No. 14-319

In The United States Court of Appeals
for the Second Circuit

JUNE SHEW, STEPHANIE CYPHER, PETER OWENS, BRIAN MCCLAIN, HILLER SPORTS, LLC, MD SHOOTING SPORTS, LLC, CONNECTICUT CITIZENS' DEFENSE LEAGUE, COALITION OF CONNECTICUT SPORTSMEN, RABBI MITCHELL ROCKLIN, STEPHEN HOLLY, Plaintiffs-Appellants,

v.

DANNEL P. MALLOY, in his official capacity as Governor of the State of

(For Continuation of Caption See Inside Cover)

On Appeal from the U.S. District Court
for the District of Connecticut

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, Oregon Firearms Educational Foundation, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center
In Support of Appellants and Reversal

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DISCLOSURE STATEMENT

The corporate *amici curiae* herein, Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, Oregon Firearms Educational Foundation, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Conservative Legal Defense and Education Fund, and Policy Analysis Center, through their undersigned counsel, submit this Disclosure Statement pursuant to Rules 26.1(a) and 29(c), Federal Rules of Appellate Procedure. All of these *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

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/s/ William J. Olson
William J. Olson

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INTEREST OF *AMICI CURIAE*[1]

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Several of these *amici* have filed *amicus curiae* briefs in other firearms-related and Second Amendment cases, including the following:

- U.S. v. Emerson, U.S.C.A. Fifth Cir., No. 99-10331 (Dec. 20, 1999)
- State of Wyoming v. U.S., District Court, Wyoming, No. 2:06-cv-00111-ABJ (Aug. 18, 2006)
- U.S. v. Stanko, U.S.C.A. Eighth Cir., No. 06-3157 (Nov. 2, 2006);
- Watson v. U.S., On Writ of Certiorari, U.S. Supreme Court, No. 06-571 (May 4, 2007);

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[1] No party's counsel authored this brief in whole or in part. No person, including a party or a party's counsel, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. All parties have consented to the filing of this Brief *Amicus Curiae*.

- State of Wyoming v. U.S., U.S.C.A. Tenth Cir., No. 07-8046 (Aug. 21, 2007);
- D.C. v. Heller, On Writ of Certiorari, U.S. Supreme Court, No. 07-290 (Feb. 11, 2008);
- U.S. v. Hayes, On Writ of Certiorari, U.S. Supreme Court, No. 07-608 (Sept. 26, 2008);
- Akins v. U.S., U.S.C.A. Eleventh Cir., No. 08-15640-FF (Nov. 26, 2008);
- McDonald v. Chicago, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 08-1521 (July 6, 2009);
- McDonald v. Chicago, On Writ of Certiorari, U.S. Supreme Court No. 08-1521 (Nov. 23, 2009);
- U.S. v. Skoien, U.S.C.A. Seventh Cir., No. 08-3770 (Apr. 2, 2010);
- Heller v. D.C., U.S.C.A. D.C. Cir., No. 10-7036 (July 30, 2010);
- Nordyke v. King, U.S.C.A. Ninth Cir., No. 07-15763 (Aug. 18, 2010);
- Skoien v. U.S., On Petition for Writ of Certiorari, U.S. Supreme Court, No. 10-7005 (Nov. 15, 2010);
- Smith v. Commonwealth of Virginia, Supreme Court of Virginia, No. 102398 (May 24, 2011);
- MSSA v. Holder, U.S.C.A. Ninth Cir., No. 10-36094 (June 13, 2011);
- Woollard v. Gallagher, U.S.C.A. Fourth Cir., No. 12-1437 (Aug. 6, 2012);

- Abramski v. U.S., On Petition for Writ of Certiorari, U.S. Supreme Court, No. 12-1493 (July 25, 2013);
- Rosemond v. U.S., On Writ of Certiorari, U.S. Supreme Court, No. 12-895 (Aug. 9, 2013);
- Woollard v. Gallagher, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 13-42 (Aug. 12, 2013);
- NRA v. BATFE, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 13-137 (Aug. 30, 2013);
- Abramski v. U.S., On Writ of Certiorari, U.S. Supreme Court, No. 12-1493 (Dec. 3, 2013);
- U.S. v. Castleman, On Writ of Certiorari, U.S. Supreme Court, No. 12-1371 (Dec. 23, 2013);
- Drake v. Jerejian, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 13-827 (Feb. 12, 2014).

SUMMARY OF ARGUMENT

The Connecticut ban on certain government-disfavored semiautomatic firearms and high capacity magazines violates the Second Amendment because it infringes upon the right of the people of Connecticut, as citizens of the United States, to choose from among constitutionally protected arms those weapons that, in their opinion, are best suited for their lawful activities, including self-defense in their homes.

This bedrock freedom recognized in the Second Amendment may not be compromised by a self-empowered judiciary exercising any degree of scrutiny — rational, intermediate, or strict — such as was employed by the district court below. There is simply no room for balancing the right to keep and bear arms against governmentally contrived gun-control needs for putative goals of public safety.

Nor is there any excuse for Connecticut to have exempted favored government officials or self-registered citizens from its selective ban. The Second Amendment right belongs to all Americans, not just to those citizens who work, or have worked, for certain government agencies, or to those who have submitted themselves to a government gun registration scheme which historically has led to gun confiscation.

In sum, the district court's ruling that the Connecticut ban is constitutional subordinates the people's unalienable right to arm themselves to protect their constitutional republic from falling into the hands of a tyrant, thereby undermining the stated purpose of the Second Amendment — "the security of a free state."

ARGUMENT

I. THE SECOND AMENDMENT INCLUDES ITS OWN STANDARD OF REVIEW — "SHALL NOT BE INFRINGED" — AND IS NOT TO BE BALANCED ACCORDING TO ANY JUDICIAL STANDARD OF SCRUTINY.

As Plaintiffs-Appellants ("Shew") have argued, the district court below erred because it failed to evaluate the constitutionality of Connecticut's "flat ban" on certain semiautomatic firearms and magazines based on the text of the Second Amendment. *See* Brief and Special Appendix for Plaintiffs-Appellants ("Pl. Br.") at 9-33.

Shew has further argued that the district court failed to establish that "Connecticut has carried its burden of showing a substantial relationship between the ban of certain semiautomatic firearms and ["large capacity magazines"] and the important governmental 'objectives of protecting police officers and controlling crime,'"[2] and thus has even failed any applicable level of judicial

[2] Shew v. Malloy, 2014 U.S. Dist. LEXIS 11339 (D.Ct. 2014) ("Op."), *39.

scrutiny, intermediate or strict. *See* Pl. Br. at 34-52. *Amici* do not address this second argument. Instead, this brief refutes the very legitimacy of applying any such balancing tests to Shew's Second Amendment claim.

As construed and applied by the U.S. Supreme Court in District of Columbia v. Heller ("Heller I"), 554 U.S. 570 (2008), the Second Amendment establishes that, once a court determines that the regulated arms are constitutionally protected, "[a]ny further evaluation of allegedly competing public-policy considerations is foreclosed by the constitutional text." Pl. Br. at 10. Thus, Heller I recognized that the phrase "shall not be infringed" is the exclusive standard of review for all Second Amendment challenges, leaving no room for any atextual judicial "means-end scrutiny" or "interest balancing," such as was engaged in by the district court below. Heller I at 634-35. As Justice Scalia explained in Heller I: "The very enumeration of the right takes out of the hands of Government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Id.* at 634.

Writing in dissent in Heller v. District of Columbia ("Heller II"), 670 F.3d 1244 (D.C. Cir. 2011), Judge Kavanaugh correctly explained that "the Supreme Court was not silent about [what] constitutional test we should employ to assess" Second Amendment cases. *Id*. at 1271. The traditional standards of scrutiny,

Judge Kavanaugh noted, were rejected in Heller I because they permit judges to "re-calibrate the scope of the Second Amendment right based on judicial assessment of whether the law advances a sufficiently compelling or important government interest to override the individual right...." *Id.* Instead, Judge Kavanaugh recognized that the Heller I test was one of "text, history, and tradition." *Id.* at 1275. What Judge Kavanaugh understood and explained was ignored by the district court below.

A. The Appropriate Standard of Review in Second Amendment Cases Is in the Text of the Second Amendment.

The Second Amendment states that "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." The Supreme Court has recognized that the prefatory clause announces its "purpose" — "the security of a free State" — while the operative clause announces its "command" — "the right of the people to keep and bear Arms shall not be infringed." Heller I at 577. At issue in every Second Amendment case is application of the operative clause, involving (i) a protected group of **people**, (ii) a protected class of **arms**, and (iii) specific types of protected **activities**. Interpreting the operative clause, Heller I follows the text of the Amendment point by point, illuminated by the prefatory clause's purpose to secure

the pre-existing right of an armed people "trained in arms and organized ... the better able to resist tyranny." *See id.* at 598.

1. Protected "People."

Heller I dispelled any notion that the Second Amendment protected only a collective right, holding "that the Second Amendment right is exercised individually and belongs to all Americans." *Id.* at 581. At the same time, the Heller I Court noted that the operative word — "the people" — does not include all human beings, but rather only "members of the political community" of the United States of America. *Id.* at 580.

In this case, the Connecticut ban on so-called "assault" weapons and high capacity magazines applies to persons who are citizens of both the United States and the State of Connecticut. As the district court found:

> The Connecticut legislation here bans firearms in common use. Millions of Americans possess the firearms banned by this act for hunting and target shooting... Additionally, millions of Americans commonly possess firearms that have magazines which hold more than ten cartridges. [Op. at *25-26.]

Standing unrebutted is Shew's and her fellow Plaintiffs' assertion that the Connecticut law extends to firearms and magazines "possessed by [Connecticut's] law-abiding citizens for lawful purposes." *See* Pl. Br. at 1-2, 7-10. As in Heller I,

these limitations on firearms apply to "law-abiding, responsible citizens." Heller I at 635. Thus, the first prong of the Second Amendment test is met.

2. Protected "Arms."

The opinion in Heller I thoroughly addressed what types of weaponry were embraced by the constitutional term "arms." Heller I stated that "the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. Indeed, Heller I explained that "all firearms constituted 'arms,'" including "'instruments of offence *generally* made use of in war.'" *Id*. at 581. Such protection of "[m]ilitary-style assault weapons"[3] makes perfect sense, as the Heller I Court recognized that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Id.* at 598. That foundational principle has been lost on the federal courts, who prefer to believe that the Second Amendment protects only the privilege to punch holes in paper, rather than the capability to resist despots who would pave the way to extinguish our "free state," after first "destroy[ing] the citizens' militia by taking away their arms...." *See* Heller I at 598, 599, 628.

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[3] Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, Shew v. Malloy, No. 13-739 (D. Conn.), Doc. # 78-1 ("DMSJ") at 1.

At issue in this case are semi-automatic, centerfire firearms with detachable box magazines and any of five common "features" typical of modern rifles, such as adjustable stocks and pistol grips. Included among these are rifles such as the AR-15 and the AK-47, which are semi-automatic derivatives of fully automatic military weapons. Such versatile rifles have a broad range of uses, including the battlefield, hunting, self-defense, and target shooting. Heller I clearly understood the term "arms" to encompass a broad range of firearms, including weapons such as those prohibited by the Connecticut ban. Defendants' pejorative characterization, that these are "weapon[s] of war," is ineffective to save this statute, as Heller I recognized that the Second Amendment protects "'instruments of offence *generally* made use of in war.'"[4] *Id.* at 581. Semi-automatic rifles, including those that Connecticut attempts to regulate, are "all firearms," and thus all protected by the Second Amendment, thereby meeting the second prong of the text.

3. Protected Activities — "Keep and Bear."

The Constitution's "keep and bear" language embodies private property principles. *See id.* at 582. "'Keep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*." *Id.* at 583. "'[B]ear arms' means ... simply the carrying of arms, [and] is not limited to military use," but

[4] DMSJ at 10.

extends to ordinary purposes to which one might put such arms. *Id.* at 588-89. The Act "prohibit[s] ... ownership of numerous semiautomatic firearms [and] 'large capacity magazines....'" Op. at *9, *14. Such activity, the district court recognized, clearly falls within the protection of the Second Amendment, stating that such weapons are "presumably ... used for lawful purposes." Op. at *27.

It is for each citizen — not the government — to choose freely from among the arms protected by the Second Amendment which ones he wants to keep and bear. Thus, in Heller I, the Supreme Court rejected the District of Columbia's argument that its ban on possession of handguns was permissible because "possession of **other** firearms ... is allowed." *Id.* at 629 (emphasis added). But the district court below ruled just the opposite, holding that it was enough for Connecticut citizens to "keep and bear" those semiautomatic firearms that the Connecticut legislature has chosen for them, rather than firearms of the people's own choosing. Op. at *31. Indeed, as Shew and her fellow plaintiffs have demonstrated, "[w]hen determining which weapons are protected, it is the choices commonly made by the American people that matter, not judges' or legislators' assessments of those choices." Pl. Br. at 14-15.

This common-law principle undergirding private property applies to keeping and bearing arms in the "home [his "habitation for shelter and safety"[5]] where the need for defense of self, family, and property [including his firearms] is most acute." *See* Heller I at 628. Yet, the Connecticut ban, if upheld, would rob the homeowner of his choice of a semiautomatic firearm and "large capacity" magazine "*even in the home.*" *See* Pl. Br. at 43 (italics original).

In sum, the Plaintiffs-Appellants in this case are clearly members of "the people" protected by the Second Amendment. The so-called "assault weapons" and so-called "large capacity magazines" are clearly protected "arms" under the Second Amendment. The 2013 Act Concerning Gun Violence Prevention and Children's Safety ("the Act") bans possession of these arms, which clearly restricts Plaintiffs' ability to "keep and bear" them, even in the home. Thus, the Act violates the Second Amendment. No further questions need be asked, nor answers given — "QED." *See* Heller I at 634.

B. The District Court's Opinion Erroneously Went beyond the Constitutional Text.

The district court's opinion below followed the "judge-empowering" dissenting approach of Justice Breyer (*see* Heller I at 634, 719), rather than the

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[5] 2 William Blackstone, Commentaries on the Laws of England, p. 4 (Facsimile Ed., Univ. Chi.: 1766).

majority opinion written by Justice Scalia. Op. at *27-40. The district court upheld the Connecticut ban, even after finding that the ban "**levies a substantial burden on the plaintiffs' Second Amendment rights**." *Id.* at 27 (emphasis added). A layman reaching that part of the court's opinion might believe that the Plaintiffs had won their case. However, the district court then ignored the unambiguous text of the Second Amendment — that the right "shall not be infringed" — permitting a "substantial burden[ing]" (infringement) of that right. To reach such a perverse result, the court differentiated between "core" and non-"core" Second Amendment rights. Op. at *30-31.

Cherry picking language from Heller I, that "Second Amendment rights are at their zenith [within the home]," the district court viewed Second Amendment rights as concentric circles radiating outward from that "core," each of which is deserving of sequentially less constitutional protection. *Id.* at *29. By reading the Second Amendment in this fashion, the district court, in effect, amended "shall not be infringed" to read "shall not be **unreasonably** infringed." This freed the court to limit Heller I to its facts — protecting only a narrow "core" right to a handgun for personal self-defense within one's own home, thus empowering the legislature to determine what types of firearms and magazines that right might include.

The district court adopted the state's argument that "core" self-defense within the home is not affected because "[t]he challenged legislation **provides alternate access to similar firearms**" and thus "does not amount to a complete prohibition on firearms for self-defense in the home." Op. at *31 (emphasis added). *See* DMSJ at *16. Thus, the district court concluded that "'the prohibitions do not impose a substantial burden' upon the core right protected by the Second Amendment." Op. at *31. In making such an argument, the state undermines its own position, for if the Act regulates some firearms while leaving "similar firearms" unregulated, then the state concedes that its limitations are arbitrary and ineffective. If the state felt it essential to eliminate "uniquely dangerous and lethal weapons," it would permit no "similar firearms." *See* Op. at *31, *33.

After having determined that the Act does not substantially burden what it calls "core" rights, the district court decided that "intermediate scrutiny" was the appropriate standard of review.[6] Op. at *31-32. Armed with such a flexible

[6] The district court acknowledged that Heller I explicitly rejected "rational basis" review. Op. at *30, n.44. But the court committed a logical fallacy, by assuming that "[t]he Heller majority suggested that laws implicating the Second Amendment should be reviewed under ... intermediate scrutiny or strict scrutiny." Op. at *30. Essentially, the district court assumed that "because not A, then B or C." But there is another option — none of the above. Indeed, the appropriate test is the standard of review based on the text of the Second Amendment, and it was

"standard," the court was free to dismiss individual constitutional rights in favor of the alleged "compelling interest of crime control and public safety." Op. at *37. Applying intermediate scrutiny, the district court's opinion moved even further away from the text of the Second Amendment. The district court cited Heller I, claiming to realize that "'[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them' and are not subject to the whims of future legislatures or judges." Op. at *27. Yet four pages later, the district court did just what Heller I prohibited, granting "'[s]ubstantial deference to the predictive judgments of'" the Connecticut General Assembly, whose "'legislative findings ... are beyond the competence of courts.'" Op. at *34. Overriding the founders, the district court stated that it is up to the legislature to "make delicate political decisions and policy choices...."[7] Op. at *35.

C. Kachalsky and Decastro Are No Impediment to the Faithful Application of Heller I, since the Connecticut Ban Is on All Fours with the Ban in Heller I.

Relying on Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012), and United States v. Decastro, 682 F.3d 160 (2d Cir. 2012), the district court

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that option which was selected and utilized in Heller I.

[7] *See* DMSJ at 1-3 for a detailed exposé of Connecticut's policy preferences.

subjected Shew's Second Amendment claim to "heightened scrutiny" on the erroneous ground that, "[u]nlike the law struck down in Heller, the legislation here does not amount to a **complete prohibition** on **firearms** for self-defense in the **home**." Op. at *31 (emphasis added). The district court's factual premise is wrong and, because it is wrong, the district court's opinion is at variance with, not in conformity to, Kachalsky and Decastro.

While the District of Columbia law in Heller I "totally ban[ned] handgun possession in the home" (*id.* at 628), that ban did not constitute a "complete prohibition on firearms ... in the home," as the district court erroneously assumed. *Id.* at *31. Indeed, D.C. officials argued in Heller that it was permissible for them "to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Id.* at 629. The Supreme Court declined the government's invitation, on the simple ground that the choice of a firearm is constitutionally vested in "the American people" who, the Court noted, "have considered the handgun to be the quintessential self-defense weapon." *Id.* Then, after noting various reasons why the people "prefer a handgun for home defense," the Court concluded with the following observation: "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a

complete prohibition of their use is invalid."[8] *Id.* In short, the Heller I Court concluded that the ban violated the Second Amendment because it denied to a District resident his constitutional right to a firearm of **his** choice, not the District of Columbia's. *Id.* That being so, the Heller I Court flatly refused to apply any further "standard of scrutiny," ruling the handgun ban a *per se* violation of the Second Amendment.

The district court below did just the opposite. It rightfully concluded that, under Heller I, every so-called "assault" weapon and every magazine proscribed by the Connecticut law was protected by the Second Amendment (Op. at *25-26), but then it abandoned the Heller I *per se* rule. Instead, it adopted the erroneous approach taken by the Court of Appeals for the District of Columbia in Heller II,[9] subjecting Shew's Second Amendment claim to "intermediate scrutiny," in direct conflict with the Supreme Court's decision in Heller I. *See* Op. at *32-40.

Indeed, by subjecting Shew's claim to additional scrutiny, the district court decided that it was perfectly permissible for the State of Connecticut to deprive the people the Second Amendment of their right to choose which lawful weapon and

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[8] Similarly, banning access to the Internet cannot be justified because newspapers and television are still permitted.

[9] The Heller II case is still being litigated.

magazine would be best suited for the pursuits that interested them, including target shooting, hunting, and self-defense. By design and in effect, the Connecticut ban on assault weapons and high capacity magazines unconstitutionally vests in state officials discretionary power that Heller I held belongs to the people without regard to any government interest — compelling, reasonable, or otherwise. *See* Heller I at 628-29.

Even if Kachalsky and Decastro were rightly decided,[10] neither supports the Connecticut ban here, for the single reason that neither addressed the constitutionality of a ban on a class of firearms. The issue in Kachalsky was whether "New York's handgun licensing scheme violate[d] the Second Amendment by requiring an applicant to demonstrate 'proper cause' to obtain a license to carry a concealed handgun in public...." *Id*., 701 F.3d at 83. The Kachalsky Court observed Heller I's *per se* rule that "[b]ecause the Second Amendment was directly at odds with a complete ban on handguns in the home, the D.C. statute ran roughshod over that right" and, thus, was immune from any further judicial "standard of scrutiny." *Id.* at 88-89. However, since the New York concealed carry law applied exclusively "beyond the home" (*id.* at 89), and because

[10] Both Kachalsky and Decastro wrongly ignored the admonition in Heller I that Second Amendment rights are not subject to judicial balancing tests. *See* Heller I at 634.

the panel professed that it "d[id] not know ... the scope of [the Second Amendment] right beyond the home," the Kachalsky Court subjected the concealed carry law to further judicial scrutiny, weighing the right to keep and bear arms against the state's claimed interest in public safety. *See id.* at 89-101. Unlike the New York concealed carry law which applied exclusively "beyond the home," the Connecticut ban on assault weapons and magazines constitutes an indiscriminate ban against firearms that would be used both within and outside the home. Op. at *9-*13. Thus, the *per se* Heller I rule applies here, not the heightened scrutiny standard employed in Kachalsky.

Similarly, in Decastro, the Second Amendment challenge was not directed to any statute that banned the possession of any class of firearms, much less any statute that banned such possession in one's own home. As applied, 18 U.S.C. § 922(a)(3) prohibited "the transportation into New York of a firearm purchased [by Decastro] in another state." Decastro, 682 F.3d at 161. This Court found the *per se* rule in Heller I inapposite for two reasons. First, the Court observed that "Heller disclaims any reading that calls into question (among other things) ... 'laws imposing conditions and qualifications on the commercial sale of arms.'" *Id.* at 165. Second, the Court found that the impact of § 922(a)(3) on the right to keep

and bear arms was *de minimis* and insubstantial. *Id.* at 165-66. Neither of these facts obtains here.

In short, neither Kachalsky nor Decastro supports the district court's decision to subject the Connecticut ban on so-called assault weapons and high capacity magazines to any level of scrutiny other than that applied in Heller I — the one set forth in the text of the Second Amendment itself.

II. THE CONNECTICUT STATUTE UNCONSTITUTIONALLY DISCRIMINATES IN FAVOR OF SPECIAL SUBSETS OF THE CITIZENRY OF THE STATE.

As the district court below has acknowledged, the Act "is not an outright ban with respect to the enumerated firearms because many of its provisions contain numerous exceptions." Op. at *15. *See* Conn. Gen. Stat § 53-202b-c.[11] *Inter alia*, there are four categories of persons who are exempt from the Act's prohibitions on assault weapons. *See* Op. at *15-16.

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[11] As of the date of this *amicus curiae* brief, the State of Connecticut still has not updated its website to inform its residents of the changes in the law contained in the 2013 Act. http://www.cga.ct.gov/2011/pub/chap943.htm#Sec53-202d.htm. However, Connecticut has begun criminally charging its residents under the new law. *See* "Milford man who shot squirrel had unregistered assault rifle, high-capacity magazines, cops say," *New Haven Register News* (Apr. 17, 2014), http://www.nhregister.com/general-news/20140416/milford-man-who-shot-squirrel-had-unregistered-assault-rifle-high-capacity-magazines-cops-say.

A. The Act Exempts Favored Classes of Citizens from Its Assault Weapon Ban.

First, those persons who previously possessed a so-called "assault weapon" or "large capacity magazine" and registered it with the state prior to January 1, 2014 were granted special dispensation to continue to possess their weapons, as well as the right to bequeath legal title to those weapons at death. Conn. Gen. Stat §§ 53-202c(d) and 53-202d(a)(2).

Second, active members of Connecticut law enforcement agencies,[12] along with certain other state departments and agencies,[13] are exempted from the bans. Conn. Gen. Stat § 53-202b(b)(1) and § 53-202c(b). Some of the state employees are permitted to possess assault weapons for use on duty, and some for use both on and off duty. *See* Conn. Gen. Stat § 53-202c(b)(1)(B).

Third, members of the "military or naval forces of this state or of the United States" are exempt from the ban on possession of assault weapons while on duty. *See* Conn. Gen. Stat § 53-202c(b).

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[12] The statute does not appear to exempt from the possession ban employees of the federal government such as federal law enforcement agents — unless they are somehow considered part of an "organized police department."

[13] Some of the exempted departments of the Connecticut government are certainly not traditional law enforcement agencies, such as "the Department of Motor Vehicles [and] the Department of Energy and Environmental Protection...."

Fourth and finally, the statute permits persons exempt under § 53-202(c), when actively employed, to register their weapons within 90 days of their retirement or termination. *See* Conn. Gen. Stat § 53-202d(a)(2)(B).

It is important to note that, in each of these categories, it is not a **firearm** that is exempt but rather, as the district court notes, "a **person** is exempt." Op. at *15 (emphasis added). Indeed, Conn. Gen. Stat § 53-202b prohibits the "[s]ale or transfer of assault weapon[s]," and this includes registered firearms. The only exception is for "intestate succession."[14] Thus, the statutory approach taken in 2013 is quite unlike the 1994 federal ban on so-called "assault" weapons, which "grandfathered" **weapons** — rather than **persons** — and did not prohibit the sale or transfer of such weapons.[15] Therein lies a fatal flaw. The federal ban exempted weapons, permitting any person to go out into the market, purchase, and possess one of the grandfathered weapons. Connecticut's statute, however, creates classes of exempted persons, who possess special rights that the rest of society is denied.

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[14] Conn. Gen. Stat § 53-202b(b)(3)-(4).

[15] *See* Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355 (103 Cong.), Sec. 110102(a)(2) (stating that the law "shall not apply to the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection.")

In the district court, Shew and her co-Plaintiffs attacked this "discriminat[ion] [against ordinary citizens] ... in favor of selected classes" on equal protection grounds. *See* Op. at *40. The district court, however, declined to reach the merits of the equal protection claim, having concluded that there are inherent differences between the groups exempted by the Act and the rest of the general population. Op. at *46-48. Thus, the district court found no need to engage in any additional equal protection analysis. *Id.*

Although Shew and her co-Plaintiffs have not presented the equal protection claim expressly among their Statement of Issues, they have presented the question whether the Connecticut ban on "assault weapons" violates the Second Amendment, which would encompass the issue addressed by these *amici* herein.

B. The Exemption of Some from the Ban Violates the Principle that the Right to Keep and Bear Arms Is Secured by the Second Amendment to "All Americans."

According to Heller I, the right to keep and bear arms belongs to "all Americans," that is, "all members of the political community, not an unspecified subset." *Id.*, 554 U.S. at 579. As applied to the states through the Fourteenth Amendment, the right to keep and bear arms belongs to all members of the Connecticut body politic, not just to the state government's favored few. Indeed, as the Supreme Court ruled in McDonald v. Chicago, 561 U.S. 742, 130 S.Ct.

3020, 3025 (2010), one of the primary purposes of the Fourteenth Amendment was to protect the inherent right of the newly-freed slave class, as citizens, to keep and bear arms. *Id.* at 3038-42. This right was not limited to citizens afflicted by racial discrimination; rather, the right extended equally to "all citizens." *Id.* at 3040-41. Otherwise, "whites in the South who opposed the Black Codes ... would have been left without the means of self-defense — as had abolitionists in Kansas in the 1850's." *Id.* at 3043. And there is nothing in the McDonald Court's lengthy discussion of the right to keep and bear arms implying that the Second Amendment protects only a general right of self-defense in one's home. *Id.* at 3044.[16]

Nor was that right of self-defense, including the right to "bear" (carry), subject to control by civil government officials. *See id.* at 3038-39. To the contrary, the Fourteenth Amendment was designed to end a gun control monopoly imposed by and for the benefit of the ruling class. As the McDonald Court pointed out, unarmed "African Americans in the South would likely have remained vulnerable to attack by many of their worst abusers: the state militia and state peace officers." *Id.* at 3043. Thus, this Court found that the Chicago and Oak Park ordinances that "effectively bann[ed] handgun possession by almost all private

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[16] ("[T]he Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.")

citizens who reside in the city,"[17] "presumably would have permitted the possession of guns by those acting under the authority of the State and would thus have left firearms in the hands of the militia and local peace officers." *Id.* at 3043. And that is precisely what the Connecticut ban on so-called assault weapons and large capacity magazines does.

There are many other reasons why the district court's rationale — that the police and military are somehow different than the rest of the general population — is flawed. The Act exempts active-duty military and both active-duty and retired law enforcement. Lumping all of these groups together, however, the district court broadly and erroneously claimed that they all (i) receive special training and (ii) are tasked with protecting the public. Op. at *46. But some of these groups, such as retired persons and members of the military, are neither tasked with protecting the general public in a law enforcement role, nor have any special training to do so. Retired law enforcement receive no additional special official training to maintain any current skill level. Finally, no one could seriously contend that employees of the State Department of Motor Vehicles fit into a category of persons who have received special training in firearms and are tasked with protecting the public.

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[17] *Id.* at 3026.

On the other hand, many members of the general public receive significant training in firearms and personal protection. Many in the general public have served in the military, where they received significant training in the use of real — not so-called — "assault weapons." Quite often, members of the general public are in fact better trained and equipped, and are far more proficient in the use of arms than are members of law enforcement.[18] Therefore, even if permissible — which it is not — it would be totally illogical to confer special benefits on a favored few, as Connecticut has done.

Finally, it is no wonder that the district court did not discuss the differences between persons who registered their weapons prior to January 1, 2014, and those who did not. It would be absurd to argue that a person who bought a firearm on January 2, 2014 is any less trained or equipped to use it than someone who possessed his firearm a day earlier. Thus, the Connecticut effort to grandfather certain owners fails even under the district court's own reasoning.

In Heller I, the Supreme Court ruled that the right to keep and bear arms belongs to the "People," because the Framers of the Second Amendment expressly

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[18] *See* R. Morse, "Civilians are Safer than Police," *AmmoLand* (June 5, 2013), http://www.ammoland.com/2013/06/civilians-are-safer-than- police /#axzz32TEBFYIV; *see also* L. Bell, "Disarming the Myths Promoted By the Gun Control Lobby," *Forbes* (Feb. 21, 2012), http://www.forbes.com/sites/ larrybell/2012/02/21/disarming-the-myths-promoted-by-the-gun-control-lobby/2/.

stated that the right was essential for the purpose of securing a "**free** State." *Id.*, 544 U.S. at 580-600 (emphasis added). In Connecticut, however, the right to keep and bear certain arms belongs only to certain current and former government officials, apparently for the purpose of achieving a "safe" State, since the district court upheld the Act on the basis that it furthered "crime control and public safety." Op. at *37. As Heller I teaches, though, the Second Amendment's operative clause must not be divorced from the constitutional purpose expressed in its prefatory clause.

By exempting certain government officials from the ban on so-called "assault" weapons and "large capacity" magazines, the Connecticut legislature and governor have set the stage for taking action like the English "Stuart Kings Charles II and James II [who] succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents." *See* Heller I at 592. Further, as Heller I observed, "what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists" — "In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas." *Id.* at 594. The antidote to King George's approach — the Second Amendment — was ratified to secure to all the People the right to keep and bear arms, not to the select few — especially when those few are loyal, dependent,

paid employees or former employees who continue to receive benefits from the Connecticut government.

C. The Exemptions Granted Are Unconstitutional Titles of Nobility in Violation of Article I, Section 10, Clause 1.

Largely forgotten in our current era of government entitlements, Article I, Section 10, Clause 1 of the Constitution prohibits any State from "grant[ing] any Title of Nobility." Article I, Section 9, Clause 8, likewise, prohibits the United States from granting such titles. Writing in *Federalist 84*, Alexander Hamilton explained why these prohibitions were included in the original Constitution, not added later by the Bill of Rights:

> Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the **cornerstone** of **republican** government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people. [The Federalist No. 84, p. 444 (G. Carey & J. McClellan, eds., Liberty Fund: 2001) (emphasis added).]

Echoing Hamilton, Joseph Story wrote in his Commentaries on the Constitution of the United States:

> As a perfect equality is the basis of all our institutions, state and national, the prohibition against creation of any titles of nobility seems proper, if not indispensable, to keep perpetually alive a just sense of this important truth. Distinctions between citizens in regard to rank would soon lay the foundation of odious claims and privileges, and silently subvert the spirit of independence and personal dignity, which are so often proclaimed to be the best security of a republican

> government. [2 J. Story, Commentaries on the Constitution, §1351, p. 222 (5th ed., Little Brown: 1891).]

Notwithstanding these clarion calls of two of America's most insightful voices about the founding era, the Connecticut legislature has created a privileged class of retired government personnel who, solely because of prior government employment, are permitted to obtain late registration of weapons that no others are permitted to register. Moreover, the Act creates another special class, those family members who come into possession of assault weapons by inheritance, from those who demonstrated fidelity to the government by virtue of their submission to the Act's requirement to register their weapons. Additionally, it creates a special class of active duty military and law enforcement personnel who are entirely exempt from registration.

Similarly, in feudal Japan, the Samurai class was the only group permitted to carry arms in society. In 1588, Toyotomi Hideyoshi issued an edict that the lower classes "are strictly forbidden to possess long swords, short swords, bows, spears, muskets, or any other form of weapon," and anyone who disobeyed "shall, needless to say, be brought to judgment." M. Berry, Hideyoshi (Harvard Univ. Press, 1982), p. 102. With most people forbidden to carry arms, "the sword became a badge of

privilege reserved for the warrior class." *Id.* at 106. The Samurai of various times acted not only as a police force but also as a form of bureaucracy.[19]

So too in England, for a long period, only the upper classes were permitted to carry arms in public. D. Hardy, "Historical Bases of the Right to Keep and Bear Arms," Report of the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess (1982).[20] Even the 1689 English Bill of Rights, which recognized a broad right to bear arms, granted the right only to "protestants." *See* Bill of Rights (Dec. 16, 1689), reprinted in Sources of Our Liberties at 246 (R. Perry & J. Cooper, eds., ABA Found., Rev. Ed. 1978).

The Second Amendment, though, was designed to break from governmental favoritism. Rather than protecting a right enjoyed only by the favored royal, political, or religions classes, the right to keep and bear arms secured the right to "the People." As Heller I put it, this is a right that "belongs to all Americans." *Id.*, 554 U.S. at 581. Members of law enforcement have no greater First or Fourth Amendment rights than does the general public, nor should they have any greater Second Amendment rights to keep and bear arms.

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[19] "The Age of the Samurai: 1185-1868," *Asia for Educators*, http://afe.easia.columbia.edu/special/japan_1000ce_samurai.htm.

[20] http://www.guncite.com/journals/senrpt/senhardy.html.

CONCLUSION

The Second Amendment's absolute standard of "shall not be infringed" was borne of long experience by the Founders with gun control. Indeed, the American revolution can be viewed as having been provoked by British gun control.[21] The Connecticut statute required persons with an assault weapon to have registered by January 1, 2014. If an inherently dangerous weapon is registered, does it make the weapon less dangerous in the hands of the people? In direct contradiction of the public safety rationale, some states have released lists of registered handgun owners to the public, even though it has been determined that such releases pose a greater threat to public safety by creating a target list for thieves.[22] The Weimar Republic established a gun registration system in the 1920's which laid the groundwork for government oppression and violence in the 1930's.[23] Even the

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[21] *See* Heller amicus brief of Gun Owners of America, Inc. http://lawandfreedom.com/ site/constitutional/DCvHellerAmicus.pdf, pp. 22-27; *see also* D. Kopel, "How British Gun Control Program Precipitated the American Revolution," 6 CHARLESTON L. REV. 283 (2012).

[22] *See, e.g.,* "The gun owner next door: What you don't know about the weapons in your neighborhood," *The Journal News* (Dec. 23, 2012), http://www.lohud.com/apps/pbcs.dll/article?AID=2012312230056.

[23] *See* S. Halbrook, "How the Nazis Used Gun Control," *National Review* (Dec. 2, 2013) http://www.nationalreview.com/article/365103/how-nazis-used-gun-control- stephen-p-halbrook.

popular culture recognizes that registration only creates a list to be used to conduct future firearm confiscation.[24]

Indeed, already Connecticut has used the registration information of dozens of owners whose applications arrived too late to force those persons to surrender their firearms or face prosecution.[25]

For the reasons stated herein, the decision of the district court should be reversed.

Respectfully submitted,

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[24] This linkage was dramatically portrayed in the 1984 film Red Dawn where the invading forces sought out ATF records (Form 4473) to focus on eliminating the threats from lawful firearm owners: https://www.youtube.com/watch?v= vmrYVJWwBfE; *see also* B. Roberts, "Gun Registration and Gun Control," *GunCite* (Aug. 24, 2007), http://www.guncite.com/gun_control_registration.html (giving several examples of registration schemes that led to later confiscations of registered weapons).

[25] B. Owens, "Botched registration leads to confiscation in Connecticut," *Bearing Arms* (Feb. 25, 2014), http://bearingarms.com/botched-registration-leads-to-confiscation-in-connecticut/.

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May 23, 2014

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of Amicus Curiae of Gun Owners of America, Inc., *et al.* in Support of Appellants and Reversal complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 6,970 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 14.0.0.756 in 14-point Times New Roman.

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Dated: May 23, 2014

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Appellants and Reversal, was made, this 23rd day of May 2014, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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