# 14-0036-cv(L), 14-0037-cv(XAP)

## United States Court of Appeals
## for the Second Circuit

WILLIAM NOJAY, THOMAS GALVIN, ROGER HORVATH, BATAVIA MARINE & SPORTING SUPPLY, NEW YORK STATE RIFLE AND PISTOL ASSOCIATION, INC., WESTCHESTER COUNTY FIREARMS OWNERS ASSOCIATION, INC., SPORTSMEN'S ASSOCIATION FOR FIREARMS EDUCATION, INC., NEW YORK STATE AMATEUR TRAPSHOOTING ASSOCIATION, INC., BEDELL CUSTOM, BEIKIRCH AMMUNITION CORPORATION, BLUELINE TACTICAL & POLICE SUPPLY, LLC,

*Plaintiffs-Appellants-Cross-Appellees,*

*(For Continuation of Caption See Inside Cover)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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

LISA E. JONES
JAMES MENDENHALL
*(admitted pro hac vice)*
DAVE M. WHARWOOD
*(admitted pro hac vice)*
SIDLEY AUSTIN LLP
Washington, D.C. 20005
Phone: (202) 736-8000
Facsimile: (202) 736-8711

JONATHAN E. LOWY
*Of Counsel (pro hac vice pending)*
BRADY CENTER TO PREVENT GUN VIOLENCE
LEGAL ACTION PROJECT
840 First Street, NE, Suite 400
Washington, D.C. 20002

*Counsel for Amicus Curiae Brady Center to Prevent Gun Violence*

August 5, 2014

*v.*

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,

*Defendants-Appellees-Cross-Appellants,*

*And*

GERALD J. GILL, CHIEF OF POLICE FOR THE TOWN OF LANCASTER, NEW YORK, LAWRENCE FRIEDMAN,

*Defendants-Appellees,*

*And*

FRANK A. SEDITA, III, DISTRICT ATTORNEY FOR ERIE COUNTY,

*Defendant.*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c), and 26.1, counsel for the undersigned states:

The *Amicus Curiae*, the Brady Center to Prevent Gun Violence, is not a subsidiary or affiliate of any publicly owned corporation, and no publicly held corporation is a holder of stock in this organization.

Dated: August 5, 2014

Respectfully Submitted,

/s/ Lisa E. Jones
Lisa E. Jones
Sidley Austin, LLP

*Counsel for Amicus Curiae*
*Brady Center to Prevent Gun Violence*

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**OTHER AUTHORITIES**

## INTEREST OF THE *AMICUS CURIAE*[1]

*Amicus*, 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 *amicus curiae* briefs in cases involving firearms, including *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *United States v. Hayes*, 555 U.S. 415 (2009), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

*Amicus* brings a broad and deep perspective to the issues raised in this case and has a compelling interest in ensuring that the Second Amendment is construed properly to permit reasonable government action to prevent gun violence.

---

[1] Pursuant to Fed. R. App. P. 29(a), *amicus* received consent from all parties to file this brief. Pursuant to Fed. R. App. P. 29(c)(5), 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.

## INTRODUCTION

New York State's Secure Ammunition and Firearms Enforcement Act of 2013 ("SAFE Act") does *not* prohibit the possession and use of semiautomatic weapons for lawful purposes either in or outside the home. That fact alone should answer any objection as to whether the SAFE Act respects Second Amendment rights.

The SAFE Act does, however, restrict the use of certain military-style features that might appear on semiautomatic weapons, such as a folding or telescoping stock, pistol grip, flash suppressor, bayonet mount, grenade launcher or barrel shroud. To find that these restrictions implicate the Second Amendment, the Court would have to find that the Second Amendment regulates not just particular categories of guns (*e.g.*, semiautomatic weapons), but the addition of secondary characteristics to guns that do not make the guns any more useful for self-defense than guns that are permitted. Each of those features, however, converts the guns into weapons which, by appearance and function, terrify the general population and enhance the utility of the weapons for mass slaughter.

The weapons regulated by the SAFE Act are, in short, dangerous and unusual weapons that have not been established to be in common use for lawful purposes at the relevant time. For this reason, the district court erred in finding that the weapons are protected by the Second Amendment.

The district court correctly concluded, however, that, to the extent (a) the weapons and secondary characteristics are protected by the Second Amendment, and (b) the restrictions substantially burden Second Amendment rights, the restrictions imposed by the SAFE Act are subject to no higher than intermediate scrutiny. The Brady Center supports the district court's conclusion that the restrictions survive such scrutiny and are consistent with the Second Amendment.

## I. The Standard for Determining Whether the SAFE Act Is Consistent With the Second Amendment

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court applied a two-stage analysis to assess the constitutionality of a District of Columbia (D.C.) law prohibiting the possession of handguns. First, the Court examined whether handguns fell within the scope of Second Amendment protection. Second, after answering in the affirmative, it asked whether the law violated the Second Amendment. *See Heller*, 554 U.S. at 628-35.[2]

Building upon the *Heller* approach, the district court in the instant case applied a three-part test in assessing the constitutionality of the SAFE ACT: (a) "whether any of the regulated weapons or magazines are commonly used for lawful purposes"; (b) if so, whether the "challenged provisions of the SAFE Act substantially burdened a Second Amendment right"; and (c) if so, "what level of scrutiny to apply." Decision and Order at 18, *N.Y. State Rifle and Pistol Ass'n v. Cuomo*, No. 13-cv-2915 (W.D.N.Y. Dec. 31, 2013), ECF No. 140.

---

[2] *See also United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (stating that *Heller* "suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. . . . If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.").

The district court erred in concluding that the weapons regulated by the SAFE Act fell within the scope of the Second Amendment in the first place. However, the district court correctly concluded that, to the extent the Second Amendment protects the weapons restricted by the SAFE Act, an intermediate level of scrutiny applies and the SAFE Act is constitutional under that standard.

### A. The Assault Weapons Possessing the Regulated Characteristics Are Not Within the Scope of the Second Amendment

The district court, in determining whether the Second Amendment applied to the subject restrictions, concluded that (1) the regulated weapons are commonly used for lawful purposes, and therefore fall within the scope of the Second Amendment; and (2) "because the SAFE Act renders acquisition of [assault weapons] illegal under most circumstances . . . the restrictions at issue more than 'minimally affect' Plaintiffs' ability to acquire and use the firearms, and they therefore impose a substantial burden on Plaintiffs' Second Amendment rights." Decision and Order, *supra*, at 22. Neither of these conclusions is correct.

#### 1. The Assault Weapons Possessing the Regulated Characteristics Were Not in "Common Use at the Time"

The district court found that, "[u]nder *Heller*, the Second Amendment does not apply to weapons that are not 'in common use at the time.'" *Id.* at 19. The district court noted that approximately 2% of all weapons in the United States are assault weapons and that, in 2011, AR-15s "accounted for 7% of all firearms

sold." *Id.* at 20. The court then concluded that the weapons were put to lawful use based on the fact that, in 1990, there were approximately 1 million assault weapons in the United States and that a website from a gun dealer that was cited in the dissenting opinion in *Heller II* indicated that semiautomatic weapons are used for lawful purposes. *Id.* at 21-22. On this basis, the district court simply "assume[d] that the weapons at issue are commonly used for lawful purposes," and, therefore, that the weapons fall within the scope of Second Amendment protection. *Id.* at 22. There was no basis for the court's assumption.

First, the level of use of weapons regulated by the SAFE Act is not remotely close to the level of use of the handguns that were at issue in *Heller*. According to *Heller*, it is unconstitutional to ban the possession of any and all handguns in the home because handguns are "*overwhelmingly chosen* by American society" for self-defense. *Heller*, 554 U.S. at 629 (emphasis added). According to the Supreme Court, "the American people have considered the handgun to be the *quintessential self-defense weapon*," and "[w]hatever the reason, handguns are *the most popular weapon chosen by Americans* for self-defense in the home . . . ." *Id.* (emphasis added). The Court did not explain whether any lower level of "use" could be deemed "common."

No other weapon has been shown to be as popular as handguns, and there is no evidence that the level of use of weapons regulated by the SAFE Act remotely

approaches the level of handgun use—certainly not for lawful purposes. The assault weapons that Appellants focus upon—semiautomatic rifles and shotguns that possess the characteristics identified by the SAFE Act—are not the "quintessential self-defense weapon" or "the most popular weapon chosen by Americans for self-defense in the home . . . ." *Heller*, 554 U.S. at 629.

Second, even if semiautomatic weapons are in common use for lawful purposes, the SAFE Act does not prohibit such weapons. Appellants do not complain that the SAFE Act prohibits a particular class of weapons (such as semiautomatic rifles)—it clearly does not—but that the SAFE Act prohibits certain secondary characteristics (such as a hand grip) that are incorporated into some of those weapons. Appellants cited no legal basis for asserting that the Second Amendment protects secondary characteristics that do not relate to the basic functionality of the weapon, in this case, the ability of the weapon to load and fire bullets semiautomatically. However, if secondary characteristics are protected by the Second Amendment, the relevant constitutional inquiry would be whether semiautomatic weapons *with the particular characteristics at issue* are commonly used. The district court did not even attempt to address the issue.

Indeed, the record before the district court indicates that the number of guns with the particular characteristics regulated by the SAFE Act may be substantially lower than the total number of assault weapons. Appellants asserted that "AR-15s

accounted for at least seven percent of firearms . . . made in the U.S. for the domestic market" in 2011. J.A. 141-42. That in itself is a small percentage of the market, but the weapons regulated by the SAFE Act appear to account for an even smaller percentage. For example, according to the National Shooting Sports Foundation ("NSSF"), only 60% of "modern sporting rifles" (semiautomatic rifles) have a collapsible/folding stock.[3] Extrapolating from this data, only 4.2% of all such firearms are AR-15s with collapsible stocks. The NSSF study also indicates that only 20% of modern sporting rifles have a permanent or non-permanent muzzle brake, 64% have a permanent or non-permanent flash-hider, and 62% have a threaded barrel. NSSF, *supra* note 3, at 30, 8. Thus the relevant weapons are only a subset of the already small number of assault rifles.

Third, while recognizing that *Heller* requires an examination of whether a weapon is in common use "at the time," the district court did not even attempt to identify the appropriate time period for assessing the level of use. The district court simply acknowledged that *Heller* left "unanswered" the question of how to define the relevant historical period. Decision and Order, *supra*, at 21. However, this question cannot remain unanswered when dealing with a weapon that has only recently been made widely available, unlike handguns, which have been

---

[3] NSSF, *Modern Sporting Rifle (MSR): Comprehensive Consumer Report 2010* 7 (2010), *available at* http://nssf.org/share/PDF/MSRConsumerReport2010.pdf.

available for a much longer period. The evidence shows that the weapons restricted by the SAFE Act were not commonly used during a relevant historical time period.

The phrase "at the time" originated in *Miller*, where the Court stated:

> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily, when called for service these men were expected to appear bearing arms supplied by themselves and of the kind *in common use at the time*.

*United States v. Miller*, 307 U.S. 174, 179 (1939) (emphasis added). From this statement, it might be understood that the relevant time for assessing whether a weapon is in common use is the time when the Constitution was drafted. *Heller* held that this was not the appropriate reference point, but it did not give any indication of what the relevant "time" should be. 554 U.S. at 582.

It would be unreasonable to look only to the day on which the statute was enacted as the relevant reference point. Suppose, for example, that a new, unregulated and highly lethal weapon is developed. When it is first offered for sale, the weapon would not be protected because it would not be in common use. However, if sales of the weapon grew explosively over the next year, prior to any legislation, then the weapon would, within that short period, become constitutionally protected, even though a ban would have been permissible had

the legislature acted just a few months earlier. Such an approach makes little sense. The reference period must at least include a reasonable period of time for the legislature to assess and respond to changes in the marketplace (and to changes in the use of those weapons) by amending the law.

While semiautomatic rifles have existed for a long time, they were not in common use for self-defense throughout their existence. Between 1986 and 2004, on average fewer than 100,000 AR-15s were sold annually.[4] The weapons clearly were not in common use at that time, in part, because their use was prohibited by the federal weapons ban. Sales spiked after the expiration of the weapons ban in 2004, peaking in 2009 at well over 500,000 units sold.[5] It cannot be that, in 2004, a ban on AR-15s was constitutional but not five years later. The district court failed to come to terms with this argument, and furthermore failed to consider the appropriate time for assessing whether assault rifles exhibiting the *particular*

---

[4] *See* J.A. 148-49; s*ee also* Marianne W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Guns Used in Crime* 6 (1995) (stating that assault weapons constituted about 1% of guns in circulation prior to federal assault weapons ban); Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003, Report to the National Institute of Justice, U.S. Dep't of Justice* 10 (2004) ("Around 1990, there were an estimated 1 million privately owned AWs in the U.S. (about 0.5% of the estimated civilian gun stock)[.]"). Sales numbers measured as U.S. production minus exports.

[5] *See* J.A. 148-49.

*characteristics* that are the subject of the regulation were in common use "at the time."

### 2. The Weapons Prohibited by the SAFE Act Are Dangerous and Unusual

The district court focused its analysis on whether the regulated weapons were in "common use." However, it did not take into account the Supreme Court's finding that the protection of weapons that are in "common use at the time" is "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 571, 627 (citations omitted).[6] Thus, in assessing whether weapons are "'in common use at the time'" for legal purposes, it is necessary to consider whether the weapons are dangerous and unusual. If they are, then the weapons are not "in common use at the time" as that phrase was understood in *Heller*. The assault weapons regulated by the SAFE Act are dangerous and unusual and, therefore, are not protected by the Second Amendment.

The Supreme Court derived the "dangerous and unusual" standard from a series of older treatises and state court decisions. Two general themes emerge

---

[6] As explained in *Marzzarella*: "By equating the list of presumptively lawful regulations with restrictions on dangerous and unusual weapons, we believe the Court intended to treat them equivalently—as exceptions to the Second Amendment guarantee." 614 F.3d at 91.

from these sources. First, a regulation does not infringe the right of the people to bear arms if it prohibits the possession of arms that terrify the population. The Court cited, for example, Blackstone, which states that "[t]he offence of *riding* or *going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land . . . ." 4 William Blackstone, *Commentaries on the Laws of England* 148 (1769).[7] Second, as the Texas Supreme Court discussed in *English v. State*, 35 Tex. 473 (1871), the Second Amendment did not protect certain types of weapons that are used for criminal

---

[7] The Court cited a number of other sources, including the following: 3 Bird Wilson, *The Works of the Honourable James Wilson* 79 (1804) ("Affrays are crimes against the personal safety of the citizens; for in their personal safety, their personal security and peace are undoubtedly comprehended . . . . In some cases, there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such manner, as will naturally diffuse a terrour among the people."); 1 William Russell, *A Treatise on Crimes and Indictable Misdemeanors* 271 (1831) ("[W]here persons arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at common law, and is strictly prohibited by several statutes."); *Id.* at 272 ("[I]t has been holden, that no wearing of arms is [prohibited within the meaning of the relevant statute], unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace.").

purposes. Among the "wicked devices of modern craft" prohibited by the statute at issue in that case were pistols. *Id.* at 474. According to *English*:

> To refer the deadly devices and instruments called in the statute 'deadly weapons,' to the proper or necessary arms of a 'well-regulated militia,' is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the constitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit.

*Id.* at 476.

Assault weapons clearly have the ability to terrify the population and are disproportionately used in crime. The SAFE Act covers certain characteristics that do not relate to the utility of the weapons for self-defense (or even sporting) but to improving the utility of the guns for mass slaughter. For example, according to the ATF, pistol grips that protrude conspicuously beneath the action of the weapon "were designed to assist in controlling machineguns during automatic fire." *See* Dep't of Treasury, *Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles*, Ex. 5, ¶ 3 (1998). The ATF also found that a flash suppressor:

> [D]isperses the muzzle flash when the firearm is fired to help conceal the shooter's position, especially at night . . . [and] assist[s] in controlling the 'muzzle climb' of the rifle, particularly when fired as a fully automatic weapon. From the standpoint of a traditional sporting firearm, there is no particular benefit in suppressing muzzle flash. Flash suppressors that also serve to dampen muzzle climb have a limited benefit in sporting uses by allowing the shooter to reacquire the target for a second shot.

*Id.* at ¶ 5.

Research supports the understanding that assault weapons are particularly dangerous. Academic studies have found that the average number of people killed or wounded in mass shootings doubled when assault weapons or semiautomatic guns combined with high capacity magazines were used in the shooting. *See* Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994-2004, in Reducing Gun Violence in America* 167 (Daniel W. Webster & Jon S. Vernick eds., 2013). Other analyses have found a similar pattern. For mass shootings from January 2009 to January 2013, shootings with assault weapons or high capacity magazines resulted in more than double the number of people shot and more than 50 percent more killed.[8] Likewise, an analysis of a database of mass shootings from 1984 to 2012 found positive correlations between rounds fired per minute and the number of people

[8] Mayors Against Illegal Guns did a study of mass shootings between January 2009 and January 2013. A mass shooting was defined as four or more people murdered with a gun. Their analysis found: "Assault weapons or high-capacity magazines were used in at least 12 of the incidents (28%). These incidents resulted in an average of 15.6 total people shot – *123% more people shot than in other incidents* (7.0) and 8.3 deaths – *54% more deaths than in other incidents* (5.4)." Mayors Against Illegal Guns, *Mass Shootings Since January 20, 2009* 1 (2013), *available at* http://www.minnpost.com/sites/default/files/attachments/mass_shootings_2009-13_-_jan_29_12pm.pdf.

hit and killed. Kevin Ashton, *The Physics of Mass Killing*, The Internet of Things and Other Things (Jan. 24, 2013, 6:27 PM), http://kevinjashton.com/2013/01/24/the-physics-of-mass-killing/. Reducing access to assault weapons and to high capacity ammunition magazines reduces criminals' ability to spray-fire a continuous stream of hundreds of bullets into crowds.

The weapons regulated by the SAFE Act are clearly dangerous and unusual and fall outside the scope of Second Amendment protection. The district court erred in failing to either consider or apply this factor in its analysis.

### B. The Assault Weapons Regulated by the SAFE Act Have Not Been Shown to Be Commonly Used for Self-Defense

As the district court recognized, "ownership statistics alone are not enough" to bring a weapon within the scope of Second Amendment protection. According to the court, "[t]he firearm must also be possessed for lawful purposes, like self defense." Decision and Order, *supra*, at 21. Indeed, the *only* "lawful purpose" specifically identified by the Supreme Court is self-defense. According to *Heller*, self-defense "was the *central component* of the right itself."[9] 554 U.S. at 599.

---

[9] *See also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3044 (2010) (The Supreme Court reiterated its "central holding in *Heller*" that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.").

In order to determine whether the assault weapons regulated by the SAFE Act are entitled to Second Amendment protection, it is necessary to determine whether the prohibited characteristics of the weapons are critical to the ability of the weapons to serve a lawful purpose. As stated in *Marzzarella*, 614 F.3d at 94:

> *Heller* distinguished handguns from other classes of firearms, such as long guns, by looking to their functionality. *Id*. at 2818 (citing handguns' ease in storage, access, and use in case of confrontation). But unmarked firearms are functionally no different from marked firearms. The mere fact that some firearms possess a nonfunctional characteristic should not create a categorically protected class of firearms on the basis of that characteristic.

The only evidence the district court cited for the proposition that assault weapons are used for lawful purposes is (a) a report showing that Americans owned approximately 1 million assault weapons in 1990 and (b) a gun seller's on-line sales pitch. On this basis, the district court determined that there is "little dispute" that restricted weapons have lawful uses, including for self-defense. Decision and Order, *supra*, at 21-22. However, neither reference is probative of whether assault rifles are used for self-defense.

In any event, the district court's lawful use analysis misses the mark, because it addresses only "assault weapons" as a class of weapons. The restrictions, however, address only a small subset of such weapons, those with certain secondary characteristics. The district court did not analyze the use of the particular weapons with the restricted characteristics.

In fact, restricted and unrestricted weapons serve equally well for purposes of self-defense. Indeed, the NRA itself admits that "the firearms banned by the Act are *not* fundamentally different from some of the semiautomatic firearms that it permits." Brief of NRA as *Amicus Curiae* at 9, *N.Y. State Rifle and Pistol Ass'n v. Cuomo*, No. 13-cv-2915 (W.D.N.Y. May 8, 2013), ECF No. 46. ("NRA Amicus Brief"). For example, according to the NRA, "[a] detachable magazine does nothing to distinguish a semiautomatic firearm from other familiar, commonly-possessed firearms." *Id*. In fact, a semiautomatic weapon with, for example, a large detachable magazine may be more dangerous (and therefore less suited for self-defense) given that the ability to fire a burst of bullets in a short period of time increases the risk of accidental shootings of innocent bystanders.

Given that the prohibited weapons are not of greater utility than permitted weapons for purposes of self-defense, or for any other identified "core" lawful purpose, the regulation cannot implicate the Second Amendment. As stated in *Marzzarella*, "it also would make little sense to categorically protect a class of weapons bearing a certain characteristic wholly unrelated to their utility." 614 F.3d at 94.

The restricted and unrestricted weapons do, however, differ with respect to one very important aspect; namely, the restricted weapons are particularly suited for criminal activity and mass slaughter.

## II. Strict Scrutiny Is Not Appropriate for Appellants' Second Amendment Challenges

### A. Applying Strict Scrutiny Is Inconsistent with *Heller*, *McDonald*, Second Circuit Precedent, and Precedents from Other Circuits

In *District of Columbia v. Heller*, the Supreme Court recognized—for the first time—individuals' rights to keep and bear arms. *Heller* held—and two years later, *McDonald v. City of Chicago* confirmed—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. As *Heller* and *McDonald* also made clear, however, "[l]ike most rights, the right secured by the Second Amendment is not unlimited" in scope and does not amount to "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. The Court further explained that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* (citing cases).

The Court, however, noting that *Heller* was the first in-depth examination of the Second Amendment, indicated that it did not expect to clarify all aspects of the Second Amendment in its decision. *Id.* at 570, 635. This meant that in *Heller* the Court did not mandate or even articulate a standard of review for Second Amendment challenges. The Court, however, made clear that an

individual right to keep and bear arms for self-defense *is* subject to reasonable regulation by the legislature. As the Court in *Heller* explained, the Constitution provides legislatures with "a variety of tools for combating" the "problem of handgun violence." *Id.* at 636. In *McDonald*, the Court reaffirmed the limited nature of the Second Amendment right explaining that "'reasonable firearms regulation will continue under the Second Amendment.'" 130 S. Ct. at 3046 (quoting Brief for State of Texas et al. as *Amici Curiae* at 23, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521)). The Court in *Heller* also set forth a non-exclusive list of a number of gun control regulations that the Court found to be "presumptively lawful" such as banning firearm possessions by felons and laws imposing conditions and qualifications on the commercial sale of arms. *Heller*, 554 at 625-28, n. 26. Thus, under *Heller* and *McDonald*, any suggestion that firearms regulations are somehow subject to a strong presumption against constitutionality (that accompanies a strict scrutiny review) is simply wrong.[10]

---

[10] States have long implemented wide-ranging restrictions on procuring, possessing, or using firearms not linked to any core purpose since the beginning of the Republic. *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 502-05 (2004). This history of the Second Amendment and restrictions on this amendment is set out in greater detail by other *amici* that participated in the *Heller* litigation, *e.g.*, Brief for Professional Historians and Law Professors Saul Cornell, Paul Finkelman, Stanley N. Katz, and David T. Konig as *Amici Curiae* in Support of

### B. Intermediate Scrutiny Is the Accepted Standard

Although the Supreme Court did not specify a standard, it did provide some guidance to lower courts. *Heller*, 554 at 626-27. As discussed above, the Court listed a number of presumptively lawful firearm regulations. The Court thus signaled that intermediate scrutiny is the highest possible standard of review. *Id.*[11]

This Court has also provided some guidance in this area. As this court stated in *United States v. Decastro*:

> Given *Heller*'s emphasis on the weight of the burden imposed by the D.C. gun laws, we do not read the case to mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny. Rather, heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).
>
> 682 F.3d 160, 166 (2d Cir. 2012), *cert. denied*, 682 F.3d 160 (2012).

---

Appellees, *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (No. 10-7036).

[11] After *Heller*, in 2010, the Court in *McDonald* addressed a Second Amendment challenge and, likewise, did not articulate a particular standard of review to evaluate Second Amendment challenges to gun regulations. *See also* Lawrence Rosenthal & Joyce Lee Malcolm, Colloquy Debate, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?* 105 Nw. U. L. Rev. 437, 438-39 (2011).

Thus, this Court set forth a threshold under which courts must determine, in the first instance, whether a challenged regulation substantially burdens an individual's Second Amendment rights and, only *after* discerning that the challenged regulation imposes a substantial burden, will a court apply some heightened level of scrutiny. *See Decastro*, 682 F.3d at 166-67.[12] However, "[i]t seems clear that, under this standard, statutes that do not impose a substantial burden on the Second Amendment would call for a less restrictive standard, such as rational basis." Andrew Peace, Comment, *A Snowball's Chance in Heller: Why Decastro's Substantial Burden Standard is Unlikely to Survive*, 54 B.C. L. Rev. E. Supp. 175, 183 n.76 (2013) (citing *Decastro*, 682 F.3d at 167 n.5). In *Decastro* this Court did not address which type of heightened scrutiny would apply in a case involving a substantial burden. Instead, the *Decastro* panel found that, in that case, there was no substantial burden. *Decastro* did not explicitly apply rational basis review, but it ultimately found that there was no substantial burden on Second Amendment rights because the law at issue did not place a substantive burden on the right to possess a gun for self-defense, because it regulated rather than restricted gun use. 682 F.3d at 168; *see Heller*, 554 U.S. 626-27.

---

[12] The *Decastro* court found that the substantial burden test is consistent with *Heller*. 682 F.3d at 165-66.

Likewise, in *Kachalsky v. County of Westchester*, a case addressing the constitutionality of a New York law requiring applicants to demonstrate "proper cause" to obtain a license to carry a concealed weapon in public, this Court drew a distinction between regulations imposing a substantial burden on "core" vs. "non-core" Second Amendment rights. 701 F.3d 81, 93-101 (2d Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013). As this Court explained, where a substantial burden is found to impact non-core rights, intermediate scrutiny should apply.[13] This Court determined that possession of a concealed weapon in public is not a core Second Amendment right, and it found that the "proper cause" requirement was substantially related to the State's important interest in public safety and crime prevention. *Id.* at 98.

Where, as here, New York's ban on certain assault weapons does not impact core Second Amendment rights, the highest appropriate constitutional standard of scrutiny test is intermediate scrutiny. To pass muster under intermediate scrutiny, New York must show that the requirements of the

---

[13] Separately, the Court found in *Kwong v. Bloomberg* that a restriction that "does not ban the right to keep and bear arms but only imposes a burden on the right" does not require strict scrutiny. 723 F. 3d 160, 168 n.16 (2d Cir. 2013), *cert. denied sub nom. Kwong v. de Blasio*, 134 S. Ct. 2696 (2014).

legislation are "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Lower court decisions have almost uniformly analyzed challenges such as those under review here under intermediate scrutiny. The Fourth, Third, Fifth and Tenth Circuits have applied intermediate scrutiny in the context of the Second Amendment. *See United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny to a ban on firearm possession by domestic violence misdemeanants); *Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny to a law criminalizing possession of guns with obliterated serial numbers); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013); *see also id.* at 1223-34 (Lucero, J., concurring) (explaining that, for Colorado's ban on carrying concealed weapons in public, if Second Amendment protection were available, the appropriate constitutional test is intermediate scrutiny); *see also NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 205 (5th Cir. 2012), *cert. denied*, 134 S. Ct. 1364 (2014) (assuming that the challenged federal laws (prohibiting persons under 18 from possessing handguns) burdened conduct

in the scope of the Second Amendment, finding that such laws "trigger nothing more than 'intermediate' scrutiny.").[14]

Under these standards, strict scrutiny is simply inapplicable. In the district court Plaintiffs wrongly suggested that a "higher standard than intermediate scrutiny" must apply "to prohibitions on possession of firearms and magazines in the home," because the Act "violates the fundamental right at issue because it bans mere possession of firearms and magazines in one's own home." Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction at 16, 18, *N.Y. State Rifle and Pistol Ass'n v. Cuomo*, No. 13-cv-2915 (W.D.N.Y. Apr. 15, 2013), ECF No. 23-1. This statement misconstrues both the New York legislation and the relevant standards. First, it is well-settled that laws that affect "fundamental rights" are not necessarily subject to strict scrutiny review. The Supreme Court has expressly rejected the argument that any "burden upon the right to vote," *Burdick v. Takushi*, 504 U.S. 428, 432 (1992), which is clearly a

---

[14] *See also United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc) (upholding intermediate scrutiny as applied to Skoien); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011) (holding that Masciandaro's Second Amendment claim for his right to carry or possess a loaded hand gun for self defense is assessed under the intermediate scrutiny standard); *see also United States v. Reese*, 627 F.3d 792 (10th Cir. 2010) (holding that intermediate scrutiny is appropriate and discussing important government objectives).

fundamental right as discussed in *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), "must be subject to strict scrutiny." *Burdick*, 504 U.S. at 432.

Next, while *Heller* rejected rational basis review for regulations that effectively eviscerate the individual right to self-defense in the home, 554 U.S. at 661 n.27 (Stevens, J., dissenting), and thus found that the District of Columbia's *complete ban* on handgun possession in the home could not stand, the Court nowhere suggested that reasonable regulations addressing firearms possession that did not prevent home self-defense would be invalid. The standard of review that pays due heed to the Supreme Court's decisions in *Heller* and *McDonald* makes the most sense in analyzing individuals' and states' interests. Furthermore, the standard used most often by state courts in analogous situations is intermediate scrutiny within a "reasonable regulation" framework. This means that the applicable standard is whether the New York legislature is reasonable in enacting prophylactic measures directed at saving lives or reducing serious crime and, in turn, the legislation should be upheld. *See, e.g., Lewis v. United States*, 445 U.S. 55, 66-67 (1980).

Intermediate scrutiny is also the highest appropriate standard to apply because of the interest at stake with respect to the Second Amendment. Rather than facing a question of whether speech (which harms no one physically) is protected or not, at stake under the Second Amendment is the potential to cause

death and imminent injury. And getting it wrong cannot be reversed. The privilege protected by the Second Amendment "is unique among all other constitutional rights to the individual because it permits the user of a firearm to cause serious personal injury—including the ultimate injury, death— to other individuals, rightly or wrongly." *Piszczatoski v. Filko*, 840 F. Supp. 2d 813 (D.N.J. 2012), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014). Under these circumstances, the state interests and objectives (to protect its citizenry from maiming and death)—which are already high—are at their very highest. Given the very real risks of injuries and death, that the legislation is "substantially related to an important governmental objective" must be presumed to meet any intermediate scrutiny standard.[15]

[15] Because the State's interest in this arena is abundantly clear and is extremely important to the health of its citizenry, it would be fair to argue that a less stringent standard than intermediate scrutiny could be utilized where appropriate.

## CONCLUSION

For all of the reasons set forth herein, this Court should reverse the district court's judgment that the New York SAFE Act restricts weapons protected by the Second Amendment; and if it does not reverse this judgment, this Court should affirm the district court's judgments that the law is subject to intermediate or lesser scrutiny and survives such scrutiny.

/s/ Lisa E. Jones
Lisa E. Jones
James Mendenhall (*pro hac vice pending)*
Dave M. Wharwood (*pro hac vice pending)*
*Counsel for Amicus Curiae*
*Brady Center to Prevent Gun Violence*
Sidley Austin, LLP
1501 K Street, N.W.
Washington, D.C. 20005
Phone: (202) 736-8000
Facsimile: (202) 736-8711

Of Counsel:
Jonathan E. Lowy
Brady Center to Prevent Gun Violence
Legal Action Project
840 First Street, NE, Suite 400
Washington, D.C. 20002

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(a) and 29(d) because this brief contains 6,170 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Date: August 5, 2014

/s/ Lisa E. Jones
Lisa E. Jones
Sidley Austin, LLP

*Counsel for Amicus Curiae*
*Brady Center to Prevent Gun Violence*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August, 2014, this brief of *amicus curiae* Brady Center To Prevent Gun Violence was served, via electronic delivery to all parties' counsel via CM/ECF system which will forward copies to Counsel of Record.

Date: August 12, 2014

/s/ Lisa E. Jones
Lisa E. Jones
Sidley Austin, LLP

*Counsel for Amicus Curiae*
*Brady Center to Prevent Gun Violence*