NO. 15-1030

# In the
# Supreme Court of the United States

JUNE SHEW, *et al.*,

*Petitioners*,

v.

DANNEL P. MALLOY, *et al.*,

*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONERS


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## CORPORATE DISCLOSURE STATEMENT

The Connecticut Citizens' Defense League has no parent corporation, and no publicly held company owns 10% or more of its stock.

The Coalition of Connecticut Sportsmen has no parent corporation, and no publicly held company owns 10% or more of its stock.

MD Shooting Sports has no parent corporation, and no publicly held company owns 10% or more of its stock.

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## ARGUMENT

This is an *a fortiori* case. *District of Columbia v. Heller* held that the Second Amendment "confer[s] an individual right to keep and bear arms" that applies to firearms "typically possessed by law-abiding citizens for lawful purposes." 554 U.S. 570, 595, 625 (2008). Applying this principle, *Heller* struck down the District of Columbia's ban on one type of commonly possessed arms, handguns. Having found that the Second Amendment "right *applies*" to handguns, *Heller* concluded that "citizens *must* be permitted to use [them]," *McDonald v. City of Chicago*, 561 U.S. 742, 767-68 (2010) (emphases added) (quotation marks omitted). Under *Heller*'s reasoning, law-abiding citizens also must be permitted to use the arms at issue in this case, which include AR-15s, the Nation's most popular semi-automatic rifles.

Despite *Heller*'s clear guidance, the Second Circuit inexplicably declined to decide whether the firearms banned by Connecticut are protected by the Second Amendment. There can be no doubt that they are protected: the firearms that Connecticut has inaccurately and pejoratively labeled "assault weapons" in reality are semi-automatic firearms with safety- and accuracy-enhancing features that millions of Americans possess for lawful purposes. Instead of squarely answering the dispositive question in this case, the Second Circuit assumed that those firearms *are* protected, yet concluded that law-abiding citizens *can be banned from possessing them*. That conclusion is fundamentally incompatible with *Heller*.

The issue presented is ripe for this Court's review. No fewer than four different approaches to bans like Connecticut's have been aired in the federal appellate

courts, and there would be no benefit to this Court in allowing the issue to continue to percolate. It is time for the Court to reiterate what it held so plainly in *Heller*: if a type of arm is *protected* by the Second Amendment, law-abiding, responsible citizens *must* be permitted to possess that type of arm *at a minimum* for self-defense within their own homes. The State's arguments for denying review in this case lack merit.

1. The State erroneously argues that "the Second Circuit faithfully followed and applied *Heller*." Brief in Opposition to Petition for Writ of Certiorari at 23 (May 16, 2016) ("Opp."). In fact, the Second Circuit's decision is *flatly inconsistent* with this Court's Second Amendment jurisprudence. This case is on all fours with *Heller*, yet the court below rejected that case's guidance and reached a directly contrary result. Like the District of Columbia in *Heller*, Connecticut has banned a class of arms that are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. As in *Heller*, Connecticut's ban forbids possession of these firearms even in "the home, where the need for defense of self, family, and property is most acute." *Id.* at 628. Yet while *Heller* concluded that the District's ban had been categorically taken "off the table" by the Second Amendment, *id.* at 636, the panel here upheld Connecticut's ban after applying a watered-down form of intermediate scrutiny.

The Second Circuit reached a result squarely at odds with *Heller* only by ignoring the binding doctrinal approach set forth in that case and its progeny. *Heller* was quite explicit about the test future courts must use to assess the constitutionality

of laws that ban arms: Has the government banned firearms of a type "typically possessed by law-abiding citizens for lawful purposes," or, instead, has it banned "dangerous and unusual weapons" that are "highly unusual in society at large"? *Id.* at 625, 627. If the answer is the former, then the ban is unconstitutional, full stop.

This Court's recent, unanimous decision in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), cements that approach. That case concerned Massachusetts's ban on the possession of stun guns, which the Commonwealth's highest court had upheld on the basis that such instruments are not protected by the Second Amendment. In a *per curiam* opinion, this Court vacated that opinion, on the basis that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," *id*. (quoting *Heller*, 554 U.S. at 582). Though the opinion remanded the case back to the state court without deciding whether stun guns are constitutionally protected, Justice Alito filed a concurring opinion addressing that question. Echoing his opinion for the Court in *McDonald*, Justice Alito concluded that stun guns are protected by the Second Amendment because they "are widely owned and accepted as a legitimate means of self-defense across the country" and that "Massachusetts' categorical ban of such weapons *therefore violates the Second Amendment*." *Id.* at 1033 (Alito, J., concurring) (emphasis added).

As urged in our Petition, there can be no serious question that the firearms at issue here, too, are "widely owned and accepted as a legitimate means of

self-defense across the country." *Id.* They are legal in 43 of the 50 states, and millions of them have been sold to private citizens. While they may be "less popular than handguns," it is not by much. *Id*. Indeed, survey data indicates that in recent years AR-15s and other "modern sporting rifles" have outsold every other type of firearm except semi-automatic handguns. *See* Br. of Nat'l Shooting Sports Found., Inc. as *Amicus Curiae* in Supp. of Plaintiffs-Appellants, *Shew v. Malloy*, No. 14-319 (2d Cir. May 23, 2014), ECF No. 67 at ADD-5 ¶ 3; NSSF FIREARMS RETAILER SURVEY REPORT 9 (2015 ed.).[1]

Questions of "market share" aside, Opp.24, "[t]his much is clear: Americans own millions of the firearms that the challenged legislation prohibits." Pet.App.24a; *see also id.* (acknowledging Defendants' admission that the banned arms number in the millions). In *Caetano*, Justice Alito's concurrence concluded that stun guns "are widely owned" and hence protected by the Second Amendment based on evidence that "*[h]undreds of thousands* of Tasers and stun guns have been sold to private citizens." 136 S. Ct. at 1032-33 (alteration in original) (emphasis added). The evidence of Second Amendment protection is even clearer here. Under this Court's precedents, it follows that "citizens *must* be permitted to use [the banned arms] for the core lawful purpose of self-defense." *McDonald*, 561 U.S. at 768 (emphasis added) (quotation marks omitted).

2. Connecticut resists this conclusion, suggesting that *Heller* does not apply because the firearms it has banned may be dangerous when used by criminals.

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[1] *Available at* Supplemental Joint Appendix at JA-3064, *Kolbe v. Hogan*, No. 14-1945 (4th Cir. May 2, 2016), ECF No. 137.

Indeed, a repeated theme of Connecticut's opposition is that criminal misuse of the banned firearms makes them too dangerous to leave in private hands. *See, e.g.*, Opp.1-2, 6-9. But as *Heller* makes clear, "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring). In other words, if the people themselves through their actions decide that a particular arm is not too dangerous for private, lawful use, the government is not free to second-guess that decision.

What is more, it is handguns, not the firearms banned by Connecticut, that "are the overwhelmingly favorite weapon of armed criminals." *Heller*, 554 U.S. at 682 (Breyer, J., dissenting). As the Second Circuit recognized below, "[t]hough handguns comprise only about one-third of the nation's firearms, by some estimates they account for 71 percent to 83 percent of the firearms used in murders and 84 percent to 90 percent of the firearms used in other violent crimes." Pet.App.26a-27a. So-called "assault weapons," or "AWs," by contrast, are very rarely used in crime. As Connecticut's own expert has written, "the overwhelming weight of evidence from gun recovery and survey studies indicates that AWs are used in a small percentage of gun crimes overall." Pet.App.368a. "A compilation of 38 sources indicated that [assault weapons] accounted for 2% of crime guns on average." Pet.App.364a. If criminal misuse of handguns could not save the District of Columbia's handgun ban, it cannot possibly save the ban at issue here.

While the mass shooting that took place in Newtown in 2012 may have "understandably moved [Connecticut] to action," Opp.1, banning the type of firearm used by the perpetrator was neither an appropriate nor constitutional response, and it does not change the result of this case under *Heller*. The dispositive issue is whether the firearms at issue are typically possessed by law-abiding citizens. Connecticut's invocation of Newtown is no more relevant to the constitutional analysis than was the District of Columbia's invocation of Virginia Tech. *See* Br. for Petitioners at 53, *Heller*, 2007 WL 2571686, at *26 ("[H]andguns are easy to bring to schools, where their concealability and capacity to fire multiple rounds in quick succession make them especially dangerous. . . . In the recent Virginia Tech shooting, a single student with two handguns discharged over 170 rounds in nine minutes, killing 32 people and wounding 25 more.").

Furthermore, mass shootings, though tragic, are "particularly rare events." Pet.App.435a. Connecticut says that "the trend of mass killings is intensifying," Opp.9, but it cites no authority for that claim—and the available authority contradicts it. As one recent study has explained, "the facts clearly say that there has been no increase in mass shootings." James Alan Fox & Monica J. DeLateur, *Mass Shootings in America: Moving Beyond Newtown*, 18 HOMICIDE STUDIES 125, 130 (2014).

As with criminals generally, mass shooters prefer handguns. "The overwhelming majority of mass murderers use firearms that would not be restricted by an assault weapons ban." *Id*. at 136. Even the idiosyncratic Mother Jones dataset, *id*. at 128-29,

which is the ultimate source of Connecticut's assertions about the prevalence of banned firearms in mass shootings, *see* Pet.App.401a-402a, indicates that mass shooters typically choose handguns. Mother Jones reviewed 62 mass shooting incidents from 1982 through 2012 and concluded that the perpetrators possessed 94 handguns versus 20 "assault weapons." Mark Follman, Gavin Aronsen & Deanna Pan, *A Guide to Mass Shootings in America*, MOTHER JONES (Apr. 18, 2016), http://goo.gl/h3yTjr.

Finally, there is no reason to believe that mass shooting incidents would be less deadly if the perpetrators were to use a legal substitute for the banned firearms. *See* Petition for a Writ of Certiorari at 27-28, 30-31 (Feb. 11, 2016) ("Pet."). Indeed, as indicated above, the District of Columbia in *Heller* insisted that *handguns* were especially dangerous when used in shooting incidents in schools. And although Connecticut insists otherwise, there is a very significant difference between the *semi-automatic* firearms at issue here and *fully automatic* firearms like the M-16. Unlike machine guns, semi-automatic firearms fire only one round per each pull of the trigger. This is why, also unlike "machineguns," semi-automatic firearms "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994).

To again cite the writings of Connecticut's expert in this case, bans like Connecticut's "target[ ] . . . outward features or accessories that have little to do with the weapons' operation." Pet.App.361a. The court below did not *even seriously try* to explain why exactly the banned features are so dangerous. And as Petitioners have explained, to the extent they affect a

firearm's operation at all, these features—e.g., a thumbhole stock or a pistol grip—tend to promote accuracy and safety in the use of the firearm. *See* Pet.5-7. "In other respects (e.g., type of firing mechanism, ammunition fired, and the ability to accept a detachable magazine), AWs *do not differ from other legal semiautomatic weapons*," Pet.App.361-62 (emphasis added), and they likewise should not differ in the protection they receive from the Second Amendment.

3. Connecticut's other arguments for declining review fare no better than the State's attempts to distinguish this case from *Heller*. Despite the grant of rehearing in *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), *rehearing en banc granted*, 2016 WL 851670, this Court's review is needed to resolve the conflict and confusion that has prevailed in the federal appellate courts over what test should be used to assess the constitutionality of bans like Connecticut's. Federal appellate judges have developed four distinct approaches to laws like these.

One judge correctly has reasoned that "*Heller*['s] history- and tradition-based test" in this context leads to the conclusions that the firearms in question "are in common use today, and are thus protected" by the Second Amendment, and that an attempt to ban them is unconstitutional *per se*. *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1287, 1288, 1290-91 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). The Fourth Circuit panel in *Kolbe*, while not adopting *Heller*'s *per se* approach, at least respected the fundamental nature of Second Amendment rights and concluded that bans like these must be subjected to strict scrutiny. 813 F.3d at 182; *see also Friedman v.*

*City of Highland Park*, 784 F.3d 406, 418 (7th Cir. 2015) (Manion, J., dissenting) (same). The panel below, however, subjected Connecticut's ban to merely *intermediate* scrutiny, Pet.App.37a, the same approach taken by the panel majority in *Heller II*. And a panel of the Seventh Circuit struck off on a path all its own, applying a three-pronged test that looks to "whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and whether law-abiding citizens retain adequate means of self-defense." *Friedman*, 784 F.3d 406, 410 (citations omitted) (quotation marks omitted). That approach is little different than the approach this Court recently repudiated in *Caetano*.

The fact that the Fourth Circuit has now granted rehearing in *Kolbe* does not eliminate the need for review. One of the reasons this Court often declines to review an issue until a circuit split has arisen is the benefits to this Court's decision-making process that result from a well-articulated division of opinion in the lower courts. When "the state and lower federal courts . . . debate and evaluate the different approaches to difficult and unresolved questions of constitutional law," this Court has concluded, it is better able to "identify rules that will endure." *California v. Carney*, 471 U.S. 386, 400 (1985) (Stevens, J., dissenting). Here, regardless of the Fourth Circuit's decision upon *en banc* review, the differing potential approaches to bans like Connecticut's have now been fully ventilated in the lower courts. And it appears that despite well-reasoned opinions to the contrary, the lower courts are

coalescing around an intermediate scrutiny approach that is irreconcilable with *Heller*.

Connecticut also errs in suggesting that the issue raised in this case "is not one of great doctrinal or national significance." Opp.22. While "[o]nly a small number of states have enacted laws similar to Connecticut's," *id.*, the banned firearms are among the most popular nationwide. And it remains entirely unclear why the outlier status of Connecticut's ban should somehow *insulate* it from this Court's review. Indeed, one of the *central functions* of the Second Amendment's protection of firearms "in common use . . . for lawful purposes," *Heller*, 554 U.S. at 624, is to protect those who live in States or localities that choose to disrespect Second Amendment rights from outlier legislation that falls short of national standards. The constitutional rights of those citizens, too, are worthy of this Court's attention. Indeed, in a wide variety of doctrinal areas, "constitutional adjudication frequently involves the justices' seizing upon a dominant national consensus and imposing it on resisting local outliers." Michael J. Klarman, *Rethinking the Civil Rights & Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16 (1996). In other words, this Court "obliterates outliers." Frank H. Easterbrook, *Abstraction & Authority*, 59 U. CHI. L. REV. 349, 370 (1992). Connecticut's suggestion that review is inappropriate because "statutes like [its ban] exist in very few jurisdictions," Opp.22, thus gets the matter exactly backwards.

Yet again, that argument is also squarely inconsistent with *Heller*. Handgun bans like the one struck down in that case were far from common; indeed, this Court expressly noted that "[f]ew laws in

the history of our Nation have come close to the severe restriction of the District's handgun ban." *Heller*, 554 U.S. at 629. Yet the fringe status of the District's ban did not cause the Court to stay its hand on the basis that a decision striking it down "would have no application to the vast majority of states." Opp.22. If anything, the fact that laws as oppressive as Connecticut's are rare heightens the urgency of this Court's review, for there is no guarantee that this Court will get many more opportunities to hold that they are unconstitutional.

Review is also imperative in this case because of the broader implications the panel's deferential application of intermediate scrutiny may carry for other constitutional doctrines that employ that standard. Connecticut's suggestion that the scrutiny applied by the court below was "searching [and] rigorous," Opp.24, is risible. The panel deferred to Connecticut's conclusions at every turn, ignoring the serious flaws in the State's argument that its ban would actually advance its interest in reducing crime, as well as the fact that the conclusions of its own expert *contradicted* that argument. Moreover—in a failing that Connecticut does not even *attempt* to defend—the court refused outright to determine whether the ban is appropriately tailored, notwithstanding this Court's clear directions that "[e]ven though [a statute] is [analyzed under intermediate scrutiny], it still must be narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (quotation marks omitted). By cheapening the intermediate tier of scrutiny in this way, the decision below creates "a casebook guide to eviscerating" the standard in future cases. *Williams-Yulee v. Florida*

*Bar*, 135 S. Ct. 1656, 1685 (2015) (Kennedy, J., dissenting). This Court's review is necessary if for no other reason than to prevent the long-term damage this dangerous precedent could cause in the other doctrinal contexts that rely on the intermediate scrutiny test to protect constitutional rights.

## CONCLUSION

For the reasons given above and in our Petition, this Court should grant the writ and reverse the judgment below.

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Respectfully submitted,

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