementary Shooting Leaves 28 Dead, Law Enforcement Sources Say*, WASH. POST (Dec. 14, 2012), https://www.washingtonpost.com/politics/sandy-hook-elementary-school-shooting-leaves-students-staff-dead/2012/12/14/24334570-461e-11e2-8e70-e1993528222d_story.html [https://perma.cc/WZ8K-AT4H] (detailing events of Sandy Hook shooting).

6. *See* ENFORCEMENT NOTICE, *supra* note 3, at 3-4 (eliminating enumerated assault weapons with cosmetic alterations having little effect on functionality).

7. 554 U.S. 570 (2008).

8. *See id.* at 628-29 (holding handgun prohibition essentially prohibits guns in homes, thus failing constitutional muster).

9. *See* James B. Jacobs, Essay, *Why Ban "Assault Weapons"?*, 37 CARDOZO L. REV. 681, 702-03 (2015) (citing seven states ban assault weapons, many in response to acts of terror); *Orlando Nightclub Shooting*, *supra* note 5 (recalling terror attack in Orlando); *San Bernardino Investigation*, *supra* note 5 (recounting terror attack in San Bernardino).

10. *See* FBI, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS tbl. 20 (2014), https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-20 [https://perma.cc/6VUG-TM8E] [hereinafter FBI 2014 CRIME REPORT] (citing FBI statistics to show handguns responsible for more gun-related deaths than rifles); *Stats Don't Support Massachusetts AG's Expanded Ban on 'Assault Weapons'*, FOXNEWS POL. (July 21, 2016), http://www.foxnews.com/politics/2016/07/21/stats-dont-support-massachusetts-ags-expanded-ban-on-assault-weapons.html [https://perma.cc/RJS4-DZUW] [hereinafter *AG's Expanded Ban*] (representing assault weapons not responsible for majority of deaths nationwide). Attorney General Maura Healey admits Massachusetts has some of "strongest and strictest" gun laws in the nation, but still calls for stricter gun control. *See* Prudence Brighton, *Healey Answers Queries in Lowell (VIDEO)*, LOWELLSUN.COM (May 24, 2017), http://www.lowellsun.com/news/ci_31010912/healey-answers-queries-lowell [https://perma.cc/EJV3-C95C] (identifying preexisting strict gun laws of Massachusetts).

advocates argue that assault weapon bans unconstitutionally burden Second Amendment rights.[11]

Second Amendment supporters challenge the Attorney General's Enforcement Notice for several reasons, including for bypassing the legislative process and creating confusion by rewording the law.[12] The Massachusetts Constitution provides for a separation of powers, explicitly stating that the executive branch shall never exercise legislative or judicial powers.[13] Nevertheless, the Massachusetts Attorney General interprets and enforces existing laws as an executive officer[14] Closing the longstanding assault rifle loophole, which existed in Massachusetts for eighteen years, represents a major change to—rather than a mere interpretation of—the Second Amendment rights of Massachusetts citizens.[15] Moreover, many firearms advocates argue the Attorney General's interpretation prohibits far more weapons than the legislature intended when passing the Massachusetts Assault Weapons Ban.[16]

This Note will explore Attorney General Maura Hleay's recent interpretation of the Massachusetts Assault Weapons Ban and whether or not she had the authority to issue such an order.[17] Part II of this Note provides a brief history of the Second Amendment, an overview of the powers of the Attorney General, and the history of assault weapons bans in Massachusetts, as well as bans in other states.[18] In Sections III.A and III.B, this Note argues that the Attorney General's unilateral ban of "copycat" and "duplicate" assault rifles poses an unconstitutional burden on gun owners' Second Amendment rights.[19] Finally,

11. *See Heller*, 554 U.S. at 627 (limiting constitutional protection of Second Amendment by prohibiting "dangerous and unusual weapons"); *see also* Kolbe v. Hogan, 813 F.3d 160, 178 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017) (holding assault rifles not within purview of "dangerous and unusual"); Christie Chung, Kolbe v. Hogan*: 4th Circuit Proscribes Strict Scrutiny for State Ban on Assault Rifles*, U. MD. CTR. HEALTH & HOMELAND SECURITY (July 21, 2016), http://www.mdchhs.com/kolbe-v-hogan-4th-circuit-proscribes-strict-scrutiny-for-state-ban-on-assault-rifles/ [https://perma.cc/Y75K-J8YP] (discussing Forth Circuit's initial decision determined ban on entire class of weapons constituted substantial burden).

12. *See* Shira Schoenberg, *National Gun Group to Sue Attorney General Maura Healey Over 'Copycat' Assault Weapon Ban*, MASSLIVE (Aug. 5, 2015), http://www.masslive.com/politics/index.ssf/2016/08/national_gun_group_to_sue_atto.html (illustrating vagueness in Enforcement Notice).

13. MASS. CONST. pt. 1, art. XXX.

14. *See* MASS. GEN. LAWS ch. 12, § 5M (2016) (empowering Attorney General to enforce and interpret laws of Massachusetts); Press Release, Nat'l Shooting Sports Ass'n, NSSF to Challenge Attorney General Healey's 'Enforcement Notice' in Legal Action (Aug. 4, 2016), http://www.nssfblog.com/nssf-to-challenge-attorney-general-healeys-enforcement-notice-in-legal-action/ [https://perma.cc/SZ97-GZGR] (declaring Attorney General's interpretation undermined legislative process).

15. *See* NRA-ILA Staff, *Massachusetts AG Renews Attack on Gun Owners*, NRA-ILA (Aug. 26, 2016), https://www.nraila.org/articles/20160826/massachusetts-ag-renews-attack-on-gun-owners [https://perma.cc/US3Z-PAC5] (claiming Healey's interpretation of "assault rifle" goes far beyond 1994 Federal Assault Weapons Ban definition).

16. *See* MASS. GEN. LAWS ch. 140, § 121 (2016) (identifying intended statutory definition of "assault weapon"); NRA-ILA Staff, *supra* note 15 (claiming Attorney General overstepped legislative intent in interpreting statute).

17. *See infra* Part II.

18. *See infra* Part II.

19. *See infra* Sections III.A, III.B.

in Section III.C, this Note contends that a ban on assault rifles in Massachusetts, even by the Massachusetts legislature, should involve a vote by the citizens of Massachusetts.[20]

II. HISTORY

A. Second Amendment Interpretation

The Second Amendment to the United States Constitution preserves an individual's right to bear arms by proclaiming, "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."[21] Even a simple textual reading confuses many modern day readers due to the Second Amendment's imprecise syntax and ambiguous clauses.[22] Specifically, gun control proponents and Second Amendment advocates dispute the intended meaning of the Amendment.[23] Gun control supporters claim that the Second Amendment is narrow in scope and only confers a right upon states to create professional militias—not an individual right to possess firearms.[24] Second Amendment advocates favor a broad reading of the Second Amendment, claiming it protects every individual's right to possess guns for self-defense, hunting, and sport.[25]

Courts and legal scholars differ in their views of what right the Second Amendment guarantees: the "collective right" of the militia, or the "individual

20. *See infra* Section III.C.

21. *See* U.S. CONST. amend. II.

22. *See* Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 890-91 (2001) (examining whether Second Amendment applies to people or only to militias). Due to this confusing and ambiguous language, readers question whether the Second Amendment is applicable to all citizens of the United States, or if it was meant to apply only to military personnel. *See id.*

23. *See id.* (explaining opposing opinions and interpretations of Second Amendment); Adam Gopnik, *The Second Amendment is a Gun-Control Amendment*, NEW YORKER (Oct. 2, 2015), http://www.newyorker.com/news/news-desk/the-second-amendment-is-a-gun-control-amendment [https://perma.cc/3AAA-L5MY] (highlighting differing interpretations of Second Amendment in Supreme Court opinion). Modern-day readers of the Second Amendment are often confused by its syntax because these readers "impos[e] twentieth-century assumptions on an eighteenth-century text." *See* Amar, *supra* note 22, at 891-92.

24. *See* Amar, *supra* note 22, at 890-91 (stating, under gun control advocate view, ordinary citizens retain no Second Amendment rights). Most legal historians state that the Founding Fathers created the Second Amendment due to a fear of standing armies, and that the right to bear arms flowed from the militia's obligation to provide a defense against standing armies and tyranny. *See* Meg Penrose, *A Return to the States' Rights Model: Amending the Constitution's Most Controversial and Misunderstood Provision*, 46 CONN. L. REV. 1463, 1473 (2014) (stating militia's importance to defend against tyranny).

25. *See* Amar, *supra* note 22, at 891 (providing argument for broad interpretation of Second Amendment). Modern day interpretations of the Second Amendment contest that the historical reasoning behind the Second Amendment is irrelevant because we no longer have militias. *See* Penrose, *supra* note 24, at 1489-90 (discussing original intent of Second Amendment opposed to ambiguous modern applications). Legal jurists and scholars are struggling with how to modernize the traditional meaning of the Second Amendment to apply to modern day weapons. *See id.* at 1490.

right" of the citizen.[26] Courts traditionally understood the Second Amendment to confer the states a collective right to maintain a well-regulated militia.[27] This view relies on the first clause of the Second Amendment—"[a] well regulated Militia, being necessary to the security of a free state,"—to support the proposition that the Framers intended to convey a right to the states to keep arms as a defense against standing armies and tyranny.[28] For example, in *United States v. Miller*,[29] the Supreme Court held that the Second Amendment does not provide individuals with the right to possess sawed-off shotguns, because that type of weapon bears no reasonable relationship to maintaining a well-regulated militia.[30]

Both courts and legal scholars tended to follow the collective approach until the 1980s, when a new and modern reading of the Second Amendment, known as the individual right approach, surfaced among legal scholars.[31] Under this approach, scholars and jurists—including Justices Thomas and Scalia—argue that the text of the Second Amendment confers an individual right to bear arms, unconnected to the states and militia service.[32] Supporters of the individual right approach point to the second independent clause in the Second Amendment, "the right of the people to keep and bear arms," and argue that this clause guarantees a private right to possess firearms.[33] These supporters

26. *See* Richard A. Allen, *What Arms? A Textualist's View of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 191, 191-94 (2008) (introducing court interpretations of Second Amendment).

27. *See id.* at 191 (asserting no personal right to bear arms under collective right approach).

28. *See* U.S. CONST. amend. II (providing Second Amendment text); Allen, *supra* note 26, at 191-92 (expressing Second Amendment only guarantees functioning members of militia right to bear arms); Penrose, *supra* note 24, at 1473, 1495 (noting militia's primary purpose to defend against tyranny and other standing armies). Legal scholars contend that a textual analysis makes it almost impossible to ignore the intended militia-focused purpose of the Second Amendment. *See* Penrose, *supra* note 24, at 1495 (observing text alone supports "collective right" approach). A slightly different version of the collective right model is the "sophisticated collective rights model." Allen, *supra* note 26, at 192. Under this view, individuals only have a right to keep and bear arms while functioning as a member of a "well-regulated militia." *See id.*

29. 307 U.S. 174 (1939).

30. *See id.* at 178 (deciding weapon must have "some reasonable relationship" to militia preservation or efficiency). The Court held that there was no right to own a shotgun with a barrel of eighteen inches or less because it has no reasonable relationship to military service and also does not "contribute to the common defense." *See id*.

31. *See* Allen, *supra* note 26, at 192-93 (identifying modern individual right approach). Two federal courts endorsed the individual right approach, but both courts subjected this individual right to bear arms to reasonable restrictions. *See id.* at 193.

32. *See id.* at 192-93 (favoring new modern approach to Second Amendment). The individual right to bear arms is not unlimited under the individual rights approach and reasonable restrictions, including specific licensing requirements, are often allowed. *See id.* at 195. Justice Thomas, in a concurring opinion about handgun regulation, stated that the right to bear arms had always been traditionally considered a state's right, but that "[p]erhaps, at some future date, this Court will have an opportunity to determine whether [this view] was correct." *See* Printz v. United States, 521 U.S. 898, 938-39 (1997) (Thomas, J., concurring) (predicting future Supreme Court decision giving individuals personal right to bear arms).

33. *See* U.S. CONST. amend. II; Allen, *supra* note 26, at 193 (suggesting prefatory clause states intention but not limitation of Second Amendment); *see also* District of Columbia v. Heller, 554 U.S. 570, 599 (2008) (explaining militia-minded prefatory clause not only reason Americans valued right to bear arms).

further argue that the prefatory clause, which mentions states and the militia, does not confine Second Amendment protections solely to militia activities.[34] The Supreme Court first recognized an individual citizen's right to bear arms in its 2008 *Heller* decision.[35]

Justice Scalia penned the landmark five-to-four decision, which states that the right to possess firearms for self-defense is a central Second Amendment right.[36] The majority opinion deals with the collective-right approach's militia argument by explaining that the prefatory clause specifies the purpose of the Second Amendment—to prevent the destruction of the militia—but does not imply that the Second Amendment solely aims to preserve the militia.[37] The *Heller* Court further explained that it is unconstitutional to ban an entire class of firearms that are typically used for self-defense in the home.[38] To determine what weapons are protected under the Second Amendment, the *Heller* majority opinion stated that weapons "in common use at the time" must be afforded protection.[39] The Court held, however, that the individual right to possess firearms is not unlimited, and that history supports prohibiting "dangerous and unusual weapons."[40] The Court acknowledged that although modern

34. *See* Allen, *supra* note 26, at 192-93 (discussing textual interpretation of Second Amendment under individual right approach).

35. *See Heller*, 554 U.S. at 595 (explaining history and text of Second Amendment confer individual right to keep and bear arms).

36. *See id.* at 628 (referencing historical quotes to support conclusion). Justice Scalia looked to state constitutions, including the Massachusetts Constitution, to demonstrate that the right to bear arms is a "right of the people" and not strictly a right of the militia. *See id.* at 601-02.

37. *See id*. at 599 (indicating Americans value right to bear arms for other reasons, like hunting and self-defense). The Court conducted an exhaustive historical inquiry into the Second Amendment's text, history, and traditional interpretation to determine that it is intended to protect more than just the use of firearms for militia purposes. *See* Lindsay Colvin, Note, *History*, Heller*, and High-Capacity Magazines: What is the Proper Standard of Review for Second Amendment Challenges?*, 41 FORDHAM URB. L.J. 1041, 1047-48 (2014) (examining multiple constitutional interpretation modalities to determine meaning of Second Amendment).

38. *See Heller*, 554 U.S. at 628-29 (holding ban on most common firearm in country unconstitutional). Handguns are afforded constitutional protection because Americans have "considered the handgun to be the quintessential self-defense weapon." *See id.* at 629. As handguns are a popular weapon choice for Americans for in-home defense, any ban preventing the possession of handguns for this purpose is unconstitutional. *See id*. The *Heller* ruling, however, does not clarify a crucial Second Amendment question: Does the right to possess firearms for self-defense extend outside of the home? *See* Megan Ruebsamen, Note, *The Gun-Shy Commonwealth: Self-Defense and Concealed Carry in Post-*Heller *Massachusetts*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 55, 55 (2013).

39. *See* District of Columbia v. Heller, 554 U.S. 570, 624-25 (2008) (explaining weapons historically possessed by militia typically weapons "in common use at the time"). The *Heller* Court explained that the "common use" standard protects weapons that are typically possessed by law-abiding citizens for lawful purposes. *See id.*

40. *See id*. at 626-27 (holding only weapons in "common use at the time" subject to constitutional protection). The meaning of this "common use" standard has been subject to much debate given the advancement of firearms technology and the polarized viewpoints on weapons possession. *See* Colvin, *supra* note 37, at 1049 (comparing modern-day "common use" standard to common uses at time of Second Amendment). Gun control advocates argue that the common use standard should only apply to weapons that were in common use when the Framers established the Second Amendment. *See id.* Justice Scalia put this argument to rest in *Heller*, stating that constitutional rights should be interpreted to apply to modern society,

developments in technology have made small arms obsolete against weapons of war, the Second Amendment still protects an individual's right to possess firearms for self-defense.[41]

Heller set precedent suggesting that weapons "in common use at the time" for lawful purposes like self-defense are protected under the Second Amendment, but "dangerous and unusual" weapons are not.[42] The *Heller* decision left it to state and federal courts to interpret what types of weapons are not afforded constitutional protection under this class of "dangerous and unusual."[43] Prior to *Heller*, most assumed that assault weapons bans—including the Federal Assault Weapons Ban—were constitutional; but now, courts have trouble determining whether these same bans are unconstitutional.[44]

B. The Federal Assault Weapons Ban of 1994 and Similar State Bans

In 1994, a Democratic White House led by the Clinton administration passed a ten-year ban on assault weapons, which many spectators viewed as one of the strongest gun control proposals since the 1960s.[45] The ban contained a

which includes the development of weapons technology since the eighteenth century. *See Heller*, 554 U.S. at 582 (noting First and Fourth Amendment rights apply to modern forms of communication and search). The Court also identified examples of "dangerous and unusual" weapons, such as short-barreled shotguns and "M-16 rifles and the like." *See id.* at 625-27.

41. *See Heller*, 554 U.S. at 627-28 (affirming right to bear arms despite societal and technological advancement since creation of Second Amendment). The Supreme Court rejected the argument that since the most frequently possessed small arms would be inadequate against current weapons of war, such weapons can be banned. *See id.* In 2009, a California appeals court upheld a ban on assault rifles, holding that assault rifles are not firearms typically possessed for lawful purposes, such as sport hunting or self-defense, but are "weapons of war" that are capable of "tak[ing] down an aircraft." *See* People v. James, 94 Cal. Rptr. 3d 576, 586 (Cal. Ct. App. 2009) (highlighting federal courts' classification of assault rifles); Denise Cartolano, *Check "Mate": Australia's Gun Law Reform Presents the United States with the Challenge to Safeguard Their Citizens from Mass Shootings*, 41 NOVA L. REV. 139, 172 (2017) (indicating primary concern of bans to protect citizens from unusually dangerous weapons).

42. *See* Heller v. District of Columbia, 670 F.3d 1244, 1260 (D.C. Cir. 2011) (recalling Supreme Court's *Heller* precedent).

43. *See* Katherine L. Judkins, Article, *Navigating the Second Amendment Crossfire: The Third Circuit Triggers Working Methodology in* United States v. Mazzarella *and* United States v. Barton, 57 VILL. L. REV. 711, 719 (2012) (outlining troubles courts have in defining protected firearms from unprotected firearms); *see also, e.g.*, Kolbe v. Hogan, 813 F.3d 160, 177 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017) (applying "unusually dangerous" standard to semiautomatic rifles); N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 256-57 (2d Cir. 2015) (considering constitutionality of Connecticut and New York assault weapons bans under *Heller*); *Heller*, 670 F.3d at 1263-64 (questioning ban on semiautomatic assault weapons). In subsequent decisions, many trial and circuit courts interpreted *Heller* by focusing on "limiting language" in the opinion in order to restrict Second Amendment rights. *See* Ruebsamen, *supra* note 38, at 60.

44. *See* Roth, *supra* note 3, at 414-15 (highlighting differences in way courts view constitutionality of assault weapons bans before and after *Heller*).

45. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993); *see* Jacobs, *supra* note 9, at 692 (citing Democratic Party's initiative to eliminate assault rifles); Roth, *supra* note 3, at 413-14 (pointing to limited duration of ban).

"sunset" provision, meaning that it would automatically expire in 2004.[46] As enacted, the ban prohibited the manufacture, sale, and possession of nineteen specifically identified assault weapons, including "copies or duplicates" of those weapons.[47] The "copycat" provision ensured that minor alterations in the manufacture and design of assault weapons would not create loopholes through which banned weapons could return to the market.[48] In addition to the listed weapons, the ban created an alternative method of defining an "assault rifle" by including a "features test."[49] The ban affected semiautomatic weapons capable of using detachable magazines and possessing two or more of any of the following features: a folding or telescopic stock, a pistol grip, a bayonet mount, a flash suppressor or threaded barrel, or a grenade launcher.[50] In

46. *See* Roth, *supra* note 3, at 413 (highlighting expiration provision). The sunset provision allowed Congress and the President to reassess and determine whether the ban was working, and decide whether or not the ban should continue. *See* John J. Phelan IV, Comment, *The Assault Weapons Ban—Politics, the Second Amendment, and the Country's Continued Willingness to Sacrifice Innocent Lives for "Freedom"*, 77 ALB. L. REV. 579, 590-91 (2014).

47. *See* 27 C.F.R. § 478.11 (2017) (identifying federal definition of "assault weapon"); Kevin A. Fox & Nutan Christine Shah, Note, *Natural Born Killers: The Assault Weapons Ban of the Crime Bill—Legitimate Exercise of Congressional Authority to Control Violent Crimes or Infringement of a Constitutional Guarantee?*, 10 ST. JOHN'S J. LEGAL COMMENT. 123, 142-45 (1994) (outlining details of Federal Assault Weapons Ban); Roth, *supra* note 3, at 413-14 (identifying freedoms restrained by Federal Assault Weapons Ban).

48. *See* Fox & Shah, *supra* note 47, at 143 (developing reasoning behind copycat provision). The Federal Assault Weapons Ban never provided a definition for what a "copy or duplicate" was, so this prong went largely unenforced. *See* Phelan, *supra* note 46, at 588. Gun manufacturers were easily able to slightly modify the appearance or rename their firearms to avoid violating the law. *See id.*

49. *See* Jacobs, *supra* note 9, at 693 (noting second way federal ban prevented possession and sale of assault rifles). Assault weapons are semiautomatic firearms that are designed to look like their military counterparts. *See id.* at 685 (addressing differences in appearance and functionality of assault weapons versus military rifles). Semiautomatic assault weapons do not fire automatically—they "discharge one bullet per trigger pull." *See id.* at 685-86 (comparing assault weapons to dangerousness of automatic weapons). Semiautomatic rifles are labeled "assault weapons" because of their appearance, and many believe that "no one needs to have a gun that looks like that." *See id.* at 685-87 (pointing to public fear of appearance of assault rifles supplied reasoning to ban semiautomatic weapons). Semiautomatic assault rifles, however, are functionally identical to most other semiautomatic weapons, such as semiautomatic pistols and shotguns. *See id.* at 685-86 (comparing deadliness of assault rifles with other semiautomatic weapons). Semiautomatic civilian rifles that have cosmetic outward features resembling military weapons are labeled "assault rifles" by gun prohibitionists as a form of propaganda to promote banning the weapons. *See* Stephen P. Halbrook, *Reality Check: The "Assault Weapon" Fantasy and Second Amendment Jurisprudence*, 14 GEO. J.L. & PUB. POL'Y 47, 49 (2016) (opining "assault weapon" can have any desired meaning).

50. *See* 27 C.F.R. § 478.11 (identifying features list for undesirable characteristics); Jacobs, *supra* note 9, at 693 (pointing to alternative method to define "assault weapon" under Federal Assault Weapons Ban). Gun dealers could still sell assault rifles under this definition, provided the weapon did not have two or more of the enumerated features. *See* Phelan, *supra* note 46, at 589. Thus, gun manufacturers began producing weapons with features that would fit the cosmetic requirements of the ban, but were still fully operational assault weapons. *See id.* It is unlikely Congress intended to ban semiautomatic weapons entirely because such a ban would likely result in a ban on most firearms. Brad Plumer, *Everything You Need to Know About the Assault Weapons Ban, in One Post*, WASH. POST (Dec. 17, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post/?utm_term=.8cb37636a42d. Therefore, the features test created by the Clinton administration still allowed for the sale of certain semiautomatic rifles so long as they conformed to specific requirements. *See* Phelan, *supra* note 46, at 589.

addition to the federal provisions, many state and municipal jurisdictions took steps to ensure that these firearms would remain out of the hands of Americans, especially after the Federal Assault Weapons Ban expired.[51]

1. The Columbus Ban

Prior to the federal ban, the City of Columbus, Ohio attempted to establish its own assault weapons ban through a 1989 city ordinance.[52] This ban identified and prohibited forty-six specifically listed weapons, as well as models of the "same action design that have slight modifications or enhancements of the firearms listed."[53] Springfield Armory, a firearms manufacturer in Illinois, challenged the ban on vagueness grounds, arguing that consumers and law enforcement officials could not determine what "slight modifications or enhancements" meant.[54] In 1994, the Sixth Circuit Court of Appeals determined that Columbus's ban was unconstitutionally vague, as ordinary citizens, and even ordinary gun owners, would not know what is

51. *See* Roth, *supra* note 3, at 414-15, 433 (identifying state and city regulations against assault rifles); *see also, e.g.*, CONN. GEN. STAT. §§ 53-202a to -202b (2017) (defining assault weapons in Connecticut); MD. CODE ANN., CRIM. LAW § 4-301 (West 2017) (providing definition of "assault weapon"); MD. CODE ANN., CRIM. LAW § 4-303 (West 2017) (codifying Maryland's assault weapons ban); MASS. GEN. LAWS ch. 140, § 121 (2016) (defining assault weapons in Massachusetts); MASS. GEN. LAWS ch. 140, § 131M (2016) (establishing Massachusetts Assault Weapons Ban); N.Y. PENAL Law § 265.00 (McKinney 2017) (establishing assault weapons ban in New York).

52. *See* Scott Charles Allan, Casenote, People's Rights Organization, Inc. v. City of Columbus*: The Sixth Circuit Shoots Down Another Unconstitutional "Assault Weapons" Ban*, 20 PACE L. REV. 433, 443 (2000) (identifying statute in question). The City of Columbus passed this ban in response to a widely publicized shooting in Stockton, California. *Id.* Many states similarly choose to ban assault rifles as a response to mass shootings carried out by shooters carrying AR-15 style weapons. *See* Healey, *supra* note 2 (opining AR-15-style weapons commonly used to commit mass murder); Jacobs, *supra* note 9, at 702 (recognizing Secure Ammunition and Firearms Enforcement Act of 2013 in response to Sandy Hook massacre). Nevertheless, some believe that banning assault weapons in response to mass shootings is historically unsuccessful because mass shooters can easily come up with alternative means of inflicting mass casualty when desired. Michael S. Rosenwald, *Why Banning AR-15s and Other Assault Weapons Won't Stop Mass Shootings*, WASH. POST (June 16, 2016), https://www.washingtonpost.com/news/local/wp/2016/06/16/why-banning-ar-15s-and-other-assault-weapons-wont-stop-mass-shootings/?utm_term=.91f9c24c90b4 [https://perma.cc/6D7H-VZF7] (arguing gun selection does not deter mass shooters). Mass shooters, such as the Virginia Tech shooter, can use handguns to commit attacks that parallel in deadliness to assault rifle attacks. *See id.*

53. Springfield Armory, Inc. v. City of Columbus, 805 F. Supp. 489, 491 (S.D. Ohio 1992), *rev'd*, 29 F.3d 250 (6th Cir. 1994) (identifying language of city ordinance); Allan, *supra* note 52, at 444 (identifying "same action design" and "slight modification" qualification for assault rifles). This ban attempted to prohibit specific firearms by manufacturer and model as opposed to defining a particular class of firearms. Allan, *supra* note 52, at 443. The ordinance banned the sale and possession of assault weapons, unless an individual possessed the weapons before the ban's enactment. Allan, *supra* note 52, at 443-44.

54. *Springfield Armory, Inc.*, 805 F. Supp. at 492 (arguing ordinance does not give adequate notice to ordinary citizenry and manufacturers regarding prohibited weapons); *see* Allan, *supra* note 52, at 444 (stating plaintiff's argument on grounds of constitutional vagueness). The plaintiffs contested that the ordinance only banned the specifically named weapons, and that other manufacturers are free to make and sell similar products. *See Springfield Armory, Inc.*, 805 F. Supp. at 492.

covered under the ordinance because average gun owners know little about how guns operate or their design features.[55]

2. The Maryland Ban

After the Federal Assault Weapons Ban expired, Maryland established its own ban by enacting the Maryland Firearm Safety Act, which prohibits any person from "possess[ing], sell[ing], offer[ing] to sell, transfer[ing], purchas[ing], or receiv[ing] an assault weapon."[56] The Maryland Firearm Safety Act defines "assault weapons" as assault long guns, assault pistols, and copycat weapons.[57] The definition of "assault long guns," which lists sixty different models of rifles and shotguns, effectively bans most semiautomatic rifles and "copies" of those weapons.[58] In *Kolbe v. Hogan*,[59] Maryland residents seeking to possess assault rifles for home defense challenged this ban by relying largely on *Heller* to argue that the Second Amendment protects the essential right to possess an assault rifle for home defense purposes.[60] In addressing the "dangerous and unusual" argument, the Fourth Circuit Court of Appeals indicated that assault rifles are not more dangerous than handguns, relying on 2006 statistics that demonstrated handguns accounted for 60% of murders while long guns only accounted for 7%.[61] Consequently, the court held that the assault rifles should be protected under the purview of the Second Amendment because they are commonly possessed for lawful purposes.[62]

55. *See* Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 253-54 (6th Cir. 1994) (concluding language of ban unconstitutionally vague due to interpretation issues). The court determined that the ordinance provided insufficient information for people of average intelligence to determine whether or not they were purchasing a firearm within the lawful limits of the city ordinance. *See id.* at 253.

56. *See* MD. CODE ANN., CRIM. LAW § 4-303(a)(2) (West 2017).

57. *See id.* § 4-301(d) (providing definition of "assault weapon").

58. *See id.* § 4-301(b), (e) (acknowledging definition of assault weapon includes "copies" but not specifying definition of "copies"); MD. CODE ANN., PUB. SAFETY § 5-101(r)(2) (West 2017) (listing specific weapons).

59. 813 F.3d 160, 169 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017).

60. *See id.* at 168 (determining Second Amendment protects assault rifles for self-defense in homes). One of several plaintiffs stated he would purchase an assault rifle if not for the ban because certain features of the assault rifle make it "ideal for self-defense in the home." *See id.* at 170.

61. *See id.* at 177 (suggesting assault rifles have bad reputation due to mass shootings). The court overturned the district court's finding that a weapon's dangerousness should be measured by the amount of damage it can unleash and its connection to mass shootings. *See id.* at 177-78. The Fourth Circuit noted that the total number of murders committed with handguns far exceeds the number of murders committed with assault rifles. *See id.* at 177. Handguns account for 88% of all firearm-related murders and only 35% of all guns in America. *Id.* at 178. Therefore, handguns are disproportionately responsible for the overall number of homicides in the United States. *See id.*

62. *See id.* at 174 (determining common possession demonstrated since semiautomatic rifles constituted 20% of all retail firearms sales). In 2012, the manufacture and import of AR- and AK-style weapons was twice the number of Ford F-150 trucks sold in the United States—the most commonly owned vehicle in the United States. *Id.*

In 2017, the Fourth Circuit, sitting en banc, subsequently reconsidered and reversed the panel's initial ruling.[63] The court held that it had no power to extend Second Amendment protections to the banned assault weapons because *Heller* excluded weapons of war from Second Amendment coverage.[64] Moreover, specifically addressing the AR-15, the court explained that the weapon is merely a semiautomatic version of the M-16, a rifle commonly used by the U.S. military and other militaries around the world, and was therefore not protected by the Second Amendment.[65] Justice Traxler's strong dissent, however, opined that the majority rejected the common use analysis in *Heller*, which states that a weapon is not "dangerous and unusual" if it is typically possessed by law-abiding citizens for lawful purposes.[66] Justice Traxler explained that assault weapons are commonly possessed weapons, as demonstrated by recent statistics showing that eight million AR- and AK-style rifles were imported into the United States between 1990 and 2012, and that at least forty-four states allow possession of these assault weapons.[67] In rejecting the majority's newly-birthed "most useful in military service" test, Justice Traxler lamented that the test erodes a weapon's Second Amendment protection by calling the weapon a "weapon of war," and ignoring whether the weapon is commonly possessed.[68]

63. *See* Kolbe v. Hogan, 849 F.3d 114, 121 (4th Cir. 2017) (vacating prior Fourth Circuit decision).

64. *See id.* (identifying court's reasoning for limiting Second Amendment coverage). The Fourth Circuit explained that under *Heller*, weapons that are most useful in military service are not covered by the Second Amendment. *See id.*

65. *See id.* at 124 (explaining similarity between AR-15 rifle and M-16 rifle). The court explained that around the time of World War II, the automatic and selective-fire AR-15 was originally designed and subsequently used for military purposes. *See id.* After the AR-15 received positive feedback from military field testing in Vietnam in 1962, the military changed the name of the AR-15 to the M-16. *See id.* Firearm manufacturers then began producing civilian versions of the semiautomatic AR-15 that retained certain military features of the fully automatic AR-15 and AK-47. *See id.* at 124-25. Furthermore, the court went so far as to say that the semiautomatic firing mode, which is the firing mode manufactured in civilian models of the AR-15, is deadlier because it is more accurate than the automatic firing mode. *See id.* at 125.

66. *See id.* at 152-53 (Traxler, J., dissenting) (explaining reasoning for majority's improper ruling). Justice Traxler explained that a weapon cannot be banned solely because of its dangerousness, but rather, the weapon must be both dangerous and unusual. *See id.* at 152. Justice Alito endorsed this principle when he identified the dangerous and unusual test in *Heller* as a conjunctive test requiring that a weapon must have both properties to be banned. *See* Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (overturning Massachusetts Supreme Judicial Court's approval of prohibiting sale of stun guns); *id.* at 1031 (Alito, J., concurring) (outlining conjunctive test). The relative dangerousness of a gun is irrelevant when the weapon is commonly possessed for lawful purposes, such as home defense. *See Kolbe*, 849 F.3d at 153 (Traxler, J., dissenting).

67. *See Kolbe*, 849 F.3d at 153-54 (Traxler, J., dissenting) (evidencing high number of sales and states allowing sales to show common use). Determining whether a weapon is popular enough to be considered in common use is largely a statistical analysis. *See id.* at 153. Semiautomatic rifles have been in existence for over 100 years, and in 2012, accounted for over 20% of all firearms sales in the United States. *See id.* at 153-54.

68. *See id.* at 156 (explaining how new test forgoes common use standard). The majority ignored the pertinent Second Amendment question of whether the weapons at issue "are commonly possessed by law-abiding citizens for lawful purposes today." *See id.* (quoting Caetano v. Massachusetts, 136 S. Ct. 1027, 1032

3. The New York Ban

New York's version of an assault weapons ban is contained in the New York Secure Ammunition and Firearms Enforcement Act of 2013 (NY SAFE Act), which bans assault rifles that have at least one of an enumerated list of features.[69] The NY SAFE Act, enacted in response to the 2012 mass shooting in Sandy Hook, Connecticut, establishes a stricter features test than the Federal Assault Weapons Ban.[70] The NY SAFE Act bans assault rifles that contain only one enumerated feature from the list of features, as opposed to the two that were required under the federal ban.[71] A number of firearms advocates and businesses filed suit against the governor of New York, arguing that the prohibition on assault rifles violated their Second Amendment rights.[72] The Second Circuit Court of Appeals held that *Heller* provided individual protection for handguns for self-defense purposes, but the Supreme Court stopped short of endorsing this protection for other firearms.[73] The court deferred to the legislature on the issue of whether assault rifles are protected under the Second Amendment, describing the argument that people use assault rifles for self-defense purposes as "speculative at best," and reasoning that such matters of public safety should be left to the legislature.[74] In total, seven states

(2016) (Alito, J., Concurring)). Justice Traxler explained that other military weapons such as Gatling guns, mortars, and bazookas could never be considered commonly possessed. *See id.* Moreover, Justice Traxler stated that in no way does *Heller* suggest that the "military usefulness of a weapon disqualifies it from Second Amendment protection." *See id.* Interestingly, the Supreme Court overturned a Massachusetts Supreme Judicial Court decision, which reasoned that the Second Amendment does not extend protection to stun guns because they are not readily adaptable for military use. *See Caetano*, 136 S. Ct. at 1028. The Supreme Court reiterated that the Second Amendment protects more than just weapons that are useful in warfare. *See id.* Thus, the two rulings of *Kolbe* and *Caetano* created an interesting dynamic, with the Fourth Circuit stating that "weapons of war" are not protected, but the Supreme Court stating that weapons useful in warfare are not the only weapons protected under the Second Amendment. *Compare id.* (reiterating Second Amendment protections extend to more than just military weapons), *with Kolbe*, 849 F.3d at 121 (determining individuals have no right to possess weapons most useful in military service).

69. *See* N.Y. PENAL LAW § 265.00(22) (McKinney 2017) (defining specific assault weapon features).

70. *See* Jacobs, *supra* note 9, at 703 (outlining amendments to strengthen existing ban due to continued and more extreme massacres). The NY SAFE Act replaced a less restrictive assault weapons ban that existed since the Columbine High School massacre in 2000. *Id.*

71. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 249 (2d Cir. 2015) (indicating recent mass shootings drove legislative action). In direct response to several mass shootings, the new assault weapons ban broadened the definition of an assault weapon. *See* Jacobs, *supra* note 9, at 703 (explaining NY SAFE Act emergency measure following Sandy Hook massacre).

72. *See N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 251 (arguing New York ban on assault rifles unconstitutionally vague).

73. *See id.* at 253 (citing limitation on dangerous and unusual weapons). The court below found that this assault weapons ban did not substantially burden an individual's right to self-defense in the home, as established in *Heller*. *See* Jacobs, *supra* note 9, at 705 (outlining district court's decision). *But see N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 259-60 (recognizing substantial burden on Second Amendment rights imposed by NY SAFE Act).

74. *See N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 263 (deferring to legislature under intermediate scrutiny). The court reasoned that the legislature is far better equipped than the judiciary to make policy

and Washington D.C. have state assault weapons bans, while forty-three others do not.[75]

C. The Massachusetts Assault Weapons Ban

The Massachusetts legislature passed its own version of an assault weapons ban before the Federal Assault Weapons Ban expired.[76] The Massachusetts Assault Weapons Ban outlawed the sale, transfer, and possession of assault rifles in similar fashion to the Federal Assault Weapons Ban.[77] The statute specifically defines "assault weapon," as having "the same meaning as a semiautomatic assault weapon as defined in" the Federal Assault Weapons Ban.[78]

The Massachusetts Assault Weapons Ban establishes three separate definitions under which a weapon may be banned.[79] First, the law includes a specific list of banned weapons, including all AK models and the Colt AR-15, which are labeled "Enumerated Weapons."[80] Second, the Massachusetts Assault Weapons Ban maintains the features test from the Federal Assault Weapons Ban, fulfilling the intention of the Massachusetts legislature to mirror the federal definition of an assault weapon.[81] Third, the Massachusetts Assault Weapons Ban outlaws "copies or duplicates" of the listed weapons.[82] Until

judgments regarding the dangers of carrying firearms. *See id.* (suggesting legislature's place to limit constitutional rights).

75. *See Assault Weapons*, GIFFORDS L. CTR., http://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/assault-weapons/ [https://perma.cc/42RN-LSYU] (describing current state of assault weapons ban jurisprudence around the United States). As of the date of this writing, the following states currently have assault rifle bans: California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York. *See id.*

76. *See* MASS. GEN. LAWS ch. 140, § 121 (2016) (establishing ban mirroring Federal Assault Weapons Ban); *Massachusetts Attorney General Unilaterally Bans Thousands of Previously Legal Guns*, NRA-ILA (July 22, 2016), https://www.nraila.org/articles/20160722/massachusetts-attorney-general-unilaterally-bans-thousands-of-previously-legal-guns [https://perma.cc/7XF4-VFEX] [hereinafter *Massachusetts AG's Unilateral Ban*] (recalling Massachusetts ban established in 1998); *see also supra* note 46 and accompanying text (recognizing federal ban expired in 2004).

77. *See* MASS. GEN. LAWS ch. 140, § 121 (intending for Massachusetts ban to have similar meaning to federal ban); MASS. GEN. LAWS ch. 140, § 131M (2016) (banning assault weapons unless possessed prior to Federal Assault Weapons Ban).

78. MASS. GEN. LAWS ch. 140, § 121.

79. *See id.* (listing weapons, prohibited features, and copycat weapons tests).

80. *See id*. (naming weapons forbidden under 1998 ban); ENFORCEMENT NOTICE, *supra* note 3, at 3 (identifying "Enumerated Weapons" language). The Enumerated Weapons list includes nineteen weapons, but most significant were popular weapons including all models of the AK and the Colt AR-15. *See* ENFORCEMENT NOTICE, *supra* note 3, at 1, 3.

81. *See* ENFORCEMENT NOTICE, *supra* note 3, at 2 (listing same features test from Federal Assault Weapons Ban). The legislation explicitly states that the Massachusetts statutory definition of an "'assault weapon[]' shall be the same meaning as a semiautomatic assault weapon as defined" by the Federal Assault Weapons Ban. *See* MASS. GEN. LAWS ch. 140, § 121. Attorney General Healey stated that the Massachusetts Assault Weapons Ban mirrors the Federal Assault Weapons Ban, but also explicitly bans copies and duplicates of the enumerated weapons. *See* Healey, *supra* note 2.

82. *See* MASS. GEN. LAWS ch. 140, § 121 (outlining definitions in statute).

recently, the Massachusetts Assault Weapons Ban was enforced in the same manner as the previous Federal Assault Weapons Ban, because many believed this was what the legislature intended.[83]

On July 20, 2016, Attorney General Maura Healey issued an Enforcement Notice, providing guidance as to which weapons are "copies or duplicates" under Massachusetts law.[84] Under this new guidance, the Attorney General issued two tests which would classify a firearm as a "copycat or duplicate" assault rifle.[85] Under the first test, called the "Similarity Test," a copy or duplicate is a weapon with internal functioning components substantially similar to those of an enumerated weapon.[86] Under the second "Interchangeability Test," a weapon is a copy or duplicate if it has the exact same receiver as, or a receiver that is interchangeable with, an enumerated weapon's receiver.[87] By creating these two tests, the Attorney General greatly

83. *See* Healey, *supra* note 2 (clarifying definition of copycat and duplicates under ban); *Massachusetts AG's Unilateral Ban*, *supra* note 76 (citing legislative intent for reasoning behind historical enforcement).

84. *See* ENFORCEMENT NOTICE, *supra* note 3, at 3-4 (issuing new framework for gun sellers to understand definition of "copies and duplicates"). Attorney General Healey rejected the gun manufacturers' claim that the definition of a "copy or duplicate" was the same as the features list. *See* Healey, *supra* note 2. Attorney General Healey further stated that this new directive would offer Massachusetts citizens the full protection intended by the legislature in passing the ban. *See id.*

85. *See* ENFORCEMENT NOTICE, *supra* note 3, at 3-4 (providing Attorney General's two new weapons tests). Attorney General Healy "said the new tests were essential to close a loophole that allowed gun manufacturers to sell 'state compliant' or 'copycat' weapons without a few features but just as deadly as the assault weapon models specifically included in the ban." Cyrus Moulton, *Mass. AG Healey Seeks Dismissal of 'Copycat' Gun Lawsuit*, WORCESTER TELEGRAM (Nov. 26, 2016), http://www.telegram.com/news/20161125/mass-ag-healey-seeks-dismissal-of-copycat-gun-lawsuit [https://perma.cc/W3FB-88YJ].

86. *See* ENFORCEMENT NOTICE, *supra* note 3, at 3 (identifying Attorney General's "Similarity Test"). According to the Similarity Test:

> A weapon is a Copy or Duplicate if its internal functional components are substantially similar in construction and configuration to those of an Enumerated Weapon. Under this test, a weapon is a Copy or Duplicate, for example, if the operating system and firing mechanism of the weapon are based on or otherwise substantially similar to one of the Enumerated Weapons.

Id.

87. *See id.* at 4 (identifying Attorney General's Interchangeability Test). This test provides a nonexclusive list of operating components such as trigger assemblies, bolt carriers, charging handles, extractor assemblies, and magazine ports. *See id.* The Interchangeability Test makes it nearly impossible for citizens to determine which firearms are banned because modern manufacturing processes take advantage of many interchangeable products, such as small springs. *See* Letter from Daniel Bennett, Sec'y of Pub. Safety & Sec., Mass. to Maura Healey, Attorney Gen., Mass. (July 26, 2016), http://d279m997dpfwgl.cloudfront.net/wp/2016/07/20160726135722881.pdf [https://perma.cc/877D-E2JR] [hereinafter Bennett Letter] (explaining high probability of use of interchangeable parts in modern firearms). Massachusetts Secretary of Public Safety and Security Daniel Bennett expressed his concern over the impossibility of determining which firearms fail under the Interchangeability Test due to the high number of components in the enumerated weapons and the ambiguity of the nonexclusive list of what may qualify as an "operating component." *See id.* Specifically, the Interchangeability Test provides that:

> A weapon is a Copy or Duplicate if it has a receiver that is the same as or interchangeable with the receiver of an Enumerated Weapon. A receiver will be treated as the same as or interchangeable

expanded the weapons covered by the Massachusetts Assault Weapons Ban without consulting the legislature or the public.[88]

Many firearms advocates, including the National Rifle Association (NRA), staunchly oppose these newly fashioned tests as over-inclusive and capable of application to nearly any semiautomatic weapon.[89] For example, the NRA argues that the Similarity Test encompasses nearly all semiautomatic rifles as, the listed weapons include rifles with the most common types of semiautomatic operating systems.[90] Moreover, the Interchangeability Test captures many common rifles since new rifles are typically built with the ability to use compatible parts from other popular weapons, allowing owners to take advantage of the large aftermarket of magazines, trigger groups, and other receiving components for semiautomatic weapons.[91] Firearm advocates point to language in the original 1998 legislation, which explicitly states that the definition of an assault weapon is the same as the definition in the Federal Assault Weapons Ban, and challenge the new tests as going far beyond the legislature's original intent.[92]

The National Shooting Sports Foundation (NSSF), another firearms advocate, recently filed suit against the Attorney General of Massachusetts, challenging the constitutionality of the Enforcement Notice.[93] The NSSF claims that the Enforcement Notice unconstitutionally violates Massachusetts

> with the receiver on an Enumerated Weapon if it includes or accepts two or more operating components that are the same as or interchangeable with those of an Enumerated Weapon. Such operating components may include, but are not limited to: 1) the trigger assembly; 2) the bolt carrier or bolt carrier group; 3) the charging handle; 4) the extractor or extractor assembly; or 5) the magazine port.

ENFORCEMENT NOTICE, *supra* note 3, at 4.

88. *See* Charles C. W. Cooke, *Massachusetts Attorney General Unilaterally Rewrites the State's Gun Laws*, NAT'L REV. (July 20, 2016), http://www.nationalreview.com/corner/438136/massachusetts-attorney-general-unilaterally-bans-assault-weapons [https://perma.cc/6RGN-XXLC] (highlighting independence of Attorney General's action taken without consultation of lawmaking process); *Massachusetts AG's Unilateral Ban*, *supra* note 76 (illuminating major expansion of banned weapons following Attorney General's action).

89. *See* NRA-ILA Staff, *Massachusetts Officials Question AG Gun Ban*, NRA-ILA (July 29, 2016), https://www.nraila.org/articles/20160729/massachusetts-officials-question-ag-gun-ban [https://perma.cc/R5FA-4PZU] (highlighting over-inclusive capture of new tests).

90. *See Massachusetts AG's Unilateral Ban*, *supra* note 76 (describing how Similarity Test broadly expanded scope of ban).

91. *See id.* (commenting on over-inclusive nature of Interchangeability Test).

92. *See* NRA-ILA Staff, *supra* note 15 (arguing scope of new test beyond original intent of Massachusetts ban). In a lawsuit brought by four local gun shops, Attorney General Healey stated in a motion to dismiss that her interpretation of the phrase "copies or duplicates" is consistent with the original intent of the Massachusetts Assault Weapons Ban. *See* Moulton, *supra* note 85 (arguing "copies and duplicates" critical component to the ban).

93. *See* Complaint for Declaratory Relief at 1, Pullman Arms Inc. v. Healey, No. 4:16-cv-40136 (D. Mass. filed Sept. 22, 2016) [hereinafter Pullman Arms Complaint] (challenging unconstitutionally vague nature of Enforcement Notice); Stephanie Ebbert, *It's the Gun Industry vs. Mass. AG Healey*, BOS. GLOBE (Sept. 23, 2016), https://www.bostonglobe.com/metro/2016/09/22/gunsuit/0l5FRF5oSQ20gvXdXoL1IOstory.html (outlining challenges to recent crackdown against assault weapons).

citizens' Second Amendment rights by radically redefining the scope of the Massachusetts Assault Weapons Ban without any legislative involvement.[94] This group contends that the recent action by Attorney General Healey demonstrates a lack of understanding about firearms, and furthermore, that the ban generates considerable uncertainty and confusion.[95] The NSSF's lawsuit also alleges that by taking on a role exclusive to the legislature, the Attorney General violated separation of powers principles.[96] A spokesperson for the Attorney General responded to these allegations by stating that the office is merely enforcing the letter of a longstanding law which has been in force for eighteen years.[97] Further, Attorney General Healey defended her action by asserting that she, not the gun industry, is authorized to interpret the law and decide what weapons are compliant.[98]

The recent Enforcement Notice also faces challenges from Second Amendment supporters on grounds that the directive is overly vague.[99] A law is void for vagueness if what the law prohibits is not clearly explained.[100] Two rationales justify this principle: to ensure that citizens of ordinary intelligence understand what the law prohibits, and to avoid arbitrary enforcement of the law.[101] A recent letter from Massachusetts Governor Charlie Baker to Attorney General Healey addressed concerns that the Enforcement Notice may be overly

94. *See* Pullman Arms Complaint, *supra* note 93, at 2 (claiming Healy redefined "copies and duplicates" in manner specifically rejected by legislature when law passed); Press Release, *supra* note 14 (outlining unilateral legislative action argument by NSSF).

95. *See* Pullman Arms Complaint, *supra* note 93, at 15 (providing examples of confusion created by new tests); Press Release, *supra* note 14 (describing vagueness of notice and arguments by Attorney General).

96. *See* Pullman Arms Complaint, *supra* note 93, at 2 (arguing Attorney General exceeded her lawful authority through Enforcement Notice); Schoenberg, *supra* note 12 (stating Attorney General has no constitutional or statutory authority to rewrite laws). Although attorney generals are frequently considered executive officers, their duties necessarily include some legislative and judicial functions that undoubtedly implicate separation of powers issues. *See* Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 8 (1993). Because the legislative and executive branches may use attorney general opinions as guidance for enforcing statutes, legal scholars discern that attorney generals may be usurping the traditional judicial role by acting as opinion renderers. *See id.* at 8-9. Attorney generals tend to issue these opinions where there is a need for explaining a certain law, or where there are legislative gaps in the enforcement of the law. *See id.* at 9.

97. *See* Ebbert, *supra* note 93 (recounting defense of Enforcement Notice by arguing new ban successfully ended sale of copycat weapons). Attorney General Healey states that nothing in the legislation restricts her power to provide notice as to how she interprets a criminal law that she is charged with enforcing. *See* Moulton, *supra* note 85.

98. *See* Ebbert, *supra* note 93 (highlighting Attorney General's executive role to interpret and enforce standing laws).

99. *See* NRA-ILA Staff, *supra* note 15 (criticizing Enforcement Notice for creating confusion amongst law-abiding citizens in Massachusetts).

100. *See* Allan, *supra* note 52, at 438 (explaining importance of clarity in laws to avoid confusion amongst citizens and police). Particularly when there are criminal penalties involved, a strict test is needed to evaluate the validity of potentially vague laws, even if the laws serve a legitimate purpose. *See id.* at 438-440.

101. *See id.* at 438 (identifying two-part vagueness principle). Vague laws often chill constitutional freedoms. *See id.* In particular, vague laws discourage citizens from engaging in behavior that may be legal because they do not understand whether a particular law prohibits the behavior or not. *See id.* at 439-40.

vague, stating that "ambiguities in your notice require clarification for responsible gun owners who simply want to follow the rules and for the thousands of gun owners who were told they were following the rules for eighteen years."[102] Furthermore, Daniel Bennett, the Massachusetts Secretary of Public Safety and Security, wrote to Attorney General Healey with concerns about the newly fashioned tests.[103] He objected to the term "operating system" in the Similarity Test as ambiguous because the term could even encompass certain pistols, since many manufacturers, such as Colt, use the same design for a variety of their firearms.[104] Secretary Bennett also addressed the Interchangeability Test, claiming it is unreasonable to expect Massachusetts citizens to understand the limits of the recently announced Enforcement Notice due to the high number of components in modern firearms.[105] Because most contemporary firearms operate in a similar way, the new Interchangeability Test essentially allows Attorney General Healy to seek out and identify similarities between an enumerated weapon and a weapon she would like to ban, therefore satisfying the test.[106] Some argue this test allows the Attorney General to give meaning to the law in any way she desires, which leads to impractical applications and confusion amongst Massachusetts gun owners.[107]

D. Powers and Abilities of the Attorney General of Massachusetts

The Massachusetts Constitution's separation of powers clause prohibits the legislative, judicial, and executive branches from exercising powers belonging to another branch.[108] Moreover, the Attorney General's role as a quasi-executive and quasi-judicial officer does not include providing "interpretations"

102. Letter from Charles D. Baker, Governor, Mass., to Maura Healey, Attorney Gen., Mass. (July 26, 2016), http://d279m997dpfwgl.cloudfront.net/wp/2016/07/20160726135722881.pdf [https://perma.cc/6XMV-WH2W] [hereinafter Baker Letter] (warning Attorney General of ambiguous interpretation by gun owners and officials). Governor Baker also stated that he supports the Second Amendment and emphasized that the previous ban had been in existence for nearly twenty years. *See id.* Governor Baker specifically expressed support for "the assault weapons ban that has been in place for nearly twenty years [] in Massachusetts," but stopped short, however, of endorsing Attorney General Healey's recent Enforcement Notice. *Id.* As the Governor of Massachusetts, Charlie Baker articulated his desire to protect Massachusetts citizens by keeping dangerous weapons out of the hands of violent individuals. *See id.*

103. *See* Bennett Letter, *supra* note 87 (offering objections from Massachusetts government officials). Secretary Bennett wrote the letter seeking clarification regarding the Enforcement Notice, as he believed that it produced a great deal of uncertainty as to what the Attorney General considers an "assault weapon." *See id.*

104. *See id.* (outlining vagueness objection from Secretary of Public Safety and Security).

105. *See id.* (explaining why expectation of understanding recent tests unreasonable).

106. *See* Cooke, *supra* note 88 (describing how Attorney General now has unrestricted listing power).

107. *See id.* (lamenting Attorney General's wide discretion in listing weapons); Jenn Jacques, *Massachusetts Governor and Public Safety Secretary Tell AG "Not So Fast" on Gun Ban*, BEARING ARMS, (July 28, 2016), http://bearingarms.com/jenn-j/2016/07/28/massachusetts-governor-and-public-safety-secretary-tell-haley-not-so-fast-on-gun-ban/ [https://perma.cc/B6KP-7CLX] (arguing new guidelines confusing to Massachusetts citizens).

108. *See* MASS. CONST. pt. 1, art. XXX (enumerating separation of sovereign powers in Massachusetts).

for legislative omissions, "except in the most obvious cases."[109] In a recent letter sent to Attorney General Healy, State Representative Harold P. Naughton, Jr. expressed his belief that Healey overstepped her role by creating the Enforcement Notice's new tests.[110] McNaughton explained that such matters are legislative in nature and should be "considered by both the House and the Senate along with public input."[111] Because the legislature intended the define "assault weapons" similarly to the definition in the Federal Assault Weapons Ban, many opposed to the ban have questioned whether the Enforcement Notice merely interprets existing law, or if the Attorney General overstepped her power and completely redefined "assault weapon."[112]

A recent court complaint challenges Attorney General Healey's action, alleging that she exceeded her authority, and essentially rewrote the 1998 Massachusetts law.[113] The lawsuit avers that Healey undermined the legislative

109. *See* Opinion Letter from Edward W. Brooke, Attorney Gen., Mass., to John J. McCarthy, Comm'r of Admin., Exec. Office for Admin. & Fin. (Oct. 10, 1966), *in* REPORT OF THE ATTORNEY GENERAL FOR THE YEAR ENDING JUNE 30, 1967, at 95, 96 (1967) (deferring to agency interpretation of statute because agencies, not attorney generals, interpret ambiguous statutes); Matheson, *supra* note 96, at 8 (indicating attorney generals' functions mainly executive, but sometimes judicial and legislative). In issuing these quasi-judicial advisory opinions, attorney generals serve as an alternative to pursuing such a judgment in court, blurring the separation of powers principle. *See* Matheson, *supra* note 96, at 8.

110. *See* Letter from Harold P. Naughton, Jr., State Representative, Mass., to Maura Healey, Attorney Gen., Mass. (July 25, 2016), https://d3uwh8jpzww49g.cloudfront.net/sharedmedia/1508946/ag-gun-directive-response.pdf [https://perma.cc/5XEW-AKSY] [hereinafter Naughton, Jr. Letter] (expressing belief notice encroaches on judicial and legislative powers); *see also* NRA-ILA Staff, *supra* note 89 (arguing Enforcement Notice violates separation of powers). Attorney General Healey received pushback from fifty-eight state representatives and senators regarding the unconstitutionality of her recent Enforcement Notice, all of whom claimed the directive appeared to be more than closing "loopholes"; rather, the Enforcement Notice creates a whole new law that infringes on Massachusetts citizens' Second Amendment rights. *See* Letter from Bradley H. Jones, Jr. et al., to Maura Healey, Attorney Gen., Mass. (July 23, 2016), https://d3uwh8jpzww49g.cloudfront.net/sharedmedia/1508945/finalgundirectivelettertoag.pdf [https://perma.cc/L7DN-UQKQ] [hereinafter Jones, Jr. Letter] (expressing opinion Enforcement Notice made "whole new law"). As the Attorney General claims she is merely enforcing the law that has been on the books for the last eighteen years, the state representatives questioned why there was no prosecutorial action over the last two decades, and inquired what changed to lead her to believe the law should be interpreted in this manner. *See id.* The representatives concluded their letter by "object[ing] in the strongest possible terms to both the substance of [her] actions and the manner in which [she] arrived and implemented [her] decision." *See id.*

111. *See* Naughton, Jr. Letter, *supra* note 110 (requiring input from legislature for expansion of law); *see also* NRA-ILA Staff, *supra* note 89 (considering gun control reform a legislative matter).

112. *See Massachusetts AG's Unilateral Ban*, *supra* note 76 (explaining Attorney General's new test attempting to fill gap left by legislature); Moulton, *supra* note 85 (providing interpretation for criminal law).

113. *See* Pullman Arms Complaint, *supra* note 93, at 17-18 (alleging Attorney General exceeded statutory authority); Press Release, *supra* note 14 (explaining Attorney General's disregard for legislative process); *see also* Cooke, *supra* note 88 (displaying attempt at legislative action without support from legislature, governor, or public). This lawsuit is likely going to force Attorney General Healey to explain how and why she decided to ban all assault rifles, and why her office is entitled to make such a dramatic, unilateral change without either public input or the legislative process. *See* Bob Adelmann, *Massachusetts AG Busy Defending Her Unconstitutional "Enforcement Notice" on "Copycat" Assault Weapons*, NEW AM. (Jan. 5, 2017), http://www.thenewamerican.com/usnews/constitution/item/25071-massachusetts-ag-busy-defending-her-unconstitutional-enforcement-notice-on-copycat-assault-weapons [https://perma.cc/EJ53-FEML] (requiring explanation for violation of separation of powers). In a similar instance, the Virginia Attorney General issued a mandate

process by unilaterally declaring certain firearms to be illegal.[114] In justifying her actions, Healey stated that the ban is necessary due to the recent tragedies committed using assault weapons, such as the Orlando Pulse Nightclub massacre.[115] According to Attorney General Healey, it is her moral and legal obligation to protect Massachusetts residents from gun violence and mass murderers.[116]

III. ANALYSIS

A. The Massachusetts Assault Weapons Ban Under Heller

The Attorney General's recent interpretation of the Massachusetts Assault Weapons Ban is an unconstitutional infringement on Massachusetts residents' Second Amendment rights.[117] Despite *Heller*'s clear holding that weapons commonly used for self-defense—except those that are "dangerous and

unilaterally changing the state's laws regarding concealed carry permit holders; the Virginia Attorney General later rescinded the mandate but the act led to the office being sanctioned for taking illegal action. *See id.* If the Enforcement Notice is treated similarly, Attorney General Healey's office may be subject to similar sanctions and barred from issuing such enforcement mandates in the future. *See id.*

114. *See* Pullman Arms Complaint, *supra* note 93, at 17-18 (alleging Attorney General created new tests not in accordance with law); Press Release, *supra* note 14 (suggesting Healey undermined legislative process to achieve desired goal of banning assault weapons). The plaintiffs in the suit include four Massachusetts gun retailers whose businesses have been affected by the Enforcement Notice, as well as the NSSF, a trade group that lobbies for the firearm industry. *See* Ebbert, *supra* note 93 (identifying plaintiffs bringing action against Enforcement Notice); Pullman Arms Complaint, *supra* note 93, at 1. The Massachusetts chapter of the National Rifle Association also filed an action in federal district court against Attorney General Healey and Governor Charlie Baker, stating that the Enforcement Notice is "void and unenforceable." *See* Complaint for Declaratory and Injunctive Relief at 32, Worman v. Baker, No. 1:17-cv-10107 (D. Mass. filed Jan. 23, 2017) [hereinafter Worman Complaint] (requesting judgment based on Enforcement Notice's vagueness and constitutional violations); Travis Andersen, *NRA Files Lawsuit Over Ban on Assault Weapons in Mass.*, BOS. GLOBE (Jan. 24, 2017), https://www.bostonglobe.com/metro/2017/01/23/mass-chapter-nra-targets-state-assault-weapons-ban-federal-lawsuit-against-healey/IX7YTBuknWbWxM7BFDJ8LO/story.html [https://perma.cc/6XU2-FG43].

115. *See* Healey, *supra* note 2 (arguing recent attacks call for ban of military style weapons). Attorney General Healey has received public support from numerous Massachusetts state officials, including five former attorney generals and U.S. Senator Elizabeth Warren. *See* Gintautas Dumcius, *'Copycat' Weapons Crackdown: Attorney General Maura Healey Says Law Will Be Enforced to the 'Fullest Extent'*, MASSLIVE (Aug. 8, 2016), http://www.masslive.com/politics/index.ssf/2016/08/attorney_general_maura_healey_16.html [https://perma.cc/NAH2-HQM5] (noting positive political feedback from assault weapons ban). When addressing the Attorney General's directive, Massachusetts Governor Charlie Baker expressed his belief that gunmakers intentionally subverting the law should be held accountable. *See* Baker Letter, *supra* note 102. Representatives from the Massachusetts Attorney General's Office commented on the pending lawsuit by claiming that the Enforcement Notice was working and that the ban was aimed at keeping "dangerous, military-style weapons off [the] streets." *See* Andersen, *supra* note 114.

116. *See* Healey, *supra* note 2 (expressing moral duty to protect citizens of Massachusetts by issuing Enforcement Notice). Attorney General Healey states that she is "merely enforcing the laws that are on the books," which is the least she can do to combat the recent mass shootings. Dumcius, *supra* note 115 (paraphrasing Attorney General's reasoning behind Enforcement Notice).

117. *See* Andersen, *supra* note 114 (arguing Second Amendment protects firearms kept for lawful purposes).

unusual"—are protected under the Second Amendment, the Enforcement Notice unilaterally bans an entire class of weapons used for self-defense, deviating from *Heller*'s interpretation.[118] In 2012, assault rifles accounted for 20% of all firearm sales in the United States, and in 2015, approximately 10,000 assault rifles were sold in Massachusetts alone.[119] An assault rifle can be used for self-defense or home defense, which, along with common use statistics, show that the Enforcement Notice is likely unconstitutional under *Heller*.[120]

Attorney General Healy defended the Enforcement Notice as a means to ensure public safety and reduce gun violence.[121] While the Attorney General is correct that *Heller* allows for limitations on "dangerous and unusual" weapons, there is little support that assault weapons are "dangerous or unusual."[122] Moreover, the FBI's 2014 report on annual crime statistics shows that assault rifles were not responsible for a single murder in Massachusetts in 2014.[123] In fact, the vast majority of gun deaths across the United States are attributed to

118. *See* District of Columbia v. Heller, 554 U.S. 570, 627-29 (2008) (outlining Second Amendment protections, including home defense); ENFORCEMENT NOTICE, *supra* note 3, at 2-4 (creating new tests leading to Second Amendment violations).

119. *See* Kolbe v. Hogan, 813 F.3d 160, 174 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017) (emphasizing high percentage of semiautomatic weapon sales compared to other types of weapons); Healy, *supra* note 2 (highlighting high number of assault rifles sold in Massachusetts). Attorney General Healey's actually pointed out the high number of assault rifles sold in Massachusetts, an act likely taken to instill fear, but ironically, the high number of rifles sold in Massachusetts actually undermines the constitutionality of her action. *See* Healey, *supra* note 2.

120. *See Heller*, 554 U.S. at 627-29 (applying "common use" precedent to statistics to show unconstitutionality); *see also* Worman Complaint, *supra* note 114, at 7 (identifying individuals seeking to own assault rifles for home and self-defense).

121. *See* ENFORCEMENT NOTICE, *supra* note 3, at 1-2; *Healy*, supra note 2 (providing rationale for ban). The new Enforcement Notice is meant to offer Massachusetts citizens the "full protection of the law." *See* Ebbert, *supra* note 93.

122. *See Heller*, 554 U.S. at 627 (holding ban on "dangerous and unusual" weapons constitutional); *AG's Expanded Ban*, *supra* note 10 (citing FBI statistics showing zero murders committed in Massachusetts by any rifle in 2014). A comprehensive analysis of manufacturers' responses to both the federal and Massachusetts ban indicates that assault weapons were and are still readily available on the market as long as they meet certain criteria. *See* 27 C.F.R. § 478.11 (2017) (providing features test); Phelan, *supra* note 46, at 589 (recognizing manufactures could sell slightly modified guns and comply with bans); Healey, *supra* note 2. Healey stated that the Massachusetts ban and the federal ban are supposed to mirror each other, but that guns intended to be banned were still sold with small tweaks and modifications. Healey, *supra* note 2. To maintain the assault rifle market, gun manufacturers would swap out banned features with equally effective features, seeking to suggest that the now-compliant firearms are neither dangerous nor unusual. *See* Phelan, *supra* note 46, at 589. For example, in response to the listing of a "flash suppressor," manufacturers replaced the flash suppressor with a muzzle compensator—a deadlier feature that prevents rapid-fire recoil and muzzle climb. *See id.* at 589-90 (indicating arbitrariness and ineffectiveness of assault weapons bans).

123. *See AG's Expanded Ban*, *supra* note 10 (pointing to recent statistics to show misguided ban on assault weapons); FBI 2014 CRIME REPORT, *supra* note 10 (displaying commonality of assault weapon deaths). In 2014, out of the 131 total murders in Massachusetts, eighty-one were committed by firearms. *See* FBI 2014 CRIME REPORT, *supra* note 10. Of the 11,961 total nationwide murders in 2014, only 2% were committed with a rifle. *See id.* Despite Massachusetts having some of the strictest gun laws and lowest gun violence rates in the nation, Attorney General Healey still stresses there is "a lot of work to do." *See* Brighton, *supra* note 10.

handgun violence, not to assault rifles or shotguns.[124] Nonetheless, the Attorney General cited the use of assault weapons in the mass shootings of Newtown, Aurora, and San Bernardino as evidence of the dangerousness of these weapons.[125] The new Enforcement Notice—which creates a de facto, categorical restriction on assault weapons in Massachusetts—is unsupported when Massachusetts assault rifle violence statistics do not indicate these weapons are used in Massachusetts shootings, and where sporadic mass shootings have occurred outside of the state.[126]

B. Legal Challenges of Other State Bans Applied to the Recent Enforcement Notice

The Enforcement Notice will likely face similar legal challenges to bans in other states.[127] The Similarity Test bans rifles that have internal functioning components that are "substantially similar . . . to those of Enumerated Weapons."[128] This test is similar to the City of Columbus's ordinance banning assault rifles with the same action design as the listed weapons with "slight modifications or enhancements."[129] The Sixth Circuit struck down Columbus's

124. *See supra* note 123 (showing FBI crime statistics do not support reasoning behind ban on assault weapons). In Massachusetts, thirty-three of the total eighty-one firearm related deaths were committed with handguns. *See* FBI 2014 CRIME REPORT, *supra* note 10. The firearm could not be identified in the remaining forty-eight firearm related deaths. *See id.* Previous studies from the Congressional Research Service show that from 1999 to 2013, assault rifles were used in only 27% of mass shootings. *See* Rosenwald, *supra* note 52. The belief that assault rifles are commonly used in mass-shootings is due to recent high-profile shootings, such as those in Sandy Hook, San Bernardino, and Orlando. *See id.* James Alan Fox, a Northeastern University professor who studies mass murder, found murder statistics change only slightly when assault weapons are banned, concluding that the hope these bans will stop mass shootings is unfounded. *See id.* Attorney General Healey, however, states her intention in expanding the scope of the Massachusetts Assault Weapons Ban through the Enforcement Notice is to save the lives of Massachusetts residents and law enforcement. *See* Dumcius, *supra* note 115. She claims that banning assault rifles is a "common sense measure" in the face of recent mass shootings. *See id.* Professor Fox, however, believes that the type of gun is immaterial and that removing access to assault weapons will just promote handgun shootings. *See* Rosenwald, *supra* note 52.

125. *See* Healey, *supra* note 2 (citing out-of-state tragedies drove in-state ban).

126. *See id.* (highlighting acts of terror occurring outside of Massachusetts); FBI 2014 CRIME REPORT, *supra* note 10 (highlighting zero riffle deaths in Massachusetts). The court in *New York State Rifle & Pistol Ass'n* stated that although mass shootings are "particularly rare events"—meaning the assault weapons ban would have little impact on violent crime—the court upheld the constitutionality of the NY SAFE Act because gun control legislation "need not strike at all evils at the same time." *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 262-6347 (2d Cir. 2015) (explaining reasoning for gun legislation even with lack of violent crime).

127. *See* Andersen, *supra* note 114 (showing Enforcement Notice challenged by NRA in district court); *see also, e.g.*, Kolbe v. Hogan, 813 F.3d 160, 160 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017) (determining constitutionality of legislatively enacted ban); *N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 247 (evaluating constitutionality of Connecticut and New York bans); Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 251-52 (6th Cir. 1994) (considering constitutionality of ban on weapons with "slight modifications or enhancements").

128. ENFORCEMENT NOTICE, *supra* note 3, at 3 (identifying language of Similarity Test).

129. *See Springfield Armory, Inc*, 29 F.3d at 252 (identifying language of overturned ban); ENFORCEMENT NOTICE, *supra* note 3, at 3 (explaining Similarity Test in equally vague terms). Attorney General Healy gave an examples of a similar "functioning component," such as the weapon's operating system and firing mechanism,

ban on vagueness grounds because ordinary gun owners were unlikely to understand how the new ban would be applied.[130] Similarly, Massachusetts citizens are having trouble identifying firearms that are banned by the Enforcement Notice and those that are not.[131] Furthermore, the Interchangeability Test allows for arbitrary enforcement by the Attorney General because modern day firearms parts are designed and manufactured to be compatible with many different rifles, creating the opportunity to ban most firearms by simply identifying widely compatible parts and banning the firearms that accept them.[132]

Further, Second Amendment supporters successfully challenged the Maryland Firearm Safety Act by asserting that assault rifles could be used for home defense purposes and were therefore protected under *Heller*.[133] Although the Fourth Circuit, sitting en banc, subsequently vacated the original ruling, ultimately upholding the Maryland ban, this decision misapplied a critical Second Amendment question under *Heller*: Are assault weapons commonly possessed by law-abiding citizens for lawful purposes?[134] The Attorney General's recent Enforcement Notice interpreting the Massachusetts Assault Weapons Ban raises the same question: Are assault rifles commonly possessed by Massachusetts residents for lawful purposes—such as home defense—protected under the Second Amendment?[135] Justice Traxler's dissent in *Kolbe v. Hogan* states that assault rifles should be afforded Second Amendment protection, in part, because statistics show that assault rifles

but gave no indication that the list is complete or how similar the components need to be. *See* ENFORCEMENT NOTICE, *supra* note 3, at 3.

130. *See Springfield Armory, Inc.*, 29 F.3d at 253-54 (finding ban unenforceable because of difficulty in applying and understanding law).

131. *See* Adelmann, *supra* note 113 (arguing new interpretation creates confusion and fear of criminal penalties among retail firearms dealers).

132. *See* Bennett Letter, *supra* note 87 (expressing difficulty in understanding limits and conformity to new test); Cooke, *supra* note 88 (displaying opportunity for ambiguous enforcement by Attorney General due to unrestricted listing power). Creating further ambiguity in the Enforcement Notice, the Attorney General explicitly stated that there is no list of banned weapons; instead, gun dealers will be instructed on how to identify copies and duplicates under the new tests. *See* ENFORCEMENT NOTICE, *supra* note 3, at 4.

133. *See* Kolbe v. Hogan, 813 F.3d 160, 178 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017) (holding semiautomatic rifles commonly used for lawful purposes within purview of Second Amendment).

134. *See* Kolbe v. Hogan, 849 F.3d 114, 152-56 (4th Cir. 2017) (Traxler, J., dissenting) (outlining common use standard). The majority claimed that Justice Traxler, in his dissent, misinterpreted *Heller*'s "common use" test because *Heller* does not afford constitutional protection to a particular weapon because it is sufficiently popular. *See id.* at 142. The majority explained that the "common use" test is not a popularity test. *See id.*

135. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (affording constitutional protection to firearms for self- and home-defense purposes); *Kolbe*, 813 F.3d at 172 (questioning assault rifle use for home-defense purposes); ENFORCEMENT NOTICE, *supra* note 3, at 3-4 (pointing to absolute ban outlawing all assault rifles). Opponents of assault weapons bans contest that if assault weapons are the "weapon of choice" for criminals, then such bans prevent law-abiding citizens from adequately defending themselves. *See* Fox & Shah, *supra* note 47, at 149.

account for 20% of retail firearm sales.[136] Together, the common use standard enumerated in *Heller*, combined with the lack of assault rifle deaths in Massachusetts, imply that an absolute ban on assault rifles infringes upon the right of Massachusetts residents to defend themselves and their homes.[137]

The NY SAFE Act is a legislatively enacted ban criminalizing the possession of assault rifles.[138] In *New York State Rifle & Pistol Association, Inc. v. Cuomo*, the Second Circuit upheld the ban on assault weapons and deferred to the legislature, concluding that the legislature and not the courts should make decisions regarding public safety. [139] Attorney General Healy's recent Enforcement Notice unilaterally interpreted existing law and significantly expanded the scope of the Massachusetts Assault Weapons Ban, including the "protections" allegedly provided to the public.[140] The Attorney General did not consult the legislature when she redefined the manner in which an eighteen-year-old law would be enforced.[141] Such deviations in enforcing the Massachusetts Assault Weapons Ban should be left to the legislature.[142] Unlike *New York State Rifle & Pistol Association, Inc.*, where the court upheld the NY SAFE Act because of its legislative origin, the Enforcement Notice should be found unenforceable because it is not a ban enacted by the legislature.[143] Massachusetts residents should be given the opportunity to provide public input, thereby protecting the safeguards inherent to the legislative process.[144]

136. *See Kolbe*, 849 F.3d at 153 (Traxler, J., dissenting) (utilizing statistical analysis to show common use throughout United States). Most federal courts rely on statistical data when considering whether a weapon is considered in common use, creating precedent among the circuits that the common use standard is an objective and primarily statistical inquiry. *See id.*

137. *See Heller*, 554 U.S. at 627 (holding common use standard as threshold Second Amendment question); FBI 2014 CRIME REPORT, *supra* note 10 (listing low number of deaths related to rifles across United States).

138. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 249 (2d Cir. 2015) (identifying importance of legislative involvement).

139. *See id.* at 263 (deferring to legislature on predictive judgments). The court explained that the legislature is far better equipped to make policy judgments than the judiciary. *See id.* at 261. "Ultimately, '[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments.'" *Id.* at 263 (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 99 (2d Cir. 2012)).

140. *See* ENFORCEMENT NOTICE, *supra* note 3, at 3-4 (expanding interpretation of current enforcement of ban); Jones, Jr. Letter, *supra* note 110 (suggesting Healy's unilateral action creates entirely new law infringing Second Amendment rights); *Massachusett AG's Unilateral Ban*, *supra* note 76 (claiming Healy issued new interpretation of eighteen-year-old ban).

141. *See* Healey, *supra* note 2 (noting Attorney General acting in face of legislative inaction).

142. *See* Naughton, Jr. Letter, *supra* note 110 (arguing r legislative action required for such deviation in law).

143. *See N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 263 (noting legislature's job to make policy judgments).

144. *See* Naughton, Jr. Letter, *supra* note 110 (requesting Healy give Massachusetts residents opportunity to vote on infringement of Second Amendment right).

C. Subsequent Legal Challenges to Massachusetts Assault Weapons Ban

The new definition of "copies" and "duplicates" under the Enforcement Notice is not clearly explained, and has resulted in mass confusion for Massachusetts gun owners and dealers.[145] Massachusetts gun owners and dealers—who believed they were properly following the gun laws for the last eighteen years—must now question whether they are in compliance with the new Enforcement Notice.[146] Due to the possibility of mistakenly violating the law and subjecting themselves to criminal penalties, gun dealers are forced to be overly cautious in interpreting the vague Enforcement Notice.[147] The Enforcement Notice is also impermissibly vague in that it allows the Attorney General to arbitrarily enforce the ban by permitting her to ban a firearm if it is compatible with a wide range of interchangeable parts.[148] This provision essentially leaves the Attorney General with unrestricted listing power, as most modern firearms are designed to accept interchangeable parts.[149]

The legislature that promulgated the Massachusetts Assault Weapons Ban did not intend to include such a broad definition of assault rifles.[150] By explicitly stating that the definition of an "assault weapon" should be the "same . . . as a semiautomatic weapon as defined in" the Federal Assault Weapons Ban, the Massachusetts legislature made the intended interpretation of the statute clear.[151] The Federal Assault Weapons Ban only prohibited weapons accepting detachable magazines with two or more listed features; the

145. *See* Cooke, *supra* note 88 (evidencing ordinary citizens' misunderstanding of Enforcement Notice prohibitions); Dumcius, *supra* note 115 (suggesting any attempt to interpret Enforcement Notice potentially disastrous); *see also* Allan, *supra* note 52, at 438-39 (explaining vagueness principle of ambiguous laws). Members of the Gun Owners Action League, a community gun activist group, stated that the Enforcement Notice raised several questions that they do not know how to answer. *See* Dumcius, *supra* note 115. Moreover, the Gun Owners Action League stated that any attempt to interpret this recent directive could be disastrous, as criminal penalties could result. *See id.*

146. *See* Baker Letter, *supra* note 102 (showing recent change in law led to ambiguous interpretation by gun owners). Attorney General Healey claims she is simply enforcing the same Massachusetts Assault Weapons Ban that has been on the books for the last eighteen years to the fullest extent possible. *See* Dumcius, *supra* note 115.

147. *See* Adelmann, *supra* note 113 (suggesting Enforcement Notice subjects gun dealers unknowingly to criminal penalties). Four retail gun dealers expressed similar vagueness complaints in an action for declaratory relief that the gun dealers recently filed in the United States District Court in Massachusetts. *See id.* The gun dealers are seeking to invalidate the Enforcement Notice as unconstitutionally vague and unenforceable. *See id.*; *see also* Pullman Arms Complaint, *supra* note 93, at 1; Worman Complaint, *supra* note 114, at 32.

148. *See* ENFORCEMENT NOTICE, *supra* note 3, at 3-4 (identifying terms of vague Interchangeability Test); Cooke, *supra* note 88 (explaining reasoning behind vagueness argument against Enforcement Notice).

149. *See* Cooke, *supra* note 88 (claiming unrestricted listing power due to similar design features of modern firearms). Attorney General Healey stated that she, not the gun industry, has the power to determine what is a compliant weapon. *See* Ebbert, *supra* note 93.

150. *See* NRA-ILA Staff, *supra* note 15 (explaining original intention of 1994 ban to mirror definition of Federal Assault Weapons Ban).

151. *See* MASS. GEN. LAWS ch. 140, § 121 (2016) (defining "assault weapon" to mirror federal ban).

Enforcement Notice greatly expands this definition.[152] As the Federal Assault Weapons Ban did not include the newly fashioned Similarity and Interchangeability Tests, such tests are merely attempts by a non-lawmaker to redefine the statutory definition of an assault weapon.[153]

In addition, Attorney General Healy's Enforcement Notice violates separation of powers principles by expanding the meaning of assault weapon under the Massachusetts Assault Weapons Ban without legislative authority.[154] This broad and sweeping reworking of the ban should have been left to the legislature and involved public input.[155] The Attorney General cited inaction on the part of the legislature as a reason for enacting the Enforcement Notice, evidencing her intent to broaden the scope of the statute.[156] Because Attorney General Healy felt that the law failed to adequately protect citizens, she undermined the legislative process by unilaterally expanding the scope of the Massachusetts Assault Weapons Ban to include all semiautomatic assault weapons.[157]

152. *See supra* note 50 and accompanying text (explaining method of defining assault weapons under federal ban). The Federal Assault Weapons Ban's features test allowed for the sale of assault rifles if banned features were removed from the firearms before being sold. *See* Phelan, *supra* note 46, at 589. This loophole allowed for the sale of a significant amount of modified assault weapons while the federal ban was still in effect. *See* Plumer, *supra* note 50. Enforcement of the Massachusetts Assault Weapons Ban should allow for the same loopholes to remain in effect and correspond with those under the Federal Assault Weapons Ban, because this is what the Massachusetts legislature intended. *See id.* (discussing loopholes); *see also* MASS. GEN. LAWS ch. 140, § 121 (outlining intent to mirror federal ban). *But see* Healey, *supra* note 2 (advocating for closing loopholes in Massachusetts ban).

153. *See* Moulton, *supra* note 85 (explaining Healey issued two new tests along with existing features test to define assault weapon).

154. *See* MASS. CONST. pt. 1, art. XXX (establishing separation of powers between governmental branches); Naughton, Jr. Letter, *supra* note 110 (contesting Healey overstepped executive powers by creating new tests).

155. *See* Naughton, Jr. Letter, *supra* note 110 (asserting such action not Healy's role); *see also* Kolbe v. Hogan, 813 F.3d 160, 174 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017) (identifying popularity of assault weapons). State Representative Harold P. Naughton, Jr., the House Chairman of the Joint Committee on Public Safety and Homeland Security, expressed his opinion that Attorney General Healy overstepped her authority, stating, "I strongly believe that any such review of our gun laws should be a legislative matter to be considered by both the House and Senate along with public input." *See* Naughton, Jr. Letter, *supra* note 110. Virginia State Attorney General Mark Herrig ran into similar separation of powers issues when he unilaterally changed state laws regarding concealed carry permits. *See* Adelmann, *supra* note 113. His enactments were overturned, and his office was subject to sanctions that prevent him from issuing such illegal mandates in the future. *See id.*

156. *See* Healey, *supra* note 2 (expressing desire to fulfill legislative obligations). Healey stated that she had a "moral obligation" to get assault weapons off the streets. *See id.* She also claimed to have the "legal authority" to issue the Enforcement Notice and create these new tests. *See id.* Under the Enforcement Notice, however, those who obtained their assault weapons prior to July 20, 2016, would not be subject to criminal penalties for possessing previously purchased assault weapons. *See* ENFORCEMENT NOTICE, *supra* note 3, at 4.

157. *See* ENFORCEMENT NOTICE, *supra* note 3, at 1(claiming Enforcement Notice would help protect citizens from harm); Healy, *supra* note 2; *see also* Cooke, *supra* note 88 (recognizing Enforcement Notice as absolute ban on all semiautomatic weapons).

IV. CONCLUSION

An analysis of Massachusetts Attorney General Maura Healey's recent Enforcement Notice reveals unconstitutional infringements on citizens' Second Amendment rights. Although her goal may have been to promote the safety and security of Massachusetts residents, the Enforcement Notice is an unlawful attempt to bypass the legislature. Moreover, the Enforcement Notice results in significant ambiguities that leave gun dealers and owners at risk of criminal penalties. Due to the nationwide popularity of assault weapons, assault rifles clearly fall under the common use test set forth in *Heller*, and should be protected under the Second Amendment.

Courts should overturn this unilateral action by the Attorney General—whose primary role is law enforcement—for the aforementioned reasons. Such a swift and expansive ban on popular weapons, including assault rifles, should involve legislative action and public input to decide whether such a ban is necessary for public safety. Attorney General Healy deserves neither support nor applause for circumventing traditional lawmaking procedures. Until the Massachusetts legislature provides a comprehensive ban on assault weapons, the law should be enforced as it has been for the previous eighteen years.

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