14-319-CV

United States Court of Appeals for the Second Circuit

June Shew, Stephanie Cypher, Peter Owens, Brian McClain, Hiller Sports, LLC, MD Shooting Sports, LLC, Connecticut Citizens' Defense League, Coalition of Connecticut Sportsmen, Rabbi Mitchell Rocklin, Stephen Holly,

Plaintiffs-Appellants,

v.

Dannel P. Malloy, in his official capacity as Governor of the State of Connecticut, Kevin T. Kane, in his official capacity as Chief State's Attorney of the State of Connecticut,

Defendants-Appellees.

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Corporate Disclosure Statement

As states, all *amici* are governmental entities with no reportable parent companies, subsidiaries, affiliates or similar entities under Fed. R. App. P. 26.1(a).

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Identity of *Amici* Curiae[1]

Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. The *amici* states have a profound interest in protecting the fundamental constitutional rights of their citizens. Among these fundamental rights is the Second Amendment right to keep and bear arms. The *amici* states believe that the fundamental rights of their citizens and others should receive the highest protection. Connecticut's Act Concerning Gun Violence Prevention and Children's Safety ("the Act") burdens those rights and should be subject to strict scrutiny under this Circuit's tiered scrutiny approach. This brief addresses how the Second Amendment restricts state efforts to ban those categories of firearms and magazines that are "typically possessed by law-abiding citizens for lawful purposes." *District of Columbia v. Heller*, 554 U.S. 570, 624, 128 S.Ct. 2783, 2816 (2008). It does not address whether, or to what extent, states may regulate weapons "not typically possessed by law-abiding citizens for lawful purposes." *Id.*

[1] Although *amici* file this brief pursuant to Fed. R. App. P. 29(a), they also certify pursuant to Rule 29(c)(5) that no party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No other person contributed money that was intended to fund preparing or submitting the brief.

Summary of the Argument

1. The Second Amendment protects the rights of citizens to possess and carry weapons for self-defense. U.S. Const. amend. II. Protected weapons include those commonly used by law-abiding citizens for lawful purposes, including self-defense, hunting, and sport. Semi-automatic firearms are among the weapons used by law-abiding citizens for these purposes.

2. Although the Supreme Court has not specified the appropriate standard of review for laws burdening the Second Amendment right, it has indicated that heightened scrutiny applies to laws that burden the core right of self-defense in the home. Because Connecticut's law amounts to a categorical ban of firearms commonly used for lawful purposes by law-abiding citizens, this Court should subject the law to strict scrutiny under its tiers of scrutiny framework.

3. The Act fails strict scrutiny. Studies show that the federal "assault weapons" ban had no measurable effect on gun violence, and police officers oppose such bans. Furthermore, criminals will continue to obtain weapons with the banned safety features, placing law-abiding citizens at risk. And those features increase accuracy, enabling citizens to mount a more effective defense and increasing public safety.

Argument

I. The Second Amendment protects the right to possess and carry semi-automatic weapons for lawful purposes.

For many years, the right of American citizens to keep and bear arms went unquestioned. *See* U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783 (2008), the Supreme Court confirmed that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592, 128 S.Ct. at 2797. The Supreme Court later reaffirmed that "the right to keep and bear arms is fundamental to *our* scheme of ordered liberty," applying the Second Amendment to the states through the Fourteenth Amendment's Due Process Clause. *McDonald v. City of Chicago*, 561 U.S. ___, ___, 130 S.Ct. 3020, 3036, 3050 (2010). The Court reiterated that the "possession of firearms," which is "essential for self-defense," is valued in the United States because "self-defense" is the "central component" of the Second Amendment right. *Id.* at ___, 130 S.Ct. at 3048.

Weapons protected by the Second Amendment include any firearm "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624, 128 S.Ct. at 2816. Although the Supreme Court acknowledged that this right "was not unlimited," *id.* at 595, 128 S.Ct. at 2799, the limits it recognized were fairly narrow: the Second Amendment did not protect "the possession of firearms by felons and the mentally ill," or the "carrying of firearms in sensitive

places." *Id.* at 626–27, 128 S.Ct. at 2816–17. The Court also suggested that there is no Second Amendment right to carry machine guns. *Id.* at 624, 128 S.Ct. at 2815. And the Court held many years ago that the Second Amendment did not protect the right to own "short-barreled shotguns." *Id.* at 625, 128 S.Ct. at 2816; *United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816 (1939).

But the Supreme Court has also indicated that semi-automatic firearms are the sort of weapons possessed by law-abiding citizens and protected by the Second Amendment. In *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793 (1994), the Supreme Court considered the *mens rea* necessary to support a conviction for possessing a weapon with "characteristics that brought it within the statutory definition of a machinegun." *Id.* at 602, 114 S.Ct. at 1795. The Court defined "semi-automatic" to mean "a weapon that fires only one shot with each pull of the trigger, and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired." *Id.* at 602 n.1, 114 S.Ct. at 1795 n.1. Although the possession of "machineguns, sawed-off shotguns, and artillery pieces," as well as "hand grenades," could be prohibited, the Court held that "guns falling outside these categories traditionally have been widely accepted as lawful possessions." *Id.* at 611–12, 114 S.Ct. at 1800. Among these lawful weapons are the kinds of semi-automatic firearms that Connecticut has prohibited. *See id.* at 615, 114 S.Ct. at 1802.

The district court in this case properly concluded that the firearms banned by the Act are in common use and are used for lawful purposes. Doc. 125 at 16; *see Heller*, 554 U.S. at 599, 128 S.Ct. at 2801 (noting that "Americans valued the ancient right," in part, to "preserv[e] the militia" but "undoubtedly thought it more important for self-defense and hunting"); *see also Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (*Heller II*) ("We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use.'"). The court rightly recognized that the Act "bans firearms in common use," as "[m]illions of Americans possess the firearms banned by this act for hunting and target shooting." Doc. 125 at 15. The court also acknowledged that at least one specific kind of semi-automatic firearm, the AR-15, is "the leading type of firearm used in national matches and in other matches sponsored by the congressionally established Civilian Marksmanship program." *Id.* at 15 n.41. The AR-15 "accounted for at least 7% of all firearms and 18% of all rifles made in the use for the domestic market" in 2011. *Id.*

It was right to do so. As the Supreme Court implied in *Staples*, semi-automatic firearms are commonly used for lawful purposes. To conclude otherwise is to place "tens of thousands of Americans" in a category with those who possess machine guns and artillery, even though those tens of thousands of Americans lawfully possess semi-automatic firearms for self-defense, hunting, or

sport. Semi-automatic firearms and handguns may both be lethal weapons, but they are not "dangerous and unusual weapons" like artillery. *Heller*, 554 U.S. at 627, 128 S.Ct. at 2817.

II. Connecticut's outright prohibition of semi-automatic firearms burdens the fundamental right to keep and bear arms and should be subject to strict scrutiny under this Circuit's levels of scrutiny approach.

The Supreme Court has not explained precisely which standard of scrutiny applies to laws that burden the Second Amendment right to bear arms, although it has rejected the rational basis standard in this context.[2] *Heller*, 554 U.S. at 628 n.27, 128 S.Ct. at 2817 n.27. In *Heller*, however, the Supreme Court concluded that the "prohibition of an entire class of 'arms'" used by the American people for a lawful purpose, including in the home, "where the need for defense of self, family, and property is most acute," could not pass "constitutional muster" no matter what standard of scrutiny applied. *Id.* at 628–29, 128 S.Ct. at 2817–18.

[2] Indeed, the traditional levels of scrutiny are arguably inappropriate in this context. *See Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1173–78 (9th Cir. 2014). As the Ninth Circuit explained, a "complete historical analysis" of the Second Amendment right is more consistent with the Supreme Court's approach in *Heller*. *Id.* at 1173; *see also Heller II*, 670 F.3d at 1271–84 (Kavanaugh, J., dissenting). And the Supreme Court in *Heller* declined to use a "freestanding 'interest-balancing' approach" when it concluded that a complete ban of handguns failed "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628–29, 634, 128 S.Ct. at 2817–18, 2821. Because this Circuit has chosen to apply tiers of scrutiny in Second Amendment cases, however, this brief urges the Court to subject Connecticut's ban to strict scrutiny.

Just as the District of Columbia's handgun ban prohibited an entire class of arms, Connecticut's prohibition of semi-automatic firearms, including in the home, amounts to a categorical ban on possessing certain firearms that are commonly owned for the lawful purpose of self-defense. Because Connecticut's Act burdens the core of the Second Amendment right, the *amici* states believe that the Act is subject to strict scrutiny.

This Circuit has applied levels of scrutiny in the Second Amendment context. *United States v. Decastro*, 682 F.3d 160, 164–65 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 838 (2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 1806 (2013). It declined to apply heightened scrutiny to 18 U.S.C. § 922(a)(3), prohibiting the transportation into one state of a firearm acquired in another state, because that statute "only minimally affects the ability to acquire a firearm." *Decastro*, 682 F.3d at 164. In *Kachalsky*, which presented a sort of middle ground between *Decastro* and the instant case, this Court applied intermediate scrutiny to a licensing scheme for carrying weapons outside the home because the scheme "place[d] substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public" but did not, in this Court's view, "burden the 'core' protection of self-defense in the home." *Kachalsky*, 701 F.3d at 93.

Unlike the laws at issue in *Decastro* and *Kachalsky*, however, the Act burdens the core of the Second Amendment right by prohibiting an entire class of weapons everywhere, including in the home. This Circuit has not yet had the opportunity to examine such a law, but language in *Decastro* and *Kachalsky* supports the conclusion that laws of its kind are subject to strict scrutiny. This Court has explained that "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)" are subject to "heightened scrutiny." *Decastro*, 682 F.3d at 166. This Court has also noted that "the home [i]s special and subject to limited state regulation." *Kachalsky*, 701 F.3d at 94. Indeed, this Court explained that "[i]t seems quite obvious to us that possession of a weapon in the home has far different implications than carrying a concealed weapon in public." *Id.* at 99 n.23. Because the Act bans a certain class of weapons everywhere, including in the home, this Court should review it for strict scrutiny. Under such review, the challenged law "'must be narrowly tailored to promote a compelling Government interest.'" *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 246 (2d Cir. 2014) (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 1886 (2000)). And, in making the law, the state "must use the least restrictive means to achieve its ends." *Id.*

Applying strict scrutiny is not, as the district court concluded, inconsistent with the practice of other circuits that have adopted a tiered scrutiny approach. The majority of cases applying that standard are distinguishable from the instant case because they do not involve categorical bans on a type of firearm commonly used for a lawful purpose. These circuits have primarily considered laws that burden rights other than the core Second Amendment right to possess a weapon for self-defense in the home. Considering a challenge to 18 U.S.C. § 922(g)(9), the Fourth Circuit concluded that prohibiting the possession of firearms by domestic violence offenders does not burden the core Second Amendment "right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense" when the citizen challenging the law has "a criminal history as a domestic violence misdemeanant." *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010). Accordingly, the Fourth Circuit determined that intermediate scrutiny applied. *Id.* The Tenth Circuit has also applied intermediate scrutiny to other subsections of 18 U.S.C. § 922 because they "prohibited the possession of firearms by narrow classes of persons who, based on their past behavior, are more likely to engage in domestic violence." *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010). And although the Third Circuit applied intermediate scrutiny to a federal ban on firearms with obliterated serial numbers, it left open the possibility that "the

Second Amendment can trigger more than one particular standard of scrutiny." *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010).

Moreover, not all circuits have applied intermediate scrutiny to laws burdening Second Amendment rights. The Seventh Circuit applied "a more rigorous" test than intermediate scrutiny, "if not quite 'strict scrutiny,'" to a scheme that banned firing ranges while requiring those who desired firearm permits to practice at such ranges. *Ezell v. City of Chicago*, 651 F.3d 684, 708–09 (7th Cir. 2011). Under this sliding scale approach, the government was required to "establish a close fit between" the law "and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights." *Id.*

Finally, although the D.C. Circuit applied intermediate scrutiny to a ban of certain semi-automatic rifles, it did so in part because, unlike the plaintiffs in this case, "the plaintiffs [in *Heller II*] present[ed] hardly any evidence that semi-automatic rifles and magazines holding more than ten rounds are well-suited to or preferred for the purpose of self-defense or sport." *Heller II*, 670 F.3d at 1262; *see* Doc. 140 at 20–22. As Judge Kavanaugh pointed out in dissent, however, the court should have applied strict scrutiny to "a ban on a *class* of arms" that were "within the scope of Second Amendment protection" because weapons like the AR-15 were "in common use by law-abiding citizens and [were] traditionally . . .

lawful to possess." *Heller II*, 670 F.3d at 1288 (Kavanaugh, J., dissenting). Because *Heller* protected semi-automatic handguns, Judge Kavanaugh contended that, without any "meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles," "semi-automatic rifles are also constitutionally protected." *Id.* at 1269.

In addition, although Judge Kavanaugh believed that *Heller* required courts to "assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny," he also contended that "[e]ven if it were appropriate to apply one of the levels of scrutiny after *Heller*," the majority should have applied strict scrutiny instead of intermediate scrutiny. *Id.* at 1271, 1284. As Judge Kavanaugh explained, "[n]o court of appeals decision since *Heller* has applied intermediate scrutiny to a ban on a class of arms that have not traditionally been banned and are in common use." *Id.* at 1285. Such a ban is "not an 'incidental' regulation"; it is "equivalent to a ban on a category of speech." *Id.*

This Court should not follow the majority of *Heller II* by applying intermediate scrutiny. The district court properly concluded, in accordance with the Supreme Court's language in *Staples* and the *Heller II* dissent, that semi-automatic firearms are commonly used for lawful purposes. As a result, this case is distinguishable from *Heller II*. Furthermore, Connecticut's Act categorically

bans such firearms, including their use for self-defense and in the home. This kind of categorical ban should be subject to strict scrutiny, not intermediate scrutiny.

III. Connecticut's ban of semi-automatic firearms cannot survive strict scrutiny.

Connecticut's decision to prevent law-abiding citizens from possessing an entire class of heretofore lawful weapons burdens the Second Amendment rights of those citizens. But it also fails to achieve its purpose, instead putting Connecticut's law-abiding citizens at risk by ensuring that only criminals will have access to certain kinds of rifles, shotguns, and handguns. Any person who wishes to obtain firearms prohibited by the Act can merely cross state lines to obtain such a weapon, outgunning law-abiding citizens. And only those who disregard the law will have firearms including the safety features banned by the Act, making it more difficult for law-abiding citizens to defend themselves. This challenged law is not narrowly tailored to achieve public safety, and Connecticut did not use the least restrictive means to achieve its ends. *See Evergreen Ass'n, Inc.*, 740 F.3d at 246.

Studies of the effect of the federal "assault weapons" ban revealed that it had little effect on gun violence. One study stated that "the maximum theoretically achievable preventive effect of the ban on gun murders is almost certainly too small to detect statistically" because "the banned guns and magazines were never used in more than a fraction of all gun murders." Jeffrey A. Roth & Christopher S. Koper, *Impact Evaluation of the Public Safety and Recreational Firearms Use*

Protection Act of 1994: Final Report (Mar. 13, 1997) 1, http://www.urban.org/UploadedPDF/aw_final.pdf. What statistics there were "reinforce[d] the conclusion that assault weapons are rare among crime guns." *Id.* at 70. Even in the mass murder context, which prompted Connecticut to pass the Act, the study's authors did not "find assault weapons to be overrepresented in a sample of mass murders involving guns." *Id.* at 6. The authors recommended "further study of the impact measures examined in this investigation." *Id.*

When those authors further assessed the effects of the federal ban, they concluded that there had been "no discernible reduction in the lethality and injuriousness of gun violence," and, even if the ban might eventually have some effects over time, "the ban's impact on gun violence is likely to be small at best, and perhaps too small for reliable measurement." Christopher S. Koeper, *Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994–2003* (Jun. 2004) 96–97, https://www.ncjrs.gov /pdffiles1/nij/grants/204431.pdf. They explained that although a renewal of the federal ban "might reduce gunshot victimizations[, t]his effect is likely to be small at best and possibly too small for reliable measurement." *Id.* at 100.

Police officers, too, overwhelmingly believe that "assault weapons" bans are ineffective and may have deleterious public safety effects. A comprehensive survey of 15,000 law enforcement officers revealed that 70% of them believed that

a federal ban on "assault weapons" would have no effect on reducing violent crime. Doug Wyllie, *PoliceOne's Gun Control Survey: 11 key lessons from officers' perspectives* (Apr. 8, 2013), http://www.policeone.com/Gun-Legislation-Law-Enforcement/articles/6183787-PoliceOnes-Gun-Control-Survey-11-key-lessons-from-officers-perspectives/. And 20.5% believed that such a ban would have a negative effect on crime reduction. *Id.* With no evidence that banning "assault weapons" affects public safety or reduces crime, Connecticut's ban is not narrowly tailored to serve its interests.

Furthermore, the district court's conclusions about the particular features banned in the Act are untenable. The court reasoned that the banned features "increase a firearm's 'lethalness.'" Doc. 125 at 24. Put another way, the district court concluded that features enabling a shooter to be more accurate are problematic. Under that logic, additional training for citizens designed to improve their accuracy could likewise be prohibited because such training would "increase" the "lethalness" of the weapons they used. *See id.* Furthermore, a law-abiding citizen should be able to increase the accuracy of the weapon he or she uses for self-defense and other lawful purposes. Increased accuracy means more effective self-defense, less risk of danger for innocent bystanders, and, as a result, increased public safety. Furthermore, although mass shootings are tragic occurrences, and states have a compelling interest in preventing them, states cannot do so by simply

banning weapons in violation of the Second Amendment. *See Heller*, 554 U.S. at 636, 128 S.Ct. at 2822 (concluding that the Second Amendment "takes certain policy choices off the table"); *id.* at 693–99, 128 S.Ct. at 2854–57 (Breyer, J., dissenting) (surveying the history and statistics of gun violence).

* * *

Although increasing safety and reducing crime are compelling government interests, the Supreme Court has made clear that "the very enumeration of the [Second Amendment] right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634, 128 S.Ct. at 2821. And the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635, 128 S.Ct. at 2821. Because Connecticut's Act burdens the core Second Amendment right of law-abiding citizens to keep and bear arms for lawful purposes, it should be subjected, at least, to strict scrutiny. Here, Connecticut has failed to show that its ban is narrowly tailored to serve its interests in public safety and preventing crime. The Act cannot pass constitutional muster.

Respectfully submitted this 22nd day of May, 2014.

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This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(a) because this brief contains 3571 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 2007 in 14-point Times New Roman font.

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