Response to Question for the Record from Senator Charles E. Grassley
Hearing on "After the Highland Park Attack: Protecting Our Communities from Mass Shootings"
July 20, 2022

Joseph Blocher
Lanty L. Smith '67 Professor of Law
Duke University School of Law
Durham, NC

Senator Grassley,

Thank you for the opportunity to testify before the Senate Judiciary Committee. I write in response to your question for the record:

> What relevant court decisions currently exist regarding the classification of the AR15 or any semi-automatic centerfire rifles as dangerous and unusual weapons? Please provide a list of decisions which have classified semi-automatic centerfire rifles like the AR15 as dangerous and unusual and a list of the decisions which have concluded these rifles are not dangerous and unusual weapons.

I believe that the following cases are relevant to your query. Please note that many were decided before the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen*, 142 S.Ct. 2111 (2022), while others are still pending as of this writing on August 9, 2022.

Please do not hesitate to let me know if you have any further questions.

1. Cases Finding Such Weapons to Be "Dangerous and unusual"

- Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017), *cert denied* 138 S. Ct. 469 (2017) (No. 17-127): In an *en banc* decision, the Fourth Circuit upheld a Maryland law prohibiting AR-assault weapons and high-capacity magazines. Quoting *District of Columbia v. Heller*, 554 U.S. 570 (2008), the court concluded that "we are convinced that the banned assault weapons and large-capacity magazines are among those arms that are 'like' 'M-16 rifles'—'weapons that are most useful in military service'—which the *Heller* Court singled out as being beyond the Second Amendment's reach. Put simply, we have no power to extend Second Amendment protection to the weapons of war that the *Heller* decision explicitly excluded from such coverage." 849 F.3d. at 121 (internal citation omitted). The court also held that "even if the banned assault weapons and large-capacity magazines are somehow entitled to Second Amendment protection—the district court properly subjected the FSA to intermediate scrutiny and correctly upheld it as constitutional under that standard of review." *Id.*
- Rupp v. Becerra, 401 F. Supp. 3d 978 (C.D. Cal. 2019), *vacated and remanded sub nom.* Rupp v. Bonta, No. 19-56004, 2022 WL 2382319 (9th Cir. June 28, 2022) (litigation still pending after *Bruen*): A federal district court upheld California's prohibition on semiautomatic rifles like the AR-15, citing *Heller* and *Kolbe*: "Because the

Court concludes that semiautomatic assault rifles are essentially indistinguishable from M-16s, which *Heller* noted could be banned pursuant to longstanding prohibitions on dangerous and usual weapons, the Court need not reach the question of whether semiautomatic rifles are excluded from the Second Amendment because they are not in common use for lawful purposes like self-defense." *Id.* at 986.

- Commonwealth v. Cassidy, 479 Mass. 527 (2018) (Mass. 2018): The Massachusetts Supreme Judicial Court upheld a conviction under the state's assault weapon statute because the right to keep and bear arms "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 540 (quoting *Heller*, 544 U.S. at 625). The court concluded that "[a] ban on assault weapons is more similar to the restriction on short-barreled shotguns upheld" by the Supreme Court in *United States v. Miller*, 307 U.S. 174, 178 (1939).
- People v. James, 174 Cal. App. 4th 662 (Cal. Ct. App. 2009): A California appellate court rejected a challenge to California's assault weapons prohibition, finding that *Heller*'s "discussion makes clear[] the Second Amendment right does not protect possession of a military M–16 rifle. Likewise, it does not protect the right to possess assault weapons or .50 caliber BMG rifles." *Id.* at 677 (internal citation omitted). *See also* People *v.* Zondorak, 220 Cal. App. 4th 829, 836 (Cal. Ct. App. 2013) ("We agree with *James* that the ban on AK series rifles does not impinge on rights protected by the Second Amendment because assault weapons are at least as dangerous and unusual as the short-barreled shotgun, which *Miller* concluded (with apparent approval from *Heller*) was outside the scope of the Second Amendment's guarantee.") (internal quotation marks and citations omitted).

2. Cases Finding Such Weapons Subject to Prohibition, Without Determining Whether They Are "Dangerous and Unusual"

- Heller v. D.C., 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*): Rejecting a challenge to the District of Columbia's prohibition on assault weapons and large capacity magazines, the D.C. Circuit concluded "we cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or hunting and therefore whether the prohibitions of certain semi-automatic rifles and magazines holding more than ten rounds meaningfully affect the right to keep and bear arms. We need not resolve that question, however, because even assuming they do impinge upon the right protected by the Second Amendment, we think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard." *Id.* at 1261.
- New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242 (2d Cir. 2015), *cert denied sub. nom* Shew v. Malloy, 579 U.S. 917 (2016) (No. 15-1030): Taking a similar approach to the D.C. Circuit in *Heller II*, the Second Circuit upheld New York and Connecticut assault weapon prohibitions: "[W]e follow the approach taken by the District Courts and by the D.C. Circuit in *Heller II* and assume for the sake of argument that these 'commonly used' weapons and magazines are also typically possessed by law-abiding citizens for lawful purposes. In short, we proceed on the assumption that these laws ban weapons protected by the Second Amendment. This assumption is warranted at this stage, because … the statutes at issue nonetheless largely pass constitutional muster." *Id.* at 257 (internal citations and quotation marks omitted).

- Friedman v. City of Highland Park, Illinois, 784 F.3d 406 (7th Cir. 2015), *cert denied* 577 U.S. 1039 (2015) (No. 15-133): The Seventh Circuit upheld Highland Park's prohibition on assault weapons without a clear holding about whether they are "dangerous and unusual." In the court's words, "[t]he best way to evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate, not by parsing ambiguous passages in the Supreme Court's opinions." *Id.* at 412. *See also* Wilson v. Cook County, 937 F.3d 1028, 1029 (7th Cir. 2019); *cert denied*, 141 S. Ct. 110 (2020) (No. 19-704) (relying on *Friedman* in rejecting a Second Amendment challenge to Cook County's ban on assault rifles and large-capacity magazines).
- Worman v. Healey, 922 F.3d 26 (1st Cir. 2019), *cert denied*, 141 S. Ct. 109 (2020) (No. 19-404): The First Circuit upheld Massachusetts' restriction on assault weapons and high capacity magazines. The district court had concluded that "because the undisputed facts convincingly demonstrate that AR-15s and LCMs are most useful in military service, they are beyond the scope of the Second Amendment." *Worman v. Healey*, 293 F. Supp. 3d 251, 266 (D. Mass. 2018). The First Circuit decided it better to "simply assume, albeit without deciding, that the [challenged law] burdens conduct that falls somewhere within the compass of the Second Amendment," 922 F.3d. at 36, since the prohibition was nonetheless constitutional under intermediate scrutiny. *Id.* at 40.

3. Cases Finding Such Weapons Are Not "Dangerous and Unusual" and Cannot be Prohibited

- Miller v. Bonta, 542 F. Supp. 3d 1009 (S.D. Cal. 2021), *vacated and remanded,* No. 21-55608, 2022 WL 3095986 (9th Cir. Aug. 1, 2022) (litigation still pending post-*Bruen*): A federal district court enjoined California's prohibition on AR-style rifles, having found that such weapons are commonly owned by law-abiding citizens for lawful purposes like self-defense and hunting, and that California's law could not be sustained on other grounds.