UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JUNE SHEW, *et al.*,	:	
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Plaintiffs,	:	
	:	
v.	:	CASE NO.: 3:13-CV-00739 (AVC)
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DANNEL P. MALLOY, *et al.*,	:	
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Defendants.	:	
	:	July 15, 2013

PINK PISTOLS' AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other

INTEREST OF AMICUS CURIAE

Pink Pistols is a shooting society that honors diversity and that is open to all. It advocates the responsible use of lawfully owned and lawfully carried 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 any other individuals, all of whom have a Second Amendment right to armed self-defense. Pink Pistols has twenty-two chapters across the United States and the organization is experiencing rapid growth, with requests to form new local chapters coming in all the time.

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 large capacity magazine (for either a rifle or a handgun) capable of holding more than ten rounds of ammunition or (2) from possessing a semiautomatic rifle, pistol, or shotgun that the Act specifically names or generally describes as an "assault weapon." These bans will respectively be referred to hereafter as the Act's "Large Capacity Magazine" ("LCM") ban and its "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*, 554 U.S. 570, 624 (2008), the Act cannot be reconciled with the Second Amendment and should be struck down.

ARGUMENT

I. Under the Principles Established by *District of Columbia v. Heller*, the Second Amendment Protects Civilian Ownership of Firearms that Are of the Kind in Common Use for Lawful Purposes.

A. *Heller* Forbids Any Form of Interest-Balancing when the Challenged Law Is a Categorical Ban on Particular Firearms.

The Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which struck down the District's ban on a particular category of firearms (to wit, handguns), is the basis for this challenge to Connecticut's ban on AWs and LCMs. In *Heller* the Court emphatically 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 asserted 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 (emphasis in original).

Although *Heller* stated that D.C.'s handgun ban would fail "any of the standards of scrutiny that [the courts have] applied to enumerated constitutional rights," 554 U.S. at 628, the Supreme Court made a point of *not* applying any of those standards. Instead, the Court categorically struck down the ban after finding it irreconcilable with the Second Amendment's text and history. The Court similarly invalidated the "trigger-lock requirement"—the separate, independent provision of D.C. law requiring "that firearms in the home be rendered and kept inoperable at all times," either by disassembly or by the addition of a trigger lock to the firearm—without subjecting it to any particular "tier," "degree," or "level" of judicial scrutiny. *Id.* at 630. Indeed, the Court *expressly disavowed* the "interest-balancing" and intermediate

scrutiny proposed by Justice Breyer in dissent as wholly inappropriate when dealing with a categorical ban on a class of firearms. *See id.* at 634-35 (opinion of the Court); *id.* at 704-05 (Breyer, J., dissenting). In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme 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. at 3047 (controlling opinion of Alito, J.). *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. As Judge Posner wrote in the Seventh Circuit's decision striking down the Illinois ban on carrying firearms for self-defense outside the home, "the 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) (citing *Heller*, 554 U.S. at 636). *See also Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) ("*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test . . . .").[1]

Although the Second Circuit applied intermediate scrutiny in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), which upheld New York's requirements for obtaining a license to carry a handgun in public, even on *Kachalsky*'s own terms its interest-balancing analysis does not control in this case, which involves a flat ban on certain categories of firearms.

[1] The *Heller* Court's decision not "to employ strict or intermediate scrutiny appears to have been quite intentional and well-considered." *Heller II*, 670 F.3d at 1273 n.5 (Kavanaugh, J., dissenting) (citing Tr. of Oral Arg. at 44, *Heller*, 554 U.S. 570 (No. 07-290) (Chief Justice Roberts: "Well, these various phrases under the different standards that are proposed, 'compelling interest,' 'significant interest,' 'narrowly tailored,' none of them appear in the Constitution .... I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up.").

The New York law under review in *Kachalsky* did not amount to a flat ban, *see* 701 F.3d at 98 (New York did not categorically "forbid[] anyone from carrying a handgun in public"), and it did not extend into the home, *see id.* at 94 ("New York's licensing scheme affects the ability to carry handguns only ***in public*** . . . ." (emphasis in original)). Neither of those distinctions exists here, and therefore interest-balancing cases such as *Kachalsky* are inapposite and do not foreclose application of *Heller*'s categorical approach to a law that *does amount to a flat ban and that does extend into the home*.

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 therefore can and should be struck down under *Heller* without resort to means-end scrutiny.

B. Under *Heller*, the Second Amendment Protects the Individual Right to Possess Firearms that Are Commonly Used by Law-Abiding Citizens for Lawful Purposes.

The Supreme Court has held that the firearms protected by the Second Amendment are those "arms 'in common use at the time' for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. *See also id.* at 624 (constitutionally protected firearms include " 'arms . . . of the kind in common use at the time.' ") (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)0; *id.* at 627 ("*Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.' ") (quoting *Miller*, 307 U.S. at 179). Or, to put it another way, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," such as sawed-off shotguns. *Heller*, 554 U.S. at 625. *See also id.*

at 627 (distinguishing protected firearms commonly used for hunting or self-defense from "sophisticated arms that are highly unusual in society at large."). The Court ruled that this distinction is "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,' " 554 U.S. at 627 – a tradition that did not bar "Persons of Quality [from] wearing *common Weapons* . . . for their Ornament or Defence, in such places, and upon such Occasions, in which it is common Fashion to make use of them, without causing the least Suspicion of an intention to commit any Act of Violence or Disturbance of the Peace." 1 HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 136 (1716) (emphasis added).[2]

Applying this Second Amendment "common use" test, rather than any nebulous form of multi-tiered or intermediate scrutiny, *Heller* struck down the D.C. ban on handguns: "The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." 554 U.S. at 628; *see also id.* at 628-29 (Handguns are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family."); *id.* at 629 ("the American people have considered the handgun to be the quintessential self-defense weapon."); *id.* ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."); *see also Ezell v. City of Chicago*, 651 F.3d at 703 ("broadly prohibitory laws restricting the core Second Amendment right," such as "handgun bans . . . are categorically unconstitutional.").

[2] Merely carrying weapons, whether swords or firearms, in public was not an offence under English law. What the law prohibited was for an individual to go about "armed . . . and having his or their faces blackened," or being "armed and otherwise disguised." JOYCE LEE MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE 68 (2002). "It is striking that although being armed and disguised with a face blackened, or simply appearing disguised was now a felony, simply appearing armed was not." *Id.*

II. The Act's Ban on "Large Capacity Magazines" Outlaws a Nearly Universal Feature of Firearms Commonly Used for Lawful Purposes and Therefore Infringes the Second Amendment Right To Keep and Bear Arms.

The principles established by *Heller* compel the conclusion that the Act's prohibition on magazines capable of holding more than ten rounds of ammunition ("LCMs") is unconstitutional. The test is whether LCMs and the firearms capable of accepting them constitute "arms 'in common use at the time' for lawful purposes like self-defense," *Heller*, 554 U.S. at 624, or are instead "weapons not typically possessed by law-abiding citizens for lawful purposes," *id.* at 625, which is to say that they are "arms that are highly unusual in society at large." *Id*. at 627. This is not a close question. Indeed, this issue was conceded by the only Court of Appeals to consider the constitutionality of a ban on LCMs. In *Heller II*, 670 F.3d at 1261, the panel majority concluded that "[w]e think it clear enough in the record that . . . magazines holding more than ten rounds are indeed in 'common use,' as the plaintiffs contend. . . . There may well be some capacity above which magazines are not in common use but, if so, the record is devoid of evidence as to what that capacity is; in any event, that capacity surely is not ten."[3]

[3] This is where the *Heller II* panel should have stopped, because the determination that a weapon is in common use for lawful purposes *is the decisive issue under Heller, see* 554 U.S. at 624-25, 627, not merely a threshold to the application of intermediate scrutiny. *See Heller II*, 670 F.3d at 1269, 1271-72, 1273, 1276-77 & n.8 (Kavanaugh, J., dissenting). Once a court has established that a class of firearms is " 'in common use at the time' for lawful purposes like self-defense," *Heller*, 554 U.S. at 624, that class enjoys Second Amendment protection and the court's work is done. *See also id.* at 625, 627, 628-29. The panel majority in *Heller II* erred by going on to apply precisely the interest-balancing test that the Supreme Court had expressly rejected in *Heller*, *see* 554 U.S. at 634. Thus, *Heller II* repeatedly (and erroneously) relied on *Turner Broad. System v. FCC*, 520 U.S. 180 (1997), *see, e.g.*, 670 F.3d at 1257,1259, 1259-60, which is the very decision on intermediate scrutiny that Justice Breyer relied upon in his *Heller* dissent, *see* 554 U.S. at 690, 696, 705-05 (Breyer, J., dissenting), and that was rejected by the opinion of the Court, *see* 554 U.S. at 634 (opinion of the Court).

The panel majority in *Heller II* actually understated the ubiquity of LCMs. Americans own tens of millions of both rifle and pistol magazines fitting the Act's description of LCMs—therefore, such magazines are "in common use" by any conceivable standard. *See* 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. Dept. of Justice at 65 (2004) (hereafter "Koper NIJ Rep. 2004") (there are at least 72 million such magazines in the U.S., not counting the millions that have been imported or manufactured in the nine years since the federal ban on magazines in excess of ten rounds expired in 2004).[4]

Indeed, the tendentious label "Large Capacity Magazine" is a misnomer because magazines that will hold more than ten rounds are *standard equipment* on: (1) the predominant brands of semiautomatic rifles used for both self-defense and recreational purposes, such as the AR-15, and (2) most semiautomatic pistols sold in America, whether to law enforcement officers or the general public, with limited exceptions such as diminutive pocket pistols or certain pistols

[4] Contrary to the Connecticut Legislature's apparent assumption, "Large Capacity Magazines" are not some sort of novel menace but a feature of firearms that has been familiar for more than 150 years. Indeed, many firearms with "large" magazines date from the era of ratification of the 14th Amendment. The Jennings rifle of 1849 had a twenty-round magazine, the Volcanic rifle of the 1850s had a thirty-round magazine, both the 1866 Winchester carbine and the 1860 Henry rifle had fifteen-round magazines, the 1892 Winchester could hold seventeen rounds, the Schmidt-Rubin Model 1889 used a detachable twelve-round magazine, the 1898 Mauser Gewehr could accept a detachable box magazine of twenty rounds, and the 1903 Springfield rifle could accept a detachable box magazine of twenty-five rounds. *See* GUN: A VISUAL HISTORY 170-71, 174-75, 180-81, 196-97 (Chris Stone ed., 2012); MILITARY SMALL ARMS 146-47, 149 (Graham Smith ed., 1994); WILL FOWLER AND PATRICK SWEENEY, WORLD ENCYCLOPEDIA OF RIFLES AND MACHINE GUNS 135 (2012); K.D. KIRKLAND, AMERICA'S PREMIER GUNMAKERS: BROWNING 39 (2013).

The same is true for semiautomatic handguns: the 1896 Mauser C/96 could accept a twenty-round box magazine (located in front of the pistol's grip); the 1908 Luger could accept a detachable thirty-two-round drum magazine; and the 1935 Browning Hi-Power pistol came standard with a thirteen-round magazine. *See* GUN: A VISUAL HISTORY, *supra* note 4, at 68-69; WORLD ENCYCLOPEDIA OF RIFLES AND MACHINE GUNS, *supra* note 4, at 138, 141; AMERICA'S PREMIER GUNMAKERS: BROWNING, *supra* note 4, at 83.

designed for large cartridges such as the .45 ACP. On these commonly owned weapons, the standard-issue magazines for semiautomatic pistols have capacities ranging from eleven to nineteen rounds, with most being around fifteen to seventeen;[5] the standard-issue magazines for AR-15 semiautomatic rifles (and their numerous clones) hold thirty rounds.[6] Therefore, referring to such magazines as "Large Capacity" is rather misleading: these are the *standard*-capacity magazines that are for firearms of this size; it is the semiautomatic firearms (particularly handguns) that can hold only magazines of ten or fewer rounds that are unusual.[7]

Insofar as firearms equipped with magazines capable of holding more than ten rounds are in "common use" for "lawful purposes"—particularly the paramount "lawful purpose [of] self-defense"—the Second Amendment guarantees the right of law-abiding, responsible citizens to acquire, possess, and use them. *Heller*, 554 U.S. at 624.

The sea change in handguns from six-shot revolvers—once commonly used by both law enforcement agents and private citizens—to semiautomatic handguns with magazines of thirteen, fifteen, seventeen rounds or more occurred in the aftermath of a notorious shoot-out between FBI

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[5] *See* HANDGUNS: 2013 BUYER'S GUIDE 11-13, 50-55, 86-123 (2013); THE COMPLETE BOOK OF AUTOPISTOLS: 2013 BUYER'S GUIDE 73-97 (2013).

[6] *See* GUNS & AMMO, BOOK OF THE AR-15 18, 32-33, 40, 42, 52, 70, 82, 146 (Eric R. Poole ed., 2013).

[7] A review of the current edition of GUN DIGEST, a standard reference work that includes specifications of currently available firearms, reveals that about two-thirds of the distinct models of semiautomatic centerfire rifles listed are normally sold with standard magazines that hold more than ten rounds of ammunition. And many rifles sold with magazines of smaller capacity nonetheless accept standard magazines of twenty, thirty, or more rounds without modification. GUN DIGEST 2013 455-64, 497-99 (Jerry Lee ed., 67th ed. 2012). Similarly, about one-third of distinct models of semiautomatic handguns listed—even allowing for versions sold in different calibers, which often have different ammunition capacities—are normally sold with magazines that hold more than ten rounds. *Id.* at 407-39. In both cases, but especially for handguns, these figures underestimate the ubiquity of magazines capable of holding more than ten rounds of ammunition, because they include many minor variations of lower-capacity firearms offered by low-volume manufacturers, such as those devoted to producing custom versions of the century-old Colt .45 ACP Government Model 1911.

agents and two bank-robbing murderers in Miami on April 11, 1986.[8] The two criminals carried semiautomatic firearms, including a Ruger Mini-14 rifle, which comes standard with a twenty-round magazine and which fires the very same .223 caliber bullet as the AR-15-style rifles that the Connecticut Act outlaws. During the firefight the FBI agents struggled to reload their five- and six-shot revolvers while the suspects hit them with a fusillade of bullets.[9] The two bank robbers eventually died, but only after absorbing 18 shots from the FBI agents' revolvers while continuing to return fire that killed two agents, permanently crippled three, and wounded two more. "It was the bloodiest day in FBI history."[10] The FBI had the bank robbers outnumbered eight to two, but in terms of firepower the FBI was "outgunned."[11]

Both the FBI and local law enforcement agencies in Florida immediately started looking for handguns to match the firepower that criminals were now employing.[12] The rest of the country followed suit, to the point that now the nation's nearly one million law enforcement agents at the federal, state and local levels[13] are virtually all armed with semiautomatic handguns with magazines holding more than ten, and as many as twenty, rounds of ammunition.[14] This trend is borne out in Connecticut itself. Until the handgun transition that they are just now

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[8] PAUL M. BARRETT, GLOCK: THE RISE OF AMERICA'S GUN 1-5 (2012).

[9] GLOCK: THE RISE OF AMERICA'S GUN, at 2-3.

[10] *Id*. at 3-5.

[11] *Id*. at 4.

[12] *Id*. at 5.

[13] *See* BUREAU OF JUSTICE STATISTICS: CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2008), *available at* www.bjs.gov (July 2011 Report).

[14] *See* MASSAD AYOOB, THE COMPLETE BOOK OF HANDGUNS 50 (2013) (discussing police transition from revolvers to semiautomatics with large magazines); *id.* ("For a time in the 1980s, this Sig Sauer P226 was probably the most popular police service pistol") (fifteen-round magazines); *id.* at 87 ("Known as the Glock 22, this pistol is believed to be in use by more American police departments than any other. Its standard magazine capacity is 15 rounds."); *id.* at 89 ("On the NYPD, where officers have a choice of three different 16-shot 9mm pistols for uniform carry, an estimated 20,000 of the city's estimated 35,000 sworn personnel carry the Glock 19."); *id.* at 90 ("The most popular police handgun in America, the Glock is also hugely popular for action pistol competition and home and personal defense.").

implementing, the Connecticut State Police were armed for sixteen years with Sig Sauer P226 semiautomatic pistols in .40 caliber, with magazines holding twelve rounds.[15] From the 1980's, when they abandoned their revolvers, until 1996, the State Troopers carried 9mm semiautomatic handguns made by Beretta, which came with a 15-round magazine.[16] Many Connecticut local police departments continue to use semiautomatics with LCMs, including the Hartford Police and the Bridgeport Police, both of which have adopted the Smith & Wesson M&P .45 caliber semiautomatic with an 11-round magazine.[17]

Such firepower has proved to be essential in police encounters with armed criminals. The FBI has just made a major change in its firearms training protocol based on its discovery (analyzing seventeen years of data) that 75% of FBI agent shoot-outs involved criminals who were within nine feet of the agent.[18] This tracks the experience of police officers nationwide: in the period from 2002 through 2011, 65% of law enforcement officers who were murdered in the line of duty were killed by assailants who were within ten feet of them.[19] Even at such close ranges, police officers who fire their handguns miss their target far more often than they hit it. A study of a decade's worth of data from the Metro-Dade police in Florida revealed that officers

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[15] *See* Dave Collins, *State Cops To Get New Guns*, CTPOST.COM (Oct. 25, 2012), www.ctpost.com/default/article/State-cops-to-get-new-guns-3978476.php.

[16] *Id*.

[17] *See* Daniel Tepfer, *Bridgeport Cops Getting More Firepower*, CTPOST.COM (May 3, 2012), www.ctpost.com/default/article/Bridgeport-cops-getting-more-firepower-3528747.php; *Smith & Wesson Wins Law Enforcement Contract for M&P45 Pistols* (Aug. 1, 2007), *available at* www.thefreelibrary.com/Smith+%26+Wesson+Wins+Law+Enforcement+Congtract+for+M%26P45+Pistols.-a0167050524; *Hartford, CT Police Force Shifts to M&P .45*, TACTICAL-LIFE.COM (May 1, 2008), www.tactical-life.com/tactical-weapons/hartford-ct-police-force-shifts-to-mp-45/.

[18] *See* Brian McCombie, *Up Close With The FBI: The Bureau Emphasizes Close Quarters in New Gun Training*, in GUNS & AMMO, HANDGUNS (Aug./Sept. 2013) at 10.

[19] *Id*.

who shot at suspects, even at these close ranges, missed 85% of the time.[20] The New York City Police Department did slightly better: its officers only missed 83% of the time when the assailant was nine to twenty-one feet away, and when the assailant was within just six feet of the officer the police still missed 62% of the time.[21]

Even for experienced police officers, confrontations with armed criminals generate adrenalin that aids the big muscle groups that are involved in running away, but that impairs the fine motor control needed to operate a handgun, and the acute stress of being terrified for one's life only makes matters worse.[22] It is little wonder then that police officers, even with all their training courses and practice, deem high-capacity magazines essential for their encounters with armed criminals. Ordinary civilians, who lack the police officer's level of training and practice, need those extra rounds even more. The question is not "When is it an advantage to have a high-capacity magazine?" The proper question is "When is it an advantage to run out of ammunition when you are assaulted by an armed criminal?" And the answer to that is "never"—regardless whether one is a police officer or a civilian.

The virtually universal use of semiautomatic pistols with LCMs by the nation's nearly one million law-enforcement officers is sufficient by itself to confirm that pistols with LCMs are "in common use" for "lawful purposes like self-defense," *Heller*, 554 U.S. at 624.[23] It also indicates that, if even *police officers* need that much firepower to defend themselves against

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[20] *Id.*

[21] *Id*.

[22] *Id*. at 11.

[23] *See* David B. Kopel, "*Assault Weapons*," in GUNS: WHO SHOULD HAVE THEM 176, 202 (David B. Kopel, ed. 1995) (if "assault weapons," as the Connecticut Legislature and other ban supporters insist, are "only made for slaughtering the innocent," then "such killing machines have no place in the hands of domestic law enforcement.")

armed criminals, *a fortiori* law-abiding citizens need the same firepower, if not more.[24] Police officers have many advantages over civilians when it comes to self-defense, in addition to the training and practice advantages discussed above: (1) they wear bullet-proof vests; (2) they carry two extra magazines for their handguns on their utility belts; (3) they often have a smaller, back-up gun hidden in their vests or in ankle holsters; (4) they have additional firepower available in their patrol cars, such as a 12-gauge shotgun or a patrol rifle (and the latter is usually the semiautomatic AR-15 that the Connecticut Act outlaws as an "assault weapon"); (5) they typically have additional weapons on their belts, including Tasers, police batons and chemical weapons such as Mace or pepper spray; (6) they usually have a partner in the car with them, who is similarly armed; and finally (7) back-up police reinforcements are only a radio call away. Regular civilians do not have all of those resources, so their need for standard pistol magazines that hold as many rounds as possible is both acute and undeniable, and Connecticut's law denying law-abiding citizens such defensive tools violates the Second Amendment.

It is no answer to say that because the police are so well-armed, citizens need not be. Not only is that proposition wrong as a matter of law—because the Second Amendment's right to bear arms is conferred on private citizens—it is also tragically false as a matter of fact. No citizen enjoys a constitutional right to police protection from assailants[25] and the police are, unfortunately, rarely around when a citizen is being assaulted. Consider the crime statistics for

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[24] *Id.* at 202.

[25] *See DeShaney v. Winnebago Cnty*., 489 U.S. 189, 197 (1989) ("As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."); *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 768 (2005) ("We conclude, therefore, that respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband."); *Piotrowski v. City of Houston*, 237 F.3d 567, 583 (5th Cir. 2001) ("local governments are under no duty to provide protective services"); *Jackson v. Joliet*, 715 F.2d 1200, 1203 (7th Cir.1983) (police do not have affirmative obligation to render aid to citizens under due process clause).

2010: in that year the police were unable to prevent 14,748 murders, 84,767 rapes, and 367,832 robberies.[26] Indeed, in 1989, the Justice Department found that there were 168,881 crimes of violence where it took the police over an hour to respond.[27]

Nor can the Act be redeemed by pointing out the many firearms that it does *not* ban. *See Heller*, 554 U.S. at 629 ("It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."); *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 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) ("[R]estating the Second Amendment right in terms of what IS LEFT after the regulation rather than what EXISTED historically, as a means of lowering the level of scrutiny, is exactly backwards from *Heller's* reasoning." (capital emphasis in original).

Finally, the Act cannot justify denying civilians the semiautomatic, high-capacity firearms that are issued to the police on grounds that civilians, unlike trained law enforcement officers, cannot be trusted to identify when it is proper to use a firearm in self-defense and they therefore constitute an unacceptable risk to public safety. The fact is that armed civilians—even though they outnumber police by several orders of magnitude—make far fewer mistakes with their firearms. Each year there are approximately thirty instances in which an armed civilian mistakenly shoots and kills an innocent individual who was not actually a burglar, mugger or similar threat—but "[o]ver the same period the police erroneously kill *five to eleven times* more

[26] FBI, *Crime in the U.S. 2010*, *cited in* PERSONAL & HOME DEFENSE, 2013 BUYER'S GUIDE 11 (2013).

[27] *Id*.

innocent people."[28] Armed civilians are also an asset to public safety: "Regardless of which counts of homicides by police are used, the results indicate that civilians legally kill far more felons than police officers do."[29]

The undeniable reality is that civilians are often 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. Semiautomatic pistols and rifles with large magazine capacities are among "the most preferred firearm[s] in the nation to 'keep' and use for protection of one's home and family." *Heller*, 554 U.S. at 628-29. The Connecticut ban on LCMs, an essential feature of a defensive semiautomatic firearm, is just as unconstitutional as the handgun ban struck down in *Heller* or the requirement that handguns be "accessorized" by the addition of a trigger lock, which was also categorically struck down in *Heller*. In this case, as in *Heller*, the state has outlawed a class of arms "overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]," 554 U.S. at 628, and therefore the result here should be the same as in *Heller:* the Act should be struck down.

Magazines holding more than ten rounds are just as standard and common, and therefore just as constitutionally protected, on rifles such as the semiautomatic, civilian versions of the AR-15—rifles that the Connecticut Act denounces and bans as "assault weapons." It is a common occurrence for a hunter to need quick, multiple shots to take down small, fleet-footed

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[28] *See* MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE, *supra* note 2, at 239 & n.71 (emphasis added).

[29] *See* Gary Kleck, *Keeping, Carrying, and Shooting Guns for Self-Protection*, in DON B. KATES, JR. AND GARY KLECK, THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS AND VIOLENCE 199 (1997).

game or varmints such as coyotes, nutria, prairie dogs and rats.[30] The need for multiple, follow-up shots is even more vital when using a semiautomatic rifle to take down bigger, more dangerous game, such as wild boar and feral hogs that have a tendency to charge their attackers and that can weigh as much as 375 pounds.[31] Hunting is a lawful activity protected by the Second Amendment, *see Heller*, 554 U.S. at 599; therefore the Act's restrictions on LCMs are unconstitutional insofar as they infringe a law-abiding individual's right to bear arms for hunting.[32]

LCMs are also essential in the most popular competitive shooting sports in America. Large ammunition capacity is essential when proceeding through multi-target stages of competitions sponsored by the highly popular International Practical Shooting Confederation (which has tens of thousands of members).[33] This is even more true for "3-Gun Competition," the fastest-growing shooting sport in America,[34] where participants compete in (and therefore require multiple high-capacity magazines in) all three categories of (i) rifle (typically using an AR-15 with 30- or 60-round magazines),[35] (ii) shotgun (typically using 23-round magazines)[36] and (iii) handgun (typically using 17- or 33-round magazines).[37] 3-Gun competition is not

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[30] *See* Kopel, GUNS: WHO SHOULD HAVE THEM, *supra* note 24, at 171 (hunters often need to take multiple shots).

[31] *See* Dick Metcalf, *The Big Boys*, in GUNS & AMMO 51 (Jan. 2013); *see also* J. Guthrie, *The 300 Blackout Story*, in GUNS & AMMO, BOOK OF THE AR-15: 300 BLACKOUT EDITION 18 (Eric R. Poole ed., 2013).

[32] *See* GUN: A VISUAL HISTORY, *supra* note 4, at 228 ("As soon as guns were invented in the 14th century, they were turned to sport use. Hunters applied matchlock arquebuses . . . to hunting difficult prey such as boar and wolf. Military shooting guilds also indulged in competitive target shooting from the 15th century—there is evidence of the first shooting club being set up in Lucerne, Switzerland, in 1466.").

[33] *See* www.ipsc.org.

[34] *See* CHAD ADAMS, COMPLETE GUIDE TO 3-GUN COMPETITION 89 (2012)

[35] *See id.* at 31, 33, 161.

[36] *See id.* at 75, 92-94.

[37] *See id.* at 75, 130, 132.

merely recreational. From the outset it was viewed "first and foremost as a law enforcement training event, and participating officers received a certificate of competition towards training credits."[38] One of the major 3-Gun matches is hosted at Fort Benning, Georgia by the U.S. Army Marksmanship Unit,[39] and military units, including the U.S. Army 5th Special Forces Group and the Oregon National Guard, have recognized the value of 3-Gun competition to refresh their firearm skills prior to deployment in Iraq or Afghanistan.[40]

Finally, the very same LCMs that are banned by the Connecticut Act are the standard for the National Match Competitions sponsored by the federal government's Civilian Marksmanship Program ("CMP"), which was established more than a century ago to improve the shooting skills of the nation's young men in case they were called to active military service.[41] The CMP and its five thousand affiliated local clubs provide safety and marksmanship training to over one million citizens a year.[42] Under the auspices of the Army Marksmanship Unit, thousands of participants—both adolescents and adults, and civilians as well as active-duty military members and law enforcement officers—compete using standard, rack-grade, military-issue M9 Beretta handguns (which are issued with 15-round magazines) and M-16 rifles (which are issued with 30-round magazines); these weapons are drawn directly from the arsenal of the Army's Small

[38] *See id.* at 30.
[39] *See id.* at 43.
[40] *See id.* at 53-54.
[41] *See* the CMP website, http://odcmp.com. For 80 years, the CMP was administered by the U.S. Army. Now it is run by a non-profit 501(c)(3) organization chartered by Congress and known as the Corporation for the Promotion of Rifle Practice & Firearms Safety, Inc. *See* 36 U.S.C. § 40701 *et seq.*
[42] *See* the CMP website, http://odcmp.com/Comm/About_Us.htm; *see also* www.TheCMP.org. (2012 CMP Sales Catalog at 1-3, 13 (noting thousands of affiliated organizations, including the Boy Scouts, 4-H Clubs, the American Legion and Junior ROTC, and the one million youth who "are now reached annually by CMP marksmanship training and education initiatives)).

Arms School.[43] To finance its operations, the CMP for many decades has been selling surplus military rifles to civilians, including the semiautomatic M-1 Carbine, which might well be an illegal "assault weapon" under the Connecticut Act, because it uses either fifteen-round or thirty-round detachable magazines and also can mount the bayonets that the CMP also sells to civilians.[44]

In sum, it is beyond cavil that what the Act demonizes and bans as "LCMs" are in fact nothing more than millions of ordinary, standard-issue magazines that are "typically possessed" by law-abiding citizens and that are " 'in common use' . . . for lawful purposes like self-defense," hunting and recreational shooting. *Heller*, 554 US at 625, 624. That brings them within the aegis of the Second Amendment and requires that the Act be struck down.

III. The Act's Ban on So-Called "Assault Weapons" Outlaws an Enormous Class of Firearms Commonly Used for Lawful Purposes and Therefore Infringes the Second Amendment Right To Keep and Bear Arms.

Once again, the dispositive constitutional question posed by the Supreme Court in *Heller* has already been conceded with respect to semiautomatic rifles by the only Court of Appeals to reach the issue. As the D.C. Circuit's panel majority wrote, "We think it clear enough in the record that semiautomatic rifles . . . are indeed in 'common use,' as the plaintiffs contend." *Heller II*, 670 F.3d at 1261. Again, this is where the Court of Appeals' analysis should have stopped, because "common use for lawful purposes" is the test under the Supreme Court's decision in *Heller*. *See* 554 U.S. at 624-25, 627, 628-29. And it is undeniable that

[43] *See* the CMP website, http://www.odcmp.org/0904/M-16Match.asp, and http://odcmp.com/NM/Pistol.htm. The minimum age for participating in the Army's Small Arms Firing Schools, sponsored by the CMP and conducted by the Army's Marksmanship Unit, is fourteen for pistol students and twelve for rifle students. *See* http://www.odcmp.com/NM/SAFS.htm.

[44] *See* the 2012 CMP Sales Catalog, *supra* note 42, at 5 (selling semiautomatic M-1 carbines with fifteen-round magazines); *id.* at 6 (selling bayonets for the M-1 carbine).

semiautomatic rifles, shotguns and handguns are common in modern America; indeed, they have been commercially available and widely popular for more than a century.[45] Semiautomatic pistols with magazine capacities of more than ten rounds have dominated the handgun market and pushed revolvers aside for two decades now.[46] And, as the Supreme Court has noted, unlike "machineguns, sawed-off shotguns, and artillery pieces," semiautomatic firearms "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 611-12 (1994).

The Act outlaws many semiautomatic guns, but its unconstitutionality can be demonstrated by considering just one of the hundreds of examples: the semiautomatic American AR-15. The principal target of Connecticut's new gun ban, the AR-15-style rifle, was the very firearm that was at issue in the Supreme Court's decision in *Staples*, which described the "AR-15 [a]s the civilian version of the military's M-16 rifle." 511 U.S. at 603. The Court noted that the

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[45] *See Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting) ("The first commercially available semi-automatic rifles, the Winchester Models 1903 and 1905 and the Remington Model 8, entered the market between 1903 and 1906. *See* JOHN HENWOOD, THE 8 AND THE 81: A HISTORY OF REMINGTON'S PIONEER AUTOLOADING RIFLES 5 (1993); JOHN HENWOOD, THE FORGOTTEN WINCHESTERS: A HISTORY OF THE MODELS 1905, 1907 AND 1910 SELF-LOADING RIFLES 2-6 (1995). (The first semiautomatic shotgun, designed by John Browning and manufactured by Remington, hit the market in 1905 and was a runaway commercial success. *See* HENWOOD, 8 AND THE 81, at 4.) Other arms manufacturers, including Standard Arms and Browning Arms, quickly brought their own semiautomatic rifles to market. *See id.* at 64–69. [A]s early as 1907, Winchester was offering the general public ten-shot magazines for use with its .351 caliber semiautomatic rifles. *See* HENWOOD, THE FORGOTTEN WINCHESTERS at 22–23. Many of the early semiautomatic rifles were available with pistol grips. *See id.* at 117–24. These semiautomatic rifles were designed and marketed primarily for use as hunting rifles, with a small ancillary market among law enforcement officers. *See* HENWOOD, 8 AND THE 81, at 115–21."); *see also* David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 413 (1994) ("semiautomatics are more than a century old"); K.D. KIRKLAND, AMERICA'S PREMIER GUNMAKERS: BROWNING 44 (2013) (Remington was making semiautomatic rifles in .25, .30, .32 or .35 caliber in 1900, leading to the 1906 Remington Model 8 Autoloading Center Fire Rifle).

[46] *See* Koper NIJ Rep. 2004 at 81 (80% of handguns produced in 1993 were semiautomatic); Department of Justice, GUNS USED IN CRIME 3 (1995) ("Most new handguns are pistols rather than revolvers.").

AR-15 was "a semiautomatic weapon," *id*., and therefore a firearm that "traditionally ha[s] been widely accepted as [a] lawful possession[]." *Id*. at 612. The Court contrasted the routine civilian ownership of a semiautomatic AR-15 with the potentially felonious possession of the military's *fully automatic* M-16 assault rifle. *Id*. Fully automatic weapons are legal under federal law and legal in most states as well, but the federal regulation of such weapons is extraordinarily strict,[47] and Connecticut's ban on machineguns and other fully automatic firearms is not at issue in this case.

If anything, the majority in *Heller II* understated the ubiquity of semiautomatic rifles like the AR-15, which have pistol grips and detachable magazines (two of the no-nos that give a firearm a black mark under the Connecticut Act). Just considering the AR-15 alone, there are approximately five million such rifles in this country and it accounts for 60% of all civilian rifles sold each year in the United States.[48] That undoubtedly qualifies them as being "in common use" and "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624, 625. Dozens of companies manufacture their own versions of the AR-15 for civilian use,[49] and the popularity of the weapon has spawned an entire industry devoted to accessorizing and customizing this semiautomatic rifle.[50]

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[47] *See* 18 U.S.C. § 922(o).

[48] *See* Dan Haar, *America's Rifle: Rise of the AR-15*, HARTFORD COURANT (Mar. 9, 2013), http://articles.courant.com/2013-03-09/business/hc-haar-ar-15-it-gun-20130308_1_new-rifle-colt-firearms-military-rifle.

[49] *See generally* GUNS & AMMO, BOOK OF THE AR-15 134 (Eric R. Poole ed., 2013) (noting semiautomatic AR-15 models produced by Colt, Daniel Defense, Rock River, Smith & Wesson, Wilson Combat, Del-Ton, Ruger, Sig-Sauer, Yankee Hill, Windham Weaponry, Stag Arms, Core Rifle Systems, LWRC Int'l, Hi-Standard and others).

[50] *See, e.g.*, *id.* at i-ii, 9, 24-27, 30-32, 34, 35, 48-52, 63, 70, 75-76, 88, 90-92, 94, 95, 123, 135, 137, 160-61; *see also* CHRISTOPHER R. BARTOCCI, BLACK RIFLE II: THE M16 INTO THE 21ST CENTURY i-ii, xxv (2004). Indeed, civilian shooters of the semiautomatic AR-15 and the manufacturers who cater to them began enhancing and accessorizing the rifle long before the

The AR-15's versatility is revealed by the fact that it is widely used for hunting everything from rodents to deer and even wild boar—a few quick changes to barrel and receiver allow the weapon to handle ammunition ranging from its standard .223 Remington round—which was itself developed from a hunting cartridge, rather than a military round[51]—up to .308 and even .500 caliber big game cartridges.[52] The semiautomatic AR-15 also dominates target shooting competition, as indicated by the discussion of the Civilian Marksmanship Program and the national shooting matches above: "If you are not shooting an AR-15, you are not in the game."[53] Both hunting and target shooting are "lawful purposes" for possessing a semiautomatic rifle like the AR-15.

Finally, the AR-15 is widely used for self-defense, whether on a farm, a ranch or in one's home.[54] The uninformed notion that this rifle is not suitable for self-defense within the confines

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military did the same with its fully automatic versions. THE AMERICAN RIFLEMAN GUIDE TO BLACK RIFLES 49 (2006).

[51] *See* GARY PAUL JOHNSTON & THOMAS B. NELSON, THE WORLD'S ASSAULT RIFLES 19-20, 23, 1036 (2010).

[52] *See* Dick Metcalf, *The Big Boys*, in GUNS & AMMO 51 (Jan. 2013)*; see also* J. Guthrie, *The 300 Blackout Story*, in GUNS & AMMO, BOOK OF THE AR-15: 300 BLACKOUT EDITION 18 (Eric R. Poole ed., 2013).

[53] *See* THE AMERICAN RIFLEMAN GUIDE TO BLACK RIFLES 40 (2006); *see also id.* at 38 ("the gun service rifle shooters can't win without"); *id*. at 43 ("The AR-15 has come a long way. Long derided as a plastic toy, it is now the benchmark in accuracy among semiauto rifles."); AMERICAN RIFLEMAN: ARMALITE 50 YEARS 76 (Dec. 2004) ("Even a casual observer of these highpower service rifle matches would recognize one thing quickly—the dominance of the AR-style rifle on the firing line.").

[54] *See* J. Guthrie, *Versatile Defender: An Argument for Advanced AR Carbines in the Home*, in BOOK OF THE AR-15 134(Eric R. Poole, ed. 2013) ("If a system is good enough for the U.S. Army's Delta and the U.S. Navy SEALs, surely it should be my weapon of choice, should I be a police officer or Mr. John Q. Public looking to defend my home."); Eric Poole, *Ready To Arm: It's Time to Rethink Home Security*, in GUNS & AMMO, BOOK OF THE AR-15 15-22 (Eric R. Poole, ed. 2013) (discussing virtues of the AR-15 platform as a home defense weapon); Mark Kayser, *AR-15 for Home & the Hunt*, in PERSONAL & HOME DEFENSE 28-29, 30-31 (2013) (advising use of AR-15 for self-defense in the home and recommending customizing with accessories).

of a house would stun the tens of thousands of soldiers and Marines who have, in the last decade, used their military-issue M-16 rifles and M-4 carbines to defend themselves and their comrades in close-quarters fighting in the cities and towns of Iraq and Afghanistan. Osama bin Laden—were he still alive—would be equally surprised by this proposition, given that two fully automatic military variants of the semiautomatic AR-15, the M-4 carbine and the H&K 416 rifle, were used by Navy SEALs to kill him in an upstairs room of his house in Pakistan during a mission which called for extraordinary accuracy to avoid collateral injury to the many non-combatant women and children living in the compound.[55] Plainly, the AR-15 works exceedingly well as a defensive firearm inside dwellings.

If that were not endorsement enough, the semiautomatic AR-15 is perhaps the most widely-issued police patrol rifle in the country.[56] For example, the AR-15 is the rifle carried in the patrol cars of the New Haven Police Department.[57] 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 seventy state and local police departments and other law enforcement agencies in Connecticut alone.[58] Colt Defense LLC could hardly ask for a more persuasive endorsement of the value of its semiautomatic rifles in defending public safety from armed

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[55] *See* MARK OWEN & KEVIN MAURER, NO EASY DAY: THE FIRSTHAND ACCOUNT OF THE MISSION THAT KILLED OSAMA BIN LADEN 44-45, 203, 226, 232, 234-36 (2012).

[56] Michael Remez, *A Civilian Version of an M-16: Bushmaster Rifle a Common Choice*, HARTFORD COURANT (Oct. 25, 2002), http://articles.courant.com/2002-10-25/news/0210252068_1_bushmaster-firearms-john-allen-williams-distributor-in-washington-state; BARTOCCI, BLACK RIFLE II, *supra* note 50, at 126.

[57] Thomas MacMillan, *Cop Rifles Headed for the Streets*, NEW HAVEN INDEPENDENT (Jan. 17, 2013), http://www.newhavenindependent.org/index.php/archives/entry/rifles_headed_for_the_streets/.

[58] *See Agencies that Carry Colt Firearms*, www.colt.com/ColtLawEnforcement/AgenciesthatCarry.aspx (last visited July 12, 2013).

assailants.

Thus, the semiautomatic rifle with pistol grips, adjustable stocks, and a large magazine capacity—as exemplified by the American AR-15—has to count as a "preferred firearm" and among the "most popular weapon[s] chosen by Americans" for lawful purposes ranging from hunting to target shooting to self-defense in the home. *Heller*, 554 U.S. at 628-29. There are literally millions of these semiautomatic rifles in private hands in America, and therefore they cannot be marginalized as "highly unusual in society" or dismissed as "not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 627, 625. Hence they fall within the Second Amendment's protection and may not be outlawed by Connecticut.

The *Heller* Court drew support for the "common use" test from the historical prohibition on carrying "dangerous *and* unusual weapons." 554 U.S. at 627 (emphasis added). That formulation, derived by the Court from Blackstone and early American legal scholars, is more properly read as a context-based restriction on the carrying and use of arms.[59] But even if read as a test for the arms that may be kept and borne, it would require both elements. By itself, the fact that a particular gun is "dangerous" would not distinguish it from any other firearm in human history, because it is in the very nature of firearms to be dangerous—that is their *raison d'être.* The second, cumulative element of the *Heller* Court's test—the requirement that a properly banned firearm be "unusual"—comports perfectly with the Court's repeated emphasis on protecting only firearms that are "in common use," "typically possessed," and "preferred" by,

[59] *See, e.g.*, 3 B. WILSON, WORKS OF THE HONOURABLE JAMES WILSON 79 (1804) (an affray may occur when a person "arms himself with dangerous and unusual weapons, *in such a manner*, as will naturally diffuse a terrour among the people") (emphasis added); 1 W. RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 272 (1831) ("no wearing of arms is within [the meaning of the rule], *unless it be accompanied with such circumstances as are apt to terrify the people*") (emphasis added) (internal numbering omitted).

or perhaps even "overwhelmingly chosen by[,] American society" for lawful purposes. *Heller*, 554 U.S. at 624, 625, 628-29. *See also id.* at 627 (distinguishing as unprotected "sophisticated firearms that are highly unusual in society at large").

But none of the semiautomatic weapons outlawed by the Act fits this bill, nor can the Connecticut legislature fill that gaping hole in its argument by tarring these popular, widely-used semiautomatic firearms as "assault weapons." That is a calculated bit of disinformation and a partisan term of opprobrium rather than an actual classification of firearms. In short, "assault weapon" is a neologism—a word invented for political purposes that simply does not exist in firearms taxonomy and that does not denote any category of weapon recognized at any time in the long history of firearms:

> 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) (internal quotation marks omitted).[60] Those who invented the term "assault weapon" to further their opposition to Second Amendment rights have been remarkably candid about their cynical and calculated effort to mislead the public (and legislators, too) into confusing semiautomatic civilian firearms with the fully automatic machine guns that equip the military:

[60] There is a well-established firearms category known as the "assault rifle." This denotes a hand-held weapon capable of semiautomatic or *fully automatic* (selective) fire, fed from a detachable box magazine, which fires an intermediate rifle cartridge. But the phrase "semiautomatic assault weapon" is a nonsense word, a contradiction in terms. *See* JOHNSTON & NELSON, THE WORLD'S ASSAULT RIFLES i (emphasis added). *See also id.* at 1196 (Glossary of Terms); *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).

> Assault weapons . . . are a new topic. The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semiautomatic 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), http://www.vpc.org/studies/awaconc.htm (emphasis omitted). This rather transparent ploy has enjoyed some success, because the Act apparently equates "selective-fire firearm[s] capable of fully automatic" fire or "burst fire" with "semiautomatic" firearms. CONN. GEN. STAT. §53-202a(1)(A)(i). And in remarks made shortly after the atrocity at the Sandy Hook Elementary School in Newtown, President Obama erroneously described the semiautomatic rifle used by Adam Lanza as a "fully automatic" firearm.[61]

Once the term "semiautomatic" is properly understood—one pull of the trigger fires one, and only one, round of ammunition—there is nothing in the Act that distinguishes banned semiautomatic "assault weapons" from permissible firearms on a *rational, functional* basis. Instead, the Act, like every other "assault weapons ban" enacted by Congress or by any State, lists features that are either cosmetic, imaginary or pointless—a proposition on which there is agreement from both ends of the political spectrum.[62]

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[61] *See* President Barack H. Obama, Remarks at a DCCC Event (Apr. 4, 2013) (transcript *available at* www.whitehouse.gov/the-press-office/2013/04/04/remarks-president-dccc-event-san-francisco-ca).

[62] Compare Charles Krauthammer, Column, *Disarm the Citizenry*, The Washington Post (Apr. 5, 1996) ("Passing a law like the assault weapons ban is . . . purely symbolic"), with Editorial, The Washington Post (Sept. 1994) ("No one should have any illusions about what was accomplished (by the ban). Assault weapons play a part in only a small percentage of crime. The provision is mainly symbolic; its virtue will be if it turns out to be, as hoped, a stepping stone to broader gun control."). An AW ban's focus on the cosmetic or aesthetic appearance of a semiautomatic firearm should come as no surprise because California's list of "assault weapons," which is the origin of the list of outlawed firearms in every state and federal ban enacted thereafter, "was derived by flipping through a picture book of guns and picking out those that

Paradoxically, the Act also outlaws features that *enhance the controllability and accuracy of the weapon*. For example, a pistol grip makes it easier to hold and stabilize a rifle or shotgun when fired from the shoulder and thereby promotes accuracy.[63] It also enables a homeowner to keep his rifle or shotgun aimed at a burglar with one hand while he dials 911 with his other hand.[64] Similarly, a vertical foregrip on a semiautomatic rifle such as the AR-15 improves accuracy, provides stability and quick target acquisition, and aids in controlling recoil when the weapon is fired.[65] An adjustable stock promotes accuracy by allowing the stock to be customized to fit the shooter's particular physique, thickness of clothing, and shooting position.[66] A threaded muzzle enables the user to affix a flash suppressor to reduce the blinding glare that occurs when a round is fired and that can temporarily blind the shooter, thereby making her more vulnerable to attack and rendering her subsequent shots less accurate.[67] Similarly, a muzzle brake—which can be affixed to a firearm with a threaded muzzle—reduces recoil and muzzle

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looked the most menacing" to the legislative staff. Kopel, GUNS: WHO SHOULD HAVE THEM, *supra* note 24, at 176 & n.68.

[63] *See* BARTOCCI, BLACK RIFLE II, *supra* note 50, at 52; Kopel, GUNS: WHO SHOULD HAVE THEM, *supra* note 24, at 170-71. If having a "pistol grip" makes a firearm radically illegitimate and useful only to mass murderers, one wonders why *all* semiautomatic handguns—which, after all, universally have "pistol grips"—are not banned along with semiautomatic rifles. There's something amiss in the logic of the Connecticut Act.

[64] *See* Kopel, GUNS: WHO SHOULD HAVE THEM, *supra* note 24, at 171; *Heller*, 554 U.S. at 629.

[65] *See* BARTOCCI, BLACK RIFLE II, *supra* note 51, at 52, 101, 368; *see also* THE AMERICAN RIFLEMAN GUIDE TO BLACK RIFLES 52 (2006).

[66] *See* BARTOCCI, BLACK RIFLE II, *supra* note 51, at 52, 56, 76; Kopel, GUNS: WHO SHOULD HAVE THEM, *supra* note 24, at 172-73. *See also* THE AMERICAN RIFLEMAN GUIDE TO BLACK RIFLES 52 ("The ability to adjust the stock to a proper length can make the difference between a hit or miss.").

[67] *See* BARTOCCI, BLACK RIFLE II, *supra* note 51, at 49; Kopel, GUNS: WHO SHOULD HAVE THEM, *supra* note 24, at 172 (quoting a senior BATF official who stated that a flash suppressor "doesn't have a thing to do with increasing a gun's firepower.").

flip, thereby making the gun more accurate and controllable, especially for follow-up shots.[68] These are not indicia of "dangerous and unusual" weapons unfit for lawful civilian use. *Heller*, 554 U.S. at 627. On the contrary, these are features that enhance a gun's accuracy and controllability. Surely the State of Connecticut has no rational, let alone legitimate, interest in making it more likely that a law-abiding citizen using a firearm for self-defense will miss her assailant and wound or kill a member of the family or an innocent passerby. To make it a felony to add features to one's rifle that make it more accurate and safer to use, for both the shooter and the public, is nothing short of perverse. Yet, that is the legislative Act that the Court confronts here.

IV. Banning So-Called "Assault Weapons" and "Large Capacity Magazines" Will Do Nothing To Reduce Violent Crime.

As demonstrated above, the challenge to Connecticut's ban on particular firearms and magazines can and should be resolved by application of the principles applied in *Heller*, which itself involved a categorical ban on a particular type of firearm. But even if the interest-balancing that *Heller* forbids were employed here, along the lines of the "tiers" or "levels" of judicial scrutiny that might be imported from Equal Protection Clause or First Amendment doctrine, 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.

The State must mount a "pragmatic defense" of the challenged law. *Moore v. Madigan*, 702 F.3d at 939. The State must "marshal extensive empirical evidence" to justify the Act and "make a 'strong showing' that [this] gun ban [i]s vital to public safety." *Id.* at 939-40. *See also United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc) (stating that "strong

[68] *See* BARTOCCI, BLACK RIFLE II, *supra* note 51, at 49-50; Kopel, GUNS: WHO SHOULD HAVE THEM, *supra* note 24, at 171-72, 175.

showing" is required). Indeed, the standard of proof required of the State is more demanding here than in either *Skoien* or *Moore* 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 criminal prosecution, the plaintiffs here are not criminals, but are instead " 'law-abiding , responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller* . . . ." *Ezell*, 651 F.3d at 708.

The State cannot meet this standard because all the empirical studies of federal or state AW or LCM bans—including the studies commissioned by the Justice Department's own National Institute of Justice—reveal that this kind of legislation has no discernible impact on firearms violence because criminal use of AWs and LCMs has always been extremely rare. Title XI of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (the "1994 Federal Ban"), was in effect from 1994 through 2004. The first review of the Federal Ban, in 1997, explained 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."[69] The "banned weapons and magazines were never involved in more than a modest fraction of all gun murders,"[70] and therefore "[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.)"[71]

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[69] 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) at 79 (*available at* www.urban.org/UploadedPDF/aw_final.pdf) ("Roth & Koper NIJ Rep. 1997").

[70] *Id*. at 2. *See also id.* at 70 ("these numbers reinforce the conclusion that assault weapons are rare among crime guns").

[71] *Id*. at 6. *See also id.* at 6 ("[We] 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*. at 2 ("We

A follow-up report done for the Justice Department in 2004 concluded that 10 years of data on the Federal Ban made no difference: "we 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."[72] Studies of state-law bans on AWs and LCMs likewise found that such bans "have not reduced crime."[73] The Justice Department report 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."[74] Remarkably, the Justice Department

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were unable to detect any reduction to date in two types of gun murders that are thought to be closely associated with assault weapons, those with multiple victims in a single incident and those producing multiple bullet wounds per victim."); *id*. at 10 ("There is very little empirical evidence, however, on the direct role of ammunition capacity in determining the outcomes of criminal gun attacks. The limited data which do exist suggest that criminal gun attacks involve three or fewer shots on average. Further, there is no evidence comparing the fatality rate of attacks perpetrated with guns having large-capacity magazines to those involving guns without large-capacity magazines (indeed, there is no evidence comparing the fatality rate of attacks with semiautomatics to those with other firearms.") (citations omitted); *id*. at 11 ("[T]here have been no studies comparing the fatality rate of attacks with assault weapons to those committed with other firearms."); *id*. at 78 ("The ban on large-capacity magazines does not seem to have discouraged the use of these guns."); *id*. at 79 (hypothetical decreases in use of AWs and LCMs due to the Federal Ban "would be impossible to detect in a statistical sense[,] . . . we caution that for the reasons just explained, we cannot statistically rule out the possibility that no effect occurred."); *id*. at 85-86, 88, 91 (in fact, both "victims per incident" and "the average number of gunshot wounds per victim" *actually increased* under the Ban—although not by a statistically significant margin).

[72] Koper NIJ Rep. 2004 at 96.

[73] Koper NIJ Rep. 2004 at 81 n.95.

[74] Koper NIJ Rep. 2004 at 3. *See also id*. at 3 ("AWs were rarely used in gun crimes even before the ban. LCMs are involved in a more substantial share of gun crimes, but it is not clear how often the outcomes of gun attacks depend on the ability of offenders to fire more than ten shots (the current magazine capacity limit) without reloading."); *id*. at 97("the ban's impact on gun violence is likely to be small at best, and perhaps too small for reliable measurement."); *id*. at 92 n.109 ("It is now more difficult to credit the ban with any of the drop in gun murders in 1995 or anytime since."); *id*. at 92 ("neither medical nor criminological data sources have shown any post-ban reduction in the percentage of crime-related gunshot victims who die."); *id*. at 79

report conceded that the policy assumption on which the Federal Ban was based was fatally flawed because it ignored the fact 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."[75] And, of course, criminals are, by definition, not likely to be deterred by the ban in any event.

Ironically, the Act specifically exempts from its AW ban the Ruger Mini-14 rifle, which fires precisely the same cartridge, from the same 30-round magazines, with precisely the same force, and at precisely the same semiautomatic pace, as all of the variations on the AR-15 that the Act does ban. *See* CONN. GEN. STAT. § 53-202a(1)(A)(i) (banning the "folding stock model only" of the Ruger Mini-14). Yet the Ruger Mini-14, which was modeled on the U.S. Army's

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("the consistent failure to find clear evidence of a pre-post drop in LCM use across these geographically diverse locations strengthens the inference that the findings are indicative of a national pattern."); *id*. at 79 n.93 ("the more critical point would seem to be that nearly a decade after the ban, LCM use has still not declined demonstrably below pre-ban levels."); *id.* at 76 ("it is not clear that LCM use has declined demonstrably below pre-ban levels."); *id*. at 78 ("criminal use of LCMs was rising or steady through at least the latter 1990s" while the ban was in effect, and the data since 2000 "provide no definitive evidence of a drop below pre-ban levels."); *id*. at 83 ("studies that attempted to make more explicit links between the use of semiautomatic firearms and trends in lethal gun violence via time series analysis failed to produce convincing evidence of such links.").

[75] Koper NIJ Rep. 2004 at 81 n.95. In a follow-up essay in 2013, the principal author of the two Justice Department studies reiterated that, "[b]ecause offenders can substitute non-banned guns and small magazines for banned AWs and LCMs, there was not a clear rationale for expecting the ban to reduce assaults and robberies with guns." 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). Although he noted that some stories by media journalists, *id*. at 170, forecast that the Federal Ban "may have modestly reduced gunshot victimization had it remained in place for a longer period," *id*. at 158, *see also id.* at 164-65, Koper himself once again concluded that "these analyses showed no discernible reduction in the lethality or injuriousness of gun violence during the post-ban years." *Id*. at 165. *See also id.* at 166 (data set was so poor that "it was impossible to make definitive assessments of the ban's impact on gun violence.").

then-standard M-14 combat rifle,[76] was the weapon in the criminal's hands at the Miami shootout in 1986 that led police and the FBI to conclude that they were outgunned and had to replace their revolvers with semiautomatic handguns with magazines of twelve, fifteen or even seventeen rounds. *See* BARRET, *supra* page 9. Former FBI agent John Hanlon, who was shot four times by the criminal wielding the Ruger Mini-14 on that day in Miami, denounced "assault weapons" bans based on features such as folding stocks as "a joke."[77] "I don't think it would have changed a damn thing. I don't see what makes that gun less dangerous" when it has a traditional fixed stock.[78] Agent Edmund Morales, another FBI agent who survived the Miami shootout, said that the features AW bans focus on are "irrelevant" and that the host of other semiautomatic rifles that are not banned are "equally dangerous."[79]

The failure of the Federal Ban on AWs and LCMs to have *any* discernible effect on gun violence has been confirmed by two government bodies—the National Research Council and the Centers for Disease Control—that conducted comprehensive reviews of all the published literature on firearms control and violence. The NRC and CDC both concluded that there was insufficient evidence to conclude that bans on "assault weapons" or other particular firearms or firearms features had any beneficial effect on gun violence.[80]

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[76] *See* JOHNSTON & NELSON, THE WORLD'S ASSAULT RIFLES, *supra*, at 1001-02, 1006.

[77] *Gun Control: Gun Ban Would Protect More than 2,200 Firearms*, ABC7 (Feb. 16, 2013, 8:38 AM), http://wj.la/12t73nS.

[78] *Id.* The folding stock reduces the rifle's length by a mere 2.75 inches. *Id.*

[79] *Id.* The Act likewise expressly exempts from its ban the semiautomatic Ruger Mini-30, which fires the Russian Kalashnikov 7.62x39mm cartridge used in the fully automatic versions of the AK-47 assault rifle. *See* JOHNSTON & NELSON, THE WORLD'S ASSAULT RIFLES, *supra* note 51, at 1004.

[80] *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

Proponents of bans on so-called "assault weapons" and "large capacity magazines" often stress—but uniformly fail to document—that AWs and LCM pose a particular risk to law enforcement officers. In truth, that risk is negligible. Consider the FBI's crime statistics for the last two years on LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED ("LEOKA").[81] In 2010 there were 56 law enforcement officer ("LEO") homicides in 49 separate incidents (there were also 72 accidental deaths of police officers while on duty). Out of those 56 homicides, there is only one that would even arguably fall within Connecticut's ban on AWs and LCMs, and it involved a semiautomatic 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.[82] Even if we count that one homicide as having been perpetrated with an AW or LCM now banned in Connecticut by the Act, it was only one of 56

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) ("available evidence is insufficient to determine the effectiveness or ineffectiveness on violent outcomes of banning the acquisition and possession of [particular] firearms"); *id.* (noting that the studies, including Koper's report, were "limited in their design and execution, and results were inconsistent."); *id*. at 42 (the CDC task force distinguished its own report from previous literature reviews by noting it alone "is based on systematic epidemiologic evaluations and syntheses of all available literature meeting specified criteria.").

[81] LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED: 2010 ("LEOKA 2010"), www.fbi.gov/about-us/cjis/ucr/leoka/2010. 2010 and 2011 are the most recent years for which the FBI has compiled data.

[82] *See id.* Moreover, the perpetrator in that case was a convicted felon with a history of violent crimes and weapons violations, and therefore already ineligible to own *any* firearm. No ban on AWs or LCMs was necessary to outlaw that individual's actions and, in any event, it is plain that outlawing AWs and LCMs would have no effect on a hardened criminal who was prepared to murder a police officer. Incidentally, Colt and other companies that manufacture M-16 and M-4 assault rifles for the military have gone to great lengths to engineer their civilian, semiautomatic AR-15 rifles with multiple features that prevent the conversion of the gun to fully automatic firing. *See* BARTOCCI, BLACK RIFLE II, *supra* note 51, at 233-35, 248.

LEO homicides. 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,[83] 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 standing on a roadside to issue somebody a traffic ticket.[84] The LEOKA statistics for 2011 are similar.[85]

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."[86] In his congressional testimony prior to the first AW ban enacted by Congress in

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[83] *See* Kopel, GUNS: WHO SHOULD HAVE THEM, *supra* note 24, 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).

[84] *See* LEOKA 2010, *supra* note 81.

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

[86] *See* Kopel, GUNS: WHO SHOULD HAVE THEM, *supra* note 24, at 189 (discussing polls of police officers revealing that 75% of them oppose a ban on "assault weapons," with the figure rising to 85% when only street patrol officers are polled); 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/ (reporting that the most comprehensive survey ever conducted of law enforcement officers (some 15,000 were polled) revealed that "95 percent say that a federal ban on manufacture and sale of ammunition magazines that hold more than 10 rounds would not reduce violent crime."); *id*. (91% say that a "ban on the manufacture and sale of some semiautomatics would have no effect on reducing violent crime" or "would actually have a negative effect on reducing violent crime"); *id*. (85% say that passage of the federal "assault weapons" ban proposed in 2013 "would have a zero or negative effect on their safety"); *id*. ("The overwhelming majority (almost 90 percent) of officers believe that casualties would be decreased if armed citizens were present at the onset of an active-shooter incident."); *Gun Policy & Law Enforcement: Survey Results*, POLICEONE.COM, (2013), at 13, http://www.policeone.com/police-products/firearms/articles/6188462-policeones-2013-gun-policy-law-enforcement-survey-results-executive-summary/ (follow "View the complete findings of the survey" hyperlink) (responding to a survey question that referred to the

1994, Joseph Constance, the Chief of Detectives and a twenty-five-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 because their rationale is cosmetic.[87] "Despite their intimidating appearance, no auto-loading rifle is as dangerous as an old-fashioned double-barreled 12-gauge shotgun."[88] The so-called "assault weapons," Chief Constance testified, "were used in an underwhelming .026 of 1 percent of crimes in New Jersey. . . . That is really nothing. This means that my officers are more likely to confront an escaped tiger from the zoo than they are to confront one of these weapons."[89]

Finally, in the vast majority of LEO homicides in both 2010 and 2011, the perpetrator was a felon for whom ownership of *any* firearm, not just an AW or LCM, was a serious crime. Plainly, no firearms law is going to affect a felon's decision whether to employ an "assault weapon" with a "large capacity magazine" on his next crime, or to use an unbanned, legal firearm instead, *because for felons there are no legal firearms.* A criminal's choice of firearm is

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Newtown and Aurora massacres); *id*. ("More than 80 percent of respondents support arming school teachers and administrators who willingly volunteer to train with firearms and carry one in the course of the job.").

[87] *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).

[88] *Id.* at 83. *See* Kopel, GUNS: WHO SHOULD HAVE THEM, *supra* note 24, 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 semiautomatic 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 semiautomatic duck-hunting gun, also defined as a 'recreational' firearm) can unleash the same 72 projectiles in 2.5 seconds.").

[89] *Assault Weapons*, 103d Cong., *supra* note 87, at 85 (statement of Joseph Constance, Deputy Chief, Trenton, New Jersey Police Department).

determined by what is available on the street for illegal purchase at the time he wants a gun.[90] An FBI study in 2006 found—unsurprisingly—that 97% of the firearms used to attack police officers "were obtained illegally."[91] Bans on AWs or LCMs "have no effect on the stemming of crime or the provision of public safety" because they only affect law-abiding citizens who buy their guns through legal channels.[92] As Chief Constance explained, New Jersey's AW ban was pointless 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."[93] Such laws "have no effect on the stemming of crime or the provision of public safety" because they affect only law-abiding citizens.[94]

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

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[90] *See* Anthony J. Pinizzotto, Edward F. Davis and Charles E. Miller III, VIOLENT ENCOUNTERS: A STUDY OF FELONIOUS ASSAULTS ON OUR NATION'S LAW ENFORCEMENT OFFICERS 9, 43-45 (FBI Criminal Justice Information Services Division 2006). *See also id.* at 43-44 (interviewed criminals "stated that none of these laws or statutes deterred them" because all the guns they used were stolen, often from other criminals); *id*. at 45 ("availability was the overriding factor in weapons choice"); *id*. at 50 (no gang members "obtained their weapons legally," instead they "trade, swap, rent and barter guns" with other criminals, making it "just as easy to obtain an illegal firearm as it was to obtain drugs.").

[91] *See id.* at 50-51.

[92] *See Assault Weapons*, 103d Cong., *supra* note 87, at 84 (statement of Detectives Chief Joseph Constance).

[93] *See id.* at 84. One of the convicts interviewed in the FBI study explained the situation quite colorfully: "All these politicians are screaming about more gun laws, more gun laws. F*** the gun laws. I never gave a sh** about the gun laws that are on the books. And the 8,000 new gun laws would have made absolutely [no difference], whatsoever, about me getting a gun. Why? Because I never went into a gun store or to a gun show or to a pawn shop or anyplace else where firearms are legally bought and sold and picked up a gun, ever. Because I'm a felon. And that's just common sense, and I think most felons know that. I'm not going to pass a background check, and I'm not even going to try." VIOLENT ENCOUNTERS, *supra* at 52.

[94] *See Assault Weapons*, 103d Cong., *supra* note 87, at 84 (statement of Chief of Detectives Joseph Constance).

though properly licensed firearms merchants.[95] Thus we are told that the gun-buying rights of law-abiding citizens may be restricted based not on fears about what *they* will do with the firearms they purchase, but on the violence that the state anticipates may come from others—that is, from criminals who may steal those firearms. 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 who may obtain such firearms illegally. *See id.* (holding that the risk of a violent and dangerous public reaction to speech is insufficient rationale to infringe the rights of the speaker); *see also Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence.").

In short, the incremental effect of the Act on criminals will be minimal. But the effect on the Second Amendment rights of law-abiding citizens will be far more pronounced.

V. The Sad Truth Is that the Statute Challenged Here Would Not Have Prevented the Atrocity that Spawned It—the Horrifying Massacre at the Newtown School.

[95] It has been suggested by some that the federal AW-LCM ban cannot be properly evaluated because it was in existence for a mere decade. *See* Christopher S. Koper, REDUCING GUN VIOLENCE IN AMERICA, *supra* note 75, at 166. On its face, that proposition is suspect—ten years is not the blink of an eye, and if the threat that "assault weapons" supposedly pose to public safety were as significant as its proponents contend, surely there would have been at least one blip on the radar screen of the ban advocates who were so eagerly awaiting confirmation of their theories of gun control. But there was nothing. Moreover, Congress itself inserted the ten-year sunset provision into the statute and therefore Congress plainly concluded that ten years was a sufficient period in which to test the merits of its legislation.

In the end, we must confront the unfortunate but stubborn fact that nothing that this Act does would have changed anything at the Newtown school. Limiting detachable magazines to ten rounds would have made no difference: Adam Lanza used 30-round magazines, but he changed many of them out before they were exhausted and he could just as easily and just as quickly have changed out 10-round magazines after firing every last round in them.[96] Or instead of reloading his AR-15, he could have employed either of the two semiautomatic pistols that he was carrying, or even the shotgun that he also brought to the school but left in his car.[97] Deranged spree killers tend to arm themselves with multiple guns, and Adam Lanza did that here.

Nor did the rate of fire of Lanza's semiautomatic AR-15 make a difference, because it was the same as every other semiautomatic rifle—one pull of trigger and the gun fires one bullet. Indeed, even if *all* semiautomatic rifles were outlawed, Lanza could still have used a 150-year-old lever-action rifle such as the Volcanic, the Henry, or the Winchester—cowboy guns familiar to us from a thousand movies and TV westerns. Lanza fired 154 shots in about five minutes; that's 30 shots per minute.[98] That same rate of fire can be achieved with a Winchester lever-action carbine from 1866,[99] or with a Volcanic lever-action rifle from the 1850s (which had a 30-

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

[97] *Id.*, *see* Kopel, GUNS WHO SHOULD HAVE THEM, *supra* note 24, at 164, for an explanation of the massive killing power that can be unleashed in three seconds by a regular shotgun statutorily classified as "recreational" and therefore not subject to any "assault weapons" ban.

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

[99] *See* GUN: A VISUAL HISTORY, *supra* note 4, at 174; MILITARY SMALL ARMS, *supra* note 4, at 147.

round magazine),[100] and that rate of fire might even be exceeded by a Henry Model 1860, which was advertised as capable of 60 shots per minute.[101]

A bolt-action rifle from the First World War would also have fired as rapidly.[102] A person practiced in using the bolt-action British Short Magazine Lee Enfield rifle ("SMLE"), with its ten-round magazine—precisely the size that the Act permits—can fire up to 37 aimed shots per minute.[103] Indeed, during the battle of Mons on August 23, 1914, German infantry advancing on the British encountered such withering fire that they were convinced they had been decimated by heavy Vickers machineguns firing at 500 rounds a minute, when in fact the Germans had faced only determined English soldiers quickly firing their bolt-action SMLE rifles.[104] Finally, Lanza could have accomplished his grim atrocities without any rifle at all, but with a mere revolver that could rapidly be reloaded with the use of such common and inexpensive devices as speed-loaders, full- or half-moon clips, or Quickstrips.[105] Thus firearms

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[100] *See* MILITARY SMALL ARMS, *supra* note 4, at 146.

[101] *See* K.D. KIRKLAND, AMERICA'S PREMIER GUNMAKERS: WINCHESTER 8 (2013). *See also* Kopel, GUNS: WHO SHOULD HAVE THEM, *supra* note 24, 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 January 1989, when he shot 34 children at a schoolyard in Stockton, California with a semiautomatic rifle).

[102] Adam Lanza apparently also possessed some type of "Enfield bolt-action rifle" at his home. *See* Clark, *supra* note 98, at 3.

[103] *See* WORLD ENCYCLOPEDIA OF RIFLES AND MACHINE GUNS, *supra* note 5, *at* 40.

[104] *Id.*

[105] *See* Joseph von Benedikt, *Double Down: Get Your DA Revolver Skills Up to Snuff with These Pro Tips*, in GUNS & AMMO, HANDGUNS (Aug./Sept. 2013) at 62-63. Further evidence of the rapid reload ability of revolvers comes from THE PUBLIC INQUIRY INTO THE SHOOTINGS AT DUNBLANE PRIMARY SCHOOL ON 13 MARCH 1996, led by Lord Cullen. *See* https://www.ssaa.org.au/research/1996/1996-10-16_public-inquiry-dunblane-lord-cullen.pdf. On that day, a madman named Thomas Hamilton walked into a primary school in Scotland and, within four minutes, shot 30 teachers and children with a 9mm Browning semiautomatic pistol before killing himself with a single shot from one of the two .357 magnum Smith & Wesson revolvers that he was carrying. *See id.* at ¶ 1.3, 6.10(i). Hamilton shot all of his victims with the 9 mm Browning semiautomatic that he kept reloading with twenty-round magazines (he fired 105 rounds in total). *Id.* at ¶ 3.39. However, the Public Inquiry by Lord Cullen concluded that

technology that is more than a century old would have wrought the same destruction at Newtown as the modern rifle that Lanza used. The monstrosity at Newtown was not the weapon, but the depraved individual who wielded it.

CONCLUSION

This case should be decided by the principles for evaluating categorical bans on particular firearms that were laid down by the Supreme Court in *Heller*. Insofar as the weapons categorically banned by the Connecticut Act are "arms 'in common use at the time' for lawful purposes like self-defense," *Heller*, 554 U.S. at 624, or are weapons "typically possessed by law-abiding citizens for lawful purposes," *id.* at 625, they are within the scope of the Second Amendment.

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Hamilton could easily have inflicted the same bloodshed in the same amount of time with either of his revolvers: "[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 speedloader 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." *Id.* at ¶ 9.51. The Inquiry further noted that use of a shotgun would have been far more deadly, on the basis of evidence showing that one could, within the same span of time, discharge and reload a double-barreled shotgun 105 times—the same number of shots that Hamilton had fired—but with much more destruction from the approximately 675 to 1000 projectiles that would be fired if one were using buckshot. *Id.* at ¶ 9.53. As a result of the Dunblane massacre, the British government outlawed virtually all private ownership of handguns—an option that the Second Amendment forbids in this country.

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2013, a copy of the foregoing AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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