

(On October 7, 2002, the Court denied this petition for a writ of certiorari)

No. 01- [Filed June 19, 2002]

In the Supreme Court of the United States

GUN OWNERS' ACTION LEAGUE, INC.; OUTDOOR MESSAGE
COOPERATIVE, INC.; MASSACHUSETTS SPORTSMEN JUNIOR
CONSERVATION CAMP, INC., *et al.*,

Petitioners

v.

JANESWIFT, Acting Governor, Commonwealth of Massachusetts,
et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A 1998 Massachusetts enactment imposes severe criminal penalties for possession of certain firearms, but exempts gun clubs which obtain a special license. The law mandates: “Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line with their official duties.” § 131(a), Ch. 140, Massachusetts General Laws. This prohibits use, as a form of political expression, of targets printed with human images that depict historical tyrants, modern terrorists, and similar pictures.

The issue is whether censorship of “human” images printed on targets used at State-licensed shooting ranges, absent any incitement to imminent lawless violence, impermissibly interferes with freedom of expression as protected by the First Amendment to the United States Constitution.

PARTIES TO PROCEEDING

In addition to the petitioners identified in the caption, other petitioners include A.G. GUNS & A, INC.; MARK C; JOHN DOE II; JAMES F. GETTENS; DANA H. CROWE; LORI CROWE; BRIAN E. DUNN; JOHN P. HEARSON; TOM LAROCHE; ANN D. LAROCHE; ROBERT L. WALTER; JOHN DOE I; and GOAL FOUNDATION, INC.

In addition to the respondent identified in the caption, other respondents include THOMAS F. REILLY, Attorney General, Commonwealth of Massachusetts; THOMAS FOLEY, Colonel, Massachusetts State Police; MARTHA COAKLEY, District Attorney, Middlesex County, MA; and EDWARD DAVIS III, Superintendent, Police Department, Lowell, MA.

The corporations which are petitioners here include GUN OWNERS' ACTION LEAGUE, INC.; OUTDOOR MESSAGE COOPERATIVE, INC.; MASSACHUSETTS SPORTSMEN'S JUNIOR CONSERVATION CAMP, INC.; A.G. GUNS & AMMO, INC.; and GOAL FOUNDATION, INC. None of these corporations have any parent companies, and no publicly held company owns 10% or more of the stock of any of these corporations.

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The opinion of the court of appeals is published at 284 F.3d 198 and is printed in the Appendix (“App.”) at 1a. The opinion of the district court, App. 38a, is unpublished.

JURISDICTION

On March 25, 2002, the court of appeals rendered judgment affirming the district court’s order dismissing the complaint. App. 36a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES

The texts of the following are in the Appendix: United States Constitution, Amendments I and XIV; and pertinent provisions of Massachusetts General Laws, Chapter 140, §§ 121, 129B(6), and 131, and Chapter 269, § 10(m).

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

The complaint was filed on October 21, 1998, the effective date of An Act Relative to Gun Control, Massachusetts Acts 1998. Plaintiffs sought, *inter alia*, a declaratory judgment that a portion of the Act censoring certain targets at licensed shooting ranges violates the right to free speech guaranteed by the First and Fourteenth Amendments to the U.S. Constitution, and sought an

injunction against the enforcement thereof.¹

Plaintiffs include associations which promote firearms competitions and safety, a shooting sports newspaper, licensed firearm dealers, and individual firearm owners. Defendants include the Governor and various law enforcement authorities of Massachusetts.²

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(3), (4). In its Memorandum and Order of September 28, 2000, the district court granted defendants' motion to dismiss pursuant to F.R.Civ.P. 12(b)(1) and (6), deciding that the complaint failed to state on claim on which relief can be granted. App. 38a. It entered an Order of Dismissal on the same date. App. 41a.

The court of appeals, which had jurisdiction under 28 U.S.C. § 1291, issued a decision on March 25, 2002, affirming the district court. App. 1a. The court held, *inter alia*, that the Act does not violate the First and Fourteenth Amendments. App. 23-28a.

Statement of Facts

Petitioners (Plaintiffs-Appellants) include four Massachusetts corporations. Gun Owners' Action League, Inc.

¹ Plaintiffs also alleged that certain definitions in criminal provisions of the Act are unconstitutionally vague. The district court dismissed this claim as unripe, and the court of appeals affirmed. That issue is not before this Court.

² Pursuant to Supreme Court Rule 35.3, Thomas Foley is the successor in office of John Difava as Colonel of the State Police.

(“GOAL”), consisting of 9000 individuals and 200 clubs, promotes gun safety, shooting sports in secondary schools and colleges, development of shooting ranges, and the federal Civilian Marksmanship Program. Its members subscribe to *The Message*, a newspaper published by Outdoor Message Cooperative, Inc. Massachusetts Sportsmen’s Junior Conservation Camp, Inc., trains youngsters concerning natural resources and outdoor skills. GOAL Foundation, Inc., promotes gun safety programs for children and instructs Boy Scouts and the U.S. Olympic shooting team. Cir. App. (Circuit Court Appendix) 14-15a.³

Petitioners include three businesses licensed by the United States and by Massachusetts as firearm dealers: A.G. Guns & Ammo, Inc.; Mark Cohen, dba The Powderhorn; and John Doe II, who is also a State Trooper. Individual petitioners include an attorney, an engineering manager, parents of juveniles involved in the shooting sports, software engineers, a minister, and retired Army officers, one of whom is disabled and participates in wheelchair competitive shooting. Cir. App. 15-16a.

Respondents (Defendants-Appellees) are responsible for enforcement of the Act, including against plaintiffs and members of plaintiff associations. The Governor, the Attorney General, and the Colonel of State Police enforce the law statewide. The Middlesex County District Attorney and the Lowell Police Superintendent enforce the law in localities where several petitioners reside. Cir. App. 16-17a, 29-30a.

An Act Relative to Gun Control in the Commonwealth,

³ Unless otherwise indicated, all references to the Circuit Court Appendix refer to the Complaint, the allegations of which must be taken as true in a motion under Rule 12(b)(6).

Acts 1998, Chapter 180, which became effective on October 21, 1998, radically criminalized previously-lawful conduct.⁴ The Act defines “large capacity weapon (including firearm [handgun], rifle, and shotgun)” and “large capacity feeding device.” Massachusetts General Laws (“M.G.L.”), § 121 of Chapter 140. Mere possession of such items without a license is punishable by imprisonment for 2½ to 10 years. § 10(m) of Ch. 269. There are no scienter requirements.

A person with a Class A license may possess any large capacity weapon, and a person with a Class B license may possess a large capacity rifle or shotgun. § 131(a), (b), Ch. 140. The licensing authority “may issue” a license if the applicant is “a suitable person” who “has good reason to fear injury to his person or property, or for any other reason, including the carrying of firearms for use in sport or target practice only.” § 131(d). The ability to obtain a license is contingent on the discretion of the licensing authority. Cir. App. 26a.

The Act provides that a gun club may qualify for a Class A license, which authorizes the club to possess and store large capacity weapons, and authorizes the club’s members (including those who have no Class A or B license) to use such weapons at the club’s shooting range. § 131(a), Ch. 140. “Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof” § 131(a) (¶ 2, last sentence). By contrast, if a club has no Class A license, its members who do not have individual licenses are subject to the above felony penalties for possession of a large capacity weapon.

Petitioner Outdoor Message distributes a target with the

⁴ Relevant portions of the Act are in App. 43a.

caption “Never Again” and the image of Adolf Hitler. Cir. App. 32-33a. The reverse side, entitled “1998—60th Anniversary of the Night of the Broken Glass,” reprints newspaper reports from 1938 that, just before attacking Jews, the Nazis ordered all Jews to surrender their firearms. Any who refused were threatened by Gestapo Chief Himmler with 20 years in a concentration camp.⁵ A copy of the target is in Cir. App. 84-85a.

The purpose of the target is political discourse. By printing the message behind the target, numerous persons will read the message who may not have done so had it not been printed on a target and taken to a shooting range for use. Shooting at this target is political expression manifesting disapproval of the architect of the Holocaust. Outdoor Message seeks to distribute this target for use at the largest number of shooting ranges possible, including ranges with Class A licenses, and thus to encourage the widest distribution of its political message. Cir. App. 33a.

Plaintiffs and GOAL members belong to gun clubs which refuse to apply for Class A club licenses because such status would forfeit their First Amendment rights. Such persons who do not have individual Class A or B licenses are thus denied the possession or use of large capacity weapons at their clubs. Cir. App. 33-34a. Further, all plaintiffs and GOAL members are prohibited from using the proscribed targets (regardless of gun type) at ranges with Class A licenses. Cir. App. 34a. The Act creates the following Hobson’s choice: either forfeit First Amendment rights in order to become a

⁵ See “Ban on Firearms for Jews,” *Boston Globe*, Nov. 12, 1938; “Nazis Smash, Loot and Burn Jewish Shops and Temples,” *New York Times*, Nov. 11, 1938, pp. 1, 4, col. 2. For a detailed analysis, see S. Halbrook, “Nazi Firearms Law and the Disarming of the German Jews,” 17 *Arizona Jour. of International & Comparative Law*, No. 3, 483, 513-27 (2000).

Class A licensed club, or forego the possession and use of large capacity weapons (or risk felony prosecution for such possession and use).

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RESOLVE WHETHER THE CENSORSHIP OF “HUMAN” TARGET IMAGES AT LICENSED SHOOTING RANGES IS CONSISTENT WITH THIS COURT’S PRECEDENTS UNDER THE FIRST AMENDMENT CONCERNING POLITICAL EXPRESSION AND INCITEMENT TO VIOLENCE

The court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court concerning freedom of expression protected by the First Amendment, particularly the requirement that censorship be justified by imminent lawless violence. Further, to the extent this case involves censorship of a particular type of expression not previously addressed by this Court, the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. This Court should grant certiorari in order to apply its First Amendment jurisprudence to an unprecedented form of censorship of political expression.

For the first time in world history, a law censors images printed on targets at shooting ranges. A 1998 Massachusetts enactment provides that the colonel of state police may grant a Class A license to a gun club with an on-site shooting range, thereby granting special privileges to the club and its unlicensed

members to possess and use what the act characterizes as large capacity weapons.⁶ These special privileges accord Class A licensed-gun clubs and their members exemption from severe felony penalties for possession of large capacity weapons. An individual may also apply for a Class A license, but licensing authorities have considerable discretion to deny applications.⁷

A club which obtains a Class A license is subject to the following form of censorship: “Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line with their official duties.” § 131(a) (¶ 2, last sentence). Violation may result in revocation of the license (¶ 3) and a fine of no less than \$1000 and no more than \$10,000. § 131(a)(¶ 1, last sentence).

This censorship implicates a significant form of political

⁶ Section 131(a), Ch. 140, M.G.L., provides:

The colonel of state police may . . . grant a Class A license to a club or facility with an on-site shooting range or gallery, which club is incorporated under the laws of the commonwealth for the possession, storage and use of large capacity weapons . . . on the premises of such club; provided, however, that not less than one shareholder of such club shall be qualified and suitable to be issued such license; and provided further, that such large capacity weapons and ammunition feeding devices may be used under such Class A club license only by such members that possess a valid firearm identification card issued under section 129B or a valid Class A or Class B license to carry firearms, or by such other persons that the club permits

⁷ The licensing authority may issue a Class A license to “a suitable person” for specified purposes. § 131(d). Great latitude has been accorded authorities in denying licenses. *E.g., Ruggiero v. Police Comm’r of Boston*, 18 Mass.App. 256, 464 N.E.2d 104, 107 (1984).

expression. The front page of the *New York Post*, October 2, 2001, shows a picture of a man shooting at targets of Osama bin Laden at a shooting range, and notes that proceeds of the target sales went to the Red Cross.⁸ While Massachusetts bans this form of defacing human images printed on paper at licensed gun ranges, Afghanistan's former rulers had the opposite fetish -- a "ban on human images" themselves.⁹

The above follows a long tradition of shooting at targets of historical tyrants such as Saddam Hussein, Slobodan Milosevic, and Adolf Hitler. The Founders at the time of the American Revolution shot at pictures of George III.¹⁰ They hung, hacked up,

⁸ Headlined "Proof, Osama Tipped off his Mama before Attack," the caption explains: "Customers at the Tactical Edge gun range in Riviera Beach, Fla., hang their used Osama bin Laden targets. The targets are being sold for \$10 a pop, with proceeds going to the American Red Cross." See <http://archives.nypost.com/nypost/>

Elsewhere, "area gun owners are using Osama bin Laden for target practice. . . . About half of every sale goes to a victim's relief fund ." *The Pittsburgh Channel*, posted Sept. 21, 2001, <http://www.thepittsburghchannel.com/pit/news/>. Bin Laden targets may be downloaded or purchased over the internet. *E.g.*, www.makempay.com; <http://www.osamatargets.com>; www.TheGunSearch.com (suggesting "do with this target as your conscience directs you, then mail" to Embassy of Afghanistan).

⁹ "Taliban Ban on Idolatry Makes a Country Without Faces," *Washington Post*, Mar. 26, 2001, A20. Humans could not be photographed and human images were required to be destroyed. *Id.*

¹⁰ "Centuries ago, taking a potshot at the image of the king or politician was not only tolerated – it was encouraged." Mathias Tugores, "Historical Painted Targets," *American Rifleman*, 47 (Feb. 2001) (picturing targets with human images).

and burned effigies of the King's evil ministers.¹¹

When Massachusetts ratified the federal Constitution in 1788, the mass celebrations in Boston included the following:

In a cart, drawn by five horses, the British flag was displayed, and insulted by numbers placed in the cart, armed with muskets, who repeatedly discharged the contents of them through the tattered remnant, in contempt of that faithless nation, whose exertions have been unremitted since the peace, to cramp our commerce and obstruct all our nautical proceedings.¹²

Targets containing human images include either a terrorist or dictator who controls a state or organization with which the United States is at war, or “bad guys” in sinister or silhouette form representing criminals. Historically, targets with human images also have included neutral subjects such as comical figures, skeletons, mythological figures, and countless other forms. Sometimes the human images are simply part of the target but not the bullseye, in other cases the human images are the target. Many such targets,

¹¹ “The Stamp Act was to go in force on November 1st, [1765,] and on that day in Boston, . . . effigies of Grenville and Huske were hung on the Liberty Tree, to be carted through the town later and cut to pieces. Similar scenes were enacted throughout New England.” (Huske suggested the Act to British cabinet head George Grenville.) 2 James Truslow Adams, *Revolutionary New England, 1691-1776*, at 333 (1923).

¹² 7 *Documentary History of the Ratification of the Constitution*, eds. John P. Kaminski and Gaspare J. Saladino (Madison: State Historical Society of Wisconsin, 2001), 1612. One man objected that “the Bostonians have acted very imprudently in Carrying the King of Englands Couloers in a Cart pulld with five Horses, armed with muskets and fireing through the same with Great Indecent Speches about England and &c.” *Id.* at 1612 n.2.

bullet holes intact, may be found in art museums throughout Europe. A book with scores of photographs of such targets was published in Communist East Germany as a contribution to art history.¹³

Eve holds up an apple – the bullseye of the target – as Adam looks on, in an exquisite masterpiece painted in 1780, now housed in the Czech National Museum.¹⁴ Neptune is the bullseye of a 1790 target kept in the By Museum in Copenhagen.¹⁵ A 1610 target depicts a group of women shooting funny little men out of a tree.¹⁶ It is doubtful that competitors at shooting festivals where these innocuous targets hung centuries ago were thereby motivated to commit murders.

Today, Massachusetts bans shooting at paper human images at licensed ranges, with an exception for law enforcement. The political content of this State-imposed message is that private citizens, but not the police, should be pacifists. The complaint alleges that this violates free speech, particularly where the target is a picture of a historical tyrant against whom one wishes to express political disapproval. Cir. App. 31-31a. It also alleges that the provision is irrational and violates equal protection. Cir. App. 32a.

The District Court dismissed this claim on the basis that “the Act’s regulation of shooting at targets shaped like human beings addresses conduct, not expression.” App. 39a, citing *United States v. O’Brien*, 391 U.S. 367 (1968) (draft-card burning case).

¹³ Anne Braun, *Historische Zielscheiben [Historical Targets]* (Edition Leipzig, German Democratic Republic, 1981).

¹⁴ *Id.*, No. 78.

¹⁵ *Id.*, No. 61.

¹⁶ *Id.*, No. 21.

The Court of Appeals affirmed, but for different reasons. It notes: “No court has recognized target shooting as a constitutionally protected form of expression.”¹⁷ App. 24a. Of course, neither is starting fires, but shooting at a picture of Osama bin Laden is every bit as much a form of political expression as burning the American flag. Yet the state may no more prohibit burning the American flag than it may prohibit shooting at a picture of Hitler. As long as the flag burning does not violate the fire code and the target shooting is conducted at a lawful shooting range, the First Amendment permits both as symbolic activities.

The Court of Appeals “assum[ed] for the purpose of the content-neutral/content-based analysis that the target shooting at human figures described by the defendants [*sic*] is expressive conduct entitled to some degree of First Amendment protection.” App. 25a. “The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Id.* at 23-24a, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Repeating Governor Swift’s argument¹⁸ that “the Act’s purpose was to stop target practice that arguably increases the practitioner’s capacity to shoot human beings,” the Court of Appeals decided:

There is an obvious connection between the

¹⁷ “This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority.” *Kingsley International Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684, 689 (1959).

¹⁸ “Swift” refers to Acting Governor Jane Swift and the other respondents.

Commonwealth's interest in preventing gun fatalities and its decision to restrict the shooting practices of certain gun clubs. A person who has practiced shooting at a human-shaped target will likely be more proficient at shooting humans than a person who has had to practice at a circular target. This rationale is a believable, reasonable, content-neutral justification for the provision.

Id. at 24a.

The above connection is hardly obvious. All Massachusetts gun owners must pass rigorous criminal background checks and have, at a minimum, a Firearms Identification (FID) Card. §§ 129B, 129C, of Chapter 140, M.G.L. To use a large capacity weapon at a Class A licensed club, a person must have an FID card or be supervised by a member who has a Class A or B license. § 131(a) of Chapter 140, M.G.L. To suggest that shooting at a picture of Osama bin Laden at a licensed range out of a sense of patriotism would encourage unlawful homicides defames law-abiding gun owners. The state must have “*evidence* that is ‘reasonably believed to be relevant’ for demonstrating a connection between speech and a substantial, independent government interest.” *City of Los Angeles v. Alameda Books, Inc.*, 2002 U.S. LEXIS 3424, *25 (2002) (emphasis added) (relying on police department study of crime rates). “This is not to say that a municipality can get away with shoddy data or reasoning. The municipality’s evidence must fairly support the municipality’s rationale for its ordinance.” *Id.* at *26.

Moreover, nothing on the face of the statute or in the legislative history suggests that the statute was intended to discourage unlawful homicides. “[W]e have generally only

sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational.” *Thompson v. Western States Medical Center*, 122 S. Ct. 1497, 1507 (2002).¹⁹ The use of tyrant targets is political speech, to which the strict scrutiny test applies.²⁰ The statute on its face suggests that its framers were simply offended by such targets and wished to impose a symbolic form of pacifism.

Despite the obvious content of the censorship – “human images” – the Court of Appeals called the restriction “content neutral” because, while plaintiffs “are not allowed to shoot at pictures of tyrants,” “supporters of tyrants are affected in the same way by the statute: they cannot shoot at images of advocates of freedom.” App. 25a. Contrary to the court, this is hardly a case where “the governmental interest is unrelated to the suppression of free expression.” *Id.* at 26a, quoting *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

The law is not content neutral, in that it does not ban shooting at all targets, but only at targets printed with disfavored images. The target may not depict “human” figures, effigies, silhouettes or images, but may depict any non-human figures, effigies, silhouettes or images. By the court’s logic, the state could

¹⁹ Even the less strict test for commercial speech “is significantly stricter than the rational basis test, however, requiring the Government not only to identify specifically ‘a substantial interest to be achieved by [the] restriction on commercial speech,’ . . . but also to prove that the regulation ‘directly advances’ that interest and is ‘not more extensive than is necessary to serve that interest.’” *Id.* at 1507 (citation omitted).

²⁰ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27 (1982) (“highly charged political rhetoric lying at the core of the First Amendment”).

ban the burning of national flags as long as all were included, from the flag of the United States to that of Iraq. One would be left free to burn other kinds of flags (such as that of the Boy Scouts). Broadening the scope of the censorship does not make it content neutral. “As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. ACLU*, 2002 U.S. LEXIS 3421, *18 (2002) (citations and quotation marks deleted).

Claiming content neutrality and applying an intermediate level of scrutiny, the Court of Appeals asserts: “The state has a particular interest in preventing those unlicensed to use large capacity weapons from becoming proficient at shooting humans with such weapons.”²¹ App. 26a-27a. The court also claims that the censorship is “narrowly tailored” in that it applies only in Class A licensed clubs, the only place where an unlicensed person may shoot large-capacity weapons. This is hardly a narrow tailoring. The legitimate State interest in discouraging murder is served by punishing murder, not by imposing censorship.

Finally, the Court of Appeals concludes that alternative means of communication exist. But if bin Laden can be denounced “via writing, the Internet, word of mouth,” App. 27a, so too can the American flag be so denounced, but that does not justify a ban on burning the flag. Similarly, the censorship is not justified by the

²¹ This assertion is doubly curious. First, the censored targets may not be used at the licensed club’s range at all, without regard to the type of gun or whether the individual is licensed. Second, becoming proficient in target shooting has much to do with the type of sights used but nothing to do with whether a weapon is “large capacity,” which relates to whether one has actual possession of a large capacity magazine. App. 19a.

“alternative channel” that plaintiffs “may shoot at such images at any place where they can lawfully shoot at targets, other than gun clubs with a Class A license.” App. 28a. This alternative does, however, impeach the argument that citizens who shoot at targets with human images are likely to commit unlawful homicides. If true, Massachusetts would have banned such expression at all places.²²

Swift argued below that the ban on target images does not censor speech but “regulates the conduct of unlicensed persons who practice shooting large capacity weapons at humans.”²³ Br. of Appellees 47. Yet the Act prohibits shooting at pictures, not “at humans,” and thus seeks to regulate one’s thoughts. The only conceivable reason to shoot at a picture of bin Laden or Hitler is symbolic expression, but Swift asserted: “A target depicting a human is not a symbol. Rather, it is an object that permits a person to become more proficient at using deadly force on a human being.” Br. 48. The premise of this statement is the pacifist dogma that it is wrong ever to use deadly force against another, even in lawful defense of innocent life against a deadly aggressor.

This goal of civilian pacifism is not a lawful purpose, in that the law allows one to use deadly force to protect life from unlawful aggression.²⁴ The means to this purpose is not lawful, because it

²² See *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (law banning the disclosure of alcohol content on beer labels but allowing it on wine and spirit labels violates equal protection).

²³ M.G.L. c. 140, § 131(a), provides broadly that “such club shall not permit shooting at targets that depict human figures,” without regard to whether a person is licensed or whether the weapon is large capacity.

²⁴ *Commonwealth v. Fisher*, 433 Mass. 340, 352, 742 N.E.2d 61 (2001). “All people . . . have certain natural, essential and inalienable rights;

seeks to suppress expression inconsistent with the pacifist message.

It would be ironic if the First Amendment allowed the state to ban shooting at pictures of Adolf Hitler and Osama bin Laden but not to ban burning the American flag. In *Texas v. Johnson*, 491 U.S. 397, 399 (1989), the defendant burned an American flag in front of the city hall. “In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’” *Id.* at 403-04. Shooting at a picture of a dictator or a terrorist certainly meets this test.

Governor Swift argued in the court below for an exception to this rule if the message (such as shooting at the Hitler picture) is not “widely accepted as a symbolic act.” Br. 52. Yet “there is a long tradition of widespread lawful gun ownership by private individuals in this country,”²⁵ and Americans have probably shot at more targets of perceived historical evil doers, from George III to Osama bin Laden, than they have burned American flags. In any event, First Amendment protection has never rested on what is “widely accepted.”

Johnson rejected the arguments that the flag-desecration prohibition was justified to prevent breach of the peace and to

among which may be reckoned the right of . . . defending their lives” Mass. Declaration of Rights, Part 1, Art. I. “The right to defend oneself from a deadly attack is fundamental.” *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982).

²⁵ *Staples v. United States*, 511 U.S. 600, 610 (1994). “Roughly 50 percent of American homes contain at least one firearm of some sort” *Id.* at 613-14.

preserve the flag as a symbol of national unity. *Id.* at 407. A “function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Id.* at 409. While it may disturb pacifists’ sensibilities that a civilian may shoot at a target with a human image, that does not justify a prohibition on such expression.²⁶

Johnson distinguished *O’Brien*, the draft-card case, explaining:

If the State’s regulation is not related to expression, then the less stringent standard we announced in *United States v. O’Brien* for regulations of noncommunicative conduct controls. . . . If it is, then we are outside of *O’Brien*’s test, and we must ask whether this interest justifies *Johnson*’s conviction under a more demanding standard.

Johnson, 491 U.S. at 403, quoting *O’Brien*, 391 U.S. at 377.

O’Brien burned his draft registration certificate on the steps of the South Boston Courthouse. This Court upheld the prohibition on destruction of the certificate because there was a compelling interest in its preservation as an official document for the functioning of the Selective Service System.²⁷ 391 U.S. at 377. However,

²⁶ The law “is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 579 (1995).

²⁷ The certificate is proof of registration, it facilitates communication with the local board, it reminds its bearer of certain duties, and the prohibition discourages deceptive misuse of certificates. *Id.* at 378-79.

O'Brien did not imply that the state could prohibit the burning of an image (such as a xerox copy) of a draft card. By contrast, the law here bans shooting at a target with the content of any human image.

Johnson stresses that the state may not “proscribe particular conduct because it has expressive elements.” The *O'Brien* test is limited “to those cases in which ‘the governmental interest is unrelated to the suppression of free expression.’” *Johnson*, 491 U.S. at 406. The state argued that flag burning diminishes nationhood and unity, to which this Court replied: “These concerns blossom only when a person’s treatment of the flag communicates some message, and thus are related ‘to the suppression of free expression’ within the meaning of *O'Brien*. We are thus outside of *O'Brien*’s test altogether.” *Id.* at 410. The result is the same here: the State does not like the message it believes is portrayed in shooting at a piece of paper picturing a human image.

The State may compel neither the pacifist message here nor the opposite message, such as the slogan “Live Free or Die” on car tags. *Wooley v. Maynard*, 430 U.S. 705 (1977). A State may not “require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.” *Id.* at 713. “New Hampshire’s statute in effect requires that appellees use their private property as a ‘mobile billboard’ for the State’s ideological message) or suffer a penalty.” *Id.* at 715. The law here requires that Class A licensed clubs use their private property – shooting ranges with sanitized targets – as a billboard for the State’s pacifist ideology. The fact that the club has a State-issued license makes no more difference than the fact

that in *Wooley* the tag was State-issued.²⁸ “Where the State’s interest is to disseminate an ideology, . . . such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.” *Id.* at 717.

Alas, “firing a gun is inherently dangerous, and the Commonwealth can regulate such conduct without running afoul of the First Amendment.” Swift Br. 54. But firing a gun at a picture of Adolf Hitler is no more dangerous than firing a gun at a bullseye target, which Governor Swift admitted when she stated that “if they [plaintiffs] wish to fire at pictures of Hitler, they can do [*sic*] at any place where it is legal to fire (other than Class A clubs) . . .” Br. 50.

The existence of alternative forums – unlicensed ranges where one can shoot at targets with human images – does not justify the ban. As *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975), explains:

Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence. . . . Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. “[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”

Holding that live drama is protected expression, this Court further noted: “By its nature, theater usually is the acting out) or

²⁸ Similarly, the issuance by a State of a license to sell alcohol would not allow the State to prohibit throwing darts at a human image (perhaps Blackbeard the pirate) at the licensed premises.

singing out) of the written word, and frequently mixes speech with live action or conduct.”²⁹ *Id.* at 557-58. Could the Commonwealth ban dramatization of William Tell shooting the apple off his son’s head or, more to the point, shooting the tyrant Gessler through the heart?³⁰

“Nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses) so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.” *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992). *R.A.V.* invalidated a ban on displays or symbols that insult or provoke violence “on the basis of race, color, creed, religion or gender.” “The ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.”³¹ *Id.* at 381.

Whether as political speech or training for lawful self-

²⁹ Moreover, “entertainment, as well as political and ideological speech, is protected” by the First Amendment. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (nude dancing). The State may not ban use of certain target images even if used for recreation or training rather than political speech.

³⁰ See Schiller, *Wilhelm Tell* 87-89, 118 (1972). The Tell play has a strong political message, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 n.13 (1943), and it is obvious why Hitler forbade the play from being performed in Germany or read in the schools. Jürg Fink, *Die Schweiz aus der Sicht des Dritten Reiches [Switzerland in the Eyes of the Third Reich], 1933-1945* (Zürich: Schulthess Polygraphischer, 1985), 22-23.

³¹ See *Virginia v. Black*, 262 Va. 764, 553 S.E.2d 738 (2001) (invalidating cross-burning prohibition), *cert. granted*, No. 01-1107 (May 28, 2002).

defense, shooting at targets printed with human images does not constitute advocacy of violence. Even if it did, the First Amendment does not permit the state “to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).³² Shooting at a target with a human image does not incite imminent lawless action.

This Court reiterated this standard most recently in *Ashcroft v. Free Speech Coalition*, 152 L. Ed. 2d 403, 122 S. Ct. 1389, 1399 (2002), as follows: “The prospect of crime, however, by itself does not justify laws suppressing protected speech.”³³ The decision adds, “the First Amendment bars the government from dictating *what we see* or read or speak or hear.” *Id.* (emphasis added). The Act here seeks to prevent people from seeing holes puncturing pieces of paper with certain images, as it may supposedly encourage them to think homicidal thoughts. But this Court explained:

The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government “cannot constitutionally premise

³² *Brandenburg* held the following actual and symbolic speech, albeit hateful, to be protected: “One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. . . . [P]hrases could be understood that were derogatory of Negroes and, in one instance, of Jews.” *Id.* at 445-46.

³³ “Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech.” *Id.*, quoting *Kingsley Int’l Pictures Corp. v. Regents of Univ. of N. Y.*, 360 U.S. 684, 689 (1959).

legislation on the desirability of controlling a person's private thoughts.”

Id. at 1403 (citation omitted).

The rationale by the court of appeals here flatly contradicts this Court's holding that “the government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’” *Id.* at 1403, quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973). “There is here no attempt, incitement, solicitation, or conspiracy.” *Id.*

One further principle of *Free Speech Coalition* is applicable here: “The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.” *Id.* at 1404. The court of appeals failed to consider this factor.³⁴ One might argue about whether shooting at a target with a plain black silhouette is political speech, although banning the practice would be impermissible thought control. But it is plain that shooting at a picture of a tyrant or even of a criminal-looking image is political speech. The Act thus bans a substantial amount of protected speech.

Video games may allow a far more realistic, interactive experience of engaging in violence than shooting at a piece of paper – you can even shoot and kill moving bin Laden targets and watch

³⁴ The court of appeals claimed to utilize “intermediate” scrutiny, but where the above principle applies, then also: “if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.” *Thompson v. Western States Medical Center*, 122 S. Ct. 1497, 1506 (2002).

the blood flow³⁵ – but the First Amendment forbids a prohibition on such games.³⁶ “The notion of forbidding not violence itself, but pictures of violence, is a novelty” *American Amusement Machine Ass’n. v. Kendrick*, 244 F.3d 572, 575 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001) (finding nothing in the record to show that video games in which players shoot at monsters incite youthful players to breaches of the peace).³⁷ Nor has shooting at targets with human images incited anyone to shoot at actual humans.

Target images and other pictures are protected by the First Amendment just as much as words, for “the Constitution looks beyond written or spoken words as mediums of expression.” *Hurley*, 515 U.S. at 569. Visual images are “a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.” *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943). Photographs, prints, and paintings “are entitled to full First Amendment protection.” *Bery v. City of New York*, 97 F.3d 689, 696 (2nd Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997). Human and

³⁵ *E.g.*, “Shoot To Kill Osama - Free online shoot em up game,” <http://www.policehumor.com/killosama>; “Gamers Blow bin Laden Away,” <http://www.wired.com/news/culture/0%2C1284%2C47226%2C00.html>.

³⁶ *See Wilson v. Midway Games, Inc.*, 2002 U.S. Dist. LEXIS 6070 (D. Conn. 2002) (First Amendment protects *Mortal Kombat* game, even if it “caused violence and physical harm” to a person, unless it meets this Court’s *Brandenburg* test).

³⁷ *See Watts v. United States*, 394 U.S. 705 (1969) (finding the following to be “political hyperbole”: “If they ever make me carry a rifle the first man I want to get in my sights is L. B. J. . . . They are not going to make me kill my black brothers.”).

animal images are protected. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54-55 (1988) (e.g., “the early cartoon portraying George Washington as an ass”); *Lighthawk v. Robertson*, 812 F. Supp. 1095 (W.D. Wash. 1993) (caricature of Smokey Bear).

Even without application of the strict scrutiny test, the censorship fails the rational basis test. Anyone is allowed to shoot at the images in question except at the shooting range of a licensed club. As the exemption for public safety personnel recognizes, shooting at realistic targets promotes safety in training for lawful self defense by increasing the chance of hitting the target rather than innocent bystanders. Cir. App. 32a. Governor Swift’s argument below that plaintiffs’ wish to shoot at the Hitler target is “contrived”³⁸ and that they really want “to practice shooting at humans,” Br. 51, is hardly inconsistent with plaintiffs’ larger free speech claim. Cir. App. 31-34a.

It goes without saying that the Commonwealth need not have provided the benefit of a Class A license to gun clubs. Having provided the benefit, it may not violate the First Amendment. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 513 (1996), explains:

That the State has chosen to license its liquor retailers does not change the analysis. Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. . . . [G]overnment “may not deny a benefit to

³⁸ See *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (the fact that a black wishing to test segregated seating “may have boarded this particular bus for the purpose of instituting this litigation is not significant”).

a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech.” (Citation omitted.)³⁹

In sum, the complaint states a valid claim that the target censorship law violates the right to free speech. Shooting at a picture is every bit as protected by the First Amendment as is hanging a person in effigy. Despite intense public criticism, this Court has been solicitous of protecting the right of dissenters publically to desecrate the American flag, and should be equally solicitous of protecting the right of patriotically-minded persons at shooting ranges to desecrate images of persons they deem America’s enemies.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

³⁹ See *Gavett v. Alexander*, 477 F. Supp. 1035, 1044-45 (D. D.C. 1979) (civilian purchase of military rifles in Civilian Marksmanship Program may not be conditioned on violation of First Amendment).

Respectfully submitted,

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