14-0319-cv

United States Court of Appeals

for the

Second Circuit

THE CONNECTICUT CITIZENS' DEFENSE LEAGUE, THE COALITION OF CONNECTICUT SPORTSMEN, JUNE SHEW, RABBI MITCHELL ROCKLIN, STEPHANIE CYPHER, PETER OWENS, BRIAN MCCLAIN, ANDREW MUELLER, HILLER SPORTS, LLC AND MD SHOOTING SPORTS, LLC,

Plaintiffs-Appellants,

– v. –

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (NEW HAVEN)

BRIEF FOR *AMICI CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE AND GEORGE W. CRAWFORD BLACK BAR ASSOCIATION IN SUPPORT OF APPELLEES

PAUL B. CARBERRY
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8507

Attorneys for Amici Curiae Brady Center to Prevent Gun Violence and George W. Crawford Black Bar Association in Support of Appellees

DANNEL P. MALLOY, in his official capacity as Governor of the State of Connecticut, KEVIN T. KANE, in his official capacity as Chief State's Attorney of the State of Connecticut, DORA B. SCHRIRO, in her official capacity as Commissioner of the Connecticut Department of Emergency Services and Public Protection, DAVID I. COHEN, in his official capacity as State's Attorney for the Stamford/Norwalk Judicial District, Geographic Areas Nos. 1 and 20, JOHN C. SMRIGA, in his official capacity as State's Attorney for the Fairfield Judicial District, Geographical Area No. 2, MAUREEN PLATT, in her official capacity as State's Attorney for the Waterbury Judicial District, Geographical Area No. 4, KEVIN D. LAWLOR, in his official capacity as State's Attorney for the Ansonia/Milford Judicial District, Geographical Areas Nos. 5 and 22, MICHAEL DEARINGTON, in his official capacity as State's Attorney for the New Haven Judicial District, Geographical Area Nos. 7 and 23, PETER A. MCSHANE, in his official capacity as State's Attorney for the Middlesex Judicial District, Geographical Area No. 9, MICHAEL L. REGAN, in his official capacity as State's Attorney for the New London Judicial District, Geographical Area Nos. 10 and 21, PATRICIA M. FROEHLICH, GAIL P. HARDY, in her official capacity as State's Attorney for the Hartford Judicial District, Geographical Areas Nos. 12, 13, and 14, BRIAN PRELESKI, in his official capacity as State's Attorney for the New Britain Judicial District, Geographic Area Nos. 15 and 17, DAVID SHEPACK, in his official capacity as State's Attorney for the Litchfield Judicial District, Geographical Area No. 18, MATTHEW C. GEDANSKY, in his official capacity as State's Attorney for the Tolland Judicial District, Geographic Area No. 19, STEPHEN J. SEDENSKY, III, in his official capacity as State's Attorney for the Danbury Judicial District, Geographical Area No. 3,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Brady Center to Prevent Gun Violence, through its undersigned counsel, states that it has no parent company and no publicly-held corporation owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, the George W. Crawford Black Bar Association, through its undersigned counsel, states that it has no parent company and no publicly-held corporation owns 10% or more of its stock.

/s/ Paul B. Carberry
Paul B. Carberry
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8507

Attorney for Amici Curiae Brady Center to Prevent Gun Violence and George W. Crawford Black Bar Association

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STATEMENT OF INTEREST

The Brady Center to Prevent Gun Violence ("Brady Center") and the George W. Crawford Black Bar Association ("Crawford Black Bar Association") are filing an amicus curiae brief in support of Defendants, principally to address the current legal standard for Second Amendment protection of restrictions on the possession for firearms and the standard of review of such restrictions.[1]

The Brady Center has a substantial interest in ensuring that the Second Amendment is not interpreted to jeopardize the public's interest in protecting families and communities through strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous amicus curiae briefs in cases involving firearms regulations, including *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady Center brief), *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"), and *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc).

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[1] Amici certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief, and that no person—other than the amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. Counsel of record for all parties have consented to the filing of this brief.

The Brady Center supports flexibility for states and localities to enact and test the effectiveness of laws intended to prevent gun violence.

The Crawford Black Bar Association was named in honor of George W. Crawford who graduated in 1903 as Yale University School of Law's second Black graduate. Since 1977, the organization has carried on Mr. Crawford's legacy of excellence and public service. The Crawford Black Bar Association's mission includes focusing attention on legal, political and social issues that affect members of the Black community, and to address those issues as a unified body. The organization also endeavors to provide a vehicle for Black attorneys to engage in meaningful, collective action on matters affecting Black legal professionals and the communities they serve. Gun violence prevention has particular relevance to Black communities in and outside of Connecticut. Submitting this amicus brief in support of the State of Connecticut's efforts to enact and enforce reasonable firearm regulations is in furtherance of the Crawford Black Bar Association's mission and consistent with its commitment to public service.

SUMMARY OF THE ARGUMENT

Assault weapons and high capacity magazines enable and facilitate violent crime and mass murder. Mass slaughters terrorize society at large, undermine the public's sense of safety and security, and burden the community with latent fear and uncertainty. In the wake of a school shooting in Newtown, Connecticut, where

twenty-six people, including twenty first-grade children and six educators, were killed in five minutes, the State of Connecticut appropriately addressed the dangers posed by assault weapons and high capacity magazines by enacting an Act Concerning Gun Violence Prevention and Children's Safety, Public Act 13-3, effective on April 4, 2013, and amended by Public Act 13-220, effective June 18, 2013 (the "Act"). This Act aims to prevent repetition of the horrors of mass shootings by curtailing the presence of certain firearms that empower one individual to inflict injury and death on many before he can be stopped.

Plaintiffs and the NRA, as amici, insist that the Second Amendment protects the rights of the general public to own assault weapons. They essentially argue that the constitutionality of the Act depends solely upon whether assault weapons are in common use for lawful purposes. Under their analysis, since gun manufacturers have persuaded Americans in recent years to purchase millions of assault weapons, states cannot regulate those firearms. The prior successful marketing of assault weapons that dramatically increase the risk of a mass shooting – a risk that has now materialized far too often – does not immunize those weapons from regulation. Rather, this shift in the market increases the pressure on state and local governments to fill the void left by the expiration of the federal assault weapons ban in 2004.

The process has moved slowly, as legislatures have grappled with the difficult policy and legal issues involved. The gun market, however, has been much more nimble and has widely encouraged the sale of assault weapons. Immediately after the expiration of the federal assault weapons ban, and before the Connecticut legislature acted, sales of assault weapons sharply increased. Now, Plaintiffs argue, the legislature did not act quickly enough, and now that the market is glutted with assault weapons, the sheer popularity of the weapons entitles the guns to Second Amendment protection. Furthermore, Plaintiffs argue, such protection is so absolute that the legislature has no discretion to restrict the most dangerous assault weapons despite the overwhelming public policy interest in doing so.

Plaintiffs misconstrue the Second Amendment. It does not protect dangerous and unusual weapons such as those restricted by the Act. Nor does it protect secondary characteristics of guns that do not detract from the basic functionality of the weapon for purposes of self-defense. It protects the right of law-abiding, responsible citizens to have, for self-defense in the home, weapons that are in common use for *lawful purposes*, and even then, legislatures have the authority to regulate such weapons to protect the public interest. Plaintiffs cannot deny that they have ample means to exercise their Second Amendment rights. Under this standard, the Act is clearly permissible and consistent with the

Constitution. The lower court's decision upholding the assault weapons and large-capacity magazines ban contained in the Act should be affirmed.

ARGUMENT

I. PRINCIPLES ESTABLISHED BY *HELLER* AND *MCDONALD*

The Supreme Court defined the scope of protection under the Second Amendment in *Heller* and *McDonald*.[2] Most notably and, contrary to the arguments proposed by the Plaintiffs and other amici, the Supreme Court never provided in those decisions that firearm regulations are subject to the strong presumption against constitutionality that accompanies a strict scrutiny review. Instead, the Supreme Court stated that a wide gamut of gun laws remained Constitutional, and the states could individually test the efficacy of these laws. These two opinions provide clear guidance in reviewing the constitutionality of gun control laws by defining the scope and limitation of the rights under the Second Amendment.

The Supreme Court made it clear that the scope of the Second Amendment is not absolute. Rather, "[l]ike most rights, the right secured by the Second

[2] States have long implemented wide-ranging restrictions on procuring, possessing, or using firearms not linked to any core purpose since the beginning of the Republic. *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right, The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 502-06 (2004).

Amendment is not unlimited" in scope and does not amount to "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. The Supreme Court repeated such assurances in *McDonald* by stating that the incorporation by the Fourteenth Amendment "does not imperil every law regulating firearms." *McDonald*, 130 S. Ct. at 3047. "[T]h[e] guarantee [under the Bill of Rights] *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values" and "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *Id*. at 3046. The Supreme Court in *Heller* acknowledged that the Constitution provides legislatures with "a variety of tools for combating" the "problem of handgun violence," *Heller*, 554 U.S. at 636, and set forth in its own decision a non-exclusive and illustrative list of a number of gun control regulations that the Court found to be "presumptively lawful." *Id.* at 626-27. In *McDonald*, the Court again explicitly reaffirmed that "reasonable firearms regulations will continue under the Second Amendment." *McDonald*, 130 S. Ct. at 3046.

The historical tradition of this nation justifies prohibition on carrying of "dangerous and unusual weapons." *Heller*, 554 U.S. at 571. The Supreme Court denied the protection of the Second Amendment for such "sophisticated arms that are highly unusual in society at large." *Id.* at 627. The Supreme Court cited, for

example, Blackstone, who stated that "[t]he offence of *riding* or *going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land . . . ." 4 Blackstone, Commentaries *148. The Supreme Court also cited *English v. State*, 35 Tex. 473, 474 (1871), which held that the Second Amendment did not protect certain types of weapons that are used for criminal purposes. Among the "wicked devices of modern craft" prohibited by the statute at issue in that case were pistols. According to *English*:

> To refer the deadly devices and instruments called in the statute 'deadly weapons,' to the proper or necessary arms of a 'well-regulated militia,' is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the constitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit.

Id. at 476. The government may prohibit the possession of arms that terrify the population without violating the Second Amendment.

Intermediate scrutiny was by no means precluded by the decisions in *Heller* and *McDonald*. Under the general proposition that the Second Amendment protection is not absolute, the Supreme Court in *Heller* has suggested a 2-prong test that was appropriately recognized by lower courts. The Supreme Court in *Heller* first examined the core rights granted under the Second Amendment and concluded that it protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. After concluding that the

regulated weapons were within the scope of the Second Amendment, the Court reviewed whether the restriction at issue substantially limits the Second Amendment rights.[3] Among other things, the Court emphasized that the D.C. gun laws plainly resulted in prohibition of the entire class of handguns, which amounts to total destruction of self-defense rights under the Second Amendment. In *Heller*, the Court did not need to go further to examine the applicable level of scrutiny and, thus, neither mandated nor even articulated a specific level of scrutiny.[4] *Id.* at 628-29. However, the Court in *Heller* repeatedly identified the primary reason of its holding is the severity of the ban that amounted to a "destruction of the right," "prohibition of entire class of 'arms,"' or rendering the arms "wholly useless for the purpose of defense." *Heller*, *Id.*

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[3] *See United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (*Heller* "suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee . . . . If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid").

[4] After *Heller*, in 2010, the Court in *McDonald* addressed a Second Amendment challenge and, likewise, did not articulate a particular standard of review to evaluate Second Amendment challenges to gun regulations. *See also* Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?* 105 Nw. U. L. Rev. 437, 438-39 (2011).

This Court has identified the appropriate level of scrutiny by examining the substantiality of the burden actually imposed on the core Second Amendment rights. In *United States v. Decastro*,[5] this Court set forth a threshold under which courts must determine, in the first instance, whether a challenged regulation substantially burdens the rights under the Second Amendment and, only *after* discerning that the challenged regulation imposes a substantial burden will a court apply heightened level of scrutiny. 682 F.3d 160, 166-67 (2d Cir. 2012). Although this Court in *Decastro* did not explicitly apply rational basis review, it ultimately found that the law at issue did not place a substantive burden on the right to possess a gun for self-defense because the law only prohibits the transportation into one's state of residence of firearms acquired outside the state to stop circumvention of state laws regulating gun possession. *Id.* at 168 n.5; *see Heller*, 554 U.S. 709. Among the reasons given in its decision, this Court explained that, under the *Heller* decision, the "time, place and manner restrictions may not significantly impair the right to possess a firearm for self-defense, and

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[5] Given *Heller*'s emphasis on the weight of the burden imposed by the D.C. gun laws, it should not be read to mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny. Rather, heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).

may impose no appreciable burden on Second Amendment rights." 682 F.3d at 165 In *Kachalsky v. County of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012), cert. denied, 133 S Ct. 1806 (2013), this Court recognized that even if a substantial burden is imposed on the Second Amendment then "some form of heightened scrutiny [is] appropriate" and in *Kachalsky* the appropriate heightened scrutiny was intermediate scrutiny where the court is required to determine whether a law is "substantially related to the achievement of an important governmental interest." *Id*.

Plaintiffs and amici tried to distinguish *Kachalsky* from the case at hand arguing that *Kachalsky* is not a flat ban, but a license scheme, and it concerns not the home, but the public arena. However, the distinction oversimplifies the holdings of *Heller* and *McDonald*, because the scope of the Second Amendment cannot be solely judged by whether a gun law imposes a flat ban involving home or not. As discussed above, the constitutionality of gun laws invites a multi-layered review of the totality of relevant facts to determine whether the laws effectively and substantially deprive law-abiding citizens of the right to self-defense under the Second Amendment. Indeed, even the Seventh Circuit's decision in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) that struck down Chicago's flat ban of carrying weapons outside home noted that it agreed with *Kachalsky* that the New York law allowing only individuals having a bona fide

reason to possess handguns to introduce them into the public sphere is reasonable. *Id*. at 940. In sum, the determinative question is the degree of severity which can be judged by the substantiality of the effect that the questioned laws would likely have on the Second Amendment rights.

II. ASSAULT WEAPONS ARE CATEGORICALLY UNPROTECTED.

The Supreme Court in *Heller* found that "dangerous and unusual weapons" are not protected by the Second Amendment,[6] a holding it supported with reference to a series of older treatises and state court decisions. *Heller*, 554 U.S. at 627. Such dangerousness and unusualness of a weapon may be determined by certain aspects of the weapon, for example, whether it enables the carrier to conceal such weapon and magnify the damage to a level that terrifies the public. The Third Circuit in *Marzzarella* also considered such criteria in identifying a dangerous and unusual weapon. While a short-barreled shotgun is dangerous and unusual in that its concealability fosters its use in illicit activity, it is also dangerous and unusual because of its heightened capability to cause damage. *Marzzarella*, 614 F.3d at 95.

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[6] As explained in *Marzzarella*, "By equating the list of presumptively lawful regulations with restrictions on dangerous and unusual weapons, we believe the Court intended to treat them equivalently – as exceptions to the Second Amendment guarantee." 614 F.3d at 91.

Research shows that assault weapons are so dangerous that they should fall outside the Second Amendment. One study found that the average number of people killed or wounded in mass shootings doubled when assault weapons or semiautomatic guns combined with high capacity magazines were used in the shooting. Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994-2004, in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* 157, 167 (Daniel W. Webster and Jon S. Vernick eds., 2013). Other analyses have found a similar pattern. For mass shootings from January 2009 and January 2013, shootings with assault weapons or high capacity magazines resulted in more than double the number of people shot and more than 50 percent more killed. Mayors Against Illegal Guns, *Mass Shootings Since January 20, 2009* (2013), *available* at http://www.washingtonpost.com/blogs/wonkblog/files/2013/02/mass_shootings_2009-13_-_jan_29_12pm1.pdf. Likewise, an analysis of a database of mass shootings from 1984 to 2012 found positive correlations between rounds fired per minute and the number of people hit and killed. Kevin Ashton, *The Physics of Mass Killing* (Jan. 24, 2013), http://kevinjashton.com/2013/01/24/the-physics-of-mass-killing/. Reducing access to assault weapons and to high capacity ammunition magazines reduces criminals' ability to spray-fire a continuous stream of hundreds of bullets into crowds, movie theaters, or schools.

The Act responded directly to the shooting at Sandy Hook, which put the devastating impact of these extraordinarily dangerous weapons on full display. In the space of five minutes, one individual was able to fire over 150 rounds, killing twenty children and six adults. He shot each of the children multiple times, some suffering as many eleven gunshot wounds, leading to devastating injuries that quickly became fatal.[7] Six children were able to run out of a classroom past the shooter to safety, however, when the shooter's weapon jammed.[8] The delay incurred by a weapon malfunction or having to reload saves lives and illustrates the utility of eliminating access to weapons that enable one individual to kill an entire classroom of children without pausing.

After suffering the impact of a similar mass shooting in a movie theater, Colorado also limited permissible magazine capacity. There, the shooter killed twelve and injured another fifty-eight people in a matter of minutes. Authorities afterward determined the loss of life could have been even greater if his assault

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[7] James Barron, *Children Were All Shot Mulitple Times with a Semiautomatic, Officials Say*, N.Y. Times, Dec. 15, 2002, http://www.nytimes.com/2012/12/16/nyregion/gunman-kills-20-children-at-school-in-connecticut-28-dead-in-all.html?pagewanted=all.

[8] Dave Altimari & Steven Goode, *Details Emerge on Sandy Hook Shooting, Items Found in Lanza Rooms*, Hartford Courant, Oct. 19, 2013, http://articles.courant.com/2013-10-19/news/hc-sandy-hook-shooting-details-20131018_1_nancy-lanza-adam-lanza-20-first-graders.

rifle—with a 100-round magazine—had not jammed.[9] Legislatures, however, cannot entrust the safety of their citizens to the fortuity of a weapon malfunction. Where Connecticut found that ten rounds was the appropriate maximum for magazines, Colorado set the limit at fifteen rounds. Colo. Rev. Stat. § 18-12-301(2)(a)(1). Such legislation exemplifies the experimentation by the states the Supreme Court endorsed in *McDonald* as they strive to balance retaining lawful uses of firearms with eliminating access to weapons that empower a malevolent actor to cause a massacre in minutes.

III. THE WEAPONS REGULATED BY THE ACT ARE NOT COMMONLY USED FOR LAWFUL PURPOSES AT THE TIME.

Even assuming that the weapons regulated are not categorically excluded from the scope of the Second Amendment, under the first prong of the *Heller* test, a court must determine whether the weapons that are the subject of regulation fall within the scope of Second Amendment protection. *Heller* stands for the proposition that a weapon is only protected if it is (A) commonly used (B) "at the time" for (C) lawful purposes such as self-defense in the home. The regulated

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[9] David A. Fahrenthold et al., *Aurora, Colo., Shooting Spree: A Day of Tears for Victims and Twists in Case*, Wash. Post, July 22, 2012, http://www.washingtonpost.com/national/explosives-removed-from-james-holmess-apartment-and-destroyed-officials-say/2012/07/22/gJQAL9XN2W_story.html

weapons must meet each of these criteria in order to qualify for protection. 554 U.S. at 627.

A. The Weapons Possessing The Regulated Characteristics Are Not Commonly Used.

In *Heller*, the Supreme Court held that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . . ." *Id*. at 625. The Court noted that historically "the sorts of weapons protected were those 'in common use at the time.'" *Id*. at 627 According to *Heller*, possession in the home of all handguns could not be totally banned because they are "*overwhelmingly chosen* by American society" for self-defense. *Id*. at 628 (emphasis added). According to the Court, "the American people have considered the handgun to be *the quintessential self-defense weapon*," and "[w]hatever the reason, handguns are *the most popular weapon chosen by Americans* for self-defense in the home . . . ." *Id*. at 629 (emphasis added). No other weapon has been shown to be as popular for self-defense in the home, and the Court did not explain whether any lower level of "use" could be deemed "common." *Id*. at 627.

However, under any reasonable interpretation, the assault weapons regulated by the Act are not in common use. First, the assault weapons that Plaintiffs focus upon – semiautomatic rifles and shotguns that possess the characteristics identified by the Act – are not the "quintessential self-defense weapon" or "the most popular weapon chosen by Americans for self-defense in the home" because there is no

evidence that the level of use of weapons regulated by the Act remotely approaches the level of handgun use. *Id*. at 629. Plaintiffs do not even attempt to argue otherwise.

B. The Weapons Possessing The Regulated Characteristics Are Not In Common Use At The Relevant Time.

According to *Heller*, "the sorts of weapons protected were those 'in common use at the time' . . . ." *Id.* at 627. The Court did not elaborate on what it meant by "at the time." *Id.* It would be unreasonable to look only to the day on which the statute was enacted as the relevant reference point. Suppose, for example, that a new, unregulated and highly lethal weapon were developed. When it is first offered for sale, the weapon would not be protected because it would not be in common use. However, if sales of the weapon grew explosively over the next year, then the weapon would, within that short period, become constitutionally protected, even though a ban would have been permissible had the legislature acted just a few months earlier. Such an approach makes little sense. If "common use at the time" is a relevant criterion, then the reference period must at least include a reasonable period of time for the legislature to assess and respond to changes in the marketplace.

Even if semiautomatic rifles have existed for a recognizable period of time, they were not in common use for self-defense throughout that period. In fact, the Sheriffs' brief demonstrates that large sales of AR-15s are a relatively recent

phenomenon. Between 1986 and 2004, on average fewer than 100,000 AR-15s were sold annually.[10] The weapons clearly were not in common use at that time, in part because their use was prohibited by the federal weapons ban. Purchases spiked after the expiration of the weapons ban in 2004, peaking in 2009 at well over 500,000 units sold. It cannot be that, in 2004, a ban on AR-15s was constitutional but not five years later.

Plaintiff's analysis becomes more absurd particularly with respect to regulations covering, not the basic weapon (*e.g.*, semiautomatic rifles), but particular characteristics of that weapon, such as particular grips, that are even more likely than entirely new classes of weapons to grow quickly in popularity. If a major gun manufacturer devised a particularly appealing hand grip, which it then incorporated into all of its otherwise standard rifles, hundreds of thousands of guns with that particular hand grip could be manufactured and sold then within a very

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[10] *See* Marianne W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Guns Used in Crime* 6 (1995), *available at* http://www.bjs.gov/content/pub/pdf/GUIC.PDF assault weapons constituted about 1% of guns in circulation prior to federal assault weapons ban); Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003 (Report to National Institute of Justice, U.S. Dep't of Justice)* 10 (2004), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf ("Around 1990, there were an estimated 1 million privately owned AWs in the U.S. (about 0.5% of the estimated civilian gun stock) . . . .").

short period of time. Under Plaintiff's argument, Second Amendment protection would then adhere not just to the category of gun (semiautomatic rifles) but to guns with that particular *hand grip*.

If "common use at the time" is the criterion to be applied, then "the time" must at least be understood to cover a historically representative period of time during which the weapons exhibiting the particular characteristics were available and widely used for lawful purposes of self-defense. *Heller*, 554 U.S. at 627. Again, no evidence supports that the secondary characteristics regulated by the Act have been in common use for such a historically-representative period of time, which may warrant the protection of the Second Amendment.

C. The Characteristics Prohibited By The Act Are Not Related To Self-Defense In The Home.

In order to bring the regulated weapons within the scope of Second Amendment protection, such common use must have been for a lawful purpose, and not for illegitimate purposes such as violent crime or the threat of violent crime. The primary "lawful purpose" identified by the Supreme Court is self-defense within the home. According to *Heller*, self-defense "was the *central component* of the right itself."[11] As stated in *Kachalsky*, "[w]hat we know from

[11] *See also McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (the Supreme Court reiterated its "central holding in *Heller*" that "the Second Amendment

these decisions is that Second Amendment guarantees are at their zenith within the home."

Therefore, a critical question in determining whether the Act oversteps Constitutional bounds is whether the regulation impinges on the ability of the weapons to serve their basic function of self-defense in the home or for any other lawful purpose. Indeed, the functionality of the weapon was at the heart of the *Heller* decision particularly when examining the constitutionality of D.C. gun law that required that handguns be disabled in the home. According to the Court, that requirement "makes it impossible for citizens to use [the firearm] for the core lawful purpose of self-defense, and is hence unconstitutional."[12] The functionality is not the technical difference as Plaintiffs argue, but rather the general availability and utility of the weapon.

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protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home").

[12] *See also Decastro*, 682 F.3d at 165 ("Throughout, *Heller* identifies the constitutional infirmity in the District of Columbia laws in terms of the burden on the ability of D.C. residents to possess firearms for self-defense. The Court emphasized . . . that the mandate to disable all firearms 'makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.'"); and *Nordyke v. King*, 563 F.3d 439, 458 (9th Cir. 2009) ("*Heller* tells us that the Second Amendment's guarantee revolves around armed self-defense. If laws make such self-defense impossible in the most crucial place – the home – by rendering firearms useless, then they violate the Constitution").

If regulating the underlying characteristics of the weapon does not undermine its utility for self-defense, then the regulation falls outside the scope of the Second Amendment. *Marzzarella*, 614 F.3d at 94. The Act's restrictions do not impact a semiautomatic weapon's utility for self-defense. As noted, the Act does not prohibit all semiautomatic weapons, but only those that possess the enumerated characteristics. The prohibited and permitted weapons serve equally well for purposes of self-defense in the home—the permitted weapons do not serve equally well, however, for the commission of mass murder. As a logical conclusion, the Act does not eviscerate the Second Amendment protection given that it does not inhibit possession and use of any such functionally-identical firearms that are proven to effectively serve the lawful purposes.

Although the basis is not entirely clear, NRA appears to contend that the Second Amendment protects the gun features regulated by the Act because they improve the usefulness and accuracy of shooting. If the technical accuracy and user-friendliness of a gun should be the criteria for constitutional protection, it would practically invalidate any governmental efforts to restrict the type of guns that can be distributed to the civilians and would prevent legislation that banned machine-guns or other military-type weapons that are lethally accurate and highly efficient.

In line with the above reasoning, the D.C. Circuit in *Heller II* upheld prohibition of assault weapons and large-capacity magazines, which are strikingly similar to those at issue here. The D.C. Circuit admitted that it is difficult to draw meaningful distinction between the semiautomatics, namely AR-15, and the M-16, *Heller II*, 670 F.3d at 1263, citing that the Supreme Court once described AR-15 as "the civilian version of the military's M-16 rifle." *Staples v. United States*, 511 U.S. 600, 603 (1994).

Also, the D.C. Circuit correctly pointed out that prohibition of semiautomatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves, notably, because the prohibition left a person "free to possess any otherwise lawful firearm." 670 F.3d at 1262. As this demonstrates, the point of review over a gun regulation must be on its effect on the ability of citizens to defend themselves, and not certain types and classes of firearms.

Based on similar reasons as the case of assault weapons, a 10-round magazine limit is constitutional because it does not fall under the scope of the Second Amendment protection. A 10-round magazine limit is simply not a burden on gun ownership or the ability to possess guns for self-defense of the home. This limitation does not and cannot disarm any Americans. It does, however, prevent

misuse of firearms to commit mass murder, and will save lives by giving innocent people the split-second opportunity needed to escape or disable the shooter.[13]

IV. EVEN ASSUMING THE ACT IMPLICATES THE SECOND AMENDMENT, THE REQUIREMENTS OF THE ACT SATISFY INTERMEDIATE SCRUTINY REVIEW.

As explained above, the weapons regulated by the Act do not fall within the scope of Second Amendment protection. However, even if they do, the restrictions in the Act should be subject to intermediate scrutiny, a standard that the Act clearly satisfies. Intermediate scrutiny is the strongest form of scrutiny that remains consistent with the *McDonald* Court's endorsement of state experimentation with "reasonable firearms regulations." Elevating the analysis of gun laws to the stringent test applied to laws that engage in racial categorization would empty the Court's statement of all meaning.

First, after *Heller*, lower court decisions have almost uniformly analyzed challenges such as those under review here pursuant to the intermediate scrutiny. This Court and the Third, Fourth, Fifth and Tenth Circuits have applied

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[13] *See, e.g.*, Mark Follman et al., *More Than Half of Mass Shooters Used Assault Weapons and High-Capacity Magazines*, Mother Jones, Feb. 27, 2013, http://www.motherjones.com/politics/2013/02/assault-weapons-high-capacity-magazines-mass-shootings-feinstein.

intermediate scrutiny in the context of the Second Amendment.[14] Indeed, the standard used most often by state courts in analogous situations is intermediate scrutiny within a "reasonable-regulation" framework – meaning that the applicable standard is whether the Connecticut legislature is reasonable in enacting prophylactic measures directed at saving lives or reducing serious crime. 670 F.3d at 1256. *See, e.g.*, *Lewis v. United States*, 445 U.S. 55, 66-67 (1980).

Second, the level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. 628 F.3d at 682. After duly acknowledging the Heller's focus on "core" Second Amendment conduct and the Court's frequent references to First Amendment doctrine, the Fourth Circuit in *Chester* elected to apply strict scrutiny only for severe burdens on the armed self-defense while endorsing an easy justification of the laws that do not implicate the central self-defense concern of the Second

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[14] *See United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny to a ban on firearm possession by domestic violence misdemeanants); *Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny to a law criminalizing possession of guns with obliterating serial numbers); *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013) (Lucero, J., concurring) (explaining that, for Colorado's ban on carrying concealed weapons in public, if Second Amendment protection were available, the appropriate constitutional test is intermediate scrutiny); *see also NRA v. ATF*, 700 F.3d 185, 205 (5th Cir. 2012) (assuming that the challenged federal laws (prohibiting persons under 18 from possessing handguns) burdened conduct in the scope of the Second Amendment, finding that such laws "trigger nothing more than 'intermediate' scrutiny.").

Amendment under intermediate scrutiny. *Id.* Given the varying degrees of burden on Second Amendment rights and diverse spectrum of governmental regulations, "one-size-fits-all standard of review" is purely impossible. *Id.*

The relevant scrutiny applicable to the Act is intermediate scrutiny. First, the Act does not infringe the "core" rights guaranteed by the Second Amendment. *Id.* Plaintiffs fail to show that the Act imposes any meaningful burden on their rights to possess firearms in the home for self-defense. Under the Act, it is clear that individuals who are not otherwise disqualified by operation of law can maintain a wide variety of handguns, rifles, or shotguns to protect themselves in their homes. The magazine capacity also does not impose serious burden on the armed self-defense by law-abiding citizens.

Second, the Act does not restrict, but regulate the possession of firearms. Under the Act, there is no ban on firearms that have been typically used to facilitate self-defense; only certain identification of dangerous features, which simply regulates the manner of possession. Again, the Third Circuit has ruled that prohibition that left a person free to possess any otherwise lawful arms "is more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights." *Marzzarella*, 614 F.3d at 97. Third, regulation of gun ownership is not a modern invention – it is a practice that was accepted by the founders. It is well-settled that firearms have always been

subject to police-power regulation in the states. Fourth, because of the important government interest at stake[15] and the slight burden they impose on any Second Amendment right, the Act may be more easily justified than other types of gun regulations. As explained above, the firearms Connecticut seeks to ban are not the quintessential self-defense weapons. Rather, these firearms are dangerous and unusual outliers. [16] They are not the type of firearms that are typically used for self-defense in the home.[17] In fact, a semiautomatic weapon with, for example, a large magazine may be more dangerous (and therefore less suited for self-defense)

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[15] Because the State's interest in regulating deadly assault weapons in this arena is abundantly clear and extremely important, it could be fairly be argued that an less stringent standard than intermediate scrutiny could be utilized.

[16] It is important to note that Congress has historically prohibited private possession of particularly dangerous types of firearms. For example, possession of machine guns is categorically prohibited, *see* 18 U.S.C. § 922(o), and a similar restriction as to "semi-automatic assault weapons" was in effect until 2004 pursuant to a pre-existing sunset provision. *See* § 922(v)(1). Congress has also restricted possession of firearms by various categories of individuals deemed unfit to possess such weapons, § 922(g)(1) and prohibited possession of firearms at specific locations. 18 U.S.C. § 930. Further, federal law also regulates the manufacturing, sale and importation of firearms. *See* 18 U.S.C. § 923; § 922(a).

[17] *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. Crim. L. & Criminology 150, 185 (1995) (revolvers and semi-automatic pistols are used almost 80% of the time in incidents of self-defense); *see also* Department of Treasury, *Studying the Sporting Suitability of Modified Semiautomatic Assault Rifles* 38 (1998) (finding semi-automatic assault rifles are "not generally recognized as particularly suitable for or readily adaptable to sporting purposes).

given that the ability to fire a burst of bullets in a short period of time increases the risk of accidental shootings of innocent others in the household, passerby and bystanders. *Heller II*, 670 F.3d at 1264.

To pass muster under intermediate scrutiny, the government must show that the requirements of the legislation are "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). That standard has been met.

The legislative object of the Act is extremely important and even compelling given that the stake here literally is one of life or death. Under these circumstances, the state interests and objectives (to protect its citizenry from maiming and death) are at their strongest. The Connecticut legislature passed the Act to protect its citizens in the aftermath of a horrendous shooting attack involving an assault weapon with high capacity magazines and the legislation regulates the type of assault weapon and magazines used in that shooting. In applying intermediate standard of review, such important regulatory interests are typically sufficient to justify reasonable restrictions. *Cf. Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Given the clear data demonstrating that assault-weapons are much more likely than other firearms to be used in acts of violence and in mass shootings, Connecticut's well-balanced legislative action to define the specific features of

assault-weapons is substantially related to and eminently serves the important government purpose of protecting the lives of its citizens. Indeed, the subset of guns that Connecticut is focusing on is one which is "preferred by criminals over law-abiding citizens eight to one." *See* Brady Center to Prevent Gun Violence, *Assault Weapons "Mass Produced Mayhem,"* at 10 (2008). Regardless of whether only a small percentage of firearms are "assault weapons," (perhaps only 1-2% of all firearms qualify as "assault weapons") these types of firearms continue to be responsible for a disproportionately higher number of mass shootings. From the mass shootings in Aurora, through Newtown, and to date, 42 guns with high capacity magazines were used across 31 mass shooting cases. Twenty assault weapons were used across 14 mass shooting cases, and 33 cases involving assault weapons, or high capacity magazines, or both. In 2012 alone there were 7 mass shootings and a record number of casualties stemming from gunfire (140 annual mass shooting casualties). Furthermore, not one (out of 62) mass shootings in the U.S. in the past 30 years, has been stopped by a civilian with a gun. [18]

Plaintiffs argue that the use of highly-sophisticated guns by such criminals enables them to be equipped with equivalent arms with the same level of accuracy and capacity. However, *Heller* or *McDonald* made no suggestion that the Second

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[18] Follman, *supra* note 13.

Amendment constitutionally protects highly-destructive weapons capable of killing vast number of people, merely because some sophisticated criminals might have access to such weapons. That argument ultimately leads to an absurd conclusion that any gun law is futile (and even constitutionally invalid), because criminals will likely ignore such laws anyway. Instead, those laws enable prosecution of those criminals for possessing highly-destructive weapons *before* they can use them in criminal activity. Further, the perpetrators of mass shootings often obtain their weapons legally,[19] like the Sandy Hook shooter whose mother lawfully owned the assault weapon he used in his massacre[20] and the Aurora shooter who purchased them himself.[21]

Throughout the United States, similar types of bans have been upheld. *See e.g.*, *Arnold v. Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993); *compare McDonald*, 130 S. Ct. at 3047 (noting the "paucity of precedent sustaining bans comparable

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[19] Mark Follman et al., *A Guide to Mass Shootings in America*, Mother Jones, May 24, 2014, http://www.motherjones.com/politics/2012/07/mass-shootings-map.

[20] Matt Flegenheimer & Ravi Somaiya, *A Mother, a Gun Enthusiast, and the First Victim*, N.Y. Times, Dec. 15, 2012, http://www.nytimes.com/2012/12/16/nyregion/friends-of-gunmans-mother-his-first-victim-recall-her-as-generous.html

[21] Michelle Castillo, *Colo. Shooter Purchased Guns Legally from 3 Different Stores*, CBS News, July 20, 2012, http://www.cbsnews.com/news/colo-shooter-purchased-guns-legally-from-3-different-stores/.

to" the Chicago handgun ban invalidated in that case); *cf. Navegar, Inc. v. United States*, 192 F.3d 1050, 1053 (D.C. Cir. 1999) (upholding federal assault weapons ban against challenges not involving the Second Amendment).

Most notably, *Heller II* has upheld the strikingly-similar D.C. laws under intermediate scrutiny based on evidence demonstrating that the D.C. laws are likely to promote the Government's interest in crime control in the densely populated urban area. Plaintiffs wrongly argue that *Heller II* decision adopted interest-balancing approach which was condemned by Supreme Court in *Heller*. However, *Heller II* is in line with the Supreme Court's guidance in *Heller* as it embodies the line of reasoning of *Heller* through utilizing the two-pronged test. Plaintiffs raised no compelling argument that *Heller II* ignored *Heller* and merely criticized the general citations of *Turner* occasionally made in majority panel opinion in *Heller II*. Plaintiffs accuse the DC Circuit in *Heller II* of allowing the government to pick and choose arms for lawful purposes. However, that was exactly what has been explicitly reserved by Supreme Court in *Heller*, which explicitly validated a ban on unusual and dangerous weapons.

CONCLUSION

Under the principles established by *Heller* and *McDonald*, a ban on assault weapons and its requirement of a 10-round or fewer loading limit do not implicate Second Amendment rights. Even assuming that they do, they are constitutionally

justified under intermediate scrutiny as they impose no severe burden on the core self-defense rights under the Second Amendment and substantially serve the important government purpose of protecting the lives of citizens from dangerous and unusual weapons predominantly used for criminal violence. Connecticut's decision to eliminate the presence of these weapons is the model of a reasonable firearm regulation tailored to protect its citizenry from the known danger of mass shootings.

For the reasons set forth above, the Brady Center and the Crawford Black Bar Association respectfully request that the decision of the district court rejecting Plaintiff's Second and Fourteenth Amendment claims should be affirmed.

Respectfully submitted,

/s/ Paul B. Carberry
Paul B. Carberry
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8507

Attorney for Amici Curiae Brady Center to Prevent Gun Violence and George W. Crawford Black Bar Association

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) and 29(d) because this brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 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 Microsoft Word 2010 in Times New Roman font, size 14.

/s/ Paul B. Carberry

Paul B. Carberry
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8507

Attorney for Amici Curiae Brady Center to Prevent Gun Violence and George W. Crawford Black Bar Association