

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

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New York State Rifle and Pistol Association, Inc.;	:	
Westchester County Firearms Owners Association, Inc.;	:	
Sportsmen’s Association for Firearms Education, Inc.;	:	Civil Action Number:
New York State Amateur Trapshooting Association, Inc.;	:	1:13-cv-00291 (WMS)
Bedell Custom; Beikirch Ammunition Corporation;	:	
Blueline Tactical & Police Supply, LLC; Batavia Marine &	:	
Sporting Supply, LLC; William Nojay; Thomas Galvin;	:	
and Roger Horvath,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
	:	
Andrew M. Cuomo, Governor of the State of New York;	:	
Eric T. Schneiderman, Attorney General of the State of	:	
New York; Joseph A. D’Amico, Superintendent of the	:	
New York State Police; Lawrence Friedman, District	:	
Attorney for Genesee County; and Gerald J. Gill, Chief of	:	
Police for the Town of Lancaster, New York,	:	
	:	
	:	
Defendants.	:	

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**THE STATE DEFENDANTS’ STATEMENT OF UNDISPUTED MATERIAL FACTS IN
SUPPORT OF STATE DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 56(a)(1) of the Civil Rules of the United States District Court for the Western District of New York, Defendants Andrew M. Cuomo, Governor of the State of New York; Eric T. Schneiderman, Attorney General of the State of New York and Joseph A. D’Amico, Superintendent of the New York State Police (hereinafter “State Defendants”), sued in their official capacities only, by and through their attorney, ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, submit the State Defendants’ Statement Of Undisputed Material Facts In Support Of State Defendants’ Cross-Motion For Summary

Judgment.¹ Citations to exhibits in the State Defendants' Statement of Undisputed Material Fact, unless otherwise noted, are to those exhibits listed in the declaration of William J. Taylor, Jr., dated June 21, 2013, and collectively annexed in the accompanying appendix, submitted in support of the State Defendants' Cross-Motion for Summary Judgment.

I. THE SECOND AMENDMENT AND THE REGULATION OF GUNS

1. The Second Amendment right to keep and bear arms is an enumerated right but is limited and subject to regulation. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 623-28 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010); *United States v. Decastro*, 682 F.3d 160, 165 (2d Cir. 2012); *United States v. Zaleski*, 489 F. App'x 474, 475 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 554 (2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) ("*Heller II*"); and *People v. James*, 94 Cal. Rptr. 3d 576 (Ct. App. 2009); Declaration of Franklin E. Zimring ("*Zimring Decl.*") ¶ 6.

2. In *Heller*, the Supreme Court stated that "[l]ike most rights, the right secured by the Second Amendment is not unlimited [and] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626.

3. In *Heller*, the Supreme Court stated that "the Second Amendment right, whatever its nature, extends only to certain types of weapons", *id.* at 623 (citing *United States v. Miller*, 307 U.S. 174, 178-82 (1939)), and that weapons "most useful in military service" may be restricted, even if that would leave citizens with access only to "small arms." *Id.* at 627-28; *see id.* at 624-25; *see also* *Zimring Decl.* ¶ 6.

¹ This Statement of Undisputed Material Facts is submitted prior to the filing of a responsive pleading or the conducting of any discovery. As such, these facts are undisputed for purposes of State Defendants' dispositive motion only and, to the extent the action continues, State Defendants reserve the right to subsequently dispute the facts as alleged in plaintiffs' First Amended Complaint, dated April 11, 2013.

4. The Supreme Court, in *Heller*, also recognized the long history of government prohibitions on the carrying of “dangerous and unusual weapons.” *Heller*, 554 U.S. at 627 (citing 4 Blackstone 148-149 (1769)).

5. In *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010), the Supreme Court stated that the Second Amendment right is not “absolute” and that “[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.” *Id.* at 3046-47.

6. Local and state governments, as well as the federal government, have long regulated firearms, including regulating the importation, possession and/or sale of weapons deemed dangerous or unusual. Zimring Decl. ¶¶ 7, 9-11; Ex. 50 (Brief for Professional Historians and Law Professors Saul Cornell, Paul Finkelman, Stanley N. Katz, and David T. Kong As *Amici Curiae* in Support of Appellees, *Heller v. District of Columbia*, 10-7036 (D.C. Cir.) (“*Heller II* Historians Brief”)); National Firearms Act of 1934, 48 Stat. 1236 (26 U.S.C. §§ 5801-5826); Gun Control Act of 1968, 18 U.S.C. § 922 *et seq.*

7. In the 1980s and 1990s, following a number of highly publicized mass shooting incidents, many federal, state and local laws were enacted which restricted weapons characterized as “assault weapons” as well as large capacity magazines. *See* Declaration of Christopher S. Koper (“Koper Decl.”) ¶ 9; Zimring Decl. ¶¶ 12, 13.

8. On September 13, 1994, the federal government enacted, as part of the Violent Crime Control and Law Enforcement of 1994, the Public Safety and Recreational Firearms Use Protection Act. Pub. L. No. 103-322, tit. XI, subtit. A, 108 Stat. 1796, 1996-2010 (1994) (codified at subsections of 18 U.S.C. §§ 921-22) (repealed by Pub. L. 103-322, § 110105(2)). This legislation (the “federal assault weapons ban”), established a ten-year prohibition on (i)

certain semiautomatic rifles, pistols, and shotguns which possessed two features from a list of enumerated features; and (ii) certain “large capacity ammunition feeding devices” (“LCMs”) capable of holding more than ten rounds. *See* Koper Decl. ¶¶ 9, 27-37.

9. The federal assault weapons ban did not ban LCMs manufactured on or before the effective date of the law (*i.e.*, on or before September 13, 1994). Such LCMs were “grandfathered” in and thus remained legal to possess and transfer. 18 U.S.C. § 921(a)(31)(A) (repealed); *id.* § 922(v)(2) (repealed); *id.* § 922(w)(2) (repealed); *see* Koper Decl. ¶ 36.

10. The Bureau of Alcohol, Tobacco, Firearms and Explosives (the “ATF”) has long blocked the importation of certain models of firearms deemed not suitable for sporting purposes. *See* Ex.10 (2011 ATF Study) at 3; Ex. 11 (1989 ATF Study) at 6-7; Ex. 12(1998 ATF Study) at 1, 11.

11. In 1998, after the passage of the federal assault weapons ban, the ability to accept a large-capacity magazine made for a military rifle was added to the list of disqualifying features, as the ATF determined that semiautomatic rifles with this feature “are attractive to certain criminals” and “cannot fairly be characterized as sporting rifles.” Ex.12 (1998 ATF Study) at 2-3, 36-38. These import bans remain in effect, even since the expiration of the federal assault weapons ban in 2004. *See* <http://www.atf.gov/firearms/faq/saws-and-lcafds.html#expiration-importation> (last visited June 20, 2013).

12. The ATF has determined that “semiautomatic assault rifles...represent a distinctive type of rifle distinguished by certain general characteristics which are common to the modern military assault rifle.” Ex. 9 (H.R. Rep. No. 103-489) at 17. Those characteristics are often characterized as “military” because of their associated military applications, design intended for offensive or combat situations, or indeed because they are civilian copies of military

weapons and can use, for example, magazines made for those military weapons. Bruen Decl. ¶ 15, 16, 17-23; Koper Decl. ¶ 31; Ex. 12 (1998 ATF Study) at 5; *Richmond Boro*, 97 F.3d at 684-85; *Heller II*, 670 F.3d at 1262-63. For example, pistol grips and thumbhole stocks, which aid a shooter in retaining control of a firearm while holding it at his or her hip, have been found to facilitate the rapid and continuous fire of ammunition without precise aiming. (Bruen Decl. ¶ 19; Ex. 12 (1998 ATF Study) at ex. 5); *see Richmond Boro*, 97 F.3d at 685; *Heller II*, 670 F.3d at 1262-63. Such features have been recognized as “serv[ing] specific, combat-functional ends” and their “net effect . . . is a capability for lethality -- more wounds, more serious, in more victims -- far beyond that of firearms in general, including other semiautomatic guns.” Ex. 9 (H.R. Rep. 103-489) at 18-20; Bruen Decl. ¶¶ 13-26; Ex. 10 (2011 ATF Study) at 9-12; Ex. 12 (1998 ATF Study) at ex. 5; Ex. 11 (1989 ATF Report).

13. It has been reported that assault weapons fire almost as rapidly as fully automatic machine guns. Ex. 31 (2008 Brady Center report).

14. In 2000, New York enacted its own ban on assault weapons and LCMs which mirrored the federal assault weapons ban. 2000 N.Y. Laws, ch. 189, § 10; Zimring Decl. ¶ 13.

15. The 2000 New York ban adopted a “two feature test” identical to the 1994 federal assault weapons ban and also banned LCMs but grandfathered in those manufactured on or before the effective date of the federal ban (*i.e.*, on or before September 13, 1994). 2000 N.Y. Laws, ch. 189, § 10; *see* Bruen Decl. ¶ 29.

II. THE SAFE ACT

16. On January 15, 2013, the Secure Ammunition and Firearms Enforcement Act (the “SAFE Act”) was signed into law in New York. 2013 N.Y. Laws, ch. 1; *see* Zimring Decl. ¶ 14; Bruen Decl. ¶ 5.

17. The SAFE Act amended New York's assault weapons ban by, among other things, amending the definition of "assault weapon" to include certain semiautomatic weapons with detachable magazines that possess one rather than two of the enumerated characteristics. Penal Law § 265.00(22); *see* Zimring Decl. ¶ 14; Bruen Decl. ¶ 9.

18. Under the SAFE Act, New York's assault weapons ban now applies to any gun that is semiautomatic, has the ability to accept a detachable magazine (in the case of rifles and pistols), and possesses at least *one* of the enumerated features. Penal Law § 265.00(22); Bruen Decl. ¶ 14.

19. The SAFE Act also added to the list of military-style features that make a semiautomatic firearm an assault weapon.. Bruen Decl. ¶ 15.

20. Under New York law, a rifle is an assault weapon if it is semiautomatic, able to accept a detachable magazine and has at least one of these seven military-style characteristics: (i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of a weapon; (iii) a thumbhole stock; (iv) a second handgrip or a protruding grip that can be held by the non-trigger hand; (v) a bayonet mount; (vi) a flash suppressor, muzzle brake, muzzle compensator, or a threaded barrel designed to accommodate the same; or (vii) a grenade launcher. *Id.* § 265.00(22)(a). Of these seven features, the third, fourth, and portions of the sixth (*i.e.*, the muzzle brake and muzzle compensator) are new. The rest were a part of both the 1994 federal ban and New York's own assault weapons ban prior to the SAFE Act. Penal Law § 265.00(22); Bruen Decl. ¶ 17.

21. A shotgun is an assault weapon under New York law if it is semiautomatic and has at least one of the following five military-style characteristics: (i) a folding or telescoping stock; (ii) a thumbhole stock; (iii) a second handgrip or protruding grip that can be held by the

non-trigger hand; (iv) a fixed magazine capacity in excess of seven rounds; or (v) an ability to accept a detachable magazine. Penal Law § 265.00(22); Bruen Decl. ¶ 24. Of these features, the second and third are new and the fourth was amended as New York law moved from a two-feature to a one-feature test (changing the maximum capacity in a fixed magazine to seven from five rounds to correspond to the new seven-round load limit for magazines). The SAFE Act also removed the pistol grip as a banned feature for shotguns as it moved from the two-feature to one-feature test. The first and fifth features were a part of both the 1994 federal ban and New York's own assault weapons ban prior to the SAFE Act. Penal Law § 265.00(22); Bruen Decl. ¶ 24.

22. Pistols are assault weapons prohibited by the SAFE Act if they are semiautomatic, able to accept a detachable magazine, and have at least one of the following eight military characteristics: (i) a folding or telescoping stock; (ii) a thumbhole stock; (iii) a second handgrip or a protruding grip that can be held by the non-trigger hand; (iv) capacity to accept an ammunition magazine that attaches to the pistol outside of the pistol grip; (v) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer; (vi) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the non-trigger hand without being burned; (vii) a manufactured weight of 50 ounces or more when the pistol is unloaded; or (viii) a semiautomatic version of an automatic rifle, shotgun or firearm. Of these eight features, the first, second, and third are new. The rest were a part of both the 1994 federal ban and New York's own assault weapons ban prior to the SAFE Act. Penal Law § 265.00(22); Bruen Decl. ¶ 25.

23. The SAFE Act does not ban assault weapons that were lawfully possessed prior to its effective date of January 15, 2013. Those who lawfully possessed assault weapons at that time may continue to do so; they need only register their firearm within fifteen months (*i.e.*, by

April 15, 2004) with the State Police. Penal Law §§ 265.00(22)(g)(v), 400.00(16-a); Bruen Decl. ¶ 27.

24. The SAFE Act also amended New York's existing ban on LCMs to ban all LCMs that have the capacity to hold more than ten rounds of ammunition, including those that were grandfathered in under the original assault weapons ban. Penal Law § 265.00(23); *id.* § 265.02(8); *id.* § 265.36; Bruen Decl. ¶ 28.

25. In addition, the SAFE Act limits to seven the number of rounds of ammunition that one may load into a magazine (unless at a gun range or recognized shooting competition, where ten-round magazines may be loaded to full capacity). Penal Law § 265.37; *id.* § 265.20(a)(7-f); Bruen Decl. ¶ 28.

26. Under the SAFE Act, hundreds of different types and models of handguns, rifles and shotguns, remain available to New York citizens for self-defense, providing alternatives to assault weapons for those New Yorkers seeking “to acquire a firearm for self-defense” or other lawful purposes. *See* Penal Law § 265.00(22)(g); Bruen Decl. ¶¶ 3, 7, 12-13, 41; Declaration of Kathleen M. Rice, District Attorney of Nassau County, New York (“Rice Decl.”) ¶ 14; Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1489 (2009) at 1485-86, 1489 (noting “the availability of close substitutes for assault weapons”); Plaintiffs’ Memorandum of Law in Support of Application for Preliminary Injunction (“Pls PI Mem.”) at 22-23.

27. Semiautomatic firearms without a banned feature, firearms with manual actions (*i.e.*, bolt, pump, lever or slide action), and those hundreds of makes and models specifically exempted in “Appendix A” to the federal assault weapons ban are all legal in New York. Penal Law § 265.00(22). Additionally, the website maintained by the New York State Police pursuant

to the SAFE Act, lists at least 145 specified pistols, more than 150 specified rifles, and at least 40 specified shotguns are explicitly not banned as assault weapons under New York law. Bruen Decl. ¶¶ 12-13.

28. The SAFE Act does not limit the number of guns or magazines which may be owned. People wishing to fire more than seven rounds at once have the option of switching magazines or reloading or using multiple firearms. *See* Pls.’ PI Mem. at 20, 28-29; Declaration of Gary Kleck at 3-5; Volokh, *supra*, at 1489 (noting that “the ability to switch magazines in seconds, which nearly all semiautomatic weapons possess, should suffice for the extremely rare instances when more rounds were needed”).

III. NEW YORK HAS A COMPELLING INTEREST IN RESTRICTING ASSAULT WEAPONS AND LCMS WHICH POSE PARTICULAR PUBLIC SAFETY RISKS.

29. In *Heller*, the Supreme Court noted the problem of gun-related violence in the United States and held that the Constitution leaves government with a “variety of tools” for combating that problem. *Heller*, 554 U.S. at 636.

30. The Second Circuit has held that “New York has substantial, indeed compelling, governmental interests in public safety and crime prevention.” *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012); *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 270 (S.D.N.Y. 2011) (District Court decision) (noting the State’s substantial interest in reducing the use of guns in crime).

31. Assault weapons and LCMS have frequently been employed in highly publicized mass shootings, and are disproportionately used in the murders of law enforcement officers, crimes for which weapons with greater firepower would seem particularly useful. *See Updated*

Assessment of the Federal Assault Weapons Ban, pp. 14-19, 87; Koper Decl. ¶ 8; Zimring Decl. ¶¶ 5, 12, 14, 16-18.

32. One recent study has determined that, out of 62 mass shootings in the United States over the past three decades, more than half involved assault weapons and/or large-capacity magazines -- with the great majority of these weapons obtained legally. (Koper Decl. ¶¶ 12, 13; *see also* Ex. 39 (2013 Mayors Against Illegal Guns study) (finding that, in mass shootings over the past four years, shooters who used assault weapons and/or high-capacity magazines shot over twice as many people and killed 57 percent more people than shooters who did not use these weapons); Allen Decl. 16-20, 22.

33. Studies have reported that when mass shootings involved assault weapons or high capacity magazines, the numbers of rounds fired, and the number of deaths and injuries was much higher. *See, e.g.*, Ex. 39 (2013 Mayors Against Illegal Guns study); Allen Decl. ¶ 21, n. 15.

34. LCMs (those with a capacity to hold more than 10 rounds of ammunition), as well as guns loaded with more than seven rounds of ammunition, are often used in mass shootings; LCMs were used in more than half of the mass shootings since 1982 (at least 34 out of 66 mass shootings) and the presence of LCMs in mass shooting incidents is linked with an increased number of shots fired and an increased average number of fatalities and injuries. Allen Decl. ¶¶ 18, 19, 20, 30; Zimring Decl. ¶¶ 17, 18; Bruen Decl. ¶ 9; Koper, ¶ 13.

35. LCMs and assault weapons also implicate other law enforcement concerns, as well, including the ability to overpower or hold off law enforcement; they are disproportionately used in the murders of law enforcement officers; and they pose risk to unintended victims. *See, e.g.*, Declaration of Chief James M. Sheppard, at ¶¶ 9-15, 26-28; Bruen Decl. ¶ 9; (Koper Decl.

8; Ex. 32 (Koper 2004) at 10, 15 & n.12, 17-18, 87; Ex. 34 (Koper 2013) at 160-61; Ex. 35 (Koper 1997) at 98-100; *see Heller II*, 670 F.3d at 1262-63; Ex. 9 (H.R. Rep. No. 103-489) at 13; *Richmond Boro*, 896 F. Supp. at 282-83 (citing evidence from Manhattan, Brooklyn, and Bronx District Attorneys regarding the use of assault weapons in crime); Sheppard Decl. 9, 10, 13, 14, 24, 28, and 29; Rice Decl. 8, 9, 10, 12; Bruen Decl. 9, 10, 41; (Ex. 37 (2003 Violence Policy Ctr. Report) at 5.); *Richmond Boro Gun Club v. City of New York*, 896 F. Supp. 276, 282-83 (E.D.N.Y. 1995), *aff'd*, 97 F.3d 681, 684-86 (2d Cir. 1996) (citing to Bureau of Alcohol, Tobacco and Firearms ban on the importation of certain assault rifles at least in part because of their increasing use in crime, particularly the drug trade).

36. The FBI has determined that, in 2003, 20% of law enforcement officers killed in the line of duty were killed with an assault weapon. Ex. 37 (2003 Violence Policy Ctr. Report) at 5.

37. Courts and legislative tribunals have cited evidence that shots fired from assault weapons may be powerful enough to penetrate walls, increasing the threat of stray bullets harming family members, neighbors, and passersby and other reports have indicated that they are inappropriate for home self-defense. *See, e.g., Richmond Boro Gun Club v. City of New York*, 896 F. Supp. 276, 282-83 (E.D.N.Y. 1995), *aff'd*, 97 F.3d 681, 684-86 (2d Cir. 1996) (Citing statement by Kings County New York District Attorney that assault weapons pose a danger to innocent bystanders because of their ability to spray fire large numbers of rounds and the penetrating power of those rounds); *Heller II*, 698 F. Supp. 2d 179, 193-194 (D.D.C. 2010)(District Court decision); *see also* Rosenthal & Winkler, *supra*, at 232; (Ex. 31 (2008 Brady Center report) at 16. *See also* Bruen Decl. ¶ 13; Sheppard Decl. ¶ 27.

38. The press has reported several instances where, when a person shooting in a public venue stops to reload to continue his shooting, that pause provided the opportunity for bystanders to intervene. *See, e.g.*, Zimring Decl. ¶ 19; Ex. 58 (collected articles).

39. Additionally, the pause necessitated when a mass shooter or other criminal has to reload or change guns, in addition to perhaps permitting a bystander to step in, may also allow potential victims the opportunity to reach safety or law enforcement an opportunity to intervene. Rice Decl. ¶ 9; Sheppard Decl. ¶ 14; Koper Decl. ¶ 62.

Dated: New York, New York
June 21, 2013

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