No. 15-1030

In The Supreme Court of the United States

JUNE SHEW, et al.,

Petitioners,

v.

DANNEL P. MALLOY, GOVERNOR OF CONNECTICUT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Connecticut may restrict access to a small subset of military-style semiautomatic firearms consistent with the Second Amendment?

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INTRODUCTION

For over twenty years, Connecticut has restricted access to powerful military-style automatic and semiautomatic firearms that are modeled on the AR-15/M-16 and AK-47 fully-automatic military weapons. The General Assembly updated and strengthened these long-standing regulations of assault weapons following the horrific events in Newtown, Connecticut on December 14, 2012, in which a mass murderer shot and killed twenty school children and six educators in less than five minutes by firing 154 rounds from an AR-15 military-style assault rifle. Understandably moved to action by that unimaginable horror, and the growing regularity of mass shootings in public places across America, Connecticut's elected officials sought to enact comprehensive gun regulation reform. After months of consideration and review, the General Assembly passed, and the Governor signed, Public Act 13-3, "An Act Concerning Gun Violence Prevention and Children's Safety," and shortly thereafter amended it in Public Act 13-220 ("the Act").[1]

The Act addressed a range of gun violence and public safety issues, including the unique concerns that arise from the availability of military-style weapons in the civilian gun market. In particular, the Act expanded the enumerated lists of assault weapons

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[1] *See* 2013 Conn. Pub. Acts 13-3, *as amended by* 2013 Conn. Pub. Acts 13-220 codified at Conn. Gen. Stat. §§ 53-202a *et seq.*; *see also* Pet. App. at 173a-211a.

proscribed by make and model and strengthened the military-feature component of the law.[2]

The Act operates to restrict access to firearms that are owned by a small percentage of gun owners and are disproportionately used in gun crime, particularly the most heinous forms of gun violence. Moreover, it curtails access to weapons that, when they are used in crime, result in more shots being fired, more people being shot and more gun death. At the same time that the Act seeks to achieve compelling public health and safety goals, it leaves the core of the Second Amendment right to self defense intact. Connecticut citizens remain free to lawfully possess, and carry in public, over one thousand alternative handguns, rifles and shotguns. These lawful weapons operate in a manner that is equally effective for self defense and, in environments like densely populated buildings and neighborhoods, are more suitable and effective. Thus, the Act does not violate the Second Amendment.

Other circuits that have considered similar prohibitions on civilian possession of military-style assault weapons concur that the laws are constitutional. The Second Circuit's decision is in accord with those

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[2] The Act also prohibited the purchase and transfer of large capacity magazines that can hold more than ten rounds of ammunition. *See generally* Public Act 13-3, §§ 23-24; Public Act 13-220, §§ 1-2; Conn. Gen. Stat. §§ 53-202w-202x. Petitioners challenged the Act's large capacity magazine ban below but do not bring that challenge here.

cases and there is no conflict on the question presented.

In carefully considering Petitioners' challenge to Connecticut's law, the Second Circuit appropriately determined that Connecticut's long-standing prohibitions on assault weapons do not violate the Second Amendment. Pet. App. at 55a. The Second Circuit applied a two-step framework that lower courts have developed and applied to a range of gun laws since this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In both its analytical framework and outcome, the Second Circuit acted consistent with the decisions of this Court and those of the other courts of appeals.

Petitioners attempt to manufacture a circuit split as grounds for granting their petition. No such conflict exists. Petitioners paint a dire picture of confusion and conflict among the lower courts. They go so far as to suggest there is such a degree of discord on the question presented, and in Second Amendment jurisprudence more broadly, that this Court should take up this question to resolve the "chaos," "cacophony" and even "schizophrenia" that has ensued since *Heller*. Pet. Br. at 21. In truth, the landscape is far more placid.

First, there is no disagreement among the lower courts on the question in this case. Indeed, the lower courts that have fully and finally considered whether a state may prohibit access to assault weapons have

universally concluded that states may do so. The Fourth Circuit's recent decision in *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), is not to the contrary, as that decision has been vacated pending rehearing. Thus, Petitioners' claim of a "stark" circuit split is simply incorrect.

Second, Petitioners argue in the alternative that this Court should take up this case to fill out the "contours" of the Second Amendment generally. Pet. Br. at 3. This Court has recently declined review of similar cases in which Petitioners advanced that same basis for the need for review.[3] Moreover, this case, with its narrow question, is unlikely to define the contours of the right announced in *Heller* in the far-reaching way Petitioners seek. But even accepting Petitioners' suggestion that this case presents a good opportunity to resolve any of *Heller*'s unanswered questions—which it does not—their justification of an urgent need for this Court's attention is misdirected. While the work of lower courts since *Heller* is yet unfinished, it cannot be fairly characterized as chaotic. Second Amendment jurisprudence is not in the disarray that Petitioners suggest.

Lacking a conflict among the circuits, Petitioners ask this Court to grant review on a relatively narrow question of limited applicability about which lower courts are in agreement. Petitioners would have this Court take up the instant case so as to pronounce

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[3] *See, e.g.*, Cert. Petn., *Jackson v. City and County of San Francisco*, No. 14-704, 2015 WL 7169757, at *19.

unequivocally that *Heller* declared unconstitutional all "flat bans" on any protected firearm. Of course, *Heller* says nothing of the sort, and it does not even suggest such a sweeping principle. Rather, the Second Circuit's approach—which appropriately rejected Petitioners' absolutist view—is a more faithful application of *Heller*.

This petition should be denied. It is premised on a non-existent circuit split on an issue that does not have broad national implications. Should a split among the lower courts develop on the question presented, this Court will have an opportunity to consider it. But given the Second Circuit's faithful application of the teachings of *Heller* and *McDonald*, there is simply no need for this Court to address the question at this time.

STATEMENT OF THE CASE

A. CONNECTICUT'S REGULATORY SCHEME

Connecticut has long restricted possession of certain semiautomatic handguns, rifles and shotguns that are modeled on military weapons. *See* Pet. App. at 7a; *see also* 1993 Conn. Pub. Acts 93-306, § 1(a); Conn. Gen. Stat. §§ 53a-202a *et seq*. In Connecticut's 1993 assault weapon ban, the General Assembly restricted ownership of 67 assault weapons specifically enumerated by name. 1993 Conn. Pub. Acts 93-306, § 1(a). In 2001, it expanded the assault weapon ban to cover assault weapons which, although not specifically

enumerated, had at least two military features. *See* Pet. App. at 8a, n.5; *see also* 2001 Conn. Pub. Acts 01-130, § 1.

On December 14, 2012, a gunman shot his way into Sandy Hook Elementary School in Newtown, Connecticut, and massacred twenty first graders and six educators in their classrooms and hallways in less than five minutes. The shooter fired 154 rounds with devastating accuracy and efficiency with a firearm that was designed for killing human beings in close quarters, JA-1026 ¶21, an AR-15 type rifle. He loaded and reloaded that weapon with ten 30-round magazines.

In response to this horrific incident and the growing routine of mass public shootings across the nation, the General Assembly enacted Public Act 13-3 on April 4, 2013. *See* Pet. App. at 12a, n.14. The Act expanded the list of assault weapons enumerated by name from 67 to 183 firearms and strengthened the generic features test from a two-feature test to a one-feature test. Pet. App. at 12a.

In addition to the expanded list of enumerated firearms, the Act now prohibits semiautomatic centerfire rifles and semiautomatic shotguns and handguns that have detachable magazines and also have at least one military-style feature such as: 1) a pistol grip, forward pistol grip and thumbhole stock that allow shooters to steady the weapon during rapid firing, easily shift from target to target, and make it

easier to spray bullets from the hip or fire the weapon with only one hand, Pet. App. at 176a, *see also* JA-1713 ¶18; JA-1370 ¶35; 2) a folding or telescoping stock that allow a shooter to make a large and powerful weapon much more compact, and therefore more concealable, *id., see also* JA-1370 ¶34; 3) a shroud that promotes prolonged rapid firing by dispersing the heat generated when the weapon is fired, allowing the shooter to hold the weapon without being burned, Pet. App. at 177a, *see also* JA-1713 ¶18; JA-1370 ¶36; 4) a flash suppressor that suppresses the flash caused by the firing of the weapon, and thereby helps a shooter avoid detection by police in a dark environment, Pet. App. at 177a, *see also* JA-1713 ¶18; JA-1370 ¶37; or 5) a grenade or flare launcher that allows a shooter to launch grenades or flares at his perceived enemy. Pet. App. at 177a, *see also* Pet. App. at 83a-84a n.53-54; JA-1712 ¶14; JA-1713 ¶18; JA-1370 ¶38.

Even with its expanded definition of assault weapons, the Act still only restricts access to a relatively small subset of military-style firearms that comprise a small percentage of the firearms owned by civilians. Pet. App. at 400a ¶17. The undisputed record evidence below established that while the covered firearms comprise a relatively small percentage of civilian gun ownership, their use in gun crime incidents is vastly disproportionate to their ownership rates. Furthermore, these guns have an established track record of disproportionate use in the most serious gun crime incidents—mass shootings and

killing of law enforcement. Pet. App. at 393a ¶7; Pet. App. at 396a ¶14; Pet. App. at 400a ¶18; Pet. App. at 402a ¶24; Pet. App. at 405a ¶30; Pet. App. at 430a-31a ¶¶87-88. Specifically, although assault weapons represented less than 1% of the civilian gun stock in 1994, they were used in between 2% and 8% of all gun crimes at that time. Pet. App. at 400a ¶17; Pet. App. at 411a ¶47. That is at least twice as frequently—and perhaps more than *eight* times as frequently—as one would expect based on their market presence. The statistics are even worse for the most serious types of crime; assault weapons account for up to 6% of murders, up to 16% of killings of law enforcement officers,[4] and 42% of mass public shootings.

The uncontroverted evidence also showed that, not only are these guns selected by criminals at disproportionate rates, when they are deployed in crime their use correlates with more shots being fired, more victims being injured and more death. Pet. App. at 394a ¶8; Pet. App. at 396a ¶13; Pet. App. at 402a ¶23; Pet. App. at 405a ¶33; Pet. App. at 407a ¶¶35-38; Pet. App. at 424a ¶75; Pet. App. at 426a ¶81, Pet. App. at 431a ¶88. The number of shots fired in a gun crime incident is significant because a person is 63% more likely to die if she receives two or more gunshot

[4] Some studies place the percentage of killings of law enforcement in which an assault weapon was used at as high as 20%. JA-1702 ¶25; JA-1368 ¶23; JA-1819.

wounds than if she is shot just once. Pet. App. at 407a-08a ¶38.

The evidence on mass killings also support the Act. That undisputed evidence below showed that the gunshot victimization rate in mass public shootings in which the perpetrator used an assault weapon was more than 33% higher than the rate in non-assault weapon cases. Pet. App. at 402a ¶23; *see also* JA-2695 ¶¶12-14. This is especially important because the trend of mass killings is intensifying in this nation. Between 2009 and 2013, there were 52 mass shootings in which there were 460 gunshot victims, and 323 victims killed. JA-1984-2000. That equates to over 1 mass killing per month somewhere in the United States. JA-1984. In those 52 shootings, incidents that involved assault weapons and/or large capacity magazines resulted in 135% more people shot and 57% more deaths compared to incidents in which the perpetrator used more conventional weaponry. *Id*.

If the Act is allowed to continue to operate, Connecticut citizens will likely experience a meaningful decrease in the rates of gun injury and gun death. Pet. App. at 394a ¶10; Pet. App. at 424a ¶¶76-77. They will also be able to continue to effectively engage in self defense with a firearm in their home, including with at least four hundred different types of hand guns. Pet. App. at 35a-36a; *see also* JA-1027 ¶¶29-32; JA-1714 ¶21.

B. THE PROCEEDINGS BELOW

Petitioners commenced this action in the United States District Court for the District of Connecticut on May 22, 2013, and shortly thereafter amended their complaint on June 11, 2013. Pet. App. at 213a-79a. In their Amended Complaint, Petitioners challenged the Act's restrictions on assault weapons and large capacity magazines on, among other things,[5] Second Amendment grounds. The parties cross-moved for summary judgment. On January 30, 2014, the district court denied Petitioners' motion for summary judgment and granted Respondents' in full. Pet. App. at 58a-106a. The district court held, *inter alia*, that the Act did not unconstitutionally infringe upon Petitioners' rights guaranteed by the Second Amendment.[6] *See Shew v. Malloy*, 994 F. Supp. 2d 234, 250 (D. Conn. 2014), Pet. App. at 58a-106a.

On appeal to the United States Court of Appeals for the Second Circuit, Petitioners argued that: (1) the Act's restrictions on assault weapons violated their Second Amendment rights; and (2) the Act's restrictions on large capacity magazines violated their

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[5] Petitioners also challenged certain exemptions in the Act, which permit possession of assault weapons and large capacity magazines by law enforcement and military personnel, on Fourteenth Amendment and Equal Protection grounds. They also challenged several definitions in the Act on Fourteenth Amendment Due Process vagueness grounds. Plaintiffs have since abandoned those challenges.

[6] The district court also rejected Petitioners' claims of Equal Protection and Due Process violations. *Shew v. Malloy*, 994 F. Supp. 2d 234, 253-57 (D.Conn. 2014); Pet. App. at 91a-105a.

Second Amendment rights.[7] In its unanimous opinion, the Second Circuit held that "[t]he core prohibitions by New York and Connecticut of assault weapons and large capacity magazines do not violate the Second Amendment." Pet. App. at 55a.[8] The Second Circuit's decision was rooted in this Court's teachings in *Heller* and *McDonald*, its own jurisprudence and the "examples provided by our sister circuits." Pet. App. at 18a.

The Second Circuit meticulously examined *Heller* and derived a number of "basic precepts" from it that guided its decision in this case. At the outset, the Second Circuit observed that *Heller* established that the Second Amendment codified and protects a pre-existing individual right to keep and bear arms. Pet. App. at 19a. It also noted that *Heller* held that the right is not unlimited and does not authorize the keeping and bearing of any weapon in any manner and in any place. *Id.* at 19a, 54a-55a. It recognized *Heller* established that laws that operate in the home to restrict access to commonly possessed firearms implicate the core of the Second Amendment. *Id.* at 31a.

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[7] At the Court of Appeals, Petitioners continued to press their vagueness claim as to two of the provisions of the Act. They abandoned the remainder of their non-Second Amendment claims.

[8] The appeals from the districts of New York and Connecticut were heard in tandem at oral argument at the Court of Appeals but the cases were not consolidated. The Petitioners in the New York case elected not to petition this Court. *See* Pet. Br. at 4 n.1, Pet. App. at 107a.

After crediting Petitioners' core factual and legal claim that semiautomatic firearms modeled on the fully automatic M-16/AR-15 and AK-47 are entitled to Second Amendment protection,[9] the Second Circuit considered the appropriate level of scrutiny to apply to the Act's restrictions. Once again it turned to *Heller* for guidance. Pet. App. at 35a, citing *Heller*, 554 U.S. at 628. While *Heller* stopped short of adopting a standard of review for the Second Amendment, the Second Circuit correctly observed that *Heller* was not completely silent on the subject. *Heller* established that where a law imposed a "severe restriction" on Second Amendment rights or caused a "destruction of the right" in the home, the strictest scrutiny must be applied. *Heller*, 554 U.S. at 629.

Following that critical *Heller* guidepost—assessing the "severity" of a Second Amendment burden—the Second Circuit observed that the Act regulates a small subset of semiautomatic weapons. Pet. App. at 35a. Perhaps more significantly, the Second Circuit emphasized that the Act left untouched over one thousand alternative firearms for use in the home by Petitioners, thereby preserving the core Second Amendment right to self defense. Pet. App. at 35a-36a. Based on the foregoing, the Second Circuit

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[9] Respondents maintain that the firearms covered by the Act should not be accorded Second Amendment protection at all. Respondents argued against a finding that they are constitutionally protected below in both the District Court and the Court of Appeals. *See, e.g.*, Respondents' Opp. Br., Docket 14-319, pp. 27-53.

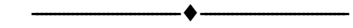
concluded that, although the Act's burdening of the right is "real," it is not severe. Pet. App. at 36a.

In light of what the court characterized as a substantial, but less-than-severe burden imposed by the Act, it determined that some form of heightened scrutiny was required but that it "need not, however, be akin to strict scrutiny." Pet. App. at 35a quoting *Kachalsky v. Westchester*, 701 F.3d 81, 93 (2d Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013). Once again, the Second Circuit looked to *Heller*'s instruction that "statutes [that] do not ban an 'entire class of arms' are substantially less burdensome," Pet. App. at 35a, quoting *Heller*, 554 U.S. at 628. The Second Circuit also found support for its application of less-than-strict scrutiny in this Court's decision in *McDonald*. In *McDonald*, this Court again declined to adopt a specific level of scrutiny, but nonetheless reiterated "*Heller*'s assurances regarding the viability of many gun-control provisions." Pet. App. at 21a, citing *McDonald*, 561 U.S. 786. Thus, based on its own precedent, the decisions of other circuits, and this Court's guidance in *Heller* and *McDonald*, the Second Circuit concluded that the application of "intermediate, rather than strict, scrutiny is appropriate" for the Act. Pet. App. at 37a.

The Act survived this heightened standard of review. In applying intermediate scrutiny, the Second Circuit considered whether the Act was "substantially related to the achievement of an important governmental interest." Pet. App. at 37a, quoting *Kachalsky*, 701 F.3d at 96. It highlighted some of

the most salient points in the record that established the Act's substantial relationship to the achievement of Connecticut's compelling governmental interests in public safety and crime prevention. In particular, it noted that "these weapons tend to result in more numerous wounds, more serious wounds, and more victims." Pet. App. at 39a. In addition, the Second Circuit observed the Act's goal of reducing the lethality of mass public shootings—by depriving killers access to weapons designed to kill large numbers of humans in close quarters—Pet. App. at 41a, was also advanced by the Act. Finally, it rejected Petitioners' claim that the Act should be declared unconstitutional because it will not have a statistically significant enough impact on gun crime. The Second Circuit appropriately rejected this argument and applied the well-established maxim that "legislation need not strike at all evils at the same time to be constitutional." *Id.* (internal quotation omitted).

The Second Circuit concluded, correctly, that the Act did not unconstitutionally infringe Petitioners' Second Amendment rights. *Id.* at 42a.



REASONS FOR DENYING THE WRIT

This petition should be denied. There is no actual conflict among the lower courts on the question presented. Essentially, this petition is premised upon a claim of error by a lower court on a question of narrow

scope and application. As such, it does not merit this Court's attention.

First, there is no conflict among the lower courts in either the analysis of or the conclusion on whether a state may prohibit possession of assault weapons. Each court of appeals that has reached the issue with finality has arrived at an identical conclusion. Petitioners' claim of conflict among lower courts is exaggerated and inaccurate. Should a genuine conflict ever actually develop on this issue, this Court will have an opportunity to review it at that time. As of now, a conflict among the lower courts is conjectural and nonexistent.

Second, this case does not present an important issue of national significance. Laws similar to Connecticut's exist in only a few jurisdictions. Moreover, the proscriptions they contain apply to a small subset of semiautomatic weapons possessed by a small percentage of civilian gun owners. Since this case does not present an issue of broad application or importance, review by this Court is not warranted.

Finally, the Second Circuit's decision was consistent with this Court's precedents in *Heller* and *McDonald* and is in harmony with the decisions of other circuits. Thus, certiorari is not appropriate.

A. NO CONFLICT OR CONFUSION PRESENTLY EXISTS AMONG THE CIRCUITS AS TO ASSAULT WEAPON REGULATION.

There is no actual split among the lower courts about the question here. To the contrary, every lower court that has fully addressed the constitutionality of assault weapon bans after *Heller* has upheld such laws without difficulty. *See, e.g.*, *Heller v. D.C.*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) ("*Heller II*"); *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 411 (7th Cir.), *cert. denied sub nom. Friedman v. City of Highland Park, Ill.*, 136 S. Ct. 447 (2015).

Notwithstanding the lower courts' decided unanimity on this issue, Petitioners claim that there is "a stark three-way split" among the lower courts that warrants this Court's review. Pet. Br. at 2. A review of the relevant cases reveals that the split is more imagined than real.

The principal case on which Petitioners rely for a circuit split, *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), has been vacated pending rehearing. *Id.*, 2016 WL 851670 (4th Cir. Mar. 4, 2016). Petitioners contend that the *Kolbe* court charted such a "completely different course" in its analysis of assault weapon restrictions from that of the Second, Seventh and D.C. Circuits, that review is necessary. Pet. Br. at 16. However, on March 4, 2016, the Fourth Circuit vacated the *Kolbe* decision when it ordered a rehearing *en banc* by the full Fourth Circuit. *See* Fourth Circuit Local Rule 35(c) ("granting of rehearing *en banc* vacates the

previous panel judgment and opinion"). Therefore, even if *Kolbe* previously could be fairly said to have established a disagreement among the lower courts, that basis has ceased to exist.

Moreover, the *Kolbe* panel decision itself was, at most, an order of remand for further proceedings to apply a different level of constitutional scrutiny. It did not present a final determination on the constitutionality of Maryland's assault weapon and large capacity magazine bans in the Fourth Circuit. *Kolbe v. Hogan*, 813 F.3d at 184 ("This is not a finding that Maryland's law is unconstitutional. It is simply a ruling that the test of its constitutionality is different from that used by the district court."). As such, even if this Court accepted this case to resolve differences among the circuits at this stage, it would not have the benefit of the full development of the Fourth Circuit's view of the Maryland law. It may have that opportunity when the Fourth Circuit has finally determined the constitutionality of the Maryland law.

Petitioners' reliance on the Seventh Circuit's decision in *Friedman*, as a basis for a split among the courts of appeals is equally unavailing. Petitioners point to the Seventh Circuit's discussion of "whether law-abiding citizens retain adequate means of self-defense," Pet. Br. at 19, quoting *Friedman*, 784 F.3d at 410, as evidence that *Friedman* "contradicts this Court's teachings in *Heller* at every turn." Pet. Br. at 19. But this Court recently declined to review *Friedman*, and it should not now accept a renewed invitation to examine and correct the case it declined

just five months ago. *Friedman v. City of Highland Park, Ill.*, 136 S. Ct. 447 (2015).

More importantly, *Friedman* is not in conflict, or even tension, with the decisions of the Second Circuit or D.C. Circuit in *Heller II* on the question here. Rather, it reaches the exact same conclusion in a somewhat different fashion.[10] Although the Seventh Circuit in *Friedman* did not apply the two-step framework used by other courts,[11] it examined the historical context of the individual right to self defense with a firearm, as this Court did in *Heller*. *Friedman*, 784 F.3d at 408. Much like *Heller* it required that the core right of self defense with a firearm be preserved. *Id.* at 411. *Friedman* also squares with the Second Circuit's examination of *Heller*'s "basic precepts" and its examination of the severity of the burden on the core Second Amendment right. *Id.* While the Second and Seventh Circuits expressed their application of *Heller* differently, each court reached the same outcome. There is no need for this Court to resolve differences in analytical approaches among the circuits where the outcomes align and the analytical approaches share much in common.

Undeterred, Petitioners contend that there is a broader problem afoot in Second Amendment jurisprudence more generally. The opposite is true.

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[10] It is also consistent with the decision of the Ninth Circuit on the related issue of the keeping of military-style large capacity magazines. *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015).

[11] *See, e.g.*, *Chester*, 628 F.3d at 680; *Marzzarella*, 614 F.3d at 89; *Chovan*, 735 F.3d at 1136-37; *Kachalsky*, 701 F.3d at 93.

Since *Heller*, lower courts have addressed a myriad of issues, such as public carry of firearms;[12] regulation of gun ranges;[13] the storage and disabling of firearms;[14] the rights of felons and domestic violence misdemeanants to possess firearms.[15] Many of these courts have expressly adopted a two-step framework similar to that applied by the Second Circuit in this case. *E.g.*, *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012), *cert. denied*, 134 S. Ct. 1364 (2014) ("*NRA v. BATFE*"); *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014).

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[12] *See, e.g., Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014) (upholding carry permit standard); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013) (same); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (addressing limits on concealed carry of firearms); *Masciandaro*, 638 F.3d at 467-68, 474-76 (upholding ban on carry of loaded handgun in national parks); *Hightower v. City of Boston*, 693 F.3d 61, 74 (1st Cir. 2012) (upholding revocation of concealed carry permit); *but see Peruta v. Cty. of San Diego*, 742 F.3d 1144 (9th Cir. 2015), *vacated pending reh'g*, 781 F.3d 1106 (2015) (striking down county permit regulation).

[13] *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

[14] *Jackson v. City and Cnty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2799 (2015).

[15] *Chovan*, 735 F.3d at 1141.

In several cases where the Courts have found a burden on Second Amendment rights and proceeded to the second step of the two-step framework, they have also applied intermediate scrutiny. *E.g.*, *Kachalsky*, 701 F.3d at 93 (upholding New York's "proper cause" requirement for "full-carry concealed-handgun" permit at second step of two-party inquiry); *Marzzarella*, 614 F.3d at 99 (upholding prohibition on obliterated serial numbers at second step of two-part inquiry); *United States v. Masciandaro*, 638 F.3d 458, 474 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011) (upholding prohibition on possession of loaded handgun in national park at second step of two-part inquiry); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013) (upholding "good and substantial reason" for handgun "carry permits" at second step of two-part inquiry); *NRA v. BATFE*, 700 F.3d 185, 211 (5th Cir. 2012), *cert. denied*, 134 S. Ct. 1364 (2014) (upholding prohibition on handgun sales to persons under 21 years of age at second step of two-part inquiry); *Chovan*, 735 F.3d at 1141 (upholding law prohibiting firearm possession by domestic violence misdemeanants at second step of two-part inquiry); *Heller II*, 670 F.3d at 1264 (upholding D.C. ban on assault weapons and large capacity magazines at second part of two-part inquiry).

This Court has not found these decisions to be so contrary to *Heller* that review was warranted. Indeed, "doctrinal confusion" arguments similar to those Petitioners' argue this petition have not persuaded this Court to grant review. *See, e.g.*, Cert. Petn.,

Jackson v. City and County of San Francisco, No. 14-704, 2015 WL 7169757, at *19 (circuit court's reasoning "symptomatic of a broader problem that merits plenary review"); Cert. Petn., *Drake v. Jerejian*, No. 13-827, 2014 WL 117970, at *23 (*certiorari* warranted in light of "widespread confusion"), *cert. denied*, 134 S. Ct. 2134 (2014); Cert. Petn., *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 13-137, 2013 WL 8147798, at *14 (noting a purported "pattern of stubborn resistance to" *Heller*), *cert. denied*, 134 S. Ct. 1364 (2014).

Accordingly, the "doctrinal wilderness" Petitioners posit, Pet. Br. at 21, does not exist. Rather, the real landscape is one of lower courts carefully analyzing the teachings of this Court in *Heller*, along with the guidance of their sister courts, to formulate a developing body of law that follows *Heller*.

Moreover, even if Petitioners' portrait of doctrinal disarray were correct, it does not exist for assault weapon regulation. The courts that have considered that issue are all in agreement. To the extent further guidance and development is necessary for Second Amendment doctrine generally, there are more appropriate cases than this to resolve *Heller*'s unanswered questions. Granting this petition, on the basis of a nonexistent split among the circuits, is simply not warranted.

B. THE CHALLENGE TO CONNECTICUT'S ASSAULT WEAPON LAW DOES NOT PRESENT AN ISSUE OF BROAD NATIONAL IMPORTANCE.

Not only is there no conflict among the lower courts, this issue is not one of great doctrinal or national significance. Only a small number of states have enacted laws similar to Connecticut's. This Court should likewise decline review for this reason.

As Petitioners acknowledge, Pet. Br. at 10, statutes like the Act exist in very few jurisdictions, and there is little evidence that an expansion of such laws, or even gun control generally, is underway nationwide. Furthermore, the overwhelming majority of civilian gun owners do not possess these guns. Pet. App. at 400a ¶17; Pet. App. at 411a ¶47. Thus, even if this Court were to resolve this precise question, it would have no application to the vast majority of states; nor would it impact most gun owners, the overwhelming majority of whom choose not to own these weapons.

Despite the narrowness of the issue, Petitioners contend that review is appropriate as a matter of sheer timing. Petitioners suggest this Court has "stayed its hand" long enough in the Second Amendment area and that now is the time to resolve the full "contours of that right." Pet. Br. at 3. Even assuming this Court followed Petitioners' timing dictate and answered the question presented in a manner Petitioners urge, the decision would only

directly apply to the few jurisdictions that restrict these military-style weapons.

Given the narrow scope and application of the issue here, this Court should deny the petition.

C. THE SECOND CIRCUIT FAITHFULLY FOLLOWED AND APPLIED *HELLER*.

To the extent this Court is inclined to even reach Petitioners' arguments that the lower court erred, which it should not, these claims too lack merit. The Second Circuit's decision is a cogent and faithful application of *Heller* to the facts of this case. Petitioners ask this Court to ignore the Second Circuit's careful adherence to *Heller*, by advancing two arguments why the court erred. Their principle claim is that the Second Circuit completely misread *Heller* and was required to apply Petitioners' absolutist "no scrutiny" standard to the Act. In the alternative, Petitioners argue that the Second Circuit misapplied the level of heightened scrutiny it selected. These claims of error do not warrant the granting of this petition.

The Second Circuit neither misread nor misapplied *Heller*. Rather, it read *Heller* in a manner that, at many turns, was generous to Petitioners' arguments about the scope of the Second Amendment. Foremost, the Second Circuit interpreted *Heller* in Petitioners' favor to accord these military-style weapons Second Amendment protection in the first instance. In Respondents' view, this was not required

under *Heller*. Indeed, Respondents maintain that assault weapons should not be accorded Second Amendment protection at all.

These weapons operate in a manner that, for all practical purposes, is akin to their close cousin, the M-16. Pet. App. at 27a; *see also* JA-1026 ¶¶20-21. *Heller* explicitly states that the M-16 can be restricted. *Id.*, 554 U.S. at 627 n.26. Notwithstanding this language in *Heller*, the Second Circuit accepted the AR-15 as "lawful" and entitled to Second Amendment protection. Pet. App. at 27a. It also credited Petitioners' claim that these weapons are commonly owned despite their minuscule market share, and that they are used for lawful Second Amendment purposes despite the lack of evidence they are commonly used for self defense. Pet. App. at 24a-28a. It also found the Act burdened Petitioners' Second Amendment rights. *Id.* at 34a, 37a.

Although the Second Circuit found in Petitioners' favor on the threshold question of whether assault weapons are constitutionally protected, Petitioners characterize the Court of Appeals' approach as "lax." Pet. Br. at 1. This assertion is belied by any fair reading of the decision. The Second Circuit analysis was, in fact, searching, rigorous and appropriate, assuming Second Amendment protection of these weapons.

Petitioners' real contention is that *Heller* and *McDonald* require a court to strike down any "flat ban" on any firearm. Pet. Br. at 17. They assert that "the application of *any* form of means-end scrutiny to a flat

ban on core Second Amendment conduct—even strict scrutiny—falls short of fully protecting the Second Amendment right." Pet. Br. at 22 (emphasis original), *see also* Pet. Br. at 23 ("the Second Circuit erred in analyzing Connecticut's ban under any sort of means-end standard. . . ."). *Heller* and *McDonald* do not support Petitioners' absolutist interpretation of the Second Amendment.

Quite the contrary, the Second Circuit was required by *Heller* and *McDonald* to follow the approach it did. While Petitioners object to the application of "mere[] intermediate scrutiny," Pet. Br. at 17, this approach was faithful to *Heller*'s language. The Second Circuit followed *Heller*'s instruction to consider the severity of the burden imposed by a regulation. *Heller*, 554 U.S. at 629. It also followed *McDonald*'s statement that the Second Amendment "does not imperil every law regulating firearms" and that "[s]tate and local experimentation with reasonable firearm regulations will continue under the Second Amendment." *McDonald*, 561 U.S. at 786. It correctly concluded that the Act did not operate to burden Second Amendment rights to the same degree and extent as the law at issue in *Heller*. Unlike the complete ban on handguns at issue in *Heller*, the Act applies to only a small subset of semiautomatic firearms and leaves many alternative firearms, including over four hundred handguns, available for use in lawful self defense. Thus, the Act does not flatly ban the use of the "quintessential self-defense weapon," *id.*, 554 U.S. at 629, in the home. Rather,

it leaves untouched the fundamental Second Amendment conduct of self defense with a handgun in the home. As such, the Act burdens Petitioners' rights only minimally, if at all.

Thus, even assuming that the Second Circuit's application of any heightened scrutiny was apt, at most the Act should have only been subject to intermediate scrutiny. Moreover, the Second Circuit's determination that strict scrutiny was unwarranted is broadly consistent with this Court's approach addressing other fundamental rights such as voting and political association rights where regulatory burdens are found to be less-than-severe. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *see also FEC v. Beaumont*, 539 U.S. 146, 148 (2003) ("The time to consider the difference between a ban and a limit is when applying scrutiny at the level selected, not in selecting the standard of review itself.").

Petitioners' additional claim that the Act should have failed intermediate scrutiny because the State's justification for the ban is not "even plausible," Pet. Br. at 24, and that there is no evidence to support the assault weapon ban. Pet. Br. at 28-29, quite simply ignores the fully developed record of uncontested evidence. The record below established the lethality and injuriousness of assault weapon use, particularly in mass shootings. For example, an assault weapon was used in 42% of mass shooting incidents between 1982 and 2012. Pet. App. at 401a. An expert cited by both sides testified that, on average, over 3 more people

were killed in mass shootings in which assault weapons were used by the shooter. JA-2696. He also found that twice as many people were injured but not killed in mass shootings in which assault weapons were used by the killer. *Id*.

While Petitioners deride the decreases in gun death and injury achieved through the Act as too small, Pet. Br. at 30, they cannot dispute that they will be real or meaningful in both human and economic terms. Pet. App. at 83a, n.51; Pet. App. at 418a ¶61. Petitioners may have preferred different policy choices by the Connecticut legislature, but they cannot assert that there was not a substantial and sufficient basis for those decisions.

The decision of the Second Circuit faithfully followed the guidance of *Heller* that "the right secured by the Second Amendment is not unlimited" and that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* 554 U.S. at 626, citing *United States v. Miller*, 307 U.S. 174, 178-82 (1939). It applied the highest degree of scrutiny that was appropriate to the Act and correctly concluded that "the core provisions of the [Act] prohibiting possession of semiautomatic assault weapons and large capacity magazines do not violate the Second Amendment. . . ." Pet. App. at 6a. Accordingly, the decision of the Court of Appeals does not warrant further review by this Court.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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