No. 11-5963

IN THE

United States Court of Appeals for the Sixth Circuit

LEONARD EMBODY,

Plaintiff-Appellant,

v.

STEVE WARD,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Tennessee in Case No. 3:10-cv-126 Judge William J. Haynes, Jr.

BRIEF OF *AMICUS CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF APPELLEE

JONATHAN E. LOWY
DANIEL R. VICE
Brady Center to Prevent Gun Violence
Legal Action Project
1225 Eye Street, N.W., Suite 1100
Washington, D.C. 20005

JONATHAN L. DIESENHAUS
JESSICA L. ELLSWORTH
MATTHEW C. SULLIVAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
Fax: (202) 637-5910

Counsel for *Amicus Curiae*

December 19, 2011

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, the Brady Center To Prevent Gun Violence makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The Brady Center To Prevent Gun Violence is a § 501(c)(3) non-profit corporation, and no publicly held corporation holds its stock.

2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

No.

Dated: December 19, 2011 /s/ Jessica L. Ellsworth

CONSENT TO FILE

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, *amicus* received consent from all parties to file this brief. No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *amicus*, its members, or its counsel, contributed money intended to fund preparation of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS:

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF *AMICUS*

Amicus the Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases involving state and federal gun laws. *Amicus* brings a broad and deep perspective to the issues raised by this case and has a compelling interest in ensuring that the Second Amendment does not impede reasonable governmental action to prevent gun violence.

INTRODUCTION

Appellant's principal Second Amendment argument on appeal is that Tenn. Code Ann. § 39-17-1311(b)(1)(H) gives a gun permit holder an "unalloyed" right to carry his gun in a state park. (*See* Appellant's Br. 9-10; Appellant's Reply 5.) According to Appellant, Appellee violated that right by disarming him. The district court, however, correctly found that Appellant's statutory right was limited by Tenn. Code Ann. § 39-17-1351, to which § 39-17-1311(b)(1)(H) specifically refers, and held that Appellee's actions were reasonable under § 39-17-1351(t).

To affirm, the Court need not address the constitutionality of open-carry provisions or of assault-weapon bans. Indeed, Appellant appears to disavow reliance on the general protections of the Second Amendment, and does not argue that Tenn. Code Ann. § 39-17-1351(t) is unconstitutional, opting instead to rely on

the right afforded him by Tenn. Code Ann. § 39-17-1311(b)(1)(H). (*See* Appellant's Reply 5 ("The issue here is one of the reasonableness of a detention and seizure. This case is not [*District of Columbia v.*] *Heller*, and it is not *McDonald* [*v. City of Chicago*].").)

Nevertheless, should the Court consider the broader Second Amendment issues, it should do so fully and completely appraised of the applicable law. *Amici* Second Amendment Foundation, Inc. ("SAF") and the Calguns Foundation, Inc. ("Calguns"), recognizing the deficiency in Appellant's Second Amendment claim, conclude that the Second Amendment does not protects his conduct, but base their conclusion on an incorrect view of the law. *Amici* assert that "the right to bear arms applies in public parks," (SAF Br. 3), and that the Second Amendment protects Appellant's AK-47, (*id.* 21-30), but that Appellant's conduct removed him from the Second Amendment's scope. If Appellant's conduct had been different—for example, if he had not painted the tip of his gun orange—*amici* argue that he would have fallen under the protections of the Second Amendment.

Amici's assertions about the scope of the Second Amendment, however, misstate the law. First, while the Supreme Court held that the Second Amendment protects a right to possess guns *in the home* for self-defense, it never recognized a broader right to carry guns in public. The right to keep and bear arms recognized in *District of Columbia v. Heller* is unique among constitutional rights in the risks

it presents. 554 U.S. 570 (2008). Guns are designed to kill, and gun possession and use subject others to a serious risk of deadly harm. In *Heller* and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Court did not announce a right to carry in public but instead repeatedly stated its holding as bound to the home. Numerous courts, from the 19th century to post-*McDonald*, have recognized that the Second Amendment does not prevent states from restricting or barring the carrying of handguns in public.

And second, the AK-47 at issue here is among the small subset of military-style semi-automatic weapons specifically designed for offensive use and most apt to injure innocent bystanders. Such assault weapons, which are used in both ordinary crime and mass shootings at rates far higher than other firearms, are not entitled to protection under the Second Amendment. As is clear from *Heller*, the Second Amendment does not protect arms that are not in common use for the lawful purpose of self-defense, or arms that are particularly dangerous. That includes the assault weapon at issue here, which was "designed for rapid fire, close quarter shooting at human beings." *See* U.S. Dep't of Treasury, *Assault Weapons Profile* 19 (Apr. 1994). Because assault weapons, unlike handguns, are not widely used for defensive purposes, and because such weapons pose particularly acute public safety concerns, restrictions on their possession and use do not offend the Second Amendment.

Therefore, although Appellant does not appear to raise a constitutional challenge to Tenn. Code Ann. § 39-17-1351(t), and the Court can consequently affirm the district court by reference to Appellant's conduct, adopting the principles urged by SAF and Calguns would be an incorrect statement of the law.

LEGAL BACKGROUND

Recent Supreme Court Second Amendment Jurisprudence: In *Heller*, the Supreme Court held that the Second Amendment protects the right of responsible, law-abiding citizens to possess guns in the home for the purpose of self-defense. 554 U.S. at 628-29. While the Court could have stopped there, it went out of its way to stress that its holding did not "cast doubt" on other gun laws and even identified a non-exhaustive list of "presumptively lawful" measures that passed constitutional muster. *Id*. at 626-27 & n.26. Those "presumptively lawful" measures included laws restricting, and even banning, the public carry of weapons. Indeed, in approvingly discussing long-understood limitations on the right to keep and bear arms, the Court specifically noted that "the majority of the 19th-century courts" considered outright "prohibitions on carrying concealed weapons . . . lawful under the Second Amendment or state analogues." *Id*. at 626. The Court also "recognize[d] another important limitation on the right to keep and carry arms," namely that the Second Amendment protects only those weapons "in

common use at the time," consistent with "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id*. at 627.

Two years later, the Court incorporated the Second Amendment to states, but "repeat[ed]" *Heller's* "assurances" regarding its limited scope, and agreed that "state and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *McDonald*, 130 S. Ct. at 3046-47 (internal citation omitted). Once again, the Court did not extend the Second Amendment right to cover assault weapons or locations beyond the home.

Standard of Review: Since *Heller*, an increasing number of courts have utilized a two-pronged approach to Second Amendment claims, under which they ask: (1) does the law or regulation at issue implicate protected Second Amendment activity, and (2) if so, does it withstand the appropriate level of scrutiny? *See, e.g.*, *Heller v. District of Columbia* ("*Heller II*"), --- F.3d ----, 2011 WL 4551558, at *5 (D.C. Cir. Oct. 4, 2011); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010). If the challenged law or regulation does not implicate protected Second Amendment activity, then the analysis ends and the law is deemed constitutional.

ARGUMENT

There is no Second Amendment right to possess and carry weapons in public places, including public parks, nor is there a Second Amendment right to possess and carry assault weapons.

I. The Right Protected in *Heller* and *McDonald* Is a Right To Keep Firearms in the Home, Not One To Carry Firearms in Public.

The Supreme Court's decision in *Heller* recognized that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*." *Heller*, 554 U.S. at 635 (emphasis added). The Court only recognized Heller's right "*to carry* [] *in the home*," *id*. (emphasis added), and did not mention, much less approve, the carrying of firearms in public. *See id*. It focused, instead, on the historical recognition of the right of individuals "to keep and bear arms to defend their homes, families or themselves," *id*. at 615 (internal quotation marks omitted), and the continuing need to keep and use firearms "in defense of hearth and home." *Id*. at 635. Thus it held no more than that "the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense." *Id*. at 635 (emphasis added); *see also Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) ("the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons.").

SAF and Calguns argue, in essence, that the *Heller* Court embraced a constitutional right to carry guns in public, but for some reason chose not to say so explicitly. Their subliminal argument misreads *Heller*. Indeed, *amici* cannot explain why the Court would so explicitly hold that the Second Amendment was "not unlimited," and that a (non-exhaustive) host of gun laws remained "presumptively lawful," while keeping its declaration that the Second Amendment protected a right to carry guns in public hidden and implicit, leaving courts with (at most) supposed tea leaves on which to find a broad right to carry in public. Nor can *amici* explain why the *Heller* Court expressly approved of decisions upholding concealed carry bans, but chose not to state the flip-side that is crucial to *amici*'s argument – that some form of public carrying must be permitted.

Post-*Heller*, numerous state and federal courts have held that the Second Amendment does not protect a broad right to carry weapons in public, repeatedly describing *Heller*'s core holding as bound to the home.[1] In *Williams v. State*, Maryland's highest court considered, and summarily rejected, the argument that Heller endorsed a public right to carry guns:

---

[1] Although the district court did not decide explicitly whether the Second Amendment extended beyond the home, it cited approvingly decisions that acknowledged *Heller*'s narrow scope and noted that the "site of this seizure of Plaintiff's weapon," a public park, "present[ed] a significant fact for Plaintiff's Second Amendment claim," which it then dismissed. *See Embody v. Ward*, No. 3:10cv-00126, 2011 WL 2971055, at *10-11 (M.D. Tenn. July 20, 2011).

> *Heller* and *McDonald* emphasize that the Second Amendment is applicable to statutory prohibitions *against home possession*, the dicta in *McDonald* that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home," notwithstanding. Although Williams attempts to find succor in this dicta, it is clear that *prohibition of firearms in the home* was the gravamen of the certiorari questions in both *Heller* and *McDonald* and their answers. If the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.

10 A.3d 1167, 1177 (Md. 2011) (emphasis added) (internal citation omitted).

This reasoning is hardly unique; in *People v. Dawson*, the Illinois Court of Appeals rejected arguments strikingly similar to *amici*'s, and held:

> *Heller specifically limited its ruling to interpreting the amendment's protection of the right to possess handguns in the home*, not the right to possess handguns outside of the home in case of confrontation—a fact the dissent heartily pointed out by noting that "[n]o party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth." The *McDonald* Court refused to expand on this right, explaining that the holding in *Heller* that the second amendment protects "the right to possess a handgun in the home for the purpose of self-defense" was incorporated.

934 N.E.2d 598, 605-06 (Ill. App. Ct. 2010) (internal citations omitted) (emphasis added), *cert. denied*, 131 S. Ct. 2880; *see also People v. Aguilar*, 944 N.E.2d 816, 823 (Ill. App. Ct. 2011) (*Heller* and *McDonald* limit the "right to possess handguns in the home, not the right possess to handguns outside the home."); *State v. Knight*, 218 P.3d 1177, 1189 (Kan. Ct. App. 2009) ("It is clear that the [*Heller*] Court was drawing a narrow line regarding the violations related solely to use of a handgun in the home for self-defense purposes.").

Likewise, the Fourth Circuit recently declined to extend the Second Amendment right beyond the home, refusing to "push *Heller* beyond its undisputed core holding." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). "On the question of *Heller*'s applicability outside the home environment," the court stated, "we think it prudent to await direction from the Court itself." *Id.* at 475-76.[2]

The same historic recognition of the Second Amendment's limits holds true across the country. *See* 1876 Wyo. Comp. Laws ch. 52, § 1 (1876 Wyoming law

---

[2] In fact, a growing number of courts have similarly held that the right recognized in *Heller* and *McDonald* is confined to the home. *See, e.g.*, *United States v. Laurent*, --- F. Supp. 2d ----, 2011 WL 6004606, at *22 (E.D.N.Y. Dec. 2, 2011) ("The right to self-defense in the home belongs to 'law-abiding citizens for lawful purposes.' It does not prohibit government regulation of firearms outside of the home or limitations on ownership of certain firearms; nor does it prevent the government from limiting the use of firearms for specific purposes or by specific people." (quoting *Heller*, 554 U.S. at 627)); *Kachalsky v. Cacace*, --- F. Supp. 2d ----, 2011 WL 3962550, at *23 (S.D.N.Y. Sept. 2, 2011) ("To the extent that Plaintiffs are attacking New York's statutory scheme as precluding open carry . . . such carrying is likewise outside the core Second Amendment concern articulated in *Heller*: self-defense inside the home."); *Richard v. County of Yolo*, --- F. Supp. 2d ----, 2011 WL 1885641, at *3 (E.D. Cal. May 16, 2011); *Gonzalez v. Village of W. Milwaukee*, No. 09CV0384, 2010 WL 1904977, at *4 (E.D. Wis. May 11, 2010) ("The Supreme Court has never held that the Second Amendment protects the carrying of guns outside the home."); *United States v. Tooley*, 717 F. Supp. 2d 580, 596 (S.D.W. Va. 2010) ("Additionally, possession of a firearm outside of the home or for purposes other than self-defense in the home are not within the 'core' of the Second Amendment right as defined by *Heller*."); *Riddick v. United States*, 995 A.2d 212, 222 (D.C. 2010) (Second Amendment does not "compel the District to license a resident to carry and possess a handgun outside the confines of his home, however broadly defined." (quoting *Sims v. United States*, 963 A.2d 147, 150 (D.C. 2008))).

prohibiting anyone from "bear[ing] upon his person, concealed or openly, any firearm or other deadly weapon, within the limits of any city, town or village"); Ark. Act of Apr. 1, 1881; Tex. Act of Apr. 12, 1871; *Fife v. State*, 31 Ark. 455 (1876) (upholding carrying prohibition as a lawful "exercise of the police power of the State without any infringement of the constitutional right" to bear arms); *English v. State*, 35 Tex. 473, 473, 478 (1871); *Hill v. State*, 53 Ga. 472, 474 (1874) ("at a loss to follow the line of thought that extends the guarantee" – in the state Constitution of the "right of the people to keep and bear arms" – "to the right to carry pistols, dirks, Bowieknives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day."); *State v. Workman*, 35 W. Va. 367, 373 (1891); *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908); *Aymette v. State*, 21 Tenn. 154, 159-61 (1840) ("The Legislature . . . ha[s] a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence."); *State v. Buzzard*, 4 Ark. 18, 21 (1842); *State v. Jumel*, 13 La. Ann. 399, 400 (1858).[3]

[3] *Bliss v. Commonwealth*, 12 Ky. 90, 91, 93 (1822), in which Kentucky's Supreme Court held Kentucky's concealed-weapons ban in conflict with its Constitution, is recognized as an exception to this precedent. *See* Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 125, at 75-76 (1868). In fact, the legislature later corrected the anomalous decision by amending its constitution to allow a concealed weapons ban. *See* Ky. Const. of 1850, art. XIII, § 25.

Noted scholars and commentators have also long recognized that a right to keep and bear arms does not prevent states from restricting or forbidding guns in public places. For example, John Norton Pomeroy's Treatise, which *Heller* cited as representative of "post-Civil War 19th-century sources" commenting on the right to bear arms, 554 U.S. at 618, stated that the right to keep and bear arms "is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons . . . ." JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 152-53 (1868). Similarly, Judge John Dillon explained that even where there is a right to bear arms, "the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons." Hon. John Dillon, *The Right to Keep and Bear Arms for Public and Private Defense (Part 3),* 1 CENT. L.J. 259, 287 (1874). And an authoritative study published in 1904 concluded that the Second Amendment and similar state constitutional provisions had "not prevented the very general enactment of statutes forbidding the carrying of concealed weapons," which demonstrated that "constitutional rights must if possible be so interpreted as not to conflict with the requirements of peace, order and security." ERNST FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904).

Courts continue to recognize post-*Heller* that there are profound public safety rationales for restricting guns in public:

> Unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized threat to public order, and is prohibited as a means of preventing physical harm to persons other than the offender. A person who carries a concealed firearm on his person or in a vehicle, which permits him immediate access to the firearm but impedes others from detecting its presence, poses an imminent threat to public safety. . . .

People v. Yarbrough, 86 Cal. Rptr. 3d 674, 682 (Cal. Ct. App. 2008) (internal quotations and citations omitted); *see also Kachalsky*, 2011 WL 3962550, at *28 ("Notwithstanding the emphasis placed on the interest in regulating concealed carry, the same rationales apply equally, or almost equally, to the regulation of open carry."); *cf. United States v. Walker*, 380 A.2d 1388, 1390 (D.C. 1977) (there is an "inherent risk of harm to the public of such dangerous instrumentality being carried about the community and away from the residence or business of the possessor").

There is no dispute that Appellee's actions in this case do not impede the ability of individuals to keep handguns in defense of their homes. Instead, they affect only the carrying of weapons *in public*, a different issue entirely, and one that neither the Supreme Court nor other courts have recognized as protected under the Second Amendment. As a result, Appellant has failed to challenge protected Second Amendment activity, and the district court's judgment should stand.

II. Under The Second Amendment, The Possession of Assault Weapons May Be Restricted Because They Are Extraordinarily Dangerous And Are Not Appropriate for Legitimate Self-Defense Purposes.

Restrictions on the possession of assault weapons are consistent with the scope of the Second Amendment right recognized in *Heller*, for such restrictions would cover only unusually dangerous weapons not commonly used for lawful self-defense. *See People v. James*, 94 Cal. Rptr. 3d 576, 585-86 (Ct. App. 2009), *cert. denied*, 130 S. Ct. 1517 (2009) ("*Heller* does not extend Second Amendment protection to assault weapons . . . ."); *see also Heller II*, 2011 WL 4551558, at *15 (upholding D.C. assault weapon ban under intermediate scrutiny because of particularly dangerous characteristics of assault weapons and their use in violent crime).

The Supreme Court in *Heller* made clear that not every prohibition on firearms would violate the Second Amendment; thus, it stated that the Second Amendment does not protect a right to own "any weapon whatsoever," and that "'dangerous and unusual weapons'" may be prohibited. 554 U.S. at 626, 627. *Amici* suggest that assault weapons fall out of the protection of the Second Amendment only when an individual possessing an assault weapon exhibits dangerous and unusual conduct. But *Heller* makes clear that assault weapons do not fall under the protections of the Second Amendment, because they, as a class of weapon, are dangerous and unusual.

A. The "Dangerous and Unusual Weapons" Doctrine Is Not the "Dangerous and Unusual Conduct With Weapons" Doctrine.

In *Heller*, the Court recognized that the Second Amendment's reach was limited to "the sorts of weapons . . . in common use at the time." 554 U.S. at 627. Indeed, the *Heller* Court took pains to note that the right to keep and bear arms for the purpose of self-defense protected by the Second Amendment is entirely compatible with the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" unnecessary for self-defense. *Id.* at 627; *see also McDonald*, 130 S. Ct. at 3047 (stressing that the "right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose'" (quoting *Heller*, 554 U.S. at 626)). In support, it cited several historical treatises and cases. Examining these sources, *amici* argues that they "had always required that the arms be used or carried in such a manner as to terrorize the population, rather than in the manner suitable for ordinary self-defense." (SAF Br. 23.) *Amici* concludes therefore that "the longstanding prohibition on the carrying of 'dangerous and unusual weapons' does not, in fact, refer to types of weapons, but to types of *conduct* with weapons." (*Id.*) *Amici* urge affirmance of the district court's judgment on this interpretation of *Heller*.

That is not the law. *Amici* are obviously correct that the Second Amendment does not protect all conduct with firearms. But this is not because *Heller* excluded "dangerous and unusual weapons" from the Second Amendment's protections.

Even if *amici*'s interpretation of the historical sources cited in *Heller* were correct, *Heller*'s "limitation on the right to keep and carry arms" explicitly referred to the "*sorts* of weapons protected," not the ways in which those weapons were used. 554 U.S. at 627 (emphasis added). No case interpreting *Heller* has so creatively substituted "dangerous and unusual *conduct* with weapons" for "dangerous and unusual weapons," and it is unsurprising that *amici* cite no modern authority for that proposition. Indeed, a wealth of authority holds that the *Heller* Court meant exactly what it said—dangerous and unusual *types* of weapons are excluded from the protection of the Second Amendment, not dangerous and unusual *conduct* with those weapons. *See, e.g.*, *Heller II*, 2011 WL 4551558, at *12 ("[W]e must also ask whether the prohibited weapons are 'typically possessed by law-abiding citizens for lawful purposes'; if not, then they are not the sorts of 'Arms' protected by the Second Amendment." (quoting *Heller*, 554 U.S. at 625)); *United States v. Chester*, 628 F.3d 673, 678 (4th Cir. 2010) ("*Heller* declined to 'undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment,' but did identify one specific historical limitation as to *which* arms a citizen had the right to bear." (quoting *Heller*, 554 U.S. at 626)); *United States v. Fincher*, 538 F.3d 868, 874 ("Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.").

B. Assault Weapons Are Not In Common Use For Lawful Purposes.

Assault weapons are not commonly used by private citizens for lawful purposes. *Amici*'s assertion that these weapons "would easily qualify as arms of the kind in common use," (SAF Br. 22), wrongly classifies assault weapons as ordinary arms. In fact, assault weapons comprise only a tiny fraction of firearms in circulation—by the government's estimates, no more than 1 percent. *See* Marianne Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Guns Used in Crime* 6 (1995) (assault weapons constituted about 1% of guns in circulation prior to federal assault weapons ban); Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban* 10 (Report to National Institute of Justice, U.S. Dep't of Justice, June 2004) ("Koper, *An Updated Assessment*") ("Around 1990, there were an estimated 1 million privately owned AWs in the U.S. (about 0.5% of the estimated civilian gun stock)[.]")).[4] Notably, these numbers are roughly in line with the number of destructive devices, machine guns, short-barreled shotguns, and other dangerous weapons that are controlled by the National Firearms Act ("NFA")—arms that clearly fall within a category of weapons permissibly banned as "dangerous and unusual" under *Heller*.[5] *See Heller*, 554

---

[4] *Available at* http://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf.

[5] The National Firearms Registration and Transfer Record indicates that approximately 1.9 million arms that are controlled under the NFA were registered in 2006. *See* ATF, *National Firearms Registration and Transfer Record* (June 2007), *available at* http://www.justice.gov/oig/reports/ATF/e0706/back.htm. The

U.S. at 625, 627 (explaining that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short barreled shotguns" or "M-16 rifles and the like").

Amici assert that "Americans today access these highly popular arms [assault weapons] for various traditional lawful purposes to which they are well-suited." (SAF Br. 22.) Unsurprisingly, *amici* cite no authority for this principle, nor do they identify what "traditional lawful purposes" an AK-47 serves. In fact, many dangerous weapons manufactured and sold in the United States are diverted to criminal use. To cite just one example, every year thousands of U.S.-made weapons are purchased by "straw" purchasers in the United States and illegally smuggled to Mexico for use by Mexican drug cartels. *See* Colby Goodman, *Update on U.S. Firearms Trafficking to Mexico Report* 5 (Apr. 2011).[6] The "most popular firearm associated with these" firearm trafficking cases "was an AK-47 type rifle." *Id.* at 6. According to a recent Government Accountability Office report, military-style assault rifles—in particular AK variants and the AR-15

National Institute of Justice estimates that there are 200 million guns in private hands in the United States, making NFA-controlled arms about .95% of the civilian weaponry. *See* Philip J. Cook & Jens Ludwig, National Institute of Justice, *Guns in America: National Survey on Private Ownership and Use of Firearms* 1 (May 1997), *available at* https://www.ncjrs.gov/pdffiles/165476.pdf.

[6] *Available at* http://www.wilsoncenter.org/sites/default/files/Update%20on%20U.S.%20Firearms%20Trafficking%20to%20Mexico%20Report.pdf (between 2007 and 2009, more than 69,808 firearms were recovered in Mexico, with a majority having a nexus to the United States).

rifle—are increasingly popular with these arms traffickers, because they can pierce the armor worn by the Mexican police. *See* Gov't Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges* 17 (2009).[7] And significantly, assault weapons are used in gun crimes at a disproportionately high rate as compared to other firearms. *See* U.S. Dep't of Treasury, *Assault Weapons Profile* 19 (finding that assault weapons "are preferred by criminals over law abiding citizens 8 to 1"); ATF & Dep't of the Treasury, *Department of the Treasury Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles* 38 ("ATF Report") (Apr. 1998) (describing assault weapons as "attractive to certain criminals").

That assault weapons make up a small percentage of the nation's gun stock used by civilians for lawful purposes is not surprising, given that those weapons are of relatively recent vintage and are marketed for their military attributes, rather than for home defense. Indeed, the term "assault weapon" was introduced by the gun industry in the 1980s to market new weapons with features not previously common or seen as necessary for self-defense or sporting. In 1986, *Gun Digest*, one of the preeminent publications of gun enthusiasts, published the first edition of *The Gun Digest Book of Assault Weapons*, which noted that a new "element of the civilian population" was beginning to show an interest in acquiring "assault-type

---

[7] *Available at* http://www.gao.gov/new.items/d09709.pdf.

weapons limited to semiautomatic fire," such as the AK-47 and the Uzi.[8] Gun manufacturer Heckler & Koch marketed its HK-91 semi-automatic as an "assault rifle," and a 1985 ad for the Colt AR-15 played up the fact that the AR-15 "is the civilian version of the battle proven and recently improved U.S. military M-16A1."[9] In 1994, after years of studying these weapons, the ATF concluded that "[y]ou will not find these weapons in a duck blind or at the Olympics," but rather assault weapons were "designed for rapid fire, close quarter shooting at human beings." *See* U.S Dep't of Treasury, *Assault Weapons Profile* 19.

C. Assault Weapons Are Unusually Dangerous.

1. The Defining Features Of Assault Weapons Make Those Weapons Particularly Conducive To Offensive Use.

The defining features of assault weapons, such as high firepower, protruding grips, folding or telescopic stocks, barrel shrouds, and muzzle brakes, render these firearms uniquely dangerous. "'[These] military features . . . are designed to enhance [these firearms'] capacity to shoot multiple human targets very rapidly." *Heller II*, 2011 WL 4551558, at *15 (quoting Testimony of Brian J. Siebel, Brady Center to Prevent Gun Violence (Oct. 1, 2008) ("Siebel Testimony")). Assault weapons' greater firepower most obviously aids in that design, but other assault-weapon features do as well.

---

[8] *The Gun Digest Book of Assault Weapons* 5 (Jack Lewis ed., 1st ed., 1986).

[9] *See* Violence Policy Center, *Assault Weapons Marketing* (1998), *available at* http://www.vpc.org/studies/awamarkt.htm.

Protruding grips. Protruding pistol grips "were designed to assist in controlling machineguns during automatic fire" and allow the shooter to spray-fire from the hip position. *ATF Report* Ex. 5; *see also Heller II*, 2011 WL 4551558, at *15 ("Pistol grips on assault rifles . . . help stabilize the weapon during rapid fire and allow the shooter to spray-fire from the hip position." (quoting Siebel Testimony)). Further, protruding pistol grips can "be an aid in one-handed firing of the weapon in a combat situation." *ATF Report* Ex. 5. By contrast, there is no reason to believe that such grips improve a firearm's performance in the overwhelming majority of self-defense encounters. Nor are such grips of any value for sporting purposes, since spray-firing and "one-handed shooting [are] not usually employed in hunting or organized competitive target competitions."[10] *Id.*

Barrel Shrouds. Barrel shrouds "disperse[] the heat generated by the rapid firing of numerous rounds of ammunition and allow[] the user to grasp the barrel and hold the weapon with two hands, facilitating spray firing," *Merrill v. Navegar, Inc.*, 28 P.3d 116, 137 (Cal. 2001) (Werdegar, J., dissenting), an attribute useful for mass assaults but hardly needed to defend oneself in the home.

---

[10] Likewise, the "predominant advantage [of folding and telescoping stocks] is for military purposes." *ATF Report* Ex. 5. These stocks' "main advantage . . . is portability, especially for airborne troops," and such stocks are "normally not found on the traditional sporting rifle." *Id.* Moreover, firearms equipped with telescoping or folding stocks are uniquely dangerous to bystanders: While "[t]hese stocks allow the firearm to be fired from the folded position, . . . it cannot be fired nearly as accurately as with an open stock." *Id.*

Muzzle Brakes and Compensators. Muzzle brakes and compensators are devices that control "muzzle climb"—*i.e.*, the tendency of the weapon's recoil to force the barrel up, and off target, after each round is fired. Muzzle climb, however, only occurs when shooters fire their weapons so rapidly that they cannot reacquire the target between shots. *See ATF Report* Ex. 5. As in the case of protruding grips, then, the utility of muzzle brakes and compensators is largely confined to offensive, rapid-fire uses—not self-defense, where the shooter is presumably confronting only a very limited number of targets and is more concerned with precisely hitting a target.

In sum, semi-automatic assault weapons with these features have "a military configuration that was designed for killing and disabling the enemy." *ATF Report*, at 1. As such, they create "mass produced mayhem" without materially improving the shooter's self-defense capabilities. U.S. Dep't of Treasury, *Assault Weapons Profile* 19 (quoted in *Heller II*, 2011 WL 4551558, at *15).

The extraordinary dangerousness of assault weapons is confirmed by the fact that they are often indistinguishable from military-grade firearms, other than firing semi-automatically rather than fully automatically. The Supreme Court has already indicated that "M-16 rifles and the like" may be banned as "'dangerous and unusual.'" *Heller*, 554 U.S. at 627. And the D.C. Circuit recently held in *Heller II* that "it is difficult to draw meaningful distinctions between the AR-15," the

civilian version of the M-16, "and the M-16."[11] *Heller II*, 2011 WL 4551558, at *15. "[S]emi-automatics still fire almost as rapidly as automatics." *Id.* (citing Siebel Testimony ("30-round magazine" of Uzi "was emptied in slightly less than two seconds on full automatic, while the same magazine was emptied in just five seconds on semiautomatic")). Furthermore, the "AR-15 and other [formerly] federally banned assault weapons . . . 'accept ammunition magazines made for . . . military weapons.'" *Id.* (quoting Koper, *An Updated Assessment* 4)). In fact, "'[m]any M-16 parts are interchangeable with those in the AR-15 and can be used to convert the AR-15 into an automatic weapon.'" *Id.* (quoting *Staples v. United States*, 511 U.S. 600, 603 (1994)).

A long history of mass shootings confirms that assault weapons are disproportionately chosen by those who intend to inflict mass mayhem, and thus present a unique danger to public safety. A 2004 study supported by the Department of Justice concluded that assault weapons "account for a larger share of guns used in mass murders and murders of police, crimes for which weapons with greater firepower would seem particularly useful." Koper, *An Updated Assessment* 51, 87, *quoted in Heller II*, 2011 WL 4551558, at *15. Consistent with this finding, the available evidence suggests that attacks carried out with assault weapons tend to be particularly lethal. "In mass shooting incidents . . . that

---

[11] Here, Appellant wielded the "civilian" version of the AK-47.

occurred during the [1984-1993 period], offenders using [assault weapons] and other semiautomatics with [large-capacity magazines] . . . claimed an average of 29 victims in comparison to an average of 13 victims for other cases." *Id*. at 86 & tbl. 9-1. As these statistics show, assault weapons are particularly well suited for those who desire to impose maximum destruction.

2. Numerous Legislatures and Courts Have Recognized The Danger Posed By Assault Weapons.

Numerous states and municipalities have recognized the dangers posed by assault weapons and enacted legislation restricting the possession of these firearms.[12] And courts reviewing restrictions on assault weapons have repeatedly recognized the unique dangers posed by these firearms. Most recently, in *Heller II*, the D.C. Circuit rejected contentions that assault weapons are no more dangerous

---

[12] *See* D.C. Code §§ 7-2502.02(a)(6), 7-2506.01(b); N.Y. Penal Law §§ 265.00(22), 265.02(7), 265.10 (prohibiting possession, manufacture, disposal, and transport of assault weapons); Conn. Gen. Stat. §§ 53-202a, 53-202c (prohibiting possession of semi-automatic firearms); Cal. Penal Code §§ 12276–12282 (same); Haw. Rev. Stat. §§ 134-1, 134-4, 134-8 (banning assault pistols); Mass. Gen. Laws ch. 140, §§ 121–123 (banning assault weapons as defined in expired federal law); Md. Code, Criminal Law, §§ 4-301–4-306 (prohibiting assault pistols); N.J. Stat. Ann. §§ 2C:39-1(w), 2C:39-5 (prohibiting assault firearms); Legal Cmty. Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State, and Selected Local Guns Laws* 25-26 (Feb. 2008), http://www.lcav.org/publications-briefs/reports_analyses/RegGuns.entire.report.pdf (listing select municipalities that prohibit assault weapons); Aurora, Ill., Code of Ordinances § 29-49 (prohibiting assault weapons); City Code of Buffalo N.Y. § 180-1 (prohibiting assault weapons, including assault rifles); Denver Colo. Mun. Code § 38-130 (same); City of Rochester Code § 47-5 (same).

than other firearms. Instead, the D.C. Circuit properly deferred to the D.C. Council's judgment that "assault weapons . . . creat[e] 'mass produced mayhem'"; that their "military features . . . are designed to enhance their capacity to shoot multiple targets very rapidly"; that they "place law enforcement officers 'at particular risk . . . because of their high firepower'"; and that they "'account for a larger share of guns used in mass murders and murders of police.'" 2011 WL 4551558, at *15 (citations omitted). Court decisions pre-dating *Heller II* had similarly noted the extraordinary dangerousness of assault weapons. *See Springfield, Inc. v. Buckles*, 292 F.3d 813, 818 (D.C. Cir. 2002) (crediting ATF's decision that certain assault weapons "had increasingly been used in the commission of violent crimes"); *Navegar, Inc. v. United States*, 192 F.3d 1050, 1061 (D.C. Cir. 1999) (upholding federal assault weapon ban because Congress acted "[b]ased on the grave dangers posed by [semi-automatic assault weapons] before prior federal and state laws could be enforced"); *Benjamin v. Bailey*, 662 A.2d 1226, 1235 (Conn. 1995) (noting that "assault weapons pose an increasing risk to society," including "police officers and innocent victims"); *Robertson v. City & Cnty. of Denver*, 874 P.2d 325, 332 (Colo. 1994) ("The unique characteristics of assault weapons coupled with the prevalent use of such weapons for criminal purposes establish that such weapons pose a substantial threat to the health and safety of the citizens of Denver."); *Arnold v. Cleveland*, 616 N.E.2d 163,

173 (Ohio 1993) (relying on the "public safety threat of assault weapons"). *Amici*'s characterization of assault weapons as ordinary arms with myriad legitimate uses is irreconcilable with these uniform judicial determinations, and assault weapons are among the "dangerous and unusual weapons" *Heller* specifically excluded from the Second Amendment's scope. Appellant's choice of weapon, therefore, precludes him from making a Second Amendment claim.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court affirm the decision of the district court.

Respectfully submitted,

/s/ Jessica L. Ellsworth

JONATHAN L. DIESENHAUS
JESSICA L. ELLSWORTH
MATTHEW C. SULLIVAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
Fax: (202) 637-5910

JONATHAN E. LOWY
DANIEL R. VICE
Brady Center to Prevent Gun Violence
Legal Action Project
1225 Eye Street, N.W., Suite 1100
Washington, D.C. 20005

Dated: December 19, 2011

Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6233 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 14-point font.

/s/ Jessica L. Ellsworth
JONATHAN L. DIESENHAUS
JESSICA L. ELLSWORTH
MATTHEW C. SULLIVAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
Fax: (202) 637-5910

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system. I further certify that I mailed a copy of the foregoing to all non-registered users of the CM/ECF system.

/s/ Jessica L. Ellsworth
JONATHAN L. DIESENHAUS
JESSICA L. ELLSWORTH
MATTHEW C. SULLIVAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
Fax: (202) 637-5910

Counsel for *Amicus Curiae*