14-0319-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 PINK PISTOLS, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pink Pistols is an unincorporated association.

Dated: May 23, 2014

s/ Brian S. Koukoutchos
Brian S. Koukoutchos
Attorney for Amicus Curiae

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INTEREST OF AMICUS CURIAE

Pink Pistols is a shooting society that honors diversity and is open to all. It advocates the responsible and lawful use of firearms for self-defense, whether by sexual minorities (a group that FBI statistics identify as particularly subject to violence based on discriminatory animus) or by other Americans, all of whom have a Second Amendment right to armed self-defense. Pink Pistols has chapters across the United States and continues to experience rapid growth; the newest chapter is in Salt Lake City, Utah.[1] The parties have consented to the filing of this brief.

INTRODUCTION

Connecticut's Act Concerning Gun Violence Prevention and Children's Safety, Pub. Act. No. 13-3, Gen. Assemb. B. No. 1160 ("the Act"), prohibits a gun owner (1) from possessing a magazine holding more than ten rounds of ammunition and (2) from possessing a semiautomatic rifle, pistol or shotgun that the Act deems an "assault weapon." These bans will be referred to as the "Large Capacity Magazine" ("LCM") ban and the "Assault Weapons" ("AW") ban. Because the Act categorically outlaws common firearms and standard magazines that are "of the kind in common use … for lawful purposes," *District of Columbia v. Heller*,

[1] This brief was not authored in whole or in part by a party's counsel, nor has a party or a party's counsel contributed money to fund the submission of this brief. In addition to amicus, its members and its counsel, the National Rifle Association of America, Inc., contributed funds to the support this submission.

554 U.S. 570, 624 (2008), the Act cannot be reconciled with the Second Amendment.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS CIVILIAN OWNERSHIP OF FIREARMS THAT ARE IN COMMON USE FOR LAWFUL PURPOSES.

A. The Second Amendment Guarantees the Right To Keep and Bear Firearms that Are Commonly Used by Law-Abiding Citizens for Lawful Purposes.

The Second Amendment extends to "arms 'in common use at the time' for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. The court below, following *Heller*, likewise ruled that "weapons that are 'in common use at the time' are protected under the Second Amendment." *Shew v. Malloy*, 2014 WL 346859, *5 (D.Conn. Jan. 30, 2014).

B. The Act's Ban on AWs and LCMs Outlaws a Wide Array of Semiautomatic Firearms that Are Commonly Used for Lawful Purposes.

The district court held that the "Connecticut legislation here *bans firearms in common use. Millions* of Americans possess the firearms banned by this Act for hunting and target shooting." 2014 WL 346859, at *5 (emphasis added).[2] The court further held that "*millions* of Americans commonly possess firearms that have magazines which hold more than ten cartridges." *Id*. Therefore:

[2] Unless otherwise noted, all emphases in quotations in this brief have been added by amicus Pink Pistols.

> The court concludes that the firearms and magazines at issue are "in common use" within the meaning of *Heller* and, presumably, used for lawful purposes. The legislation here bans the purchase, sale, and possession of assault weapons and LCMs, … which the court concludes more than minimally affect the plaintiffs' ability to acquire and use the firearms, and therefore levies a substantial burden on the plaintiffs' Second Amendment rights.

Id.[3]

II. *HELLER* FORBIDS ANY FORM OF INTEREST-BALANCING HERE.

The Supreme Court ruled that the line between permissible regulations and impermissible bans on firearms *is not* to be established by balancing the individual right protected by the Second Amendment against competing government interests such as public safety, *because that balance has already been struck*: the Second Amendment itself "is the very *product* of an interest-balancing by the people," and "[t]he very enumeration of the 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, 635 (original emphasis). The Court therefore invalidated the ban and *expressly disavowed* the "interest-balancing" proposed by Justice Breyer's dissent as inappropriate when dealing with a categorical restriction on a class of firearms. *See id.* at 634-35 (opinion of the Court).

[3] With all due respect, this is where the constitutional inquiry should have ended, because the determination that a firearm is in common use for lawful purposes *is the decisive issue under Heller*, *see* 554 U.S. at 624-25, 627; it is not merely a threshold to the application of intermediate scrutiny.

In *McDonald v. City of Chicago*, the Court reiterated that *Heller* "*expressly rejected* the argument that the scope of the Second Amendment right should be determined by judicial interest-balancing." 130 S. Ct. 3020, 3047 (2010) (controlling opinion of Alito, J.). In *McDonald*, where Chicago likewise defended its ordinance on grounds of public safety, the Court was similarly unpersuaded. Justice Alito reminded the parties that the "right to keep and bear arms … is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes"—such as the Fourth Amendment exclusionary rule—"fall into the same category," because they inflict "'substantial social costs'" by "'return[ing] a killer, a rapist or other criminal to the streets ... to repeat his crime.'" *Id.* at 3045 (collecting cases) (citations omitted). The need for public safety has not been weighed against the people's rights under the Fourth, Fifth, or Sixth Amendments, nor should courts be allowed to "balance" away the people's rights under the Second Amendment.

McDonald emphasized that resolving Second Amendment cases *would not* "require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." *Id.* at 3050. "[T]he Supreme Court made clear in *Heller* that it wasn't going to make the

right to bear arms depend on casualty counts." *Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir. 2012).

Although this Court applied intermediate scrutiny in *Kachalsky v. County of Westchester*, it acknowledged that a law must be tested against the Second Amendment's "text, history, and tradition." 701 F.3d 81, 89 n.9 (2d Cir. 2012). Under *Kachalsky*, interest-balancing is inappropriate here, where we confront a *categorical ban* on the sale of AWs and a *categorical ban* on mere possession of LCMs, *even within the confines of the home*—where this Court has recognized that "Second Amendment guarantees are at their zenith." *Id*. at 89. In contrast, the statute in *Kachalsky* was not a ban, *see id.* at 98, nor did it invade the home:

> This is a critical difference. The state's ability to regulate firearms and, for that matter, conduct, is qualitatively different in public than in the home.

Id. at 94 (quoting *Heller*, 554 U.S. at 628).

In sum, as *Kachalsky* recognized, "where a state regulation is entirely inconsistent with the protections afforded by an enumerated right—as understood through that right's text, history, and tradition—it is an exercise in futility to apply means-end scrutiny." 701 F.3d at 89 n.9. That is the case here, and the Act's categorical bans on particular firearms and specific features of firearms should therefore be struck down without resort to means-end scrutiny.

III. EVEN IF SOME FORM OF INTEREST-BALANCING WERE APPROPRIATE HERE, THE ACT COULD NOT SURVIVE INTERMEDIATE SCRUTINY.

Even if the interest-balancing that *Heller* forbids were employed here, and even if, contrary to *Heller*, intermediate scrutiny were the correct standard of review, the Act's ban on AWs and LCMs could not stand. Even under intermediate scrutiny, a restriction must be "substantially related to the achievement of an important governmental interest." *Kachalsky*, 701 F.3d at 96. It is undisputed that the State's proof of a threat to public safety must be "exceedingly persuasive," *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), and that the State must mount a "pragmatic defense" of the challenged law and "marshal extensive empirical evidence" that the challenged gun regulation "[i]s vital to public safety." *Moore*, 702 F.3d at 939-40. The standard of proof required here is particularly demanding because: (1) this categorical ban on firearms reaches into the home, *Heller*, 554 U.S. at 628; and (2) unlike the criminal defendants who have raised Second Amendment defenses to prosecution, the plaintiffs here are not criminals, but "'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*," *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

A. The Act's Ban Cannot Be Redeemed by Pointing to All of the Firearms that It Does Not Ban.

In its balancing of interests, the court below tried to minimize the burden that the Act imposes on citizens' Second Amendment rights by observing that its "prohibition" on AWs and LCMs "does not effectively disarm individuals or substantially affect their ability to defend themselves," because the "challenged legislation [1] provides alternate access to similar firearms and [2] does not categorically ban a universally recognized class of firearms." 2014 WL 346859, at *7 (citation and quotation marks omitted).

With respect to the court's first rationale, its reasoning is precisely backwards. Moreover, the Court in *Heller* has already rejected it: "It is no answer to say … that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller*, 554 U.S. at 629. "[R]estating the Second Amendment right in terms of what IS LEFT after the regulation … is exactly backward from *Heller*'s reasoning." *National Rifle Ass'n of America, Inc. v. BATFE*, 714 F.3d 334, 345 (5th Cir. 2013) (Jones, J., joined by Jolly, Smith, Clement, Owen, and Elrod, JJ., dissenting from denial of rehearing en banc) (emphasis in original).

B. The Act's Ban Cannot Be Redeemed by Confusing Semiautomatic Civilian Firearms with Fully Automatic Military Machineguns.

As to the district court's second proffered justification for the Act, it is simply wrong to say that the firearms outlawed by the Act are not "a universally recognized class of firearms." 2014 WL 346859, at *7 & n.44. Citing, of all things, Webster's dictionary rather than an authority on firearms classification, the district court erroneously equated semiautomatic "assault weapons" with fully "automatic" "assault rifle[s] … designed for use by the military." *Id*. at nn. 12, 44.[4] This cannot stand. The Supreme Court itself has consistently characterized the AR-15 rifle that Connecticut outlaws as "the *civilian* version of the military's M–16 rifle." *Staples v. United States*, 511 U.S. 600, 603 (1994). *Staples* explained that, *unlike fully automatic* "machineguns," *semiautomatic* firearms such as the AR-15 rifle "traditionally have been widely accepted as lawful possessions." *Id*. at 612. Indeed, the Supreme Court went further and characterized the AR-15 as a "lawful," "semiautomatic," "civilian," and "entirely innocent" firearm. *Id*. at 603, 610-11.

The district court's confusion of civilian firearms with military weapons is

[4] There is a well-established firearms category known as the "assault rifle." This denotes a rifle capable of *both* semiautomatic *and fully automatic* fire; the phrase "semiautomatic assault weapon" is a nonsense word, a contradiction in terms. *See* GARY PAUL JOHNSTON & THOMAS B. NELSON, THE WORLD'S ASSAULT RIFLES 1196 (2010); *see also* MAXIM POPENKER & ANTHONY G. WILLIAMS, ASSAULT RIFLE 9, 12, 212 (2004) (By definition, all assault rifles can be fired in fully automatic mode.). The district court simply ignored this universally accepted firearms taxonomy.

the legacy of a calculated campaign of disinformation:

> Prior to 1989, the term "assault weapon" did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of "assault rifles" so as to allow an attack on as many additional firearms as possible on the basis of undefined "evil" appearance.

Stenberg v. Carhart, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting). The advocates who coined the misnomer "assault weapon" have been candid about their cynical effort to mislead the public (and courts and legislatures) into confusing semiautomatic civilian rifles with military machineguns:

> Assault weapons ... are a new topic. The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.

Josh Sugarmann, *Assault Weapons and Accessories in America*, VIOLENCE POLICY CENTER (1988), www.vpc.org/studies/awaconc.htm (emphasis omitted) (last visited May 5, 2014). Although the court below apparently succumbed to this ploy, that is not an acceptable basis for infringing Second Amendment rights by banning firearms that the district court itself found to be " 'in common use' within the meaning of *Heller*." 2014 WL 346859, at *5.

C. The Act's Ban on Common Semiautomatic Civilian Firearms Cannot Be Justified by the Fact that the Law Allows the Police To Continue To Use Such Weapons—Indeed, this Fact Supports Plaintiffs' Second Amendment Claim.

In balancing Second Amendment rights against the interest in public safety, the court below tried to trivialize the Act's invasion of law-abiding citizens' right to bear arms by insisting that the Act is not an "outright ban" insofar as it allows law enforcement officers to have AWs and LCMs "for use in the discharge of their official duties or when off duty." *Id*. at *3. But it is no answer to say that, because the police are well-armed, citizens need not be. That proposition is wrong as a matter of law—because the Second Amendment guarantees the rights of *individuals*—and tragically false as a matter of fact. No citizen enjoys a constitutional right to police protection,[5] and the police are often not around when a citizen is being assaulted.[6] Civilians are usually left to defend themselves, and the Second Amendment guarantees that they may do so with firearms that are "in common use" and "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624, 625. As in *Heller*, the state has outlawed a class of arms

[5] *See, e.g., Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756-67 (2005); *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981).

[6] Consider these statistics: in 2012 the police were unable to protect citizens from 14,827 murders, 84,376 rapes, 354,520 robberies and 760,739 aggravated assaults. *Crime in the United States 2012, Violent Crime*, FBI, www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime/violent-crime (last visited May 5, 2014) (browse by violent crime category).

"overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Id*. at 628.

If anything, Plaintiffs' Second Amendment claim is buttressed by the fact that America's one million law enforcement agents are virtually all armed with semiautomatic handguns holding more than ten rounds of ammunition.[7] This trend is borne out in Connecticut itself. Until their recent transition to a new handgun, Connecticut's State Police were armed for sixteen years with SigSauer P226 semi-automatic pistols[8] with magazines holding more than ten rounds.[9] From the 1980's, when they abandoned their revolvers, until 1996, state troopers carried 9mm Beretta semiautomatics,[10] which came with a 15-round magazine. Nearly all local police departments continue to use semiautomatics with LCMs, including, e.g., the Hartford Police and the Bridgeport Police.[11]

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[7] *See* MASSAD AYOOB, THE COMPLETE BOOK OF HANDGUNS 50, 87, 89-90 (2013).

[8] *See* Dave Collins, *State Cops To Get New Guns*, CTPOST.COM (Oct. 25, 2012, 2:53 PM), www.ctpost.com/default/article/State-cops-to-get-new-guns-3978476.php (last visited May 21, 2014).

[9] *P226*, SIGSAUER, www.sigsauer.com/CatalogProductDetails/p226.aspx (last visited May 21, 2014).

[10] Collins, *State Cops To Get New Guns*, *supra* note 8.

[11] *See* Daniel Tepfer, *Bridgeport Cops Getting More Firepower*, CTPOST.COM (May 3, 2012 7:00 AM), www.ctpost.com/default/article/Bridgeport-cops-getting-more-firepower-3528747.php (last visited May 21, 2014); *Smith & Wesson Wins Law Enforcement Contract for M&P45 Pistols* (Aug. 2, 2007),

Such firepower is essential in encounters with criminals. Even at close range, officers who fire their handguns miss more often than they hit. Years of data reveal that shots fired by police officers generally miss 83% of the time when the assailant is within 21 feet, and *even when the assailant is within six feet, the police still miss 62% of the time*.[12] Unsurprisingly, police officers consider LCMs essential to protect themselves from criminals. This universal use of pistols with LCMs by a million American police officers by itself proves that semiautomatic pistols with LCMs are "in common use" for "lawful purposes like self-defense," *Heller*, 554 U.S. at 624, and that law-abiding civilians are equally entitled to them.

The same is true with respect to the semiautomatic AR-15 rifle—the very firearm that the Supreme Court has characterized as "the civilian version of the military's M-16 rifle," *Staples*, 511 U.S. at 603, but which the Act demonizes as an "assault weapon" with only military applications. This is patently untrue. The

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www.correctionsone.com/products/firearms/press-releases/1338992-Smith-Wesson-Wins-Law-Enforcement-Contract-for-M-P45-Pistols/; Michael O. Humphries, *Hartford, CT Police Force Shifts to M&P .45*, TACTICAL-LIFE.COM (May 1, 2008 12:11 PM), www.tactical-life.com/tactical-weapons/hartford-ct-police-force-shifts-to-mp-45/.

[12] *See* Brian McCombie, *An Inside Look at FBI Handgun Training*, GUNS & AMMO: HANDGUNS (June 20, 2013), www.handgunsmag.com/2013/06/20/new-fbi-handgun-training/ (last visited May 5, 2014).

AR-15 is the most widely-issued police patrol rifle in the country.[13] For example, the AR-15 is the rifle carried in the patrol cars of the New Haven Police Department.[14] This same semiautomatic rifle, replete with features that the Act treats as indicia of weapons useful only to sociopathic spree killers—such as an adjustable stock, a pistol grip, a 30-round magazine and a muzzle compensator or flash hider—is used by some seventy law enforcement agencies in Connecticut.[15]

If the defendants were correct that semiautomatic rifles and pistols with LCMs are useful only for mass slaughter of the innocent, then "such killing machines have no place in the hands of domestic law enforcement."[16] In truth, these

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[13] The AR-15, whether built by Colt, Bushmaster, or another manufacturer, is the most common police patrol rifle in America. *See e.g.*, Michael Remez, *A Civilian Version of an M-16: Bushmaster Rifle a Common Choice*, HARTFORD COURANT (Oct. 25, 2002), articles.courant.com/2002-10-25/news/0210252068_1_bushmaster-firearms-john-allen-williams-distributor-in-washington-state (last visited May 5, 2014). The AR-15 platform "has become the carbine of choice" for the nation's law-enforcement officers. *See* Richard Nance, *Eight Years with My Colt M4 Commando: Protect and Serve*, *in* GUNS & AMMO: BOOK OF THE AR-15 48 (Eric Poole ed., 2013). The AR-15's standard-issue magazine holds 30 rounds. *See id.* at 3, 18, 32-33, 52, 70, 82, 146.

[14] Thomas MacMillan, *Cop Rifles Headed for the Streets*, NEW HAVEN INDEPENDENT (Jan. 17, 2013, 8:51 AM), www.newhavenindependent.org/index.php/archives/entry/rifles_headed_for_the_streets/ (last visited May 21, 2014).

[15] *See Agencies that Carry Colt Firearms*, www.colt.com/ColtLawEnforcement/AgenciesthatCarry.aspx (last visited May 5, 2014).

[16] *See* David B. Kopel, "*Assault Weapons*," *in* GUNS: WHO SHOULD HAVE THEM 176, 202 (David B. Kopel ed., 1995).

firearms are essential self-defense tools, which Connecticut tacitly—but unavoidably—concedes by arming its police with semiautomatic handguns and patrol rifles with magazines of more than ten rounds.[17]

If police need that much firepower to defend themselves, *a fortiori* law-abiding citizens need the same firepower, if not more.[18] Police have many advantages over civilians: (1) they wear bullet-proof vests; (2) they carry extra magazines; (3) they usually carry a hidden back-up pistol; (4) they have additional firepower in their cars, such as a shotgun or a patrol rifle (and the latter is usually an AR-15 with a 30-round magazine); (5) they have additional weapons on their belts, including Tasers, truncheons, and Mace or pepper spray; (6) they often have a partner in the car who is similarly armed; and (7) reinforcements, including paramilitary SWAT teams, are only a radio call away. Civilians lack such resources, so their need for standard pistol magazines that hold as many rounds as possible is both acute and undeniable.

IV. BANNING SO-CALLED "ASSAULT WEAPONS" AND "LARGE-CAPACITY MAGAZINES" WILL NOT REDUCE FIREARMS VIOLENCE.

The court below observed that the General Assembly's "decision to prohibit [AWs and LCMs] was premised on the belief that it would have an appreciable impact on public safety and crime prevention." 2014 WL 346859, at *8. But research

[17] *See supra* notes 8-11, 13-15.

[18] *See* Kopel, *in* GUNS: WHO SHOULD HAVE THEM, *supra* note 16, at 202.

on the now-expired federal statute banning AWs and LCMs reveals that such legislation has no discernible impact on firearms violence.[19] The Justice Department's own study, led by Professor Christopher Koper, found that:

> [W]e cannot clearly credit the ban with any of the nation's recent drop in gun violence. And, indeed, there has been no discernible reduction in the lethality and injuriousness of gun violence, based on indicators like the percentage of gun crimes resulting in death or the share of gunfire incidents resulting in injury, as we might have expected had the ban reduced crimes with both AWs and LCMs.[20]

Professor Koper concluded that, "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement."[21] The insurmountable problem is that criminals denied AWs and LCMs will simply substitute other firearms: "Because offenders can substitute non-banned guns and small magazines for banned AWs and LCMs, there is not a clear rationale for expecting the ban to reduce assaults and robberies with guns."[22]

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[19] Title XI of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). The federal ban expired in 2004.

[20] CHRISTOPHER S. KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994-2003, REP. TO THE NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE 96 (2004).

[21] *Id.* at 3.

[22] *Id.* at 81 & n.95. These conclusions are consistent with the first study of the federal ban (done in 1997), which recognized that "[a]ny effort to estimate how the ban affected the gun murder rate must confront a fundamental problem, that the maximum achievable preventive effect of the ban is almost certainly too small to detect statistically." JEFFREY A. ROTH & CHRISTOPHER S. KOPER, IMPACT EVALUATION OF THE PUBLIC SAFETY AND RECREATIONAL FIREARMS USE PROTECTION ACT

In an essay in 2013, Professor Koper again stressed substitution as an inherent weakness of any AW/LCM ban,[23] and in the affidavit he filed in the court below he reiterated that, "[b]ecause criminals and mass shooters will be able to substitute legal firearms for the banned assault weapons and LCMs, it is true that this kind of legislation is unlikely to substantially reduce overall gun violence in terms of the number or rate of crimes committed."[24] Although he noted that some stories by media journalists[25] suggested that the federal ban "may have modestly reduced

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OF 1994 (FINAL REPORT) 79 (Mar. 13, 1997), *available at* www.urban.org/UploadedPDF/aw_final.pdf. "[T]he evidence is not strong enough for us to conclude that there was any meaningful effect (i.e., that the effect was different from zero.)." *Id.* at 6. Specifically, the research "found no statistical evidence of post-ban decreases in either the number of victims per gun homicide incident, the number of gunshot wounds per victim, or the proportion of gunshot victims with multiple wounds. Nor did we find assault weapons to be overrepresented in a sample of mass murders involving guns." *Id.*

[23] Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994-2004*, *in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 165 (Daniel W. Webster & Jon S. Vernick eds., 2013) ("Koper 2013").

[24] *See* Affidavit of Christopher Koper at ¶83 (Sept. 30, 2013), Doc. 80-1 ("2013 Koper Aff.") (JA1412).

[25] Koper 2013 at 170.

gunshot victimizations had it remained in place for a longer period,"[26] Koper concluded that "analyses showed no discernible reduction in the lethality or injuriousness of gun violence during the post-ban years."[27]

The failure of the federal ban to have *any* discernible effect on gun violence has been confirmed by two government agencies—the National Research Council and the Centers for Disease Control—that conducted comprehensive reviews of *all*

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[26] *Id.* at 158; *see also id.* at 164-65.

[27] *Id*. at 165. Professor Koper filed an affidavit below to take issue with how his conclusions have been characterized by Pink Pistols and other parties. *See* 2013 Koper Aff. ¶¶78-88 (JA1410-13). But even there he conceded that: (i) "it is true that my research team and I cannot clearly credit the federal ban with decreasing gunshot victimizations during the time it was in effect," *id*. ¶81 (JA1411); (ii) "[b]ecause criminals and mass shooters will be able to substitute legal firearms for the banned assault weapons and LCMs, it is true that this kind of legislation is unlikely to substantially reduce overall gun violence in terms of the number or rate of crimes committed," *id*. ¶83 (JA1412); and (iii) although "there are a few studies" of "state assault weapons bans" that "have suggested that such bans have not reduced crime," Koper "specifically noted, however, that it is hard to draw definitive conclusions from these studies" due to the poor quality of the data, which "undermine[s] the usefulness of the cited studies," *id*. ¶84 (JA1411); *see also id.* ¶56 (JA1405) ("the data in the four cities I investigated were too limited and inconsistent to draw any clear overall conclusions"). Professor Koper also repeatedly noted that his analysis was based on data about *all* gun attacks with "*semiautomatics*," rather than on data limited to gun violence committed with the assault weapons that are banned by Connecticut's Act. *See* ¶¶8, 13, 15, 16, 21, 34, 36, 38, 75, 88 (JA1395, 1396, 1396-97, 1397-98, 1399, 1401, 1401, 1402, 1409-10, 1413) (mingling data and analysis of crimes committed with unbanned "semiautomatic" firearms with data and analysis about banned AWs and LCMs). Thus Professor Koper impeached all of his own conclusions with his repeated admissions that his data and analysis were not limited to banned AWs but swept more broadly to include semiautomatic firearms that are not banned.

the published literature on firearms violence, including Professor Koper's research (in contrast, neither the defendants nor Professor Koper has tried to refute the conclusions of the NRC and the CDC). The NRC and CDC both found that there is insufficient evidence to conclude that bans on "assault weapons" or other particular firearms or firearm features have had any beneficial effect on gun violence.[28]

V. BANNING AWS AND LCMS WILL NOT REDUCE THE THREAT THAT CRIMINALS POSE TO LAW ENFORCEMENT OFFICERS.

Unable to demonstrate that the Act will reduce firearms violence generally, the defendants and the court below retreat to the position that the firearms banned by the Act pose a particular threat to police officers. *See* 2014 WL 346859, at *9. The data do not support this proposition. Consider the FBI's recent statistics on

[28] *See* NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 97 (Charles F. Wellford et al. eds., 2005) ("[G]iven the nature of the [1994 assault weapons ban], the maximum potential effect of the ban on gun violence outcomes would be very small and, if there were any observable effects, very difficult to disentangle from chance yearly variation and other state and local gun violence initiatives that took place simultaneously."); Centers for Disease Control, *Recommendations To Reduce Violence Through Early Childhood Home Visitation, Therapeutic Foster Care, and Firearms Laws*, 28 AM. J. PREV. MED. 6, 7 (2005) (With respect to "bans on specified firearms or ammunition," the CDC Task Force found that "[e]vidence was insufficient to determine the effectiveness of [bans, for] the prevention of violence."); *see also* Robert A. Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREV. MED. 40, 49 (2005).

police homicides.[29] In 2010 there were 56 law enforcement officer ("LEO") homicides. Out of those 56 homicides, there is only one identified weapon that would arguably fall within Connecticut's ban on AWs and LCMs, and it involved a semi-automatic rifle that had been illegally converted to fire in fully automatic mode and which was therefore already illegal under both federal and Connecticut law, wholly independent of the Act challenged here.[30] The FBI data show that, in 2010, a law enforcement officer was eight times more likely to be murdered with a revolver than with an AW or LCM,[31] eight times more likely to be killed with his own service pistol, three times as likely to be killed by a "firearms mishap" during police training (whether by his own hand or that of a fellow officer), and 72 times as likely to be killed in the line of duty accidentally—usually by being run over by another motorist while the officer was on a roadside issuing a traffic ticket.[32] The LEOKA statistics for 2011 are similar.[33]

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[29] LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED: 2010 ("LEOKA 2010"), www.fbi.gov/about-us/cjis/ucr/leoka/2010.

[30] *See id.*

[31] *See* Kopel, *in* GUNS: WHO SHOULD HAVE THEM, *supra* note 16, at 182 (" 'It is interesting to note, in the current hysteria over semi-automatic and military look-alike weapons, that the most common weapon used to murder peace officers was that of the .38 Special and the .357 Magnum revolvers.' ") (quoting a report in *The Journal of California Law Enforcement*).

[32] *See* LEOKA 2010, *supra* note 29.

[33] LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED: 2011, www.fbi.gov/about-us/cjis/ucr/leoka/2011.

These facts explain why professional, rank-and-file police officers (as distinguished from elected or politically appointed law enforcement chiefs) oppose bans on so-called "assault weapons."[34] In his congressional testimony on the first AW ban proposed by Congress in 1994, Joseph Constance, a 25-year veteran of the Trenton police, explained that New Jersey had had such a ban in place for years and that the "practical value of such bans" is zero.[35] "Despite their intimidating appearance, no auto-loading rifle is as dangerous as an old-fashioned double-barreled 12-gauge shotgun."[36] The so-called "assault weapons" were used in such a small proportion of assaults on police that, Chief Constance testified, as a statistical matter "my officers are more likely to confront an escaped tiger from the local

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[34] *See* Kopel, *in* GUNS: WHO SHOULD HAVE THEM, *supra* note 16, at 189 (75% of police officers oppose a ban on "assault weapons," with the figure rising to 85% when only street patrol officers are polled).

[35] *Assault Weapons: A View from the Front Lines: Hearing on S. 639 and S. 653 Before the S. Comm. on the Judiciary*, 103d Cong. 83-84 (1993) (statement of Joseph Constance, Deputy Chief, Trenton, New Jersey Police Department).

[36] *Id.* at 85. *See* Kopel, *in* GUNS: WHO SHOULD HAVE THEM, *supra* note 16, at 164 ("The Winchester Model 12 pump action shotgun (defined as a 'recreational' firearm by [assault weapons bans]) can fire six 00 buckshot shells, each shell containing twelve .33 caliber pellets, in three seconds. Each of the pellets is about the same size as the bullet fired by a[] [Russian] AKS (a semi-automatic look-alike of an AK-47 rifle). In other words, the Winchester Model 12 pump action shotgun can in three seconds unleash seventy two separate projectiles …. The Remington Model 1100 shotgun (a common semi-automatic duck-hunting gun, also defined as a 'recreational' firearm) can unleash the same 72 projectiles in 2.5 seconds.").

zoo than they are to confront one of these weapons."[37]

Finally, in the vast majority of LEO homicides, the perpetrator in all likelihood had a criminal record and was therefore already barred from owning *any* firearm. No gun-control law is going to affect a felon's decision whether to employ an "assault weapon" with a "large capacity magazine," or to use an unbanned, legal firearm instead, *because for felons there are no legal firearms.* An FBI study in 2006 found—unsurprisingly—that 97% of the firearms used to attack police officers "were obtained illegally."[38] As Chief Constance explained, New Jersey's AW ban was pointless and ineffective because "rank-and-file officers in New Jersey knew to a certainty that criminals would continue to obtain guns illegally, no matter how strict our gun laws are. Our prediction of failure has been borne out. Simply put, ladies and gentlemen, criminals do not fill out forms."[39]

The stubborn fact is that criminals are not deterred by firearms regulations; therefore the only people affected by bans such as the Act are law-abiding citizens who buy their firearms though properly licensed firearms merchants. Thus we are told that the gun-buying rights of law-abiding citizens may be restricted based not

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[37] *Assault Weapons*, 103d Cong., *supra* note 35, at 85.

[38] *See* ANTHONY J. PINIZZOTTO ET AL., VIOLENT ENCOUNTERS: A STUDY OF FELONIOUS ASSAULTS ON OUR NATION'S LAW ENFORCEMENT OFFICERS 50 (FBI Criminal Justice Information Services Division 2006); *see also id*. at 43-45, 50-52 (interviewed criminals stated that none of these laws or statutes deterred them because all the guns they used were stolen, often from other criminals).

[39] *Assault Weapons*, 103d Cong., *supra* note 35, at 84.

on fears about what *they* will do with the firearms they purchase, but on the violence that the state anticipates from *others*. But to ban firearms because criminals use them is to tell law-abiding citizens that their liberties depend not on their own conduct, but on the conduct of the lawless, and that the law can vouchsafe the law-abiding only such rights as the lawless will allow. Surely this cannot be. Just as "[t]he First Amendment knows no heckler's veto," *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004), the Second Amendment cannot tolerate restrictions on law-abiding citizens' right to keep and bear arms based on the threat to public safety posed not by those citizens, but by criminals. In short, the incremental effect of the Act on criminals will be minimal, but the infringement of the Second Amendment rights of law-abiding citizens will be profound.

VI. THE SAD TRUTH IS THAT THE ACT WOULD NOT HAVE PREVENTED THE ATROCITY THAT SPAWNED IT—THE MASSACRE AT NEWTOWN.

Unable to demonstrate that the Act will reduce firearms violence generally or reduce homicides of police officers, the defendants and the court below retreat once again—this time to the position that the Act might reduce the carnage from mass shootings. *See* 2014 WL 346859, at *8-9 & nn. 49, 52-53. But the latest scholarly research reveals that, despite the horrors of recent massacres, "[m]ass shootings have not increased in number or in overall death toll, at least not over the past several decades." James Alan Fox et al., *Mass Shootings in America: Moving*

Beyond Newtown, 18 HOMICIDE STUDIES 128 (2013).[40] The *only* thing that "has increased with regard to mass murder … is the public's fear, anxiety, and widely held belief that the problem is getting worse." *Id*. at 130.

Professor Fox concluded that the notion that "restoring the federal ban on assault weapons will prevent these horrible crimes" is a "myth." *Id*. at 136. "[A] comparison of the incidence of mass shootings during the 10-year window when the assault weapon ban was in force against the time periods before implementation and after expiration shows that the legislation had virtually no effect" on mass shootings. *Id*. The problem is that the "overwhelming majority of mass murderers use firearms that would not be restricted by an assault weapons ban" and "these mass murderers … easily could have identified an alternate means of mass casualty if that were necessary." *Id*. "Eliminating the risk of mass murder would involve

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[40] The journal is available at http://hsx.sagepub.com/content/18/1/125. Professor Fox systematically dismantled an article published by a journalist—not a criminologist—in a news magazine called *Mother Jones*, on which Professor Koper heavily relied: Mark Follman et al., *A Guide to Mass Shootings in America*, MOTHER JONES (Feb. 27, 2013), www.motherjones.com/politics/2012/07/mass-shootings-map. *See* 2013 Koper Aff. ¶¶15 n.7, 22-23 & nn.11-12, 31, 33 (JA1397, 1399, 1400-01, 1401); Supplemental Affidavit of Christopher Koper at ¶¶6-14 (Jan. 6, 2014), Doc. 117-2 ("Koper Suppl. Aff.") (JA2691-94).

Despite devoting most of his Supplemental Affidavit to the *Mother Jones* data, Professor Koper acknowledges that he "ha[s] not independently investigated or researched the mass shooting incidents reported by *Mother Jones* but [is] simply using the data as it [*sic*] appears in *Mother Jones*[] …." Koper Suppl. Aff. ¶10 n.5 (JA2693).

extreme steps that we are unable or unwilling to take—abolishing the Second Amendment … and rounding up anyone who looks or acts at all suspicious." *Id*. at 141.

In the end, we confront the cruel but stubborn fact that the Act would have changed nothing at Newtown because, as the court below conceded, the Act does not "prohibit bolt action rifles or revolvers, nor most shotguns," 2014 WL 346859, at *2 (footnote omitted), any of which would have been just as deadly at Newtown.

Limiting magazines to ten rounds would have made no difference: Adam Lanza used 30-round magazines, but he changed them out before they were exhausted and could just as readily have used legal 10-round magazines.[41] That is precisely what Eric Harris did at Columbine High School on April 20, 1999, where he fired 96 shots from a rifle using ten-round magazines.[42]

Instead of reloading his AR-15, Lanza could have employed the two handguns that he was carrying or the shotgun that he took to the school but left in his

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[41] N.R. Kleinfield et al., *Newtown Killer's Obsessions, in Chilling Detail*, N.Y. TIMES, Mar. 28, 2013, at A1.

[42] *How They Were Equipped That Day*, Jefferson County Sheriff's Office (2000), www.cnn.com/SPECIALS/2000/columbine.cd/Pages/EQUIPMENT_TEXT.htm (last visited May 23, 2014); *Sandy Hook Elementary School Shooting*, WIKIPEDIA, *available at* http://en.wikipedia.org/wiki/Sandy_Hook_Elementary_School_shooting (last visited May 23, 2014).

car.[43] Deranged mass killers tend to arm themselves with multiple guns, just as Adam Lanza did.

Nor did the rate of fire of Lanza's AR-15 make a difference, *because it was the same as every other semiautomatic rifle*—one pull of trigger fires only one bullet. Even if *all* semiautomatic rifles were outlawed, Lanza could have used a 150-year-old lever-action rifle such as the Volcanic, the Henry, or the Winchester—cowboy guns familiar to us from myriad movies, which are specifically exempted from the Act. *See* 2014 WL 346859, at *2. Lanza fired 154 shots in about five minutes; that's 30 shots per minute.[44] That rate of fire can be achieved with an 1866 Winchester[45] or with an 1850s Volcanic (which had a 30-round magazine).[46] Indeed, Lanza's rate of fire could be exceeded by a Henry Model 1860, which was advertised as capable of 60 shots per minute.[47]

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[43] *Id.*

[44] *See* Mary Ellen Clark & Noreen O'Donnell, *Newtown School Gunman Fired 154 Rounds in Less than 5 Minutes*, REUTERS U.S. ED. (Mar. 28, 2013), www.reuters.com/article/2013/03/28/us-usa-shooting-connecticut-idUSBRE92R0EM20130328 (last visited May 23, 2014).

[45] *See* GUN: A VISUAL HISTORY 174 (Chris Stone ed., 2012); MILITARY SMALL ARMS 147 (Graham Smith ed., 1994).

[46] *See* MILITARY SMALL ARMS, at 146.

[47] *See* K.D. KIRKLAND, AMERICA'S PREMIER GUNMAKERS: WINCHESTER 8 (2013).

A bolt-action rifle from World War One would also have fired just as rapidly, and Lanza had one at home.[48] A person practiced in using the bolt-action Enfield rifle with its ten-round magazine—entirely legal under the Act—can fire up to 37 aimed shots per minute.[49]

Finally, Lanza could have accomplished his atrocities with a simple six-shot revolver, which can be rapidly reloaded with the use of devices called "speed-loaders."[50] Further evidence of this comes from *The Public Inquiry into the Shootings at Dunblane Primary School on 13 March 1996*.[51] On that day, a madman named Thomas Hamilton walked into a school in Scotland and, within four minutes, shot 30 teachers and children with a 9mm pistol before killing himself.[52] Hamilton shot his victims with a Browning semiautomatic pistol that he reloaded with 20-round magazines (he fired 105 shots).[53] However, the *Public Inquiry* concluded that

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[48] *See* Clark, *supra* note 44 ("Enfield bolt-action rifle" among firearms in Lanza home).

[49] *See* WILL FOWLER & PATRICK SWEENEY, WORLD ENCYCLOPEDIA OF RIFLES AND MACHINE GUNS 40 (2012); Kopel, *in* GUNS: WHO SHOULD HAVE THEM, *supra* note 16, at 166 ("Even including time for reloading, a simple revolver or a bolt-action hunting rifle can easily fire [as] fast" as Patrick Purdy did in 1989, when he shot 34 children at a schoolyard with a semiautomatic rifle).

[50] *See* Joseph von Benedikt, *Double Down: Get Your DA Revolver Skills Up to Snuff with These Pro Tips*, *in* GUNS & AMMO: HANDGUNS 62-63 (Aug./Sept. 2013).

[51] *Available at* www.ssaa.org.au/research/1996/1996-10-16_public-inquiry-dunblane-lord-cullen.pdf (last visited May 23, 2014).

[52] *See id.* ¶¶1.3, 6.10.

[53] *Id.* ¶3.39.

Hamilton could have inflicted the same bloodshed with the two revolvers that he was carrying:

> [W]ith a revolver it is possible to maintain a speed of firing which approaches that of the self-loading pistol. Further, as I stated earlier, the use of a speed-loader in conjunction with a revolver which had a cylinder which could be swung out would enable a whole set of cartridges to be removed and replaced very quickly."[54]

The *Public Inquiry* concluded that an old-fashioned double-barreled shotgun—a firearm unrestricted by the Act—would have been far more deadly. Within the same span of time that transpired at Dunblane, a shooter could discharge and reload a double-barreled shotgun 105 times—the same number of shots that Hamilton fired—but with far more carnage from the storm of approximately one thousand projectiles that would be unleashed if one were using buckshot.[55] As a result of the Dunblane massacre, the British government outlawed virtually all private ownership of handguns—an option that the Second Amendment forbids.

Thus firearms technology that is 150 years old and that is entirely unrestricted by the Act would have wrought the same death toll at the Newtown school as the semiautomatic AR-15 that Lanza used. The monstrosity at Newtown was not the weapon, but the depraved individual who wielded it.

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[54] *Id.* ¶9.51.
[55] *Id.* ¶9.53.

CONCLUSION

The challenged provisions of the Act should be struck down.

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Respectfully submitted,

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This brief complies with the type-volume limits of Federal Rules of Appellate Procedure 32(a)(7)(B) and 28.1(e)(2)(A) because the brief contains 6,858 words.

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Dated: May 23, 2014

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