14-0319-CV

In the 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.

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. Shriro, 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 State's Attorney for the Fairfield Judicial District, Geographical Area No. 2, Stephen J. Sedensky, III, in his official capacity as State's Attorney for

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF MARYLAND, CALIFORNIA, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, ILLINOIS, IOWA, MASSACHUSETTS, NEW YORK, AND OREGON AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES

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Corporate Disclosure Statement

All *amici* are governmental entities with no reportable parent companies, subsidiaries, affiliates, or similar entities under Federal Rule of Appellate Procedure 26.1(a).

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IDENTITY OF *AMICI CURIAE*

Maryland, California, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Massachusetts, New York, and Oregon submit this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. The *Amici* States seek to protect their sovereign prerogative to enact and implement legislation that advances the states' compelling interest in promoting public safety, preventing crime, and reducing the negative effects of firearm violence. The *Amici* States have each taken different approaches to addressing the problem of firearm violence based on determinations about what measures will best meet the needs of their citizens. They join this brief not because they necessarily believe Connecticut has chosen the optimal policy for itself—or that Connecticut's approach would necessarily be optimal for the *Amici* States—but because they believe that Connecticut Public Act 13-3, as amended by Public Act 13-220, (the "Act") represents a policy choice that Connecticut should be constitutionally free to adopt. The enactment by states of reasonable firearm regulations that are substantially related to the achievement of an important governmental interest is fully compatible with the right to keep and bear arms protected by the Second Amendment. The *Amici* States also are concerned that the absolutist reading of the Second Amendment advanced by the plaintiffs and their *amici* threatens to tie the

hands of states in responding to real threats to public safety, even in the absence of any substantial burden on the Second Amendment right.[1]

SUMMARY OF THE ARGUMENT

In *District of Columbia v. Heller*, 554 U.S. 570, 592, 634-35 (2008), the Supreme Court held the right to keep and bear arms to be a pre-existing right codified in the Second Amendment and enshrined with the scope the right was understood to have when the amendment was adopted. The right has never been interpreted as a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatsoever purpose." *Id.* at 626. Nor does the codification of the right preclude states from enacting reasonable firearms regulations to promote public safety. To the contrary, as with all other rights guaranteed by the Constitution, the Second Amendment limits, but "by no means eliminates," the ability of states to "experiment[] with reasonable firearms regulations." *McDonald v. City of Chicago*, 561 U.S. 742, ___, 130 S. Ct. 3020, 3046 (2010).

If a challenged law regulates conduct falling within the scope of the Second Amendment's protection, courts apply means-end scrutiny to the law. Doing so is

[1] New York joins this brief to support the authority of its sister states to make their own policy choices regarding the regulation of assault weapons and large-capacity magazines in the interest of reducing firearm violence. For the definitive statement of New York's defense of the constitutionality of its own policy choices in this area, see the brief of appellees/cross-appellants in the related case, *New York State Pistol and Rifle Association v. Cuomo*, Nos. 14-36(L), 14-37(XAP).

consistent not only with the Supreme Court's decisions in *Heller* and *McDonald*, but also with the Court's treatment of other constitutional rights. Under this approach, the level of scrutiny that a court should apply will depend on the nature of the alleged infringement. In cases where a challenged law does not implicate core Second Amendment interests, most courts have determined that a less rigorous standard of scrutiny should apply, if heightened scrutiny applies at all.

Regardless of which standard of scrutiny applies, public safety is a compelling governmental interest that is appropriately considered by courts both in determining what conduct falls within the scope of a constitutional guarantee and in applying all of the traditional standards of scrutiny. In this respect, the Second Amendment is no different from other constitutional rights, as the Supreme Court has signaled in identifying a number of "presumptively lawful" firearms regulations that are driven primarily by public safety concerns. *Heller*, 544 U.S. at 626-27 & n.26. Our federalist system recognizes the value in having government respond to the needs of the citizenry in ways that are adapted to local conditions, and the flexibility afforded to states under that system is vital for implementing policies in the states' traditional sphere of regulating in the interest of public health, safety, and welfare. Different states confront different public safety challenges. With respect to the problems posed by firearms violence in particular, the states vary widely in ways that critically influence the desirability and

effectiveness of different policy responses, including such factors as population density, economic conditions, population stability, cultural factors, climate, influence of the drug trade, and many others. It is essential for states to have latitude in formulating policies aimed at promoting public safety that are responsive to local conditions and consistent with constitutional guarantees. Although the Second Amendment places constraints on state policymaking discretion, it does not preclude efforts like Connecticut's to enact reasonable legislation to reduce the negative effects of firearm violence.

The plaintiffs and their *amici* misapprehend the role of courts in reviewing evidence in a case challenging the constitutionality of a legislative enactment. If intermediate scrutiny is triggered, the role of the court is not to weigh the evidence to determine which policy it favors; rather, the court's role is to determine whether there is substantial evidence to support the legislature's predictive judgment that the solution it has chosen is a reasonable fit to the state's compelling interest in promoting public safety. In this case, Connecticut has presented substantial evidence supporting the predictive judgment of its legislature that the Act is a reasonable fit to its compelling interest in reducing the negative effects of firearms violence. It is immaterial whether the Court, the plaintiffs, or policymakers in other states would have made the same policy choice Connecticut has made.

Under traditional methods of assessing challenges to laws alleged to infringe an enumerated constitutional right, Connecticut's Act satisfies constitutional scrutiny.

ARGUMENT

I. CLAIMS ASSERTING VIOLATIONS OF SECOND AMENDMENT RIGHTS CAN BE ANALYZED USING STANDARDS OF REVIEW APPLICABLE TO OTHER CONSTITUTIONAL RIGHTS.

A. The Scope of the Individual Right to Keep and Bear Arms for Self-Defense Protected by the Second Amendment Is Defined by History and Tradition.

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The right to keep and bear arms, though codified in the Second Amendment, predates the Bill of Rights; it is a pre-existing right that is neither "'granted by the Constitution'" nor "'dependent upon that instrument for its existence.'" *Heller*, 554 U.S. at 592 (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)). Thus, the scope of the right is not defined exclusively by the Second Amendment's text, but by the scope it was "understood to have when the people adopted [the amendment]," regardless of the current views of legislatures or courts. *Id.* at 634-35. As a result, although the text of the amendment does not set forth any limitation on the right, it has never been interpreted as "a right to keep and carry

any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626.

The Supreme Court, in *Heller* and *McDonald*, repeatedly emphasized that the Second Amendment does not stand apart from other rights enumerated in the Constitution; it is neither "subject to an entirely different body of rules than the other Bill of Rights guarantees," *McDonald*, 130 S. Ct. at 3044, nor is it a superior right entitled to more vigorous judicial enforcement. Just as the First Amendment is subject to numerous limitations unstated in its text, the "Second Amendment is no different." *Heller*, 554 U.S. at 635; *see id.* at 595 ("Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." (emphasis in original)); *see also McDonald*, 130 S. Ct. at 3046 (Scalia, J., concurring) ("No fundamental right—not even the First Amendment—is absolute.").

The codification of the right to keep and bear arms in the Second Amendment, and as incorporated against the states through the Fourteenth Amendment, necessarily "takes certain policy choices off the table," such as a complete ban on the possession of all handguns kept for self-defense within the home. *Heller*, 554 U.S. at 636. But taking certain policy choices off the table does not leave the table completely bare; the people's democratically chosen

representatives are not forbidden from considering every policy proposal that might in some way limit the use or enjoyment of any particular type of arm. To the contrary, the Supreme Court has made clear that constitutional protection of the right imposes "limits" on policy alternatives, but the Second Amendment "by no means eliminates" the states' "ability to devise solutions to social problems that suit local needs and values." *McDonald*, 130 S. Ct. at 3046. The Court has affirmed that "State and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *Id.* (internal citation omitted).

In this case, which tests whether states remain free to enact reasonable firearms regulations, the plaintiffs and their *amici* urge this Court to adopt an absolutist interpretation of the Second Amendment. In doing so, they seek to tie the hands of states in addressing the problem of firearm violence by asking the Court to constitutionalize their own policy preferences, with the effect that these policies would then be foisted on Connecticut.[2] That approach is inconsistent with

[2] An *amicus* brief filed in support of the plaintiffs by Alabama and a group of other states advocates for an interpretation of the Second Amendment right whose contours are strongly influenced by those states' current policy choices. But constitutionalizing those policy preferences would sharply circumscribe the ability of those states, and of all other states, to respond to public safety challenges in the future. The Constitution permits these states to adopt the policies that they have chosen; it does not require other states to follow suit. Our Constitution has no "horizontal supremacy clause" forcing one state to defer to another state's laws. On the contrary, under our federalist system, each state is generally free to operate

Heller and *McDonald*, with the treatment of other guarantees in the Bill of Rights, and with this Court's Second Amendment jurisprudence, and it misconstrues the scope of the Second Amendment right, as informed by history and tradition.

B. The Right Codified in the Second Amendment May Be Analyzed Under Familiar Standards Used in Adjudicating Other Constitutional Rights.

The plaintiffs and their *amici* are wrong in contending that the Supreme Court's decisions in *Heller* and *McDonald* require courts to abandon the traditional standards of scrutiny when evaluating challenges to laws that are found to burden conduct protected by the Second Amendment.[3] In *Heller*, the Court's discussion of these standards made clear that it had reserved judgment on what level of scrutiny would apply in cases where the core Second Amendment right was not burdened as substantially as it was by the District of Columbia law at issue there. "Under *any* of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family' would fail constitutional muster." *Heller*, 554 U.S. at 628-29 (emphasis added) (citation omitted); *see also Kachalsky*

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as a laboratory of democracy, constrained by the Constitution but not by another state's parallel conduct.

[3] The *Amici* States do not address in this brief whether the district court's decision that the Act burdens conduct falling within the scope of the Second Amendment's protection is correct. Instead, this brief addresses the application of heightened scrutiny *if* the Court concludes that it applies to the Act.

v. County of Westchester, 701 F.3d 81, 89 n.9 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013). The Supreme Court's statement declining to prescribe the applicable standard of scrutiny (in a case where the selection among these standards would not affect the outcome) cannot reasonably be read to imply that the Second Amendment doctrine, uniquely among constitutional rights, does not employ tiers of judicial scrutiny; to the contrary, it implies that the applicable standard of scrutiny will be defined in a case in which doing so matters.

The plaintiffs are also mistaken in their reliance on the *Heller* majority's rejection of the test proposed by Justice Breyer in his dissent. The Supreme Court did not eschew the traditional standards of scrutiny it regularly applies in constitutional analysis. To the contrary, the majority faulted Justice Breyer's proposed test precisely because it resembled "none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis)" and because it instead would entail "a judge-empowering 'interest-balancing inquiry.'" *Heller*, 554 U.S. at 634. In contrast with that approach, which the majority concluded would invite courts to weigh different interests to determine whether they were worth protecting, the "traditionally expressed levels" do not call on judges to weigh the value of the interests at issue, *id.* at 634, or to assess "costs and benefits of firearms restrictions and thus to make difficult empirical judgments," *McDonald*, 130 S. Ct. at 3050. The traditionally expressed levels of means-end scrutiny direct courts to

determine whether there is "substantial evidence" to support the predictive judgments of legislatures, *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994)), not to weigh or balance that evidence themselves.

Nor is there reason to believe that the Supreme Court, when it does squarely address this issue, would treat the Second Amendment differently from other enumerated constitutional rights in determining which standard of scrutiny to apply in a particular case. In these other areas of jurisprudence, the standard varies with the nature of the alleged infringement. Thus, where the core First Amendment free speech interest of content-regulation is at issue, courts apply strict scrutiny. *See, e.g.*, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *Eclipse Enterprises v. Gulotta*, 134 F.3d 63, 66 (2d Cir. 1997). On the other hand, in other circumstances, courts apply a "less rigorous examination." *Eclipse Enterprises*, 134 F.3d at 66; *see also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624-25 (1995). In accordance with this approach, a regulation that substantially impinges on the right of law-abiding citizens to defend themselves in the home might face a higher level of scrutiny. But a less rigorous standard, if any, will be appropriate in evaluating challenges to other types of enactments,[4] such as

[4] If a law is determined to regulate conduct outside the protection of the Second Amendment, the law would not be subject to heightened scrutiny at all. *See Kachalsky*, 701 F.3d at 93 (applying intermediate scrutiny to statute regulating

laws that regulate carrying firearms outside the home, *see Kachalsky*, 701 F.3d at 93-97, laws that regulate possession of firearms by non-law-abiding individuals, *see United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010), or, as in this case, a law that regulates particular firearms that evidence demonstrates are particularly dangerous and that are not of the class "overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense, *Heller*, 554 U.S. at 628.

In this case, the district court correctly determined that the Act's prohibitions "do not impose a substantial burden upon the *core right* protected by the Second Amendment." (SPA21 (internal quotation marks and citation omitted)). Based on that determination, the court concluded that the Act should be evaluated under a standard of intermediate scrutiny. (SPA21.)

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carry of handguns outside the home only after assuming, but not deciding, that the Second Amendment applies in that context); *Woollard v. Gallagher*, 712 F.3d 865, 874-76 (4th Cir. 2013) (same); *see also United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010) (adopting two-prong inquiry in which heightened scrutiny is applied only to laws that burden conduct protected by Second Amendment); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (same). As noted above, the *Amici* States do not address in this brief whether the challenged provisions of the Act burden conduct protected by the Second Amendment.

C. Public Safety Is a Compelling Governmental Interest that Is Appropriately Considered in Applying Traditional Constitutional Analysis to the Right to Keep and Bear Arms.

The Supreme Court has long recognized public safety as a compelling governmental interest that supports limitations on other enumerated constitutional rights, either in identifying conduct that falls outside of those guarantees or in upholding laws regulating conduct that falls within them. *See, e.g.*, *Schall v. Martin*, 467 U.S. 253, 264 (1984); *see also Kachalsky*, 701 F.3d at 97. Thus, for example, the First Amendment does not protect fighting words or incitements to violence, *see, e.g.*, *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942), or screaming fire in a crowded theater, *see Schenk v. United States*, 249 U.S. 47, 52 (1919). Similar considerations inform the analysis of the Fifth Amendment, in which courts recognize a "public safety" exception to the requirement to provide Miranda warnings before a suspect's answers may be admitted into evidence. *New York v. Quarles*, 467 U.S. 649, 655-56 (1984). The Eighth Amendment does not prohibit long sentences under three-strikes laws because of the special public safety dangers posed by recidivist offenders. *See Ewing v. California*, 538 U.S. 11, 24-26 (2003). And the protections of the Fourth Amendment yield to the interest in public safety when exigent circumstances exist. *See, e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978).

Of course, the government interest in promoting public safety is no less compelling in the Second Amendment context. Indeed, the Supreme Court, "aware of the problem of handgun violence in this country," has made clear that policymakers retain "a variety of tools for combating that problem." *Heller*, 554 U.S. at 636. And, even more significantly, the Supreme Court has elaborated on this point by identifying a list—which "does not purport to be exhaustive"—of "presumptively lawful" firearms regulations. *Id.* at 626-27 & n.26. These include complete prohibitions on carrying concealed weapons, *id.* at 626; *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897); bans on the possession of firearms by felons and the mentally ill and on carrying firearms in sensitive places, *Heller*, 554 U.S. at 626-27 & n.26; and bans on carrying "dangerous and unusual weapons," including weapons "not typically possessed by law-abiding citizens for lawful purposes," *id.* at 625-26 (discussing *United States v. Miller*, 307 U.S. 174 (1939)).[5]

[5] Just as it would border on the frivolous to argue that the Second Amendment's protection extends only to those firearms in existence at the time it was ratified, *Heller*, 554 U.S. at 582, so it would be equally meritless to argue that the only permissible regulations affecting the right are those that were actually in force in 1791. Indeed, most of the "presumptively lawful regulatory measures" the Supreme Court identified in *Heller*, 554 U.S. at 626-27 & n.26, were not in place in 1791, *see* Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 138-41 (2006) (first state prohibition on concealed carry enacted in 1813); Lawrence Rosenthal, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 Nw. U. L. Rev. Colloquy 85, 92 (2010) (prohibitions on possession of firearms by felons not commonplace until 20th century); *United States v. Yancey*, 621 F.3d 681, 683 (7th

Naturally, these regulatory measures have in common an origin in concerns for promoting public safety; so, too, the 19th-century gunpowder storage laws discussed in the majority and dissenting opinions in *Heller*, which, for fire safety reasons, effectively imposed severe limitations on the amount of ammunition readily available for home defense. *See* 554 U.S. at 632; *id.* at 686-87 (Breyer, J., dissenting).

In 2012, according to the Federal Bureau of Investigation, 8,855 murders, 122,174 robberies, and 143,119 aggravated assaults known to law enforcement were committed with firearms.[6] Although firearm violence is a national problem, it affects states and localities differently. Among the factors "known to affect the volume and type of crime occurring from place to place" are: "Population density and degree of urbanization"; "Variations in composition of the population . . ."; "Stability of the population . . ."; "Modes of transportation and highway system"; "Economic conditions, including median income, poverty level, and job availability"; "Cultural factors . . ."; "Family conditions with respect to divorce and family cohesiveness"; "Climate"; "Effective strength of law enforcement agencies"; "Administrative and investigative emphases of law enforcement";

Cir. 2010) (Congress did not prohibit firearm possession by the mentally ill until 1968).

[6] *Crime in the United States 2012*, Tables, 20, 21, 22, available at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime (last visited July 26, 2014).

"Policies of other components of the criminal justice system . . ."; "Citizens' attitudes toward crime"; and "Crime reporting practices of the citizenry." *Caution against ranking*, Crime in the United States, 2012, Federal Bureau of Investigation (Fall 2013), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/caution-against-ranking (last visited July 26, 2014). These factors, and many others, vary widely across states (and within them), demonstrating why policymakers in different jurisdictions address threats to public safety with varied responses, which may correspond to differences in the degree of vulnerability to different types and sources of firearm violence. Thus, an approach to firearms violence that may be appropriate or effective in one state may not be appropriate or effective in another. But all states have an interest in maintaining the flexibility, within the constraints established by the United States Constitution and their own state constitutions, to enact common-sense regulations aimed at minimizing the adverse effects of firearm violence.

A particular type of firearm violence that has been a growing focus of public safety efforts is mass public shootings. In recent years, horrific mass shooting events have occurred in Newtown, Connecticut (28 dead in incident involving assault rifle and large-capacity magazines); Aurora, Colorado (12 dead and 58 injured in incident involving assault rifle and large-capacity magazines); and Tucson, Arizona (6 dead and 13 injured in incident involving assault pistols and

large-capacity magazines), among too many others. The enormous toll in terms of lives lost or tragically altered in such incidents—including elementary school children, teachers, and federal officials in the judicial and legislative branches—is beyond measure. Thus, the destabilizing impact that these horrific events have on Americans' basic sense of personal safety has created an impetus for finding new ways to prevent these incidents or ameliorate their severity. In the Act, Connecticut has sought to enhance public safety by strengthening its regulation of assault weapons and large-capacity magazines, which evidence shows play a disproportionate role in mass public shootings. (J.A. 1398-1402.)

In light of the different challenges facing different states, and the daunting challenges that states and local law enforcement encounter in preparing for the next "active shooter" incident, it is critical that states have the opportunity to experiment with different policies to attempt to reduce the negative effects of firearms violence. Such policy experimentation, as long as it does not transgress the limitations imposed by the constitutional right, must be allowed to proceed, as the Supreme Court promised it would. The Second Amendment imposes some "limits" on policy alternatives, but it "*by no means eliminates*" the states' "ability to devise solutions to social problems that suit local needs and values." *McDonald*, 130 S. Ct. at 3046 (emphasis added). Underscoring the degree to which states would retain flexibility to devise new regulatory measures and to maintain existing

ones—including, presumably, the bans on assault weapons and large-capacity magazines first enacted by California in 1989—the Supreme Court cautioned that "it should not be thought that the cases decided by [] judges" under the pre-*Heller* understanding of the Second Amendment "would necessarily have come out differently under a proper interpretation of the right." *Heller*, 554 U.S. at 624 n.24.

The Supreme Court's affirmation that state experimentation with firearm regulations would continue, *McDonald*, 130 S. Ct. at 3046, is consistent with the Court's jurisprudence in other areas. For example, in *Oregon v. Ice*, 555 U.S. 160, 164 (2009), the Court held that the Sixth Amendment does not prohibit states from leaving to judges the determination of certain facts that dictate whether a court may impose consecutive as opposed to concurrent sentences, despite arguments that the Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), should lead to that result. Instead, the Court in *Ice* allowed states to retain some flexibility. As the Court explained, "[w]e have long recognized the role of States as laboratories for devising solutions to difficult legal problems. This Court should not diminish that role absent impelling reason to do so." *Ice*, 555 U.S. at 171 (citation omitted). That is especially true when dealing with state efforts to control crime, which is "much more the business of the States than it is of the Federal Government." *Id.* at 170-71 (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)). The courts "should not lightly construe the

Constitution so as to intrude upon" the efforts of states to fight crime. *Patterson*, 432 U.S. at 201.

One mechanism the courts have devised for determining the constitutionality of a particular instance of state policy experimentation—for determining, in other words, whether it is a policy choice "take[n] . . . off the table" by the enumeration of a constitutional right or is instead an allowable regulation—is to subject the law to means-end scrutiny. The district court below, joining a majority of courts to have considered Second Amendment challenges since the Supreme Court's landmark decision in *Heller*, took that approach in this case. Evaluating the Act under a form of means-end scrutiny—and taking into account a state's interest in promoting public safety and reducing the negative effects of firearm violence—is entirely consistent not only with *Heller* and *McDonald* but also with the analysis that the Supreme Court employs in cases involving other enumerated constitutional rights.

II. THE DISTRICT COURT PROPERLY RELIED ON THE EVIDENTIARY RECORD BEFORE IT IN UPHOLDING THE ACT.

In their challenge to the Act, the plaintiffs and their *amici* make a number of evidentiary arguments that are either misleading or simply untrue. As an initial matter, the plaintiffs misapprehend the role of evidence in a case challenging the constitutionality of a legislative enactment. The question before this Court under

intermediate scrutiny—should the Court conclude that heightened scrutiny applies—is not whether the State can demonstrate, to the satisfaction of this Court or to some degree of scientific certainty, that the Act will make Connecticut safer. Such an approach misconceives both the responsibilities of the legislature and the prerogatives of the courts. The question, under intermediate scrutiny, is whether the Act is "substantially related to the achievement of" the State's "compelling[] governmental interests in public safety," including reducing the negative effects of firearms violence. *Kachalsky*, 701 F.3d at 96-97.

Recognizing that it is the legislature's predictive judgment that is at issue has several implications for the types of evidence that a court may consider and the manner in which that evidence is evaluated. First, the court's role is not to "assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments" about whether the restrictions will work. *McDonald*, 130 S. Ct. at 3050. Nor is a court empowered to substitute its judgment (or that of the plaintiffs or their *amici*) for the judgment of the Connecticut General Assembly. Rather, "'substantial deference to the predictive judgments of [the legislature]' is warranted." *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)); *see also Woollard*, 712 F.3d at 881-82 (court cannot substitute the views of the law's challengers "for the considered judgment of the General Assembly" that a firearm regulation "strikes an appropriate balance").

Thus, the question is not whether there is unanimity among experts or even popular opinion regarding whether a particular firearm restriction will or will not advance Connecticut's interest in public safety, but whether there is substantial evidence to support the Legislature's predictive judgment that it will. That others may have made a different predictive judgment does not undermine the constitutional legitimacy of the law at issue.

Thus, even if the survey of law enforcement officers cited in Alabama's *amicus* brief, *see* Brief of Alabama, *et al*. at 13-14, were taken at face value, it does not undermine the substantial evidence supporting Connecticut's legislative judgment, such as evidence that other law enforcement officers, including leading national law enforcement organizations, have reached a very different conclusion. *See, e.g.*, International Association of Chiefs of Police Position Paper on Firearm Violence, at 1-2, available at: http://www.mwcog.org/uploads/committee-documents/b11bV19e20130528130749.pdf (last visited July 26, 2014); Major City Chiefs Association, Firearms Violence Policy, available at: https://www.majorcitieschiefs.com/pdf/news/firearms_violence_policy_2.pdf (last visited July 26, 2014); National Law Enforcement Partnership to Prevent Gun Violence, Protecting Communities from Assault Weapons and High-Capacity Ammunition Magazines, available at: http://lepartnership.org/wp-content/uploads/2013/04/Partnership-Facts-Assault-Weapons-and-High-Cap-

Ammo.pdf (last visited July 26, 2014). Moreover, unlike these official position statements of national law enforcement organizations taken based on votes of their membership, the unscientific, self-reporting survey cited by Alabama cannot reasonably be relied on as reflecting the views of a representative sample of law enforcement officers.[7]

Second, it is not necessary that there be conclusive evidence that a particular firearm regulation will work before it can be sustained against constitutional attack. Indeed, if absolute certainty were required before a legislature could pursue a policy innovation, the state-by-state "experimentation" with new firearms regulations that the Supreme Court has forecast would be impossible. Instead, a legislative body may "rely on predictions about the effect of" firearm laws, provided they are supported by "substantial evidence," and is not required to prove "definitively that the challenged gun regulations will actually further its important interests." *Heller v. District of Columbia*, Civ. A. No. 08-1289, 2014 U.S. Dist. LEXIS 66569, at *29-*30 (D.D.C. May 15, 2014) ("*Heller III*").

Connecticut has assembled an impressive body of evidence attesting to the public safety benefits that the Act is likely to produce, but it is not Connecticut's

[7] Remarkably, more than 60% of the respondents in that survey stated that, if they were "Sheriff or Chief," they would refuse to enforce more restrictive firearm restrictions in their jurisdictions. *See* PoliceOne's Gun Control Survey: 11 key lessons from officers' perspectives, Response to question 16, available at http://www.policeone.com/pc_print.asp?vid=6183787. Fewer than 20% of the respondents said they would enforce such restrictions. *Id.*

burden in this litigation to prove conclusively that the Act will result in the public safety benefits that the State anticipates. The plaintiffs' attacks on the evidence proffered by Connecticut are therefore misguided. For example, even if it were true that Professor Christopher Koper's studies had concluded that the federal assault weapons ban had not advanced public safety, as the plaintiffs assert, Brief at 44-45,[8] that would not undermine his conclusion that Connecticut's Act is likely to advance the State's interest in public safety and reducing the negative effects of firearms violence in Connecticut. (*See* J.A. 1395-96, 1409-10.) Among other reasons, Professor Koper's work identifies numerous shortcomings in the federal ban on assault weapons and large-capacity magazines that limited its impact during its relatively brief duration. Among the shortcomings, the federal ban: (1) did not prohibit the sale and transfer of grandfathered firearms or large-capacity magazines (J.A. 1403); (2) did not prohibit the importation of millions of additional large-capacity magazines from other countries (J.A. 1403); (3) allowed for easy substitution of firearms that differed only slightly from the banned firearms (J.A. 1403); and (4) expired before long-term effects could be measured (J.A. 1406-07). Notably, Connecticut's Act replicates none of those flaws.

[8] To the contrary, Professor Koper found that the federal assault weapons ban did result in a reduction in the use of assault weapons in crimes. (J.A. 1404-05.) In his 2013 paper, he also concluded, based on additional evidence that was not available when he prepared his 2004 report, that the federal assault weapons ban, despite its flaws, may have meaningfully reduced the number of large-capacity magazines used in crime. (J.A. 1405-06.)

(J.A. 1409-10.) Thus, the Connecticut Legislature's predictive judgment that the Act may produce a greater impact than the federal ban appears justified.[9]

Third, because it is the legislature's predictive judgment that is at issue, a court reviewing that judgment may consider all the forms of information that could have been considered by the legislature. Thus, Connecticut, in defending the judgment made by its legislature, is not limited to relying only on "empirical data," but may rely on other forms of "meaningful evidence," including "anecdotes . . . history, consensus, and simply common sense." *Heller III*, 2014 U.S. Dist. LEXIS 66569, at *34-*35 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001)); *see also United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012) (government's burden under intermediate scrutiny can be met by "resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require"). The record before this Court presents more than sufficient "substantial evidence" to support the

[9] A proposed *amicus* brief submitted in support of the plaintiffs echoes their arguments urging this Court to "ignore" and "disregard" the record evidence considered by the district court. NRA *Amicus* Brief at 11, 14 (ECF No. 62; action on motion for leave to file brief deferred, ECF No. 77). The brief also asks the Court to consider isolated statements taken from discovery materials developed in a separate lawsuit in Maryland, and claims that they undermine the conclusions drawn by Professor Koper. *See id.* at 19. Significantly, the trial court in Maryland, with the benefit of the entire record developed in that litigation, has rejected these same arguments because the court found that they "mischaracterize Koper's statements and his research, cherry-picking items and presenting them out of context." *Kolbe v. O'Malley*, 2014 U.S. Dist. LEXIS 110976, at *14 (D. Md. Aug. 12, 2014).

Connecticut General Assembly's predictive judgment that the Act will promote the State's compelling interest in promoting public safety and reducing the negative effects of firearm violence.

CONCLUSION

The judgment of the United States District Court for the District of Connecticut should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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