

# 14-319-CV

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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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,*

—against—

*(Caption continued on inside cover)*

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ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT OF CONNECTICUT

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**BRIEF FOR *AMICI CURIAE* LAW CENTER TO PREVENT GUN  
VIOLENCE, CONNECTICUT AGAINST GUN VIOLENCE,  
AND CLEVELAND SCHOOL REMEMBERS**

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## **CORPORATE DISCLOSURE STATEMENT**

*Amicus curiae* Law Center to Prevent Gun Violence does not have any parent company. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

*Amicus curiae* Connecticut Against Gun Violence does not have any parent company. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

*Amicus curiae* Cleveland School Remembers does not have any parent company. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

## **INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amicus curiae* the Law Center to Prevent Gun Violence (“the Law Center”) is a non-profit, national law center dedicated to reducing gun violence and the devastating impact it has on communities. The Law Center focuses on providing comprehensive legal expertise to promote smart gun laws. These efforts include tracking all Second Amendment litigation nationwide and providing support to jurisdictions facing legal challenges. As an *amicus*, the Law Center has provided informed analysis in a variety of firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

The Law Center has a particular interest in this litigation because it was formed in the wake of an assault weapon massacre at a San Francisco law firm in 1993. The shooter in that rampage was armed with two assault weapons and multiple large capacity ammunition magazines, some capable of holding up to 50 rounds of ammunition.

*Amicus curiae* Connecticut Against Gun Violence (“CAGV”) has been since 1993 the predominant statewide gun violence prevention organization in

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<sup>1</sup> Amici make the following disclosure pursuant to Fed. R. App. P. 29(c)(5): no party’s counsel authored this brief in whole or in part. No party, party’s counsel, nor any other person contributed any money to fund the preparation or submission of this brief, other than amici. All parties have consented to the filing of this brief.

Connecticut. Its mission has been to reduce gun violence through education and legislative advocacy. Its members and supporters number more than 30,000 Connecticut residents. The organization has been involved in every legislative effort to reform gun safety law since its founding in 1993. It was in the forefront of the legislative campaign following the Sandy Hook Elementary school shooting, including the organization of a grass roots effort that played a critical role leading to the major reforms included in Public Act 13-3, signed into law by Governor Dannel Malloy on April 4, 2013. In its effort to keep communities, families, and children safe from gun violence, CAGV has strongly advocated the position that the changing nature of weapons towards more powerful, military style ones is a major threat to the public safety of the people of Connecticut.

*Amicus curiae* Cleveland School Remembers is a grassroots group motivated to organize in the aftermath of the Sandy Hook Elementary School shooting of December 14, 2012. The founding members were teachers and staff at Cleveland Elementary School in Stockton, California in January of 1989 when a gunman with a semi-automatic assault weapon equipped with large capacity magazines came onto their campus and murdered five students and wounded 32 others, including a teacher, in just three minutes. In the aftermath of the Cleveland School shooting, the California Legislature enacted a ban on assault weapons and adopted a ban on large capacity ammunition magazines in 2001.

Cleveland School Remembers works locally and nationwide to bring about strong, enforceable gun violence prevention legislation through affiliations with education, law enforcement, and other organizations. The organization supports laws banning assault weapons and large capacity magazines.

The Law Center, CAGV and Cleveland School Remembers all filed an amicus brief in this case before the District Court.

### **SUMMARY OF ARGUMENT**

On December 14, 2012, a man walked into Sandy Hook Elementary School in Newtown, Connecticut, carrying an assault weapon with large capacity ammunition magazines and hundreds of rounds of ammunition. He shot 20 children and six adults before turning the gun on himself – all *within five minutes*. In that very short time, the gunman fired 155 bullets and shot each of his victims multiple times, including one six-year-old who was shot 11 times. To prevent such tragedies from happening again, Connecticut strengthened its longstanding ban on assault weapons and added a ban on the possession or transfer of large capacity ammunition magazines, enacting the Gun Violence Prevention and Children’s Safety Act (the “Act”).

The District Court upheld the Act, holding that the Act’s regulations are “substantially related to the important governmental interest of public safety and

crime control.” SPA-4. This Court should affirm the District Court’s order. The Act is completely consistent with the Second Amendment.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court held that the Second Amendment protects the right of law-abiding, responsible citizens to possess an operable handgun in the home for self-defense. The Act does not conflict with this right, as residents may lawfully purchase and possess numerous handguns and ammunition magazines for use in self-defense. Appellants, however, demand that this Court radically extend *Heller* to protect the possession of assault weapons and large capacity ammunition magazines, devices of military origin designed to kill large numbers of people quickly and efficiently. *Heller* does not support such an extension and, as courts elsewhere have ruled, the Second Amendment does not guarantee the right to possess these devices, which are frequently employed in mass shootings and attacks on law enforcement and are not suitable for self-defense.

Appellants’ challenge to the Act fails because the Act does not burden the Second Amendment. However, even if it does implicate the Second Amendment, the Act clearly passes constitutional muster under intermediate scrutiny, the applicable standard of review.

## ARGUMENT

### I. THE ACT REGULATES CONDUCT WHICH FALLS OUTSIDE THE SCOPE OF THE SECOND AMENDMENT RIGHT RECOGNIZED IN *HELLER*.

#### A. Background of the Act.

Since 1993, the State of Connecticut, like many other state and local governments nationwide, has prohibited assault weapons. Conn. Gen. Stat. § 53-202b et seq. The Act revised the definition of “assault weapons” to include semiautomatic rifles, shotguns, and pistols that have any of a number of specifically enumerated characteristics that enable the firing of over a hundred bullets per minute, aid in the commission of mass murders and assaults, or facilitate the weapon’s concealment. See Conn. Gen. Stat. § 53-202a(1)(E). Plaintiffs’ challenge focuses on three of these characteristics:

- A folding or telescoping stock. This feature promotes concealment and mobility, allowing shooters to easily hide their weapons before a rampage and move from place to place during mass killings.
- A pistol grip that protrudes conspicuously beneath the action of the weapon. This feature allows a shooter greater control during rapid fire (when the barrel of the gun can jump and quickly get too hot to hold), making it deadlier.
- A thumbhole stock. This feature also helps a shooter retain control of a firearm while holding the firearm at the hip, facilitating the spraying of rapidly-fired ammunition, making it easier to kill many people quickly.

These features have nothing to do with lawful self-defense in the home and everything to do with enabling the shooter to unleash maximum levels of carnage as quickly as possible.

Connecticut also enacted a prohibition on the possession or transfer of any “magazine, belt, drum, feed strip, or similar device that has the capacity of, or can be readily restored or converted to accept, more than ten rounds of ammunition”. Conn. Gen. Stat. § 53-202p(a)(1), 53-202p(b). The Act requires that persons possessing such magazines either lawfully dispose of them, register them and keep them at home, or permanently alter them to limit the device’s capacity to no more than 10 rounds of ammunition. Conn. Gen. Stat. §§ 53-202p(e)(3), 53-202q(f)(7), 53-202p(a)(1).

State and local governments across the country have adopted laws restricting civilian access to assault weapons and large capacity ammunition magazines (“LCMs”) because of the devastating role they repeatedly play in mass shootings.<sup>2</sup> The shooting rampage at Sandy Hook is one of the more recent examples of the

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<sup>2</sup> See H.B. 13-1224, 69th Gen. Assemb., Reg. Sess. (Colo. 2013); N.Y. Penal Law §§ 265.02(7)-(8), 265.37; Cal. Penal Code §§ 12275-12290 (2013); Haw. Rev. Stat. Ann. §§ 134-1, 134-4, 134-8 (2013); Md. Code Ann., Crim. Law §§ 4-301-4-306 (2013); Mass. Gen. Laws ch. 140, §§ 121-123, 131, 131M (2013); N.J. Stat. Ann. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13 (2013); D.C. Code Ann. §§ 7-2551.01 – 7-2551.03; Cook Cnty. Code of Ordinances §§ 54-211 – 54-213; New York City Admin. Code § 10-301; San Francisco Police Code § 619; Sunnyvale Municipal Code § 9.44.030-60.



enormous public safety threat posed by assault weapons and LCMs. This threat is not new, however. For example:

- In July 1993, a shooter armed with assault weapons and LCMs killed nine people and injured six others at a law firm in San Francisco.<sup>3</sup>
- In December 1993, a shooter armed with LCMs killed six people and wounded 19 others, on a Long Island Rail Road train.<sup>4</sup>
- In April 2009, a shooter armed with two semiautomatic pistols, two 30-round and two 15-round LCMs killed 13 people and wounded four others in Binghamton, New York.<sup>5</sup>
- In January 2011, a shooter killed six people and wounded 13 others, including Congresswoman Gabrielle Giffords, in a parking lot in Tucson using a LCM holding 33 rounds.<sup>6</sup>
- In July 2012, a gunman killed 12 people and wounded 58 others in a movie theater in Aurora, Colorado, armed with, among other firearms, an AR-15 assault rifle with a 100-round ammunition magazine.<sup>7</sup>

Criminals disproportionately use both assault weapons and LCMs in two categories of crimes: those with multiple victims and those that target law

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<sup>3</sup> Karyn Hunt, *Gunman Said to Have List of 50 Names*, Charlotte Observer, July 3, 1993, at 2A. This tragedy led to the formation of *amicus* Law Center to Prevent Gun Violence.

<sup>4</sup> Wikipedia page, available at [http://en.wikipedia.org/wiki/Colin\\_Ferguson\\_\(mass\\_murderer\)](http://en.wikipedia.org/wiki/Colin_Ferguson_(mass_murderer)).

<sup>5</sup> Citizens Crime Commission of New York City, *Mass Shooting Incidents in America (1984-2012)*, <http://www.nycrimecommission.org/mass-shooting-incidents-america.php>.

<sup>6</sup> Violence Policy Ctr., *Mass Shootings in the United States Involving High Capacity Ammunition Magazines*.

<sup>7</sup> Dan Frosch and Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. Times, July 21, 2012, at A1.

enforcement. On average, shooters who use assault weapons or LCMs in mass shootings shoot 151% more people, and kill 63% more people than shooters who do not.<sup>8</sup> In light of these alarming facts, the Connecticut Legislature enacted the Act to strengthen prohibitions on the possession of assault weapons and LCMs.

**B. The Second Amendment Does Not Protect a Right to Possess LCMs.**

In *Heller*, the Supreme Court held that the Second Amendment right to bear “arms” protects the right of responsible, law-abiding citizens to possess a handgun in the home for self-defense. 554 U.S. at 635. However, the Court cautioned that the Second Amendment right is “not unlimited” and does not confer a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at 626. Furthermore, the Court explicitly excluded certain classes of weapons from the scope of the Second Amendment, endorsing the “historical tradition of prohibiting the carrying of dangerous and unusual weapons.” *Id.* at 627. For the reasons explained below, LCMs are not protected by the Second Amendment right to bear “arms” and the provisions of the Act regulating such magazines are constitutional.

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<sup>8</sup> Mayors Against Illegal Guns, Analysis of Recent Mass Shootings, [s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/analysis-of-recent-mass-shootings.pdf](https://s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/analysis-of-recent-mass-shootings.pdf).

## 1. LCMs Are Not “Arms.”

As a threshold matter, the right protected under the Second Amendment applies only to “arms.” *See Heller*, 554 U.S. at 581. The *Heller* Court undertook to define “arms,” looking first to the 1773 edition of Samuel Johnson’s dictionary, which defined “arms” as “weapons of offence, or armour of defence.” 554 U.S. at 581 (*citing* 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). A LCM is not a “weapon of offence” or “armour.” Instead, it is a special type of ammunition storage device, which merely enhances a firearm’s ability to fire more rounds without reloading; it is neither an integral nor necessary component of the vast majority of firearms.<sup>9</sup>

While a magazine necessary to supply a firearm with *some* number of bullets may be considered integral to its core functionality, the same cannot be said of a magazine that expands that supply beyond 10 rounds. This principle is grounded in America’s historical experience with handguns. Prior to the 1980s, the most common type of handgun was the revolver, which typically holds five or six rounds of ammunition. It was only during the 1980s that the firearms industry began focusing on the production and aggressive marketing of semiautomatic

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<sup>9</sup> The *Heller* majority also relied on a historical legal definition of the term “arms:” “Servants and labourers shall use bows and arrows on Sundays, . . . and not bear other arms.” *Heller*, 554 U.S. at 581 (citing Timothy Cunningham, *A New and Complete Law Dictionary* (2d ed. 1771)). The definition is instructive here: guns are like bows and bullets are like arrows, but the analog to a LCM – the quiver – is conspicuously *not* an “arm.”

pistols, which can accept larger ammunition magazines.<sup>10</sup> As a result, for the majority of the last century and a half, an American using a handgun in the home for self-defense could fire six rounds before reloading. There is no evidence to suggest this was inadequate for self-defense purposes and, in fact, there is good reason to believe that access to more rounds per magazine may only create a significant threat to public safety.

As non-essential items that merely enhance a feature beyond what was traditionally available, LCMs are not “arms,” but, rather, firearm *accessories*. Historical sources support the conclusion that firearm accessories are separate and distinct from “arms.” In Justice Stevens’ *Heller* dissent, he cited The Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2, stating: “The Virginia military law, for example, ordered that ‘every one of the said officers . . . shall constantly *keep* the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for. . . .” *Heller*, 554 U.S. at 650 (Stevens, J., dissenting). This source specifically differentiates between “arms,” “ammunition,” and “accoutrements.” LCMs are not arms, *nor are they ammunition*. They fall most readily into the category of accoutrements—i.e., accessories, akin to today’s detachable scopes or silencers. Accessories that do not

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<sup>10</sup> Violence Policy Center, *Backgrounder on Glock 19 Pistol and Ammunition Magazines Used in Attack on Representative Gabrielle Giffords and Others* (Jan. 2011), available at [http://www.vpc.org/fact\\_sht/AZbackgrounder.pdf](http://www.vpc.org/fact_sht/AZbackgrounder.pdf).

affect the weapon's core functionality are not "arms" and their use falls outside of the Second Amendment.

As one court recently found after a full trial, prohibitions on LCMs do not deprive gun owners of the magazines they need for their weapons to function. *See Colorado Outfitters Assoc'n v. Hickenlooper*, Civ. Action No. 13-cv-01300, 2014 WL 3058518, at \*14 (D. Col. June 26, 2014) ("The parties agree that semiautomatic weapons that use large-capacity magazines will also accept compliant magazines . . . and that compliant magazines can be obtained from manufacturers of large-capacity magazines. Thus, this statute does not prevent the people of Colorado from possessing semiautomatic weapons for self-defense, or from using those weapons as they are designed to function.").

The firearm industry itself categorizes magazines as accessories, not as firearms. A search of online firearm retailers shows that businesses intimately involved in the firearm industry classify magazines as accessories. For instance, Mississippi Auto Arms, Inc. organizes its online store by item type, differentiating between items such as "firearms" and "ammunition," offering magazines for sale under an entirely separate category: "accessories."<sup>11</sup> Atlantic Firearms, Guns America, and Palmetto State Armory similarly categorize magazines as

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<sup>11</sup> *See id.* at [http://www.mississippiautoarms.com/sort-by-item-magazines-c-169\\_177.html](http://www.mississippiautoarms.com/sort-by-item-magazines-c-169_177.html).

accessories, not firearms.<sup>12</sup> Where the firearm industry itself defines a magazine as an accessory rather than an “arm,” it bends credulity to assume otherwise.<sup>13</sup>

Amici do not contend that ammunition is not within the category of “arms,” nor that compliant magazines are not “arms.” Rather, Amici’s assertion is that LCMs, accessories which enhance ammunition storage well above and beyond traditional functionality, are not arms. Unlike ammunition, most firearms are completely operable without LCMs and function perfectly well with compliant magazines. A prohibition on LCMs has no impact whatsoever on the core functionality of the vast majority of firearms. *Compare Jackson v. San Francisco*, 746 F.3d 953, 967 (9<sup>th</sup> Cir. 2014) (Without the ability to obtain *ammunition* “the right to bear arms would be meaningless” by “mak[ing] it impossible to use firearms for their core purpose.” (citation omitted)).

Just as the Second Amendment does not protect a person’s right to possess other non-essential accessories, such as silencers, it does not protect a right to

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<sup>12</sup> See Atlantic Firearms, available at <http://www.atlanticfirearms.com/accessories.html>; Guns America, available at <http://www.gunsamerica.com/BrowseSpecificCategory/Parent/Non-Guns/ViewAll.htm>; Palmetto State Armory, available at <http://palmettostatearmory.com/index.php/accessories.html>.

<sup>13</sup> The State of Kansas recently defined “firearms accessories” as “items that are used in conjunction with or mounted upon a firearm but *are not essential to the basic function of a firearm*, including, but not limited to, telescopic or laser sights, *magazines*,...collapsible or adjustable stocks and grips, pistol grips, thumbhole stocks, speedloaders, [and] ammunition carries.” K.S.A. § 50-1203(b) (emphasis added).

possess LCMs. *See United States v. McCartney*, 357 Fed. Appx. 73, 76 (9th Cir. 2009) (silencers are “not protected by the Second Amendment.”).

**2. Even If LCMs Are “Arms,” They Are Still “Dangerous and Unusual” And Not Protected By The Second Amendment.**

Even if LCMs are “arms,” they are still not protected by the Second Amendment because they are “dangerous and unusual” weapons not typically possessed for lawful purposes. The *Heller* Court explicitly endorsed the “historical tradition of prohibiting the carrying of dangerous and unusual weapons” and held that the Second Amendment “does not protect those weapons not typically possessed by law-abiding citizens *for lawful purposes*.” *Id.* at 625, *aff’g United States v. Miller*, 307 U.S. 174, 178 (1939) (short-barreled shotguns not protected by the Second Amendment, because they are dangerous and unusual) (internal quotation omitted).

This Court has confirmed the limited nature of the Second Amendment right recognized in *Heller*: “[T]he Second Amendment right does not encompass all weapons, but only those ‘typically possessed by law-abiding citizens for lawful purposes’ and thus does not include the right to possess ‘dangerous and unusual weapons.’” *United States v. Decastro*, 682 F.3d 160, 165 n.4 (2d Cir. 2012) (quoting *Heller*, 544 U.S. at 625, 627). Courts outside the Second Circuit are also in accord. *See, e.g., United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008)

(machine guns not protected by the Second Amendment as those firearms fall “within the category of dangerous and unusual weapons”).

LCMs, which enable a shooter to fire high numbers of rounds without having to reload, are “dangerous and unusual” and inappropriate for lawful self-defense purposes. After hearing evidence at trial, the court in *Colorado Outfitters* recently found that “large capacity magazines are frequently used in gun violence and mass shootings . . . [and] there is a positive correlation between the firearm ammunition capacity and the average number of shots fired during criminal aggression.” *Colorado Outfitters*, 2014 WL 3058518, at \*16. In *Kolbe v. O’Malley*, a district court recently upheld Maryland’s ban on assault weapons and LCMs, citing evidence that both are used “disproportionately” in mass shooting and “in the killing of law enforcement officers.” *Kolbe v. O’Malley*, Civil No. CCB-13-2841, 2014 U.S. Dist. LEXIS 110976, at \*62-63 (D. Md. Aug. 12, 2014).

Their exceedingly dangerous nature makes LCMs a popular choice for criminals and inappropriate for self-defense in the home. See, e.g., *Hightower v. City of Boston*, 693 F.3d 61, 66, 71-72 & n.7 (1st Cir. 2012) (noting that “large capacity weapons” are not “of the type characteristically used to protect the home.”). According to a former Baltimore Police Colonel, “[t]he typical self-defense scenario in a home does not require more ammunition than is available in a standard 6-shot revolver or 6-10 round semiautomatic pistol. In fact, because of



potential harm to others in the household, passerby, and bystanders, too much firepower is a hazard.” See Brian J. Siebel, Brady Ctr. To Prevent Gun Violence, Assault Weapons: Mass Produced Mayhem 16 (2008), <http://www.bradiycampaign.org/sites/default/files/mass-produced-mayhem.pdf> (quoting *Police Fear a Future of Armored Enemies*, USA Today, Mar. 3, 1997, at 02A). LCMs exacerbate the threat of stray bullets, because “the tendency for defenders [is] to keep firing until all bullets have been expended.” *Id.*

Responsible, lawful self-defense does not encompass the ability of gun owners to spray dozens of bullets in the home without reloading. The *Colorado Outfitters* court held that a limitation on magazine capacity did not meaningfully impact “a person’s ability to keep and bear (use) firearms for the *purpose of self-defense*,” explaining that “[e]ven in the relatively rare scenario where the conditions are ‘ideal’ for defensive firing, there is no showing of a severe effect [of the magazine capacity limitation] on the defensive shooter.” *Colorado Outfitters*, 2014 WL 3058518, at \*14, \*15; see also *Kolbe* at \*47-48. LCMs are “dangerous and unusual” weapons, ill-suited for self-defense and not “typically possessed for lawful purposes,” which fall outside of the protection of the Second Amendment.

**C. The Second Amendment Does Not Protect a Right to Possess Assault Weapons.**

The Act also prohibits the possession of assault weapons. As discussed above, the Second Amendment right is “not unlimited” and should not be

understood to confer a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626. Moreover, the Second Amendment only protects those weapons “in common use at the time for lawful purposes” and does not protect “dangerous and unusual” weapons. *Id.* at 625 (quotations omitted). Assault weapons are a category of dangerous and unusual firearms totally different from the handguns at issue in *Heller*. Assault weapons are generally semiautomatic versions of fully automatic weapons designed for combat. For example, the AR-15 rifle, some versions of which are prohibited by the Act, was originally designed as a military weapon and issued primarily to combat troops. *See ArmaLite, A Historical Review of ArmaLite* 3, 12 (Jan. 4, 2010). For the reasons discussed below, assault weapons fall outside of the protection of the Second Amendment.

### **1. Assault Weapons Are Not in “Common Use.”**

The *Heller* Court held that the Second Amendment only protects those weapons “in common use at the time for lawful purposes like self-defense.” 554 U.S. at 624 (quotations omitted). Assault weapons are not commonly used or purchased by the public. While Appellants offer a lot of bluster about how supposedly common these weapons are, the numbers tell a different story. These weapons have historically only comprised a small percentage of the total firearms in circulation. *See* Marianne W. Zawitz, U.S. Dep’t of Justice, *Guns Used in*

*Crime* 6 (1995) (assault weapons constituted about 1% of guns in circulation prior to the federal assault weapons ban). As the District Court here noted, according to the testimony of Professor Lawrence Tribe, as of February, 2013, the rough numbers show that assault weapons currently account for only about “2.5%” of the guns owned in this country. SPA-6 n.14. Furthermore, while gun sales in America have risen in recent years, the percentage of households owning guns has sharply dropped, reflecting the fact that more firearms are being sold to an ever-smaller group of enthusiasts, concentrating gun ownership substantially.<sup>14</sup> Thus, assault weapon ownership is likely even less common than is suggested by the already meager raw figures. Unlike the right to own a handgun in *Heller*, any alleged “right to possess assault weapons” is “not at all rooted in the conscience of the American public.” Jason T. Anderson, Second Amendment Standards of Review: What the Supreme Court Left Unanswered in *District of Columbia v. Heller*, 82 S. Cal. L. Rev. 547, 583 (2009). After reviewing similar evidence, the court in *Kolbe* expressed its “serious[] doubts that the banned assault long guns are commonly possessed for lawful purposes, particularly self-defense in the home.” *Kolbe* at \*42.

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<sup>14</sup> See Hepburn et al., “The US Gun Stock: Results from the 2004 National Firearms Survey,” *Injury Prevention* 2007.

**2. Even If They Are In “Common Use,” Assault Weapons Are “Dangerous and Unusual” And Not Protected By The Second Amendment.**

Even if assault weapons are “in common use,” their exceedingly dangerous nature makes them better suited for the commission of violent crime than for self-defense purposes. As the District Court here stated, to determine whether a provision impinges upon a Second Amendment right, one asks “whether the regulated firearms or magazines are commonly used *for lawful purposes . . .*” SPA-13 (emphasis added). Just like fully automatic weapons, assault weapons are “designed to enhance [the] capacity to shoot multiple human targets very rapidly.” *Heller v. Dist. of Columbia* (“*Heller II*”), 670 F.3d 1244, 1262 (D.C. Cir. 2011) (quoting *Firearms Registration Amendment Act of 2008: Hearing on Bill 17-0843 Before the Comm. on Public Safety and the Judiciary of the Council of the District of Columbia* (Oct. 1, 2008) (statement of Brian J. Siebel, Brady Ctr. To Prevent Gun Violence) (“*Siebel Statement*”). The Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) confirms that “[a]ssault weapons were designed for rapid fire, close quarter shooting at human beings. That is why they were put together the way they were.” A-1126, ATF, *Assault Weapons Profile* 19 (1994). “You will not find these guns in a duck blind or at the Olympics. They are mass produced mayhem.” *Id.*

The only significant difference between civilian and military assault rifles is the manner in which they fire multiple bullets (i.e., whether they are “semiautomatic” or “automatic”). “A semiautomatic weapon fires one bullet for each squeeze of the trigger.” A-517, Christopher S. Koper, U.S. Dep’t of Justice, *An Updated Assessment of the Federal Assault Weapons Ban* 4 n.1 (2004). In contrast, a fully automatic assault weapon “fires continuously as long as the trigger is held back - until it runs out of ammunition.” See Violence Policy Ctr., *Bullet Hoses: Semiautomatic Assault Weapons – What Are They? What’s So Bad About Them?* Sec. 2 (May 2003), available at <http://www.vpc.org/studies/hosetwo.htm>.

The differences between firing a semiautomatic assault weapon and a fully automatic are minimal, and fully automatic firearms are unquestionably “dangerous and unusual” weapons. See, *Fincher*, 538 F.3d at 874 (machine guns are “within the category of dangerous and unusual weapons”); *Kolbe* at \*43 (finding that semiautomatic assault weapons are “equally, or possibly even more effective, in functioning and killing capacity as their fully automatic versions”). Most notably, both can fire hundreds of bullets in a single minute. As the District Court specifically found, “[a]lthough semi-automatic firearms, unlike automatic M-16s, fire only one shot with each pull of the trigger, semi-automatics still fire almost as rapidly as automatics. . . .” SPA-25 n.51 (citing *Heller II*, 670 F.3d at 1263). In a police department test, an automatic UZI with a 30-round magazine

“emptied in slightly less than two seconds...while the same magazine was emptied in just five seconds on semiautomatic” mode. Siebel Statement. The already fine line between these dangerous weapons only narrows when one considers the firepower of semiautomatic assault weapons.<sup>15</sup>

Ammunition shot from semiautomatic assault weapons is powerful enough to penetrate walls, increasing the already significant threat of stray bullets harming innocent family members, neighbors, and passersby. *See Kolbe* at \*61. Hartford Chief of Police James Rovella explains that ammunition typically used with assault weapons “could easily pass through the walls of many dwellings and result in shooting of unintended victims such as family members, passers-by or neighbors.” A.1370, *Rovella Aff.* At ¶ 39.<sup>16</sup> With such a fine line between civilian assault weapons and their fully automatic military equivalents, it is plain that assault

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<sup>15</sup> Any argument that the Act arbitrarily prohibits assault weapons merely because they *resemble* military-style fully automatic assault weapons is disingenuous. Their characteristics are so similar that a semi-automatic assault weapon can readily be converted into a fully automatic weapon. *See, e.g., Lightning Link*, [http://thehomegunsmith.com/pdf/fast\\_bunny.pdf](http://thehomegunsmith.com/pdf/fast_bunny.pdf) (last visited June 7, 2013) (describing how AR-15 can be converted into fully automatic weapon in matter of *ten seconds*).

<sup>16</sup> The risk of errant bullets striking innocent household members or bystanders is very real. In September 2010, a 15-year-old girl was killed in Buffalo by stray bullets from an AK-47 assault rifle while she was in her house typing on her computer. Lou Michel, *Dead girl was not target of shooting; Police say her brother may have been the one*, Oct. 2, 2010, available at <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20101002/CITYANDREGION/310029895>.

weapons are “dangerous and unusual” weapons outside of the Second Amendment’s scope. *See People v. James*, 94 Cal. Rptr. 3d 576, 586, 09 Cal. Daily Op. Serv. 6769 (Cal. Ct. App. 2009) (upholding California’s assault weapon prohibition because assault weapons are “dangerous and unusual” weapons).

That assault weapons are often used to commit violent crimes where greater firepower is needed underscores how ill-suited these weapons are to lawful, defensive purposes. Assault weapons like the AR-15, AK-47, and UZI models that are prohibited by the Act are frequently chosen by criminals for assaults and homicides. *See Heller II*, 670 F.3d at 1263 (citing Dep’t of Treasury, *Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles* 34-35, 38 (1998)) (“assault weapons are preferred by criminals . . . because of their high firepower.”). Assault weapons “account for a larger share of guns used in mass murders and murders of police, crimes for which weapons with greater firepower would seem particularly useful.” A-600, Koper, *supra*, at 87; *Kolbe* at \*43, 58. A study analyzing FBI data found that 20% of the law enforcement officers killed in the line of duty were killed with an assault weapon.<sup>17</sup> Assault weapons are 20 times

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<sup>17</sup> *See* Violence Policy Ctr., “*Officer Down*” — *Assault Weapons and the War on Law Enforcement, Section One: Assault Weapons, the Gun Industry, and Law Enforcement* (May 2003), available at <http://www.vpc.org/studies/officene.htm>; *see also Kolbe* at \*59.

more likely to be used in the commission of a crime than other kinds of weapons.<sup>18</sup>

For the reasons discussed above, both assault weapons and LCMs fall outside of the protection of the Second Amendment.

## **II. EVEN IF THE ACT DOES IMPLICATE THE SECOND AMENDMENT, IT REMAINS CONSTITUTIONAL.**

The fact that the Act does not burden the Second Amendment should end this Court's inquiry. *See, e.g., United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). But even if this Court were to radically expand the limited holding of *Heller* and conclude that the Act implicates the Second Amendment right to possess a handgun in the home for self-defense, the Act would still pass constitutional muster. As the District Court correctly held, intermediate scrutiny is the most appropriate level of Second Amendment review and the Act easily meets this standard. SPA-27.

### **A. If Heightened Scrutiny Is Necessary In Evaluating This Challenge, Strict Scrutiny Is Not Appropriate.**

#### **1. The Application of Strict Scrutiny to Firearm Regulations Is Generally Inappropriate.**

Appellants argue that the Act must be subject to a strict scrutiny standard because the Second Amendment protects a fundamental right. However, not all restrictions on constitutional rights—even those that are fundamental—trigger

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<sup>18</sup> *See* Jim Stewart & Andrew Alexander, *Assault Guns Muscling in on Front Lines of Crime*, Atlanta Journal-Atlanta Constitution, May 21, 1989, at A1, A8.



strict scrutiny. *See Marzzarella*, 614 F.3d at 96-97 (noting that even the right to free speech, a fundamental right essential to democratic governance, “is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue,” and finding that there is “no reason why the Second Amendment would be any different”) (internal citations omitted).

The application of strict scrutiny is inappropriate in the evaluation of firearm regulations. Protecting public safety is the bedrock function of government, and guns have a “unique potential to facilitate death and destruction and thereby to destabilize ordered liberty.” *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3108 (2010) (Stevens, J., dissenting). Accordingly, state and local governments have a profound interest in safeguarding the public and law enforcement personnel from gun violence. *See Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“promotion of safety of persons and property is unquestionably at the core of the State’s police power”).

Indeed, most courts that have chosen a level of scrutiny for evaluating Second Amendment claims, including this Court have rejected strict scrutiny. *See, e.g., Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); *Heller II*, 670 F.3d at 1256; *Jackson*, 746 F.3d at 964-65; *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *United States v. Williams*, 616 F.3d 685, 691-93 (7th Cir. 2010);

*Marzzarella*, 614 F.3d at 96-97; *United States v. Walker*, 709 F. Supp. 2d 460, 466 (E.D. Va. 2010).

## 2. Strict Scrutiny is Inconsistent with *Heller* and *McDonald*.

As “numerous other courts and legal scholars have pointed out, a strict scrutiny standard of review” does “not square with the majority’s references to ‘presumptively lawful regulatory measures.’” *Heller v. Dist. of Columbia*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010) (citing *United States v. Skoien*, 587 F.3d 803, 811 (7th Cir. 2009) (noting that the court did “not see how the listed laws could be ‘presumptively’ constitutional if they were subject to strict scrutiny”)); *United States v. Marzzarella*, 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009) (observing that “the Court’s willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of a strict scrutiny standard of review”); Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. Rev. 1171, 1197-98 (2009) (stating “the *Heller* majority . . . implicitly rejected strict scrutiny”).

Indeed, this Court has expressly rejected the indiscriminate application of heightened scrutiny to firearms laws, unless they “substantially burden” the Second Amendment right. This Court previously held that “[r]eserving heightened scrutiny for regulations that burden the Second Amendment right substantially is not inconsistent with the classification of that right as fundamental to our scheme of ordered liberty. . .” *United States v. Decastro*, 682 F.3d 160, 166-67 (2d Cir.

2012). “In deciding whether a law substantially burdens Second Amendment rights,” the *Decastro* Court explained, “it is . . . appropriate to consult principles from other areas of constitutional law, including the First Amendment”:

Regulation may “reduce to some degree the potential audience for [one’s] speech” so long as “the remaining avenues of communication are [ ]adequate.” . . . By analogy, [a] law that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.

*Id.* at 167-168 (citations omitted).<sup>19</sup> The Act’s prohibition on a limited class of weapons that are particularly dangerous and ill-suited for self-defense leaves citizens free to possess a vast array of firearms and magazines with which to defend themselves. Accordingly, the application of strict scrutiny to the Act’s prohibition on assault weapons and LCMs is unwarranted.

**B. If Heightened Scrutiny Applies, Intermediate Scrutiny is the Appropriate Level of Review.**

Because the Act does not substantially burden the Second Amendment, intermediate scrutiny is the appropriate level of review, assuming that any heightened scrutiny is required. Courts have reached the same conclusion in cases involving similar prohibitions on certain classes of weapons.

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<sup>19</sup> Compare *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding content-neutral regulations on the time, place, and manner of speech, aimed at limiting the volume of amplified music and speeches)

The U.S. Court of Appeals for the D.C. Circuit applied intermediate scrutiny to the District of Columbia's ban on assault weapons and LCMs. *Heller II*, 670 F.3d at 1261. The court stated that the prohibition of assault weapons and LCMs was "more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights," since the prohibition did not "prevent a person from keeping a suitable and commonly used weapon for protection in the home." *Id.* at 1262. The court also summarized a fundamental distinction from the absolute handgun ban in *Heller*: "Unlike the law held unconstitutional in *Heller*, [bans on assault weapons and LCMs] do not prohibit the possession of the 'quintessential self-defense weapon,' to wit, the handgun." *Id.* at 1261-62 (quoting *Heller*, 544 U.S. at 629).

In its opinion, the District Court similarly applied intermediate scrutiny to Connecticut's ban on assault weapons and LCMs. Citing the opinion of the District Court in *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 990 F. Supp. 2d 349, 366 (W.D.N.Y. 2013), the District Court noted that "courts throughout the country have nearly universally applied some form of intermediate scrutiny in the Second Amendment context." SPA-21-22 n.47. Like the laws at issue in *Heller II*, the Act does not impose a substantial burden on an individual's ability to exercise his or her Second Amendment right since it does not "prevent a person from keeping a suitable and commonly used weapon for protection in the home." *Heller*

*II*, 670 F.3d at 1262. Indeed, the District Court specifically found that “[t]he challenged legislation provides alternative access to similar firearms and does not categorically ban a universally recognized class of firearms.” SPA-21.

**C. The Assault Weapons and LCM Bans Satisfy Intermediate Scrutiny.**

Intermediate scrutiny requires a showing that the asserted governmental end is “significant,” “substantial,” or “important.” *See, e.g., Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010). It requires that the fit between the challenged regulation and the stated objective be reasonable, not perfect, and does not require that the regulation be the least restrictive means of serving the interest. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001); *Marzzarella*, 614 F.3d at 98; *Jackson*, 746 F.3d at 965. The Act easily satisfies intermediate scrutiny.

**1. Preservation of Public Safety and Prevention of Crime Are Paramount Government Interests.**

In passing the Act, the Connecticut Legislature was concerned by the enormous threat to public safety posed by assault weapons and LCMs. The District Court found that the legislature’s passage of the Act was “premised on the belief that it would have an appreciable impact on public safety and crime prevention.” SPA-25. The District Court made this finding, citing to the following Senate Session Transcript excerpt: ““At the end of that unimaginable day, we

learned that we had lost 20 elementary school children and 6 teachers and administrators. They were killed with a weapon of war, a semi-automatic assault rifle, the platform of which – was originally designed for the battlefield and mass killings. . . .” SPA-25 n.49.

## **2. Assault Weapons and LCMs Jeopardize Public Safety.**

As demonstrated above, assault weapons and LCMs are particularly dangerous, military-style weapons designed for combat use, making them a significant threat to public safety. Connecticut has an interest in preventing devastating attacks committed with these weapons, such as the mass shootings at Sandy Hook Elementary School.

Connecticut also has a substantial interest in protecting its law enforcement officers from harm. “[C]riminals using assault rifles pose a heightened risk to law enforcement.” *Kolbe* at \*58. The prohibition on LCMs protects these officers because gun users limited to ten-round magazines must reload more frequently. For law enforcement confronting dangerous shootouts, “the 2 or 3 second pause to reload [ammunition] can be of critical benefit.” *Heller v. Dist. of Columbia*, 698 F. Supp. 2d 179, 194 (D.D.C. 2010); *see also Kolbe* at \*63. The District Court found that “limiting rounds in a magazine means that a shooter has to pause periodically to change out his magazine, reducing the amount of rounds fired and limiting the shooters capability of laying ‘suppressing fire’ that can frustrate the efforts of

responding law enforcement.” SPA-26 n.53. The *Colorado Outfitters* court similarly found that “[a] pause, of any duration, imposed on the offensive shooter can only be beneficial, allowing some period of time for victims to escape, victims to attack, or law enforcement to intervene.”<sup>20</sup> *Colorado Outfitters*, 2014 WL 3058518, at \*17.

**3. The Act is Substantially Related to the Government’s Significant Interests.**

This Court should affirm the District Court’s ruling that “Connecticut has carried its burden of showing a substantial relationship between the ban of certain semiautomatic firearms and LCMs and the important governmental ‘objectives of protecting police officers and controlling crime.’” SPA-27 (*citing Heller II*, 670 F.3d at 1264). Given the real and immediate threats to public safety and law enforcement personnel posed by assault weapons and LCMs, Connecticut has made the reasonable choice to prohibit access to these dangerous instruments of mass mayhem, while preserving access to handguns and other firearms. Since the most effective way to eliminate the danger and destruction caused by assault weapons and LCMs is to prohibit their use, possession, and sale, a substantial relationship clearly exists between the Act and the government’s significant interests. *See* SPA-25 n.50 (crediting testimony that “Connecticut’s bans on

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<sup>20</sup> Indeed, in the 1993 Long Island Rail Road massacre, Colin Ferguson was only prevented from continuing his rampage because he was subdued while attempting to reload. A-2022-2023.

assault weapons and large-capacity magazines, and particularly its ban on LCMs, have the potential to prevent and limit shootings in the state over the long-run.”).

Moreover, the Act places no burden on an individual’s ability to possess a firearm in the home for self-defense. The Act prohibits only a fraction of available firearms – those with military-style features which facilitate rapid devastation of human life – which the Connecticut Legislature deemed to be exceedingly dangerous. *See* A-1126, ATF, *supra*, at 19. The Act leaves common handguns, the weapons “overwhelmingly chosen” by the American people for self-defense in the home, untouched. *See Heller*, 554 U.S. at 628.

As a result, the Act is a reasonable means of serving vital government interests that is neither overly broad nor arbitrary. *See, e.g., Turner Broad. Sys.*, 512 U.S. at 662; *Heller II*, 670 F.3d at 1262; *Marzzarella*, 614 F.3d at 98. As the court noted in *Kolbe*, “[e]very court that has addressed the issue has...found bans on assault weapons and LCMs to survive intermediate scrutiny.” *Kolbe* at \*57 n.33.



## CONCLUSION

For all of the reasons set forth above, this Court should affirm the District Court's Order.

Dated: August 21, 2014  
New York, New York

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28(e)(2)(a) because this brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(viii).

This brief complies with the typeface 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 14-point Times New Roman font.

Dated: August 21, 2014

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