

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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; BATAVIA MARINE &
SPORTING SUPPLY; WILLIAM NOJAY,
THOMAS GALVIN, and ROGER HORVATH,

Plaintiffs,

-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; LAWRENCE FRIEDMAN, District
Attorney for Genesee County; and GERALD J.
GILL, Chief of Police for the Town of Lancaster,
New York,

Defendants.

13-cv-00291-WMS

DECLARATION OF WILLIAM J. TAYLOR, JR.

WILLIAM J. TAYLOR, JR. declares under penalty of perjury, pursuant to 28
U.S.C. § 1746, that the following is true and correct:

1. I am an Assistant Attorney General, of counsel to Eric T. Schneiderman, Attorney
General of the State of New York, attorney for 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 (collectively the "State

Defendants”).

2. I submit this declaration in support of the State Defendants’ motion for an Order:

(a) permitting the State Defendants to present to the Court’s attention additional authority -- an October 1, 2013 decision by the United States District Court for the District of Maryland denying a motion for a temporary restraining order against Maryland’s recently enacted bans on assault weapons and detachable magazines with a capacity of more than ten rounds of ammunition -- which was not decided until after the State Defendants submitted their reply papers in further support of their cross-motion to dismiss and/or for summary judgment and in opposition to Plaintiffs’ cross-motion for summary judgment on September 24, 2013 (Docket Nos. 122-25), and that is directly relevant to issues currently being considered by the Court both on the State Defendants’ cross-motion to dismiss and/or for summary judgment (Docket No. 64) and on Plaintiffs’ motion for a preliminary injunction and cross-motion for summary judgment (Docket Nos. 23, 113); and

(b) permitting the State Defendants to submit a supplemental exhibit in support of their cross-motion to dismiss and/or for summary judgment -- the Guide to the New York SAFE Act for Members of the Division of State Police (the “NY State Police SAFE Act Guide”) -- that likewise was not issued until after the State Defendants submitted their recent reply papers on September 24, 2013.

Recent District of Maryland Decision Denying TRO Motion Against Maryland’s Assault Weapons and Large-Capacity Magazine Bans

3. Just days ago, on October 1, 2013, the United States District Court for the District of Maryland, in *Tardy v. O’Malley*, Civil No. CCB-13-2841, denied a motion for a temporary restraining order that the plaintiffs there had brought against Maryland’s recently enacted bans

on assault weapons and on detachable magazines with a capacity of more than ten rounds of ammunition. Just as in this case, the plaintiffs in *Tardy* had moved for relief under the Second Amendment, the Equal Protection Clause, and on vagueness grounds. The Court in *Tardy* rejected plaintiffs' motion as to each of these claims.

4. A true and correct copy of the official transcript containing the Court's oral decision denying the motion for a temporary restraining order is attached hereto as Exhibit A. The Court's decision itself is at pages 65 to 76 of the transcript. (Ex. A at 65-76). Oral argument on this motion, including the Court's questioning of and colloquy with counsel for both plaintiffs and the State of Maryland, is at pages 3 to 50 of the transcript. (Ex. A at 3-50). A copy of the Court's separate brief Order denying the TRO motion is attached hereto as Exhibit B.

5. The decision in *Tardy* is relevant as it relates to issues currently pending before the Court in this matter, which involves similar challenges to New York's recently strengthened bans on assault weapons and large-capacity magazines, both on the State Defendants' cross-motion to dismiss and/or for summary judgment (Docket No. 64) and on Plaintiffs' motion for a preliminary injunction and cross-motion for summary judgment (Docket Nos. 23, 113). Accordingly, the State Defendants ask that the Court grant their motion to present this additional authority.

Supplemental Exhibit: the NY State Police Guide to the SAFE Act

6. The State Defendants also request that the Court grant them permission to submit as a supplemental exhibit in support of their cross-motion to dismiss and/or summary judgment a document that, like the *Tardy* decision, was not issued until after the State Defendants filed their reply papers in further support of their cross-motion to dismiss and/or for summary judgment and in opposition to Plaintiffs' cross-motion for summary judgment on September 24, 2013.

7. Specifically, the State Defendants request that the Court permit them to submit a copy of the NY State Police Guide to the SAFE Act as new Exhibit 76 in support of their cross-motion to dismiss and/or for summary judgment. This document, which was prepared by the Office of Division Counsel at the New York State Police, was issued to members of the Division of State Police, through the Division's internal intranet system, on September 27, 2013. As noted in the accompanying Declaration of Richard Lynch, the NY State Police Guide to the SAFE Act is not a directive or order, but is one of many Field Guides, Legal Guides, or Legal Bulletins that the Office of Division Counsel routinely issues in various areas of the law, including with respect to new legislation and recent court decisions, in order to assist members of the State Police in performing their duties and to be used as a reference by officers in the field.

8. Among other things, the NY State Police Guide to the SAFE Act sets forth the one-feature test of New York's strengthened assault weapons ban and the new provisions that have enhanced New York's large-capacity magazine ban and that prohibit having more than seven rounds of ammunition loaded into a magazine. (Ex. C at 3-10). It thus relates to the issues currently before the Court in this matter and provides further support for the State Defendants' motion for dispositive relief. A copy of this document is attached hereto as Exhibit C.

9. Accordingly, the State Defendants ask the Court to grant their Motion for Permission to Submit Additional Authority and Supplemental Exhibits.

Dated: New York, New York
October 8, 2013

/s/ William J. Taylor, Jr.
William J. Taylor, Jr.
Assistant Attorney General

EXHIBIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAWN J. TARDY, et al.

PLAINTIFFS

VS. CIVIL NO. CCB-13-2841

MARTIN J. O'MALLEY, in his
official capacity as Governor
of the State of Maryland, et al.

DEFENDANTS

JANE DOE, et al.

PLAINTIFFS

VS. CIVIL NO. CCB-13-2861

MARTIN J. O'MALLEY, in his
official capacity as Governor
of the State of Maryland, et al.

DEFENDANTS

Baltimore, Maryland

October 1, 2013

The above-entitled case came on for a Temporary
Restraining Order proceedings before the Honorable
Catherine C. Blake, United States District Judge

Gail A. Simpkins, RPR
Official Court Reporter

A P P E A R A N C E S

For the Plaintiffs:

Tara Sky Woodward, Esquire
John Parker Sweeney, Esquire
James W. Porter, III, Esquire

For the Defendants:

Matthew J. Fader, Esquire
Dan Friedman, Esquire

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P R O C E E D I N G S

THE CLERK: The matter now pending before this Court is Civil Docket Number CCB-13-2841, Shawn J. Tardy, et al. versus Martin J O'Malley, et al.

Counsel for the plaintiffs, Tara Woodward, John P. Sweeney and James Porter. Counsel for the defendants, Matthew Fader and Dan Friedman.

This matter now comes before the Court for the purpose of a temporary restraining order.

THE COURT: All right. Good morning again, everyone. I am ready to hear from you. I have read the papers from both sides. That includes the second case, the handgun licensing case, Doe. I understand from the State's response that they are ready to discuss that today as well today if the plaintiffs want to do that.

Mr. Sweeney.

MR. SWEENEY: May it please the Court, Your Honor, my name is John Parker Sweeney, and I am here representing the plaintiffs.

May I introduce today in the courtroom, we have Shawn Tardy for the plaintiff in the Tardy lawsuit.

We have Carol and Gary Wink also in the Tardy suit and the Doe suit, owners of Wink's Sporting Goods.

1 We have Steve Schneider, who is the owner of
2 Atlantic Guns and is the President of Maryland
3 Licensed Firearms Association, and John Josselyn,
4 Legislative Vice President for the Associated Gun
5 Clubs of Baltimore.

6 THE COURT: All right. Happy to have everybody
7 here.

8 MR. SWEENEY: Thank you, Your Honor, for making
9 yourself available on such short notice.

10 Ms. Woodward will address the Tardy motion for a
11 TRO, and then following that I will address the
12 handgun qualification license TRO.

13 THE COURT: All right.

14 MS. WOODWARD: Thank you, Your Honor. May I use
15 the podium?

16 THE COURT: Sure, wherever you are comfortable.

17 MS. WOODWARD: May it please the Court, Sky
18 Woodward on behalf of the plaintiffs. My colleague,
19 Mr. Sweeney, has introduced them to Your Honor.

20 For the record, they include Andrew Turner,
21 Shawn J. Tardy, Matthew Godwin, Wink's Sporting Goods,
22 Atlantic Guns, Inc., and Association Plaintiffs,
23 Associated Gun Clubs of Baltimore, Maryland Shall
24 Issue, Maryland State Rifle and Pistol Association,
25 the National Shooting Sports Foundation, and the

1 Maryland Licensed Firearms Dealers Association.

2 These plaintiffs, Your Honor, come to the Court
3 today as the people of the State of Maryland, the real
4 people, and not the government. In a democracy, the
5 state represents at best a political majority of the
6 people.

7 When the plaintiffs speak on behalf of enshrined
8 individual rights, particularly those that are
9 disfavored rights, they speak for all of the people,
10 even those who may hate the right and wish its
11 suppression.

12 The Court performs no more sacred duty than as
13 it sits today, to protect the civil rights of the
14 minority when disfavored by the political will of the
15 majority. Whether that civil right is to marry the
16 person you love, exercise your reproductive rights, or
17 to exercise your Second Amendment rights, to keep and
18 bear arms, it is in that vein that the plaintiffs come
19 today seeking a TRO under Federal Rule 65.

20 I will address first, Your Honor, that the
21 plaintiffs are likely to succeed on the merits of
22 their claims.

23 THE COURT: Well, if you wouldn't mind, if you
24 would first address why this lawsuit was not filed
25 until the Friday before the Tuesday on which it was to

1 take effect.

2 MS. WOODWARD: The law obviously is set to take
3 effect today, Your Honor. Had the plaintiffs come
4 before the Court prior to the effective date of the
5 Act, we are confident we would have been met with a
6 standing challenge or a ripeness challenge.

7 Because the law allowed the purchase of the
8 to-be-banned firearms up until yesterday, Your Honor,
9 there is no reason to come before the Court for a law
10 that is only to be in effect as of today.

11 THE COURT: But you anticipated. You obviously
12 knew that it was going to be coming into effect, and
13 you could have brought this suit, it seems to me.

14 I mean if you had standing on Friday, then you
15 had standing sometime ago. It would have permitted a
16 much more deliberate consideration of the law than
17 what seems to be possible by filing it as late as you
18 did.

19 MS. WOODWARD: Well, certainly a deliberate
20 consideration, Your Honor, comes in the form of a
21 preliminary injunction style hearing.

22 There is nothing in the rules or the law that
23 suggests that the plaintiffs needed to come before
24 this Court or any court prior to the effective date of
25 the Act, and we would have been, to put it in a

1 certain way, Your Honor, I think damned if we did and
2 damned if we didn't.

3 Because had we come to the Court as of the
4 signing of the Bill in May, any time between now and
5 then, Your Honor, the plaintiffs or the defendants
6 would have been able to say to the Court they can
7 exercise their right. There is no ban. They have the
8 ability to purchase the things that are to be banned
9 as of October 1. It's only as of today that the
10 infringement of the right will begin, because it is
11 the acquisition of the firearms to be banned that is
12 the exercise of the right that as of today cannot
13 occur.

14 THE COURT: Okay.

15 MS. WOODWARD: As to whether plaintiffs are
16 likely to succeed on the merits of their claims, Your
17 Honor, the plaintiffs and the individual association
18 plaintiff members have clear fundamental individual
19 rights under the Second Amendment to the United States
20 Constitution to acquire and possess firearms and
21 ammunition magazines in their home for defense of
22 themselves, their family, and their property.

23 This is clear under the Heller case. It is
24 clear under the McDonald case, as applied to the
25 states. It is also clear under Fourth Circuit law

1 under Chester and Masciandaro.

2 As of today, as I've noted, that right, the
3 Second Amendment right to keep and bear arms will be
4 infringed as to an entire class of firearms that are
5 in common use by plaintiffs and association members
6 for use in their home.

7 THE COURT: When you call it an entire class,
8 you're assuming that assault rifles are a class as
9 compared to a subclass?

10 I mean there are certainly plenty of long guns,
11 rifles and shotguns that are still perfectly legal for
12 your clients to possess.

13 It appears to me more like a subclass, a limited
14 group of weapons that your clients are not allowed to
15 possess.

16 MS. WOODWARD: Well, Your Honor --

17 THE COURT: Acquire. They are not allowed to
18 acquire going forward. Obviously, what they already
19 have they are allowed to keep.

20 MS. WOODWARD: The list includes 68 to-be-banned
21 firearms, Your Honor.

22 THE COURT: Uh-huh.

23 MS. WOODWARD: Whether one considers that class
24 or subclass, it's a still a comprehensive class of a
25 significant number of firearms that are in common use

1 and are desired to be purchased by law-abiding,
2 responsible Marylanders for the purposes of
3 self-defense and defense of home.

4 So whether an entire class or a subclass, these
5 are nonetheless an entire category of weapons to be
6 banned as of today.

7 Under Heller, under McDonald, under Chester, and
8 Masciandaro, the Court has said that a class of
9 firearms commonly used for defense of home, and if it
10 is banned, that is unconstitutional.

11 THE COURT: Well, Heller, of course, was talking
12 about handguns, and the Supreme Court made it quite
13 clear that they thought handguns were the preferred
14 weapon for self-defense for various reasons.

15 Now, you are not challenging, as I understand
16 it, the continuing ban on certain types of assault
17 pistols. This is just directed at the long guns and
18 the magazines.

19 Let me just be clear about that. Is that
20 correct?

21 MS. WOODWARD: That is correct vis-a-vis this
22 lawsuit, Your Honor. The Doe lawsuit deals with
23 handguns.

24 THE COURT: Yes.

25 MS. WOODWARD: But that's within the licensing

1 scheme, not the ban, not a ban.

2 THE COURT: Right. I understand that. But just
3 talking about this case, it's the rifles and the
4 magazines. Of course, as you alluded to, Heller said
5 you can't have a total ban on handguns.

6 Now what evidence do you have that assault-style
7 long guns and detachable magazines carrying more than
8 ten rounds are ordinarily or commonly used for defense
9 of the home?

10 MS. WOODWARD: Your Honor, the plaintiffs will
11 proffer that there will be expert testimony that will
12 be provided to the Court initially through
13 declaration, affidavit, and through live testimony, if
14 the Court will entertain it, in a preliminary
15 injunction hearing. There will be testimony of
16 experts that will address the Court's question, that
17 these types of firearms to be banned are in common
18 use.

19 THE COURT: Uh-huh.

20 MS. WOODWARD: In fact, one of the declarations
21 presented in support of the TRO by Mr. Schneider has
22 identified for the Court that the types of weapons to
23 be banned are commonly purchased and commonly used.

24 The second point, Your Honor, on commonly used
25 for defense of home, self and home, we will be able to

1 proffer that there will be expert testimony on that
2 point as well, Your Honor, that it's not just the
3 handguns that the U.S. Supreme Court in Heller found
4 to be specifically protected and off the table for a
5 state to ban, but that these types of weapons are also
6 the types of weapons that responsible, law-abiding
7 citizens in the State of Maryland would use in defense
8 of home.

9 There are certain characteristics, Your Honor,
10 of the firearms to be banned that make them more
11 effective for defense of home, and there will be
12 expert testimony and expert proof to support that.

13 THE COURT: Now I assume some of this would have
14 been presented to the D.C. Circuit in the Heller case,
15 the second Heller case, if you will. Are you going to
16 be able to distinguish your evidence and the result
17 here from what the D.C. Circuit did?

18 MS. WOODWARD: Yes, Your Honor, we will. We
19 will be able to distinguish between.

20 We will also be able to demonstrate that the
21 plaintiffs who we have in this case, and the members
22 of association plaintiffs, that these are the types of
23 firearms, these to-be-banned firearms are the types
24 that for their personal self-protection and protection
25 of the home, are the types of firearms that they

1 desire.

2 There is nothing in Heller, and there is nothing
3 in McDonald, there is nothing in Chester, or
4 Masciandaro, that restricts the application of the
5 Second Amendment and the right to keep and bear arms
6 to simply handguns. It is an open question, but one
7 that requires strict scrutiny in our estimation as
8 well, Your Honor.

9 THE COURT: Would you like to tell me why you
10 think strict scrutiny would be applicable to this when
11 we are talking -- again, I invite you to distinguish
12 the D.C. Circuit's decision in Heller.

13 We are not talking about a ban, as I see it, on
14 an entire class of weapons, and at least at this
15 point, I don't believe there's evidence that they are
16 commonly used for defense of the home. Why wouldn't
17 intermediate scrutiny be the appropriate standard?

18 MS. WOODWARD: Well, the Fourth Circuit has not,
19 as the State has said, adopted an intermediate
20 scrutiny standard. The Heller case identifies strict
21 scrutiny on a categorical ban of common firearms that
22 are to be used in the home.

23 The Fourth Circuit --

24 THE COURT: I'm sorry. Where does the Heller
25 case do that? I thought the Heller --

1 Do you mean the Supreme Court case?

2 MS. WOODWARD: Yes, yes.

3 THE COURT: I guess we should distinguish
4 between the Supreme Court and --

5 MS. WOODWARD: Yes, the Supreme Court Heller,
6 Your Honor.

7 THE COURT: I thought that they said we don't
8 even need to decide what level of scrutiny applies.

9 MS. WOODWARD: Correct, Your Honor. I misspoke.

10 THE COURT: I haven't seen actually -- I
11 certainly have not in this limited time read all the
12 case law out there on this issue, but I haven't
13 actually seen strict scrutiny applied.

14 MS. WOODWARD: In the context of these
15 to-be-banned firearms in this instance.

16 THE COURT: Right.

17 MS. WOODWARD: At least within the Fourth
18 Circuit, Your Honor, that is correct. There has not
19 been an application of a level of scrutiny vis-a-vis
20 these to-be-banned firearms.

21 The State has argued that it would be a lesser
22 standard, that strict scrutiny would not apply. It is
23 our position that the Fourth Circuit, to the extent it
24 has spoken on this, and again, Chester and
25 Masciandaro, which I probably continue to butcher --

1 it's a tough one. I'm not sure if the C is hard or
2 it's soft.

3 THE COURT: I know which one you mean.

4 MS. WOODWARD: In any event, I presume that Your
5 Honor knows the case of which I speak.

6 THE COURT: I do.

7 MS. WOODWARD: In both of those cases, Your
8 Honor, before the Fourth Circuit, that Court has
9 alluded to the fact that strict scrutiny would apply.

10 In fact, in Masciandaro, the Court said we
11 assume that any law that would burden the fundamental
12 core right of self-defense in the home by a
13 law-abiding citizen would be subject to strict
14 scrutiny.

15 There is nothing that the State has brought
16 before this Court that they have even attempted to
17 justify the ban, a categorical ban under a strict
18 scrutiny standard. And ultimately, the government
19 will bear the burden of proof to justify a ban, and
20 must do so under strict scrutiny, in our estimation,
21 consistent with Fourth Circuit precedent --

22 THE COURT: Well, as you --

23 MS. WOODWARD: Or even if it's under
24 intermediate scrutiny.

25 THE COURT: Okay. Because Masciandaro assumes,

1 I think, but certainly does not decide, that strict
2 scrutiny would apply. I think that it also said, as I
3 believe you just quoted, that it would apply to any
4 law that burdens the fundamental core right of
5 self-defense.

6 So we sort of get back to the original question,
7 if the fundamental core right of self-defense is
8 implicated by the particular to-be-banned weapons on
9 this list.

10 I mean there's at least an argument to be made,
11 and I know that generally courts have tried to avoid
12 making that decision at the first prong, but there is
13 at least an argument to be made that these weapons
14 don't even fall with the protection of the Second
15 Amendment, that they are unusual and dangerous as
16 opposed to common and ordinary.

17 MS. WOODWARD: If I may address that point, Your
18 Honor, on the unusual and dangerous piece of this?

19 The defendants have made reference to the
20 Heller, Supreme Court Heller decision, and the Court's
21 discussion of M16 assault rifles, assault weapons.
22 The defendants make much of this in their opposition
23 papers to justify the categorical ban on semiautomatic
24 rifles.

25 The State doesn't disclose to the Court a

1 critical difference between an M16 and the
2 semiautomatic rifles that are to be banned here under
3 this state law. The defendants attempt to equate the
4 categorical ban of firearms, of the dangerous and
5 unusual type, to be as outside the scope of the Second
6 Amendment.

7 So to that point, Your Honor, the M16, as
8 referenced in Supreme Court Heller, and as referenced
9 in the State's papers as the type of weapon to be
10 banned, the M16 is a fully automatic, military-only
11 version, which is adapted from a Colt AR-15 that was
12 manufactured over 50 years ago.

13 The AR-15, which is one of the models of
14 semiautomatic rifles that the defendants have now
15 banned, was developed for the civilian market before
16 its military M16 version was developed.

17 Just some of the mechanics here, Your Honor.

18 THE COURT: Uh-huh.

19 MS. WOODWARD: If you are handling an M16, that
20 firearm will continuously shoot bullets at a high rate
21 of speed until the trigger is released, the gun jams,
22 or it runs out of bullets. That's the M16.

23 When one operates one of the banned
24 semiautomatic rifles, it's one bullet and only one
25 shot until another is reloaded, and it cannot be shot

1 until there is another pull of the trigger. There is
2 a mechanical distinction between the M16 assault
3 weapon and an AR-15-style semiautomatic rifle, which
4 is in the category of to be banned.

5 THE COURT: When you said reloaded, you just
6 mean pulling the trigger again, right?

7 I mean on the semiautomatic, you don't have
8 to -- you've got a magazine of at least ten rounds.

9 MS. WOODWARD: Correct, Your Honor.

10 THE COURT: Okay.

11 MS. WOODWARD: That's correct.

12 A couple more points on these mechanics.

13 A fully automated M16 can shoot over ten bullets
14 per second. A semiautomatic AR-15 shoots
15 approximately one bullet every two seconds.

16 Fully automatic weapons have been the subject of
17 regulation since the 1930's. Fully automatic weapons
18 are not in common use for the defense of the home.

19 The defendants also rely upon a faulty
20 assumption, Your Honor, that the Court's focus should
21 be on keeping banned classes of firearms off the
22 streets and generalized public safety. It is our
23 position, Your Honor, that the only focus of location
24 would be the home, and that these to-be-banned
25 semiautomatic firearms are entirely for the purpose of

1 self-defense in the home.

2 If I may touch upon magazine capacities, Your
3 Honor?

4 THE COURT: Sure.

5 MS. WOODWARD: The defendants have
6 mischaracterized the law as banning the possession of
7 magazines holding more than ten rounds. The law in
8 fact is that one can possess. One simply cannot
9 acquire.

10 The State also states that firearm dealers would
11 be able to simply alter the magazines to hold less
12 than ten rounds, but that is not accurate. The
13 firearm dealers are not able to simply alter magazines
14 to hold less than ten.

15 The State does not address the critical fact
16 that we have put forth to the Court, which is that the
17 magazines in excess of ten rounds are necessary for
18 our individual plaintiffs and individual members of
19 associations to use their firearms at home.

20 THE COURT: Now there has been a 20-round limit
21 in place for sometime; is that correct?

22 MS. WOODWARD: Yes. It is a 30 round maximum,
23 20 round, yes, Your Honor, 20 round --

24 THE COURT: Do you think that's unconstitutional?

25 MS. WOODWARD: We are not challenging that

1 today, Your Honor. We are challenging this law which
2 would limit to ten rounds per magazine.

3 Again, we will have expert testimony, as well as
4 the testimony of our plaintiffs, that the limitation
5 of a ten-round capacity essentially for individuals
6 makes the use of the firearm --

7 It essentially prevents the use of the firearm
8 in a way to defend one's self against a surprise
9 attack or any attack in the home.

10 Your Honor, if we look to Heller, Supreme Court
11 Heller, it is instructive.

12 The District of Columbia's law required that a
13 handgun be kept inoperable, and the Supreme Court
14 deemed that an unconstitutional requirement, because
15 it made it impossible for citizens to use that firearm
16 for self-defense. Rendering it inoperable meant it
17 was of no use.

18 Individual plaintiffs and association
19 plaintiffs, Your Honor, have the same situation as it
20 relates to limitations of magazine capacities. As the
21 affidavit or declarations demonstrate, and as would be
22 demonstrated in an injunction hearing, Your Honor,
23 there would be testimony to show that there are
24 physical limitations of the plaintiffs that make
25 magazines in excess of ten rounds useful and necessary

1 to exercise the fundamental right of that firearm in
2 the home.

3 THE COURT: As I recall, that depends in part on
4 your first argument, that the bullets that are going
5 to be fired, many of them will miss their intended
6 target, that it is very hard to be accurate in firing
7 these bullets and, therefore, one needs to be able to
8 fire more, which to me raises a question of what
9 unintended targets are all those extra bullets going
10 to hit?

11 MS. WOODWARD: Well, Your Honor, the instance
12 that we are focused on is the defense of self in one's
13 home. There are any number of scenarios that could
14 play out, but a very specific one to your concern of
15 where do the bullets go, Your Honor, we are talking
16 about defensive situations of a law-abiding,
17 responsible citizen in one's home, protecting the
18 home, protecting one's self against an intruder,
19 against a criminal.

20 We are not talking about an instance where there
21 is gunfire in the streets, where there is activity
22 outside the home. It is the ability of an individual
23 to exercise that right, and to be able to do so
24 effectively.

25 Our plaintiffs and members of association

1 plaintiffs are in positions, Your Honor, because of
2 physical limitations to desire and to demonstrate that
3 magazines in excess of ten are necessary for them to
4 be able to use the firearms for self-protection and
5 defense of home.

6 THE COURT: But you're not asking that only
7 individuals with similar disabilities be allowed to
8 have 20 rounds or higher magazines.

9 MS. WOODWARD: We are not limiting this, Your
10 Honor, to individuals with physical limitations. We
11 have identified for Your Honor individuals with such
12 limitations.

13 THE COURT: Right.

14 MS. WOODWARD: And it is not to the exclusion of
15 other law-abiding, responsible Maryland citizens to
16 have the continued access to magazines in excess of
17 ten rounds.

18 Your Honor, the plaintiffs have also, on the
19 counts that we have brought to the Court, and again,
20 on the likelihood of success on the merits, we have
21 also brought a claim under the Equal Protection
22 Clause.

23 The ban unfairly favors retired law enforcement
24 officers.

25 THE COURT: What's the suspect classification,

1 suspect category?

2 MS. WOODWARD: Well, again, Your Honor, we have
3 to start with the premise of Second Amendment applies,
4 fundamental right, fundamental right to keep and bear
5 arms of the type to be banned, and what the State has
6 done is said that one class of citizens, law
7 enforcement officers and retired law enforcement
8 officers, will be able to continue to have access to
9 these to-be-banned firearms. Non-law enforcement
10 officers will not as of today.

11 THE COURT: So it essentially is still a Second
12 Amendment right, isn't it, not an equal protection
13 challenge?

14 MS. WOODWARD: It is a Second Amendment right,
15 Your Honor. Our argument is that the State unfairly
16 and unconstitutionally favors one segment of the
17 population over another segment of the population.

18 There is no distinction, Your Honor, between a
19 retired law enforcement agent, a law enforcement
20 officer needing the protection of these types of
21 to-be-banned firearms in one's home for
22 self-protection compared to another citizen of the
23 State of Maryland.

24 There is no distinction between who would need
25 that in a time of attack in one's home, which is what

1 our point is vis-a-vis law enforcement officers
2 compared to the citizens of Maryland.

3 We also challenge on vagueness of the Act, Your
4 Honor, and this is essentially the copycat provision
5 of the law.

6 The State has responded by suggesting that there
7 is Office of the Attorney General guidance that says a
8 similarity between the internal components and a
9 function of the firearms in question is not vague.

10 The defendants translate this in other words to
11 say an unlisted weapon must have interchangeable
12 internal parts with the listed weapon to qualify as a
13 copy, not merely a similar appearance.

14 That doesn't help. The State has offered an
15 Attorney General's Opinion, but that is not in the
16 law, and there are real questions, Your Honor, as to
17 whether or not law-abiding, responsible citizens of
18 Maryland actually know what these copycat weapons are.

19 It is not to be left --

20 THE COURT: I'm sorry. Just let me understand.

21 The copycat provisions of this new law, are they
22 different from what has been in effect?

23 I mean obviously most of these assault rifles
24 have been listed and regulated for sometime. The
25 copycat provision, is that new? Did something change?

1 MS. WOODWARD: That is a new provision, Your
2 Honor, that a firearm that's a copycat of a previously
3 restricted is now banned. But it is that point, Your
4 Honor, that is where the challenge lies, because one
5 cannot distinguish between these firearms as an
6 average, law-abiding responsible citizen of Maryland.

7 So one does not know if there's an attempt to
8 purchase a copycat of a banned or not. It's too vague
9 for the citizens to be able to know where there will
10 be criminal penalties, and it is likewise challenging
11 for the dealers, Your Honor, to be able to assess
12 their sales in light of the vagueness of the copycat
13 provisions.

14 THE COURT: Obviously you cited general case law
15 on vagueness. Are you aware of this particular issue
16 of vagueness being applied or resolved or ruled on in
17 any other case applicable to copycat weapons?

18 Is there anything similar to what you are
19 presenting to me now, any court ruling that you know
20 of so far?

21 MS. WOODWARD: I don't have anything that comes
22 to the ready, Your Honor. If I may take a --

23 THE COURT: Well, there may not be any. I don't
24 know.

25 MS. WOODWARD: Right, right.

1 THE COURT: I mean I'm asking you.

2 MS. WOODWARD: Right.

3 THE COURT: May we can get to that later.

4 MS. WOODWARD: Your Honor, I was going to move
5 from likelihood of success on the merits to balance of
6 equities and the other factors of Winter, the
7 requirements of Winter in a TRO.

8 THE COURT: Sure.

9 MS. WOODWARD: The balance of equities favors
10 maintaining the status quo, Your Honor.

11 The defendants' enforcement of these
12 unconstitutional provisions of the Act will
13 irreparably injure plaintiffs' fundamental
14 constitutional rights insofar as the plaintiffs will
15 be unable to acquire and possess these certain
16 commonly used firearms and standard-issued magazines
17 for the purpose of defending themselves in their
18 homes, and that is as of today.

19 This does potentially expose the individual
20 plaintiffs and the individual members of the
21 association plaintiffs to a risk of injury, perhaps
22 even death, should a defensive need for a firearm
23 arise or criminal prosecution should occur should they
24 decide to exercise this fundamental constitutional
25 right, despite the Act's provisions.

1 The benefits to the plaintiffs in obtaining a
2 temporary restraining order, which would enable the
3 plaintiffs to continue to exercise this fundamental
4 right to purchase and keep these commonly used
5 firearms for purposes of self-defense, greatly
6 outweighs any potential harm to the defendants that
7 would result from the granting of a TRO.

8 THE COURT: Now let me ask you, in this case,
9 and again, we are not talking about Doe at the moment,
10 if I recall correctly from the affidavits, most of
11 your clients, the individual ones, that would want
12 them for the home already have a number of these kind
13 of to-be-banned weapons, and they are not being
14 precluded from keeping those, as best I understand.

15 MS. WOODWARD: There's no preclusion on the
16 keeping, Your Honor. But there's also no rationing of
17 the right within Heller, or any of the Fourth Circuit
18 case law, to suggest that by the mere ownership of one
19 available firearm means that one does not have the
20 constitutional right to secure another.

21 THE COURT: But if you are talking about
22 likelihood of harm and balancing of the equities, and
23 the need to have these weapons for self-defense in the
24 home, they have that ability now with the weapons that
25 they've got.

1 MS. WOODWARD: The individual plaintiffs, as
2 part of this complaint, that is correct, Your Honor.

3 The association plaintiffs, the individual
4 members of association plaintiffs, of which there are
5 potentially 8,000 of which we know in the State of
6 Maryland, also are affected by this ban, the
7 to-be-banned firearms.

8 The possibility that a firearm that one
9 currently has in one's home being rendered inoperable,
10 broken, a failure of some type, these plaintiffs,
11 although there may be firearms in their homes at this
12 time, they will be prevented from acquiring the types
13 of firearms that they have previously chosen, and
14 would choose again, for defense of self in the home.

15 So I appreciate Your Honor's point that at least
16 as to the individual plaintiffs who are before Your
17 Honor on this motion have access, and may continue to
18 have in their home, but it doesn't mean that the right
19 is restricted simply because you already possess.

20 Again, for the purposes of self-defense, the
21 desire to acquire new is a valid choice in this
22 instance, Your Honor.

23 The public interest that the State puts forth,
24 social science evidence that suggests that the types
25 of firearms to be banned are used in an overwhelming

1 number of crimes, that social science evidence, Your
2 Honor, the plaintiffs will be able to demonstrate that
3 that evidence will show that it's less than three
4 percent of crimes that these to-be-banned firearms are
5 involved in.

6 For what it's worth, Your Honor, the State's
7 attempt to put forth its social science evidence on
8 this point, they suggest that it is only under a
9 rational basis review or at most, intermediate
10 scrutiny. But again, our argument is we are looking
11 at these issues under strict scrutiny, and the State's
12 burden is much higher than the mere introduction of
13 social science evidence, as they have done.

14 The balance of equities, Your Honor, still on
15 that point, there is a recent case by Judge Garbis in
16 this district, PJK Food Service Corp. v Panache
17 Cuisine, 2013 U.S. District LEXIS 50028 at 2 and 3.
18 It was a 2013 case by Judge Garbis.

19 The Court stated that the balance of equities
20 can include the courts considering, one, any
21 irreparable harm that would be sustained by plaintiff
22 if a TRO turns out to be erroneously denied against,
23 two, any irreparable harm that would be sustained by
24 the defendant if a preliminary injunction or TRO turns
25 out to be erroneously granted.

1 So with that construct, Your Honor, I would also
2 point the Court to Chase v. Town of Ocean City, also
3 District of Maryland, at 825 F.Supp.2d 599.

4 In that case, Your Honor, there was a challenge
5 to a city ordinance that threatened the plaintiffs
6 with fines for exercising a First Amendment right.
7 Ordinarily, such a threatened injury to plaintiff will
8 easily outweigh whatever burden the injunction may
9 impose because the government is in no way harmed by
10 the issuance of an injunction that prevents the State
11 from enforcing unconstitutional restrictions.

12 That Town of Ocean City case obviously was
13 within the context of the First Amendment. We would
14 submit to Your Honor that the Fourth Circuit case of
15 Chester would liken the Second Amendment fundamental
16 right to bear arms with the First Amendment free
17 speech right, and that the Court could look to First
18 Amendment context and find it equally applicable to
19 the case here, and that in this instance, Your Honor,
20 the State does not have an interest in the enforcement
21 of an unconstitutional regulation.

22 Our plaintiffs, on the other hand, Your Honor,
23 have a daily violation of constitutional rights that
24 outweighs the government's purported interest. As we
25 move into public interest supporting a TRO, obviously

1 those two factors, we can kind of morph in and out of
2 the two of them.

3 But moving to the more specific on public
4 interest, it is our position, Your Honor, that a TRO
5 is necessary to preserve the status quo of the
6 plaintiffs' right to acquire these certain commonly
7 used firearms and magazines for self-defense in the
8 home pending this Court's determination of whether to
9 grant a preliminary injunction.

10 The granting of the plaintiffs' request for a
11 TRO would allow both plaintiffs and defendants an
12 opportunity to fully brief this issue at the
13 preliminary injunction stage. But as I said a moment
14 ago, the public has no interest in the enforcement of
15 an unconstitutional law.

16 The public interest is best served by granting
17 our requested TRO because it would ensure that the
18 defendants do not impermissibly prevent law-abiding,
19 responsible citizens from exercising a fundamental
20 right to acquire and possess commonly used firearms in
21 their homes for self-defense.

22 I would note, Your Honor, that if the public
23 interest is so strong in banning these firearms and
24 magazines as of today, why was it not so strong as to
25 require an immediate ban earlier this year?

1 The General Assembly passed this Act on April
2 4th. Defendant O'Malley signed the Act on May 16th.
3 The State has identified nothing in the interim that
4 suggests that the public is any more at risk today
5 than they were yesterday.

6 THE COURT: Isn't it fairly common to give the
7 public some time to adjust to a new law? I mean are
8 you complaining that there was not time between April
9 and October for folks to make plans, perhaps acquire
10 additional weapons, perhaps file a lawsuit earlier?

11 MS. WOODWARD: That is not our point, Your
12 Honor. Our point is, as it relates to the State's
13 argument that it is in the public interest to deny a
14 TRO today, our point is if it is in the public
15 interest to deny the TRO such that the to-be-banned
16 firearms -- such that the firearms ban goes into
17 effect today, and the limitation on magazine
18 capacities goes into effect today, why is today any
19 more of a risk to public safety than was yesterday?

20 The State has not been able to demonstrate, has
21 not refuted that particular point, that yesterday is
22 any different from today.

23 To the point of irreparable harm, Your Honor,
24 plaintiffs will suffer irreparable harm without a TRO.

25 At the very heart of this, Your Honor, is a

1 fundamental constitutional right. To be able to
2 exercise that fundamental constitutional, enumerated
3 right, one must be able to purchase a firearm of
4 choice for use in the home that is in common use, and
5 is not dangerous and unusual. It is that fundamental
6 right that we are here on today.

7 A fundamental right is no right at all if a
8 restraint on its exercise cannot be addressed by the
9 Court the day of its implementation.

10 THE COURT: I'm going to need to ask you to wrap
11 up so I have time for the rest of the arguments.
12 Thanks.

13 MS. WOODWARD: I am concluding, Your Honor.

14 Your Honor has already pointed out some of the
15 arguments that actually the State had made in its
16 opposition papers, which was that the individuals
17 perhaps already own a firearm for self-defense.
18 Again, we submit that there is no rationing of the
19 right available to the defendants.

20 This Court has the jurisdiction to enter a TRO.
21 The defendants don't dispute that there is a
22 constitutional right of individual business and member
23 associations.

24 Plaintiffs, they do not dispute that beginning
25 today the plaintiffs will be unable to acquire and

1 possess in their homes for self-protection certain
2 commonly used firearms that will be banned, and the
3 defendants have pointed to no adequate remedy at law
4 by which the plaintiffs may exercise their rights in
5 the absence of equitable relief from this Court.

6 Thank you, Your Honor.

7 THE COURT: Thank you very much. I appreciate
8 it.

9 Mr. Fader.

10 MR. FADER: Good morning. May it please the
11 Court.

12 By enacting Chapter 427 of the 2013 laws of
13 Maryland, the General Assembly created a comprehensive
14 measure to stem gun violence in Maryland. Two of the
15 provisions that were critical in Chapter 427 were the
16 provisions that are at issue in the Tardy case, a ban
17 on the future purchase of assault weapons, and a ban
18 on the future purchase of high-capacity magazines.

19 Through a lot of evidence that was presented to
20 the General Assembly, the General Assembly determined
21 that the public interest of the State of Maryland was
22 best served by banning these very dangerous weapons
23 that have led to significant -- that have led to mass
24 shootings and other things that the General Assembly
25 was very concerned about.

1 THE COURT: On that point, the evidence that was
2 presented to the General Assembly, have you given me a
3 comprehensive set of that in your memorandum response
4 so far?

5 There were a few -- there were some exhibits
6 attached, and you did refer to some testimony, but I'm
7 not sure if I've got sort of, as of yet, a full
8 picture of what evidence was presented to the General
9 Assembly and whether it made any specific findings
10 about this law.

11 MR. FADER: I don't believe we've given you a
12 comprehensive set. As I understand it, the General
13 Assembly did not make specific findings with respect
14 to this law. It's the unusual case in which the
15 General Assembly makes specific findings, and it's the
16 information before it. In fact, I think the Court's
17 review is not limited to the information before the
18 General Assembly.

19 THE COURT: That's true.

20 MR. FADER: The Court can consider other
21 evidence as well, and we've cited other evidence,
22 including the evidence relied on by the District of
23 Columbia Court of Appeals in the Heller II case,
24 addressing exactly the same laws that are being
25 challenged in this case before Your Honor.

1 THE COURT: Right.

2 MR. FADER: I just diverge for one second
3 because in describing the law with respect to assault
4 weapons, I believe there was some confusion before.

5 The law with respect to assault weapons is
6 accomplished in three ways. One is there's a specific
7 list of specific assault long guns that are covered.

8 Second, the law also applies to their copies.

9 THE COURT: Right.

10 MR. FADER: And third, there's a separate
11 copycat provision. So the copies and copycat are two
12 separate things.

13 Copies is what was briefed by the two parties.
14 That's what has been in the law since 1996. That has
15 not changed. There's nothing that has changed with
16 respect to having copies covered.

17 There's a new provision that is a copycat
18 provision that specifically identifies as copycat
19 weapons weapons that have any two of three different
20 features, being a folding stock, a grenade launcher or
21 a flash suppressor.

22 That's the only thing that's new. It's not
23 subject to any vagueness challenge that was raised in
24 the complaint. In fact, it seems very
25 straightforward. You have two of those things or you

1 don't.

2 The provision that was raised in the complaint
3 by the plaintiffs as a claim of vagueness was the
4 copies provision, which has not changed in the last 17
5 years.

6 It is not vague, and even if it were otherwise
7 to be determined that it could be ambiguous, it has
8 been interpreted by the Maryland State Police and the
9 Attorney General to basically be not just a cosmetic
10 similarity, but it has to really be the same gun. It
11 has to have interchangeable parts, and that's not
12 something that there has been any concern raised with
13 the way that has been enforced or lack of
14 understanding of that in the 17 years that it has been
15 in the law.

16 THE COURT: That was one of my questions. So
17 that has not been challenged since 1996, I mean at
18 least in the form of a lawsuit or any ruling on it by
19 the Court of Appeals, anything?

20 MR. FADER: Certainly nothing that I am aware
21 of, Your Honor, and I think that provision is not only
22 in Maryland law, but it is a common provision in other
23 states' laws that have banned assault weapons that are
24 in place now as well.

25 I've just confirmed that there have been no

1 lawsuits that people who are even more familiar with
2 this than I am are aware of either.

3 THE COURT: Okay. As to the copycat weapons, as
4 you said, there has to be two of the three
5 specifically identified features in order for it to be
6 a copycat.

7 MR. FADER: That's correct, and these are some
8 of the features that make these weapons so dangerous
9 and able to be used in these incidents, some of which
10 we referred to, some of these mass shooting incidents
11 that have occurred in recent years that have been so
12 devastating to society.

13 One more point of clarification. I think Ms.
14 Woodward incorrectly said that we identified in our
15 brief these assault weapons to be banned as the ones
16 used in most crimes. I don't think that we said that
17 in our brief. In fact, that's not true. The vast
18 majority of weapons used in crimes as a general matter
19 are handguns.

20 It's the use of assault weapons in a minority of
21 crimes, but in the particularly heinous crimes that
22 give rise to mass casualties that make them so
23 particularly dangerous.

24 I wanted to clarify that as well.

25 THE COURT: Sure.

1 MR. FADER: Assault weapon bans in fact are not
2 new, nor are challenges to their constitutionality.
3 But what would be completely unprecedented would be a
4 finding that assault weapon bans are unconstitutional.

5 Your Honor has already referred to the Heller II
6 decision in which the Court of Appeals for the
7 District of Columbia reviewed essentially the same
8 bans, did a careful review of legislative history in
9 those cases, other social science evidence, and
10 concluded they were in fact constitutional.

11 A California intermediate appellate court in the
12 People v. James decision also reviewed these laws and
13 came to the same conclusion. We cited that case in
14 our brief as well.

15 And it is the dangerousness of these weapons
16 that are derived from military weapons that separates
17 them from weapons that have been found to be
18 protected, such as handguns, which were the issue in
19 Heller and McDonald, and in other cases that have been
20 before the Court.

21 On the point that was addressed as far as the
22 similarity between these types of items and the M16,
23 the Heller II decision I think deals with that very
24 explicitly, and that's at page 1263, 670 F.3d 1263,
25 where it dealt with this very issue of the quote from

1 Heller about M16 rifles.

2 And looking at evidence that was before the
3 District Court in that case, it noted that the M16 is
4 automatic and the AR-15 is semiautomatic, but said
5 semiautomatics still fire almost as rapidly as
6 automatics, based on evidence that was presented in
7 that case.

8 The District of Columbia Court of Appeals
9 specifically said it is difficult to draw meaningful
10 distinctions between the AR-15 and the M16 based on
11 that evidence. In fact, the Supreme Court in prior
12 cases also reviewed in that Heller II decision has
13 drawn comparisons between those two.

14 So by virtue of that, the Supreme Court's
15 reference to seemingly, without the need for further
16 analysis, the right to ban M16's and that kind of
17 military weapon strongly suggests that the same result
18 would be reached in this case.

19 Turning to the specific factors that the
20 plaintiffs need to prove to demonstrate a right to
21 preliminary injunctive relief, and that applies to
22 preliminary injunction, as well as a temporary
23 restraining order, they, of course, need to satisfy
24 all four of those factors, not just one, two or three.

25 Taking first the factor of irreparable harm, I

1 thin it's pretty clear on this record that there is no
2 prospect of irreparable harm to any of the plaintiffs
3 as a result of this lawsuit going into effect.

4 The delay in bringing this lawsuit has been
5 noted by the Fourth Circuit as an indication of an
6 absence of irreparable harm. The plaintiffs are
7 simply incorrect in stating that they would have been
8 met by a standing challenge if a lawsuit had been
9 filed earlier.

10 A declaratory judgment action to challenge a law
11 in advance of its effective date is a common thing and
12 helps to avoid last-minute challenges, for people to
13 walk in and have created an emergency of their own.
14 That itself is a factor that the Fourth Circuit has
15 looked at and said is an indication of the absence of
16 irreparable harm.

17 Moreover, as has been noted, each of the
18 individual plaintiffs already possesses the weapons
19 and magazines that are at issue, and if it really were
20 essential to self-defense, would have the ability to
21 use them. There simply has been no indication of any
22 irreparable harm at all.

23 With respect to the likelihood of success on the
24 merits, as to the assault weapons ban, first of all,
25 every court that has looked at the constitutionality

1 of such ban before, and there haven't been many, but
2 they have universally upheld them.

3 In fact, the Supreme Court in Heller did not
4 identify a right to any category, a subcategory of
5 weapons that somebody wants for self-defense. The
6 Supreme Court identified an individual right protected
7 by the Second Amendment for self-defense, for
8 self-defense in the home, and in that context,
9 recognized that handguns were unquestionably the
10 category of weapon most used for self-defense within
11 the home. I think the word the Supreme Court used was
12 the overwhelming choice. If handguns are the
13 overwhelming choice, then no other firearm can be the
14 overwhelming choice.

15 Here, we are dealing with a specific subclass of
16 long guns that is not the overwhelming choice of
17 individuals for self-defense within the home, and is
18 not protected as such, and, therefore, lies outside,
19 at a minimum, outside the core protection of the
20 Second Amendment.

21 That gets to the scrutiny issue that was being
22 discussed earlier. The Fourth Circuit has very
23 clearly identified that when the burden of a
24 regulation falls on a right that is outside the core
25 right of self-defense within the home, it is subject

1 not to strict scrutiny, but to intermediate scrutiny.

2 THE COURT: Assuming for the moment that we are
3 talking about intermediate scrutiny, would you
4 articulate for me just specifically the substantial
5 purpose, the governmental substantial purpose served
6 by this law, and the reasonable fit.

7 MR. FADER: Certainly, Your Honor.

8 The substantial purpose is the protection, is
9 public safety from gun violence, and that certainly
10 has been recognized as a compelling governmental
11 interest, including by the Fourth Circuit in the
12 Woollard case and the Masciandaro case, and the
13 Chester case as well. So it is protecting the public
14 from gun violence and furthering public safety.

15 The reasonable fit lies in the harm, protecting
16 the public from the harm that these weapons can
17 inflict. That was, of course, the subject of the
18 testimony and some of the evidence that we presented,
19 and a lot of the evidence that was before the General
20 Assembly, and considered by the United States Court of
21 Appeals for the District of Columbia Circuit in Heller
22 II, that identifies the public safety risks of these
23 guns, of course, as culminated in some of the
24 tragedies that the General Assembly had very fresh in
25 its mind when it enacted this law.

1 So the substantial fit is from the fact that
2 these very dangerous weapons, to the extent that they
3 proliferate and end up causing a danger to public
4 safety, that the General Assembly has the right to
5 determine that they are too dangerous in light of
6 their specific features, the features that have caused
7 them to be on this list, when people have access to
8 handguns and other types of long guns for the lawful
9 purpose of self-defense within the home, as well as
10 for other purposes, like hunting and sport shooting,
11 and things of that nature.

12 So it is not a ban on all weapons that could be
13 used for self-defense. Those rights are preserved,
14 the rights that the Heller court and the Fourth
15 Circuit following from that have found must be
16 protected by having weapons that can be used for
17 self-defense within the home.

18 This does not affect that. This affects a
19 particularly dangerous class of weapons suited for
20 military-style assaults, not the weapon overwhelmingly
21 chosen and best suited for self-defense within the
22 home.

23 THE COURT: You have alluded to this a little
24 bit. As I understood your papers, of course, the
25 purpose generally is public safety, but specifically,

1 you are focused on the particular dangerousness of
2 these weapons in connection with what I'll just call
3 mass murders.

4 I also saw a reference to the safety of law
5 enforcement officers. Is that something --

6 MR. FADER: It certainly is, Your Honor, and
7 that was another issue that was discussed in
8 particular in the Heller two decision, that these pose
9 particular risks to law enforcement.

10 They are, again, they are designed to be able to
11 be used for, you know, military-style assaults, and
12 that's why they are called assault weapons, and that
13 poses a particular risk to police officers in the
14 field if they were to come in contact with somebody
15 with these types of weapons, as distinct from a
16 handgun or a different type of long gun. It's a
17 particular danger to law enforcement.

18 THE COURT: As opposed to an argument that
19 crimes generally are more likely to be committed by
20 long guns. I mean you're not making that --

21 MR. FADER: Not at all. In fact, the opposite
22 is true. Crimes generally are more likely to be
23 committed using handguns.

24 THE COURT: Right. If we go forward with the
25 preliminary injunction hearing -- I'm just curious at

1 this point -- do you have in mind additional evidence?
2 Would you expect me simply to be looking at what's in
3 your memorandum now and what's discussed in the Heller
4 II, the D.C. Circuit Heller opinion, or have you
5 contemplated that yet?

6 MR. FADER: We haven't gotten to the point of
7 what additional evidence we might put in at that
8 point. I think a couple of things on that.

9 First of all, I think the evidence that's there
10 is certainly sufficient to show the reasonable fit to
11 the government's interest.

12 Secondly, I think that obviously we are not here
13 on the preliminary injunction, but there are a number
14 of factors that I think could not be overcome on a
15 preliminary injunction motion by the plaintiffs,
16 including the complete absence of irreparable harm.

17 So I would question the utility of that at this
18 point as opposed to proceeding to a hearing on the
19 merits on a permanent injunction. But we have not
20 gotten to the point of deciding what other evidence
21 there might be. This was filed on Friday.

22 THE COURT: Sure, sure. Again, this is
23 something I may just wind up discussing additionally
24 with counsel, but I would have a question about
25 whether, assuming it goes forward to an injunction

1 hearing, whether we even need to call it a preliminary
2 injunction or whether it would make sense to just get
3 to the merits, and whether there is or is not going to
4 be a permanent injunction so that you all could get to
5 the Fourth Circuit.

6 MR. FADER: I think there is a lot of sense in
7 that, Your Honor.

8 I will only touch on briefly, I think that it is
9 very clear that there is no evidence in the record
10 that one needs more than ten rounds at one time in
11 order to have a defense of the home. I think the
12 plaintiffs have promised such evidence to come, but it
13 is certainly not in this record and not something that
14 the Court can rule on.

15 As far as the equal protection claim, that is a
16 claim that would be subject to a rational basis.
17 There is no suspect class involved in this, and for
18 reasons we -- unless Your Honor has questions, I don't
19 feel the need to go into further -- we think it's
20 clear that retired law enforcement officers are not
21 similarly situated with respect to this specific
22 provision.

23 I addressed the vagueness issue I think already.

24 As far as the public interest, the General
25 Assembly of the State of Maryland has identified what

1 is in the public interest here based on the evidence
2 that the public safety requires this.

3 The fact that the General Assembly did not enact
4 this as an emergency law to take effect immediately is
5 irrelevant to that. The General Assembly determined
6 that the public safety required this Act.

7 Moreover, Your Honor is correct. It's not
8 unusual to have a time period. In fact, it is much
9 more usual for all laws to go into effect in Maryland
10 on October 1st. That's the standard. That's the
11 norm.

12 Whether the recent dramatic increase in sales of
13 these weapons in the last few months, if the General
14 Assembly had to do it over again, whether it would
15 have done it the same way is a question that nobody
16 will know. But the General Assembly's choice was to
17 have it go into effect in the normal course on October
18 1st, and that doesn't at all implicate whether there
19 is in fact a public interest basis for the law.

20 Unless Your Honor has further questions on this,
21 I think I'll sit down.

22 THE COURT: That's fine.

23 MR. FADER: Thank you.

24 THE COURT: Thank you.

25 Do you all want to move on to the Doe case?

1 MS. WOODWARD: Your Honor, if I could just add
2 two things to the record vis-a-vis this particular
3 motion?

4 THE COURT: Sure.

5 MS. WOODWARD: Your Honor had asked a question
6 regarding vagueness, and whether there was a case to
7 bring to the Court's attention.

8 There is a case, Your Honor, People's Rights
9 Organization versus City of Columbus, Court of Appeals
10 for the Sixth Circuit. The court had noted in
11 reference to other cases that nothing in the ordinance
12 provided sufficient information to enable a person of
13 average intelligence to determine whether a weapon
14 they wish to purchase has a design history of the sort
15 which would bring it within the ordinance's coverage,
16 and there was a holding of a similar provision invalid
17 because ascertaining the design history and action of
18 a pistol is not something that can be expected of a
19 person of common intelligence.

20 The record in that case indicated that the
21 average gun owner knows very little about how the gun
22 actually operates vis-a-vis its design features.

23 Now I don't want to suggest that a firearm user
24 does not know how to operate their firearm. I don't
25 want to put that out there and suggest that people

1 don't know what they are doing, but the mechanical
2 distinctions, Your Honor, are beyond the common
3 citizen.

4 THE COURT: Do you have a cite to that Sixth
5 Circuit case?

6 MS. WOODWARD: The cite to the Sixth Circuit
7 case, Your Honor, 152 F.3d 522, 1998.

8 THE COURT: Thank you.

9 MS. WOODWARD: Also on magazine rounds, Your
10 Honor, you had a specific question regarding really,
11 what's the difference between 10 and 20, I think to
12 get to the heart of that question.

13 We would submit, Your Honor, that it is a
14 15-to-19 round magazine that is common in popular
15 handguns and commonly used handguns. There are no
16 10-round magazines available for certain popular
17 commonly used handguns.

18 We are not asking for unlimited capacity. What
19 we are talking about here is what would be used on
20 standard handguns that are protected by Heller.

21 I just wanted to make sure that we had
22 information in the record that it is in excess of 10,
23 perhaps less than 20, in that 15 to 19 range, Your
24 Honor, that a plaintiff would use to have the
25 effective use of a handgun in the home.

1 THE COURT: Okay.

2 MS. WOODWARD: Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. SWEENEY: May it please the Court, this is
5 John Parker Sweeney again for the plaintiffs,
6 addressing the Doe lawsuit.

7 We are here simply asking to be able to acquire
8 handguns for use in the home for defense. This is the
9 core right of the Second Amendment that was addressed
10 by Heller and has been embraced by the Fourth Circuit.

11 The Fourth Circuit characterized it in Chester
12 as the right of a law-abiding, responsible citizen to
13 possess and carry a weapon for self-defense.

14 These rights are newly articulated, Your Honor.
15 It has only been five years since Heller was decided
16 in the Supreme Court, only three since McDonald came
17 down, clearly applying Heller to the states.

18 Maryland, as you know, has no constitutional
19 right to bear arms. It is one of the few states that
20 doesn't. It never has. There's no tradition here in
21 Maryland.

22 And it's not surprising that we hear hostility
23 not only in this courtroom, but throughout the state,
24 to the exercise of that newly articulated right.

25 I submit, Your Honor --

1 THE COURT: I will just interject to say that I
2 am not hearing hostility to the core fundamental right
3 of having at least handguns in the home for
4 self-defense. I don't think that's what this case is
5 about, not in this courtroom.

6 MR. SWEENEY: Well, Your Honor, when a hundred
7 thousand individuals flocked to the shops, to the
8 sporting good stores, to the Winks, to the Atlantic
9 Guns to purchase firearms this year, they
10 overwhelmingly chose handguns, and that is the vote
11 with the feet of the citizens of Maryland for their
12 weapon of choice for self-protection in the home.

13 Now the State said they regret that this has
14 happened. The Maryland State Police have issued a
15 number of releases, and this is not my first time in
16 court with Mr. Fader and Mr. Friedman with respect to
17 handgun regulation in Maryland. But this is my first
18 time in federal court, Your Honor.

19 The reason we are here in federal court today is
20 that today there is a de facto ban on acquiring
21 handguns. Unless you are active or retired law
22 enforcement or military, today you cannot go to the
23 Winks, you cannot go to Atlantic Guns and fill out a
24 Form 77R to purchase a handgun. You will be turned
25 away. There is a moratorium.

1 When the General Assembly passed the handgun
2 qualification requirement, I cannot believe, and there
3 is no indication, that they would require on October 1
4 a handgun qualification license for the purchase of a
5 handgun if there was none that could be obtained in
6 the State of Maryland, because the State of Maryland
7 had not implemented the system.

8 We have learned from the State's response,
9 Captain Dalaine Brady's affidavit, that they were
10 aware of this qualification requirement being put into
11 the Bill even before the Bill was introduced, that
12 they had millions of dollars that were allocated for
13 implementing the handgun qualification license
14 requirement.

15 Today we've learned that they are going to offer
16 them for the first time by application today, and that
17 the State does not expect applications to come in
18 right away. As Dalaine Brady's affidavit says, she
19 expects they will be staggered as they come in.

20 Why is that? That's because the training and
21 fingerprinting requirements for the new handgun
22 qualification license aren't fully up and running and
23 available to citizens.

24 I think it is quite telling that the State, in
25 its opposition papers to our motion, nowhere says a

1 date certain when the first handgun qualification
2 license will issue. They don't know, or if they know,
3 they certainly are not sharing it with us.

4 This is hostility to the exercise of the right
5 to acquire a handgun for self-protection in the home.

6 THE COURT: You're not challenging the licensing
7 law is unconstitutional, are you?

8 MR. SWEENEY: I am not, but as implemented, it
9 is becoming closer and closer to an implemented
10 challenge. But that's not what I am here for today,
11 Your Honor.

12 Today, no one, if you are not police or
13 military, can purchase a handgun. No one can go to a
14 store and apply, fill out a Form 77R for a handgun,
15 because they don't have a handgun qualification
16 license. This is a de facto moratorium.

17 Citizens of Maryland cannot buy a handgun today,
18 and we don't know how long that period will last.
19 We've asked. They haven't told us. We don't know.

20 So the denial of a right certainly starts with
21 the delay in allowing its exercise. Individuals,
22 individual members of association plaintiffs here
23 today who want a handgun can't purchase it.

24 THE COURT: But you are not suggesting that it
25 is unconstitutional, are you, that one --

1 MR. SWEENEY: I am suggesting -- I'm sorry.

2 Excuse me, Your Honor.

3 THE COURT: I'm sorry. Let me just finish.

4 That there be licensing and regulation schemes
5 in effect that would require, for example, a
6 background check, a delay?

7 I mean it is not unusual, I don't think, for
8 people to have to wait some period of time to purchase
9 a weapon.

10 MR. SWEENEY: The law of Maryland establishes a
11 seven-day waiting period, Your Honor, for the purchase
12 of a handgun. That law has been on the books for many
13 years. It certainly predates Heller. No one has
14 reviewed its constitutionality under Heller, and we
15 are not here today challenging the constitutionality
16 of that requirement. What we are challenging is
17 something more than that.

18 The seven-day waiting period associated with the
19 77R application to purchase a handgun has long been on
20 the books. We have established only earlier this year
21 that once that waiting period expires, a handgun may
22 be transferred.

23 That is not the issue. The issue is when will
24 anyone even be able to fill out a 77R to start that
25 seven-day waiting period running? We don't know when

1 that could be. At the earliest, it will be sometime
2 in November, at the earliest.

3 We have a de facto moratorium. They are not
4 ready. They don't have the process in place. Their
5 failure to implement the handgun qualification license
6 in a timely manner has resulted in a catch-22. You
7 need a license, but you can't get one. That's where
8 we are today, and they haven't told us when it will
9 happen.

10 Now, there is also a problem of the confusion
11 which has been created by the conflicting signals from
12 two of the defendants with respect to the massive
13 backlog of applicants for handguns.

14 We have something approaching 50,000 applicants
15 for handguns right now whose applications have not
16 been processed and approved or not disapproved by the
17 Maryland State Police.

18 The Attorney General's Office earlier this year,
19 in response to a delegate inquiry, opined that anyone
20 in the backlog as of October 1 could not receive
21 transfer of that handgun, once approved, unless they
22 had a handgun qualification license.

23 Suddenly, last week, the Maryland State Police
24 said well, we're not going to enforce that
25 requirement. It's not required, or maybe it's

1 required, but we are not going to enforce it, and has
2 thrown complete confusion into the community.

3 What we are asking for here today, Your Honor,
4 is a temporary restraining order and/or a preliminary
5 injunction for at least 90 days to allow the State to
6 get its act together, to have the handgun
7 qualification license process up and running, to allow
8 an opportunity for citizens to apply for a handgun
9 qualification license, to take that license down to a
10 shop and apply for a firearm. That's what we are
11 asking for today.

12 As I understand it, the State has not challenged
13 that this is a core Second Amendment right, but you
14 can't exercise it if you can't buy a handgun.

15 They said this is a temporary, a temporary
16 processing delay, and that we do not have a right to
17 immediate possession.

18 We're not asking for immediate possession.
19 That's not what we are asking here. We are asking for
20 the law to be stayed that will allow us to continue to
21 fill out Form 77R's and apply for the purchase of
22 handguns while the process is implemented, and that's
23 all we are asking for today. During this period of
24 time the backlog can be processed and resolved.

25 Now one thing very important, and I want to be

1 very careful to distinguish because I fear that I may
2 have struck with a little too broad a blade in my
3 motions papers. We are not asking for this Court to
4 stay all of Public Safety Article 5-117.1. We are
5 only asking that the Court stay provisions (b) and (c)
6 of that Article.

7 The reason we are only asking for those, those
8 are what we call in the paper the handgun
9 qualification license requirements. That is those
10 provisions of the law that prohibit the sale, rental
11 or transfer of a handgun to anyone without a handgun
12 qualification license, and prohibit anyone from
13 accepting that sale, rental or transfer without a
14 handgun qualification license.

15 That's all we are asking to be stayed today,
16 Your Honor. The State obviously misconstrued my
17 papers, and we were all working on a tight deadline.
18 We are not asking the application process to be
19 stayed. We are not here for that today.

20 If the State is up and running today as they say
21 they are -- and God bless them. I hope it works well,
22 and things are up and running -- that's fine. We are
23 not asking for a stay of that. What we want is a stay
24 of the prohibitions, a stay of the prohibitions from
25 our purchase today of handguns until the system is up

1 and running and handgun qualification licenses can be
2 issued. Until then, only the police and the military
3 can buy handguns.

4 We are proudly known as the Free State, Your
5 Honor, but the Second Amendment and the Fourteenth
6 Amendment to the Constitution were designed entirely
7 so that we did not become a police state.

8 Citizens are entitled to purchase handguns for
9 self-defense, and that is not happening today, and
10 only Your Honor can change that.

11 Thank you.

12 THE COURT: Thank you, Mr. Sweeney.

13 Mr. Fader.

14 MR. FADER: Thank you, Your Honor.

15 I would just like to begin -- obviously Your
16 Honor noted that you are not here in hostility to the
17 fundamental right, nor is the State here in hostility
18 to the fundamental right to self-defense in the home,
19 including through the use of handguns, and this law is
20 not hostile to that right.

21 This law requiring handgun qualification
22 licenses in order to purchase handguns was enacted, as
23 the rest of the package of laws in Chapter 427, for
24 the purposes of protecting public safety based on
25 scientific evidence of the value of this registration

1 system in keeping guns out of the hands of criminals.

2 Especially the fingerprint requirement that is
3 part of the handgun qualification license severely
4 curtails straw gun purchases that allow guns to get
5 into the hands of people who should not possess them.

6 This is not a law that bans handguns or comes
7 close to that, and the fact that there's an
8 administrative process that individuals need to go
9 through in order to get their handgun qualification
10 license does not burden the Second Amendment right to
11 ultimately possess those guns, and to have those guns
12 in their homes for the purpose of self-defense.

13 There are administrative delays. There have
14 been administrative delays in processing the firearm
15 application, which I hope we made clear in our papers
16 is a completely separate issue from the handgun
17 qualification license that goes into effect today.

18 In fact, the process is up and running. I
19 signed on this morning myself to make sure that it
20 was, and established a log-in ID to get to the screen
21 where you can start putting in your information to
22 apply for one. So the system is up and running today.

23 The argument that Mr. Sweeney made about we know
24 that there's not going to be any handgun qualification
25 license issued until November, I certainly don't know

1 that. The process is underway for the application.

2 The State, by law, has 30 days to complete the
3 review, but I don't think there's any indication that
4 it is necessarily going to take that long for the
5 first license to be issued, and there is not a
6 challenge here to the underlying constitutionality of
7 the requirement.

8 It's pure speculation to say that there are
9 going to be delays out into the indefinite future in
10 the issuance of these licenses, and as we noted in our
11 papers, there's no case that we are aware of that says
12 there is an immediate right to possession, without
13 going through a reasonable administrative process that
14 would result in background checks, including now
15 through the extra layer of security of the fingerprint
16 that is so important to making sure that the weapons
17 don't get into the hands of people in whose hands they
18 should not be.

19 There are two claims or at least two ways in
20 which the plaintiffs have articulated their claim, the
21 first, an allegation that there is essentially a de
22 facto ban on possession of handguns, or the
23 acquisition of handguns. It is certainly not a ban on
24 the possession of handguns. Everybody who has a
25 handgun and has had one continues to have one, and

1 handguns can be possessed and used for self-defense
2 within the home.

3 With respect to future acquisition, the State
4 has simply imposed a reasonable qualification process,
5 and if there are going to be problems in that process,
6 it's reasonable to let the process take its course and
7 see how it actually functions before exercising the
8 extraordinary equitable relief of enjoining a state
9 statute that was enacted for the protection of public
10 safety and protection to the citizens of the State of
11 Maryland.

12 The second claim that has been made by the
13 plaintiffs is really a complaint in search of a cause
14 of action, and there is no legal claim or legal cause
15 of action that they have articulated that could
16 provide the basis for a temporary restraining order
17 issued by the Court.

18 Their claim is that there is some sort of
19 conflict between the Attorney General's Opinion that
20 the law means what it says, which is you need a
21 handgun qualification license to buy a handgun as of
22 October 1st on the one hand, and the Maryland State
23 Police's press release saying that they do not intend
24 to enforce that requirement with respect to people who
25 have applications to purchase firearms pending as of

1 October 1st.

2 There's no conflict between, on the one hand,
3 the statement of what the law is, and on the other
4 hand, the statement of an agency saying how they
5 intend to enforce that law.

6 First of all, there's no conflict. Secondly,
7 even if there were, the plaintiffs haven't identified
8 an actual legal right or cause of action that would be
9 implicated by that and that would provide any basis
10 for equitable relief from this Court.

11 So the State does not believe that there is a
12 likelihood of success with respect to either of the
13 claims that the plaintiffs have raised on the merits,
14 and much to the contrary, the likelihood of success
15 weighs strongly in favor of the State.

16 With respect to irreparable harm, we also don't
17 believe that there have been any allegations that rise
18 to the level of a likelihood of irreparable harm on
19 behalf of the plaintiffs. There has been a
20 significant increase in purchases of handguns over the
21 course of time since Chapter 427 has been enacted.

22 Handguns are possessed and have been acquired
23 and will, through this new administrative process, be
24 able to be acquired going forward, and there has not
25 been any assertion of actual irreparable harm as a

1 result of either the past delays in processing of
2 firearm applications, which are not even at issue in
3 their lawsuit, or the speculation as to potential
4 future delays in the process that has just gotten
5 underway today.

6 The General Assembly of the State of Maryland
7 determined, based on very strong scientific evidence
8 linking these fingerprinting requirements to keeping
9 handguns out of the hands of criminals, that it was in
10 the public interest to the State of Maryland that this
11 requirement went into place. The public interest,
12 therefore, certainly weighs against issuing equitable
13 relief.

14 And for the same reason, the balance of
15 equities, based on the public interest supported by
16 this law and this requirement going into effect, as
17 contrasted with, really, an absence of anything other
18 than possible economic harm to the dealer plaintiffs,
19 also weighs against the issuance of preliminary
20 equitable relief.

21 Unless Your Honor has any questions, thank you.

22 THE COURT: Thank you.

23 Mr. Sweeney.

24 MR. SWEENEY: If I may, Your Honor, very briefly
25 respond?

1 One, the seven-day statutory requirement for
2 Maryland State Police to act on 77R background checks
3 has now morphed into almost four months. It takes
4 four months after you apply for a handgun for you to
5 hear back from the Maryland State Police on whether or
6 not they have approved your application.

7 We have no idea how the handgun qualification
8 license processing will go, but they have to do all
9 the checks that are involved in the 77R application
10 checking process, plus they have to look at and check
11 fingerprints, and they have to look at and check
12 training requirement satisfactions that aren't present
13 in the current 77R.

14 So we expect it would take longer. We know
15 there will be different personnel involved, but all
16 I've heard again from Mr. Fader is speculation as to
17 when it will be offered.

18 We have asked for very specific relief, Your
19 Honor, very specific relief which will resolve this
20 situation satisfactorily, consistent with the
21 Constitution and the rights of the plaintiffs, as well
22 as the needs of the State of Maryland, and that is
23 that this Court issue a declaratory judgment that the
24 de facto prohibition created by the State's catch-22
25 is a violation of the Second Amendment, and a staying

1 of the effective date of only the prohibited
2 paragraphs of Section 5-117.1(b) and (c), and allow
3 the State to go ahead and process applications.

4 Thank you, Your Honor.

5 THE COURT: Thank you very much.

6 All right. Thank you all for your arguments.
7 I'm going to take about a ten-minute recess, and I'll
8 come back and give you a ruling.

9 (A recess was taken.)

10 THE COURT: Let me start by thanking counsel for
11 their thorough arguments and briefing on short notice.
12 I am here to consider the request for a temporary
13 restraining order first in the Tardy v. O'Malley case
14 and then in the Doe case.

15 Starting, of course, with the standards for a
16 temporary restraining order, which will be the same in
17 both cases, it is clear under current law, and I think
18 this at least is not debated, that the plaintiffs have
19 the burden of making a clear showing on all four
20 factors in regard to a TRO or, for that matter, a
21 preliminary injunction:

22 First, that they are likely to succeed on the
23 merits; second, that they are likely to suffer
24 irreparable harm; third, that a balance of hardships
25 tips in the plaintiffs' favor; and fourth, that the

1 injunction is in the public interest, paying
2 particular regard for the public consequences.

3 A couple of cases to cite for that are a 2013
4 Fourth Circuit case, Pashby versus Delia, 709 F.3d
5 307, and, of course, The Real Truth about Obama, 575
6 F.3d 343, simply for the standard.

7 It is also worth noting that in terms of the TRO
8 request, this is extraordinary relief. You need to
9 demonstrate a true emergency, and I will point out
10 again that it seems to me the plaintiffs have known
11 for months that this law would take effect October
12 1st, but the challenge was not filed until last
13 Friday.

14 What the law does, and I am speaking now of the
15 law at issue in Tardy, the challenge in Tardy,
16 generally speaking, and I am not going to be precise
17 about every statutory provision, but generally on and
18 after October 1st, this law prohibits the sale and
19 possession and receipt of assault weapons. These are
20 defined as certain semiautomatic pistols, which are
21 not the subject of the challenge. There are also
22 certain semiautomatic rifles and shotguns that are
23 defined as assault weapons and are affected by this
24 new law.

25 The new law also generally prohibits sale and

1 receipt of detachable magazines with the capacity of
2 over ten rounds of ammunition.

3 The law imposes criminal penalties for
4 violation, but it permits individuals to retain,
5 without penalty, all such long guns that were lawfully
6 acquired, or where the purchase has been applied for
7 prior to October 1st. Again, the assault pistol issue
8 is not challenged.

9 So turning to the likelihood of success on the
10 Second Amendment challenge, let me review some of the
11 relevant case law. Of course, Heller, a Supreme Court
12 case, established that the core element of the Second
13 Amendment is an individual's right to use weapons in
14 the defense of their home. Those weapons are those
15 commonly possessed by law-abiding responsible citizens
16 for that purpose, and the Court noted that handguns
17 are far and away the preferred self-defense weapon for
18 persons in their homes.

19 Heller, of course, involved a total ban on
20 handguns.

21 This challenged law, the aspect of the law that
22 is challenged, does not prohibit an entire class of
23 weapons. It is a subclass of long guns only,
24 classified as assault rifles.

25 The Second Amendment, as the Supreme Court

1 explained, does not protect dangerous and unusual
2 weapons, which the Court in that Heller opinion at
3 least mentioned included short barreled shotguns.

4 Heller was followed by the McDonald case, which
5 described Heller as holding that the Second Amendment
6 protects the right to possess a handgun in the home
7 for the purpose of self-defense, and, of course, held
8 the Second Amendment applicable to the states under
9 the due process clause of the Fourteenth Amendment.
10 So that's in part why we are here.

11 Counsel have referred to, and I agree it is a
12 very significant Fourth Circuit opinion, U.S. versus
13 Chester, 628 F.3d 673, from the Fourth Circuit, in
14 2010. The Fourth Circuit adopted, as a number of
15 other circuits have done, a two-part test, which is
16 first whether the challenged law imposes a burden on
17 conduct that falls within the scope of the Second
18 Amendment's guarantee.

19 If it does not, and the example they gave was
20 carrying a sawed-off shotgun, then the law is valid.
21 At least it is not subject to a Second Amendment
22 challenge.

23 If it does burden conduct within the scope of
24 the Second Amendment, then the Court needs to
25 determine, and then apply, the appropriate level of

1 means-end scrutiny.

2 In Chester, which, as you all know, criminalized
3 possession of a firearm after a misdemeanor conviction
4 for a crime of domestic violence, the Fourth Circuit
5 chose intermediate scrutiny. The Court explained that
6 the level of scrutiny to be applied depends on both
7 the nature of the conduct that is being regulated and
8 the degree to which the challenged law burdens those
9 rights.

10 Under intermediate scrutiny, of course, the
11 government has to demonstrate a reasonable fit between
12 the challenged law and a substantial government
13 objective.

14 In that case, the Fourth Circuit remanded to
15 permit the government to offer evidence to establish
16 that relationship.

17 I would note that in that case, one of the
18 judges on the panel, Judge Davis, concurred, but added
19 that he thought strict scrutiny would be unwarranted
20 in a Second Amendment case.

21 Since then there have been other challenges to
22 these criminal statutes. In Section 922(g)
23 convictions, challenges have been denied by the Fourth
24 Circuit under intermediate scrutiny. An example of
25 that is United States versus Mahin, at 668 F.3d 119.

1 Now another case that counsel appropriately
2 referred to, and I may or may not also pronounce it
3 correctly, is United States versus Masciandaro, at 638
4 F.3d 458, which applied intermediate scrutiny to
5 uphold a conviction for carrying a loaded firearm in a
6 car, in violation of National Park regulations. The
7 Court did assume, but not decide in that case, that
8 strict scrutiny would apply to any law that burdened
9 the fundamental core right of self-defense in the home
10 by law-abiding citizens.

11 Similarly, we have Woollard versus Gallagher --
12 I believe that's the most recent one here from the
13 Fourth Circuit -- 712 F.3d 865, where the Fourth
14 Circuit again upheld under intermediate scrutiny the
15 requirement that a person show good and substantial
16 reason to wear and carry a handgun outside the home,
17 again assuming, without deciding, that strict scrutiny
18 would apply if the requirement were applied to
19 carrying handguns inside the home. Again, a broader
20 and different class of weapons was involved.

21 So it seems to me the question here first, on
22 likelihood of success, when I at some point get to an
23 actual decision on the merits, is whether the Second
24 Amendment applies to these assault weapons at all or
25 whether these are unusual and dangerous, like the

1 sawed-off shotgun; assuming, and again, a number of
2 courts have just gone on to that second prong and
3 assumed that some Second Amendment protection applies,
4 what's the level of scrutiny?

5 I think an extremely persuasive opinion in this
6 regard is Heller versus D.C., the D.C. Circuit case,
7 at 670 F.3d 1244. Again, simply at this point for
8 purposes of the temporary emergency relief and the
9 factors that I need to look at, likelihood of success,
10 I am likely to agree with the D.C. Circuit -- assuming
11 that the Second Amendment applies at all, intermediate
12 scrutiny is the correct standard; though, I am not
13 making that determination at this point.

14 I note that despite some of the language about
15 strict scrutiny in the Fourth Circuit cases, if you go
16 back to the Chester case, the Fourth Circuit tells you
17 that you also have to look at the degree to which the
18 conduct burdens a core right, and this law is a
19 prohibition only of a limited number of long guns that
20 we are talking about. It does not affect law-abiding,
21 responsible citizens' right to possess handguns in the
22 home for self-defense, and the Supreme Court has told
23 us that's the weapon of choice for self-defense. It
24 does not impinge on law-abiding, responsible citizens'
25 right to possess most long guns in the home for

1 self-defense as well.

2 Of course, those citizens can still have
3 magazines that fire up to ten rounds without
4 reloading.

5 The Heller case, assessing a very similar law,
6 did note that assault rifles were in common use, and
7 in this case plaintiffs have presented some evidence
8 about the sale and common purchase of these kind of
9 rifles; but the D.C. Circuit noted that they were not
10 necessarily in common use for self-defense.

11 Plaintiffs' counsel tells me that they will be
12 able to provide that evidence. There is certainly no
13 evidence of that yet, that it is necessary or common
14 for assault rifles and high capacity magazines to be
15 used for self-defense in the home.

16 The D.C. Circuit decided that even if the Second
17 Amendment were implicated, this ban on assault rifles
18 and high capacity magazines was not a substantial
19 burden on a core Second Amendment right, and that the
20 government had showed a reasonable fit between this
21 prohibition and the substantial governmental interest
22 of protecting law enforcement officers and controlling
23 crimes, especially those involving mass tragedies,
24 mass wounding and murder, and there were a number of
25 studies that were cited for that proposition in the

1 D.C. case.

2 So I do not find at this point that the
3 plaintiffs have made a clear showing of a likelihood
4 of success on the merits, as would be required to
5 grant the extraordinary relief they seek, nor have
6 they made a clear showing of the likelihood of
7 irreparable harm.

8 First of all, I do believe that the delay in
9 bringing this suit undercuts their argument of
10 irreparable harm. This could have been brought months
11 ago and was not.

12 Second of all, the individuals, and particularly
13 the individual plaintiffs here, still have the assault
14 weapons and high capacity magazines that were acquired
15 legally before October 1st and have those available
16 for self-defense.

17 There is a very limited amount of potentially
18 economic harm that has been proffered on behalf of the
19 dealers. Again, we are talking about not a
20 necessarily lengthy period of time, so I don't think
21 that's an irreparable harm that has been shown by the
22 plaintiffs.

23 So turning for the moment to the public
24 interest, I believe there is a strong public interest
25 in upholding a duly enacted law that is directed at

1 the protection of public safety, including lessening
2 the risk of mass tragedies, like Newtown, and others
3 in the news, and lessening the risk of harm to law
4 enforcement officers.

5 In some of the information and evidence provided
6 by the State, which they have said they may wish to
7 supplement, there is even reference to the fact that a
8 necessity to pause to reload has enabled citizens in
9 some instances to intervene and disarm people who are
10 involved in these horrific crimes.

11 In any event, I do not find that the balance of
12 harm, therefore, tips in favor of the plaintiffs,
13 quite the contrary.

14 I don't find the plaintiffs' need to be able to
15 fire more bullets, again, in the absence of some kind
16 of evidence that this is necessary for self-defense,
17 the need to fire more bullets in defense of the home,
18 which appears to be based on the lack of accuracy that
19 they propose the citizens would have in firing these
20 weapons, I can't see that as tipping the balance in
21 favor of the plaintiffs, or arguing against the strong
22 public interest here.

23 The equal protection argument, to the extent
24 that it is here to be made, I think the State has
25 clearly shown a rational basis for distinction between

1 retired law enforcement officers and other citizens.
2 Just to mention the training that they receive would
3 be one element of that distinction.

4 And it is not a general right, as I understand
5 it, for retired law enforcement officers to purchase
6 any assault weapon they might want to in the future.
7 It has to be connected to their retirement.

8 In terms of the vagueness challenge and
9 likelihood of success, it appears that the law on
10 copies has been the same since 1996, and it has not
11 been shown that it has been difficult for the
12 plaintiffs in this case, particularly dealers, and
13 those experienced in firearms, to understand those
14 definitions. The copycats are fairly clearly defined
15 under the law, I believe, in terms of the features
16 that are required.

17 Again, just in terms of likelihood of success, I
18 am not making a final ruling, and I will certainly
19 look at the Sixth Circuit case that the plaintiffs
20 have mentioned, as well as any other information they
21 might want to present about these definitions; but I
22 do not, on the current record, believe that the
23 plaintiffs have met the requirements for a temporary
24 restraining order, for the reasons that I have just
25 stated.

1 In terms of a preliminary injunction hearing, I
2 think the most sensible thing for me to do is to ask
3 counsel to confer and contact chambers, and we will
4 set up a conference call to discuss a reasonable
5 schedule for a preliminary injunction and what
6 evidence either side might want to present, and again,
7 the question of whether it should be purely a
8 preliminary injunction hearing or a hearing on the
9 merits. We can talk about that more with a conference
10 call and consider further all the issues that both
11 sides have raised today.

12 I will enter a separate very brief order -- this
13 is obviously my oral opinion -- denying the temporary
14 restraining order in the Tardy case.

15 Regarding the Doe case, I will also find that
16 the plaintiffs have failed to meet the requirements
17 for a temporary restraining order. This seems to me
18 at this stage particularly speculative. The
19 plaintiffs have not shown any irreparable harm.

20 There's a handgun qualification licensing system
21 that is not challenged. It begins today. There is no
22 showing yet of any unreasonable delay.

23 There is an administrative delay in place now
24 for processing the applications. That is not the
25 issue. That's not part of the new law. Of course,

1 that is caused by the extreme increase in applications
2 for guns of various kinds that has occurred between
3 the enactment of this law and the effective date here
4 in October.

5 But as far as the handgun qualification
6 licensing requirement, on the record in front of me,
7 it is up and running today. Whether, or what degree
8 of delay there will be, at this point is speculative.

9 With no challenge to the underlying
10 constitutionality of the handgun qualification
11 licensing requirements, and there being no right to
12 immediate possession of even handguns, and no harm
13 that I can see shown from the Maryland State Police
14 saying that they may choose not to enforce some
15 provisions in this law, I certainly can't see that
16 there is a sufficient showing of likelihood of
17 imminent harm, or a likelihood of success on the
18 merits that would outweigh the public interest in
19 permitting, again, a duly enacted law that is aimed at
20 protecting public safety and keeping guns out of the
21 hands of criminals from proceeding in effect as it is
22 today.

23 So I will do a separate short order denying that
24 and again can discuss with counsel in a separate
25 conference call what schedule may be necessary for

1 further proceedings on that issue.

2 Anything I have not addressed, anything else
3 anybody needs to say? I understand you disagree, but
4 anything you feel I have not addressed or would like
5 me to clarify?

6 MR. SWEENEY: Nothing further, Your Honor.
7 Thank you.

8 MS. WOODWARD: Thank you, Your Honor.

9 MR. FADER: Nothing further, Your Honor.

10 THE COURT: All right. Thank you all.

11 (The proceedings concluded.)
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REPORTER'S CERTIFICATE

I hereby certify that the foregoing transcript in the matter of Shawn J. Tardy, et al., Plaintiffs vs. Martin J. O'Malley, in his official capacity as Governor of the State of Maryland, et al., Defendants, Civil Action No. CCB-13-2841, and Jane Doe, et al., Plaintiffs vs. Martin J. O'Malley, in his official capacity as Governor of the State of Maryland, et al., Defendants, Civil Action No. CCB-13-2861, before the Honorable Catherine C. Blake, United States District Judge, on October 1, 2013 is true and accurate.

Gail A. Simpkins
Official Court Reporter

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EXHIBIT

B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAWN J. TARDY, ET AL.

v.

MARTIN J. O'MALLEY, ET AL.

:
:
: CIVIL NO. CCB-13-2841
:
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ORDER

For the reasons stated on the record in open court, it is hereby **ORDERED** that:

the plaintiffs' Motion for Temporary Restraining Order is **Denied**.

October 1, 2013
Date

/s/
Catherine C. Blake
United States District Judge

EXHIBIT

C

Guide to
The New York Safe Act
for
Members of the Division of State Police



Prepared by
The Office of Division Counsel
September, 2013

NY State Police Guide to the Safe Act

September, 2013

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INTRODUCTION

The NY SAFE Act, signed into law by Governor Cuomo on January 15, 2013, amended various provision of New York law in relation to firearms, long guns, assault weapons and ammunition. The Act was intended to enhance public safety by:

- Expanding the classification of those weapons considered to be Assault Weapons and restricting their access, possession and transfer.
- Providing safeguards, through the implementation of a new statewide database, to help ensure that individuals who are not qualified to possess certain weapons or ammunition do not obtain access to them.
- Restricting the types of magazines that individuals are allowed to possess and limiting the number of rounds permitted to be loaded in a magazine.
- Extending the requirement of a NICS check, formerly applicable only to commercial sales, to private sales of firearms subject to certain exceptions.
- Requiring those with existing firearms licenses (pistol permits) to renew or recertify these permits every 5 years.
- Establishing several new penal law offenses and enhancing the penalties for existing offenses
- Exempting records relating to the Act from public disclosure and providing all permit holders and applicants with an opportunity to ensure that any county records relating to their individual permit or application will also be exempt from the NY State FOIL provisions.

As with many large legislative initiatives, the SAFE Act has raised questions from members of the field relating to the scope of the Act and its effect on those police officers who will have the responsibility to enforce the various provisions. The purpose of this guide is to provide guidance to police officers regarding the enforcement of the Safe Act's provisions.

I. THE STATEWIDE DATABASE

The SAFE Act requires the creation of a statewide license and record database¹, through which records will be checked in order to determine whether or not a particular applicant or licensee is or remains qualified to possess a firearm or to register an Assault Weapon.

Disqualifiers will include traditional criteria, such as not being convicted of a crime or serious offense, and new criteria established by the Act, such as expanding the situations where a court must suspend or revoke a subject's license pursuant to an Order of Protection or where the person has been the subject of a mental health professional's determination that he or she is likely to engage in dangerous behavior.

Database records will be checked when the subject applies for a firearm's license or when he or she seeks to register an Assault Weapon. The system will also continually run checks after the application or registration process and will detect if a licensee or registrant subsequently becomes unqualified.

The database will be maintained by the State Police and records assembled or collected for purposes of inclusion in the database are exempt from public disclosure laws. It is currently being assembled and is expected to be operational in 2014.

EFFECT ON POLICE (Database)

Other than the personnel assigned to build and input data, there is no direct effect on law enforcement personnel. However, there will be an indirect effect in those cases where the applicant or registrant is disqualified because police officers may be assigned to secure weapons owned or possessed by a person who does not meet the qualification requirements.

The Statewide Database is the common thread in all of the Safe Act provisions. All of the eligibility checks for the various parts of the act will utilize this database.

¹ New Penal Law section 400.02.

II. ASSAULT WEAPONS

1. **Definition:** The Safe Act redefined the term “Assault Weapon” and created registration requirements for those who lawfully owned them before the enactment of the statute.

As of January 15, 2013, the term “Assault Weapon” has been redefined as:²

- A semiautomatic rifle that has an ability to accept a detachable magazine and has at least one of the following military characteristics:
 - a. Folding or Telescoping Stock
 - b. Protruding Pistol Grip
 - c. Thumbhole Stock
 - d. Second Handgrip or Protruding Grip that can be held by non-shooting hand
 - e. Bayonet Mount
 - f. Flash Suppressor
 - g. Muzzle Brake
 - h. Muzzle Compensator
 - i. A threaded barrel designed to accommodate the above
 - j. Grenade Launcher
- A semiautomatic shotgun having at least one of the following characteristics:
 - a. Folding or Telescoping Stock
 - b. Thumbhole Stock
 - c. Second Handgrip or Protruding Grip that can be held by non-trigger hand
 - d. Fixed magazine capacity in excess of seven rounds
 - e. An ability to accept a detachable magazine
- A semiautomatic pistol, able to accept a detachable magazine and has at least one of the following characteristics:
 - a. Folding or Telescoping Stock
 - b. Thumbhole Stock
 - c. Second Handgrip or Protruding Grip that can be held by non-trigger hand
 - d. Capacity to accept an ammunition magazine that attaches to the pistol outside the pistol grip
 - e. A threaded barrel capable of accepting a barrel extender, flash suppressor, forward hand grip or silencer
 - f. 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
 - g. A manufactured weight of fifty ounces or more when the pistol is unloaded

² There are some exceptions to this definition. For example a rifle, shotgun or pistol that is manually operated by bolt, pump, lever or slide action, an antique firearm, and those firearms, rifles and shotguns made at least 50 years ago are not classified as Assault Weapons. Officers seeking more specific information on these and other exceptions should check the information on the Internet at <http://www.governor.ny.gov/nysafeact/gun-reform> or contact the state police Safe Act hotline at 1-855-LAW-GUNS.

2. Registration Requirements

Anyone who lawfully possessed a weapon on or before January 15, 2013, that has been redefined as an Assault Weapon by the Act, may keep that weapon provided the person registers the weapon by April 15, 2014. The registration process is a quick, simple and free procedure that can be conducted over the Internet. The web site is <https://firearms.troopers.ny.gov/safeact/welcome.faces>.

The registration for an assault weapon must be renewed every 5 years.

3. Restrictions on Transfers

Once registered, the person who registered it may keep the assault weapon for life, but may not transfer it to another unless the person he or she transfers it to is exempt from the law. There are no exceptions that allow a person to transfer an Assault Weapon to an immediate family member. Therefore, the owner of a registered assault weapon may only transfer it to a police officer, a firearms dealer or to a person in another state where possession of the weapon would be lawful.

4. Applicable Criminal Charges: (Chargeable after April 15, 2014)

Applies when a person lawfully possessed the assault weapon before January 15, 2013.

Failure to Register an Assault Weapon / PL 400.00 (16-a) (c) (class A misdemeanor)

A person who knowingly fails to register by April 15, 2014, may be charged with PL section 400.00 (16-a) (c) / “Knowingly Failing to Register an Assault Weapon,” a class A misdemeanor. This charge applies to a person who lawfully possessed the weapon prior to the Safe Act, knew that the weapon was of the type that must be registered and failed to register it.

Applies when the person did not lawfully possess the assault weapon before January 15, 2013.

Criminal Possession of a Weapon 3rd / PL 265.02 (7) (class D felony)

The only assault weapons that may be registered, and therefore, are exempt from the firearms laws are those that were lawfully possessed by the person before the Safe Act became law on January 15th, 2013. Therefore, a person who acquired an assault weapon after January 15th is subject to full criminal liability for possessing the weapon unless he or she is covered by one of the exemptions in PL 265.20.

EFFECT ON POLICE (Assault Weapons)

A. Serving Police Officers

While police officers may continue to legally purchase and possess Assault Weapons and Large Capacity Ammunition Feeding Devices under the former police exemption in Penal Law 265.20 (a) (1), this exemption only applies when the officer is an active police officer. Once a police officer retires, he or she is prohibited from possessing an Assault Weapon or Large Capacity Ammunition Feeding Devices unless he or she 1) is eligible to register it in the same manner as anyone else (i.e. it was made unlawful by the Safe Act, acquired by the officer before 1/15/13 and is registered by 4/15/14), or 2) meets the definition of a “Qualified Retired New York or Federal Law Enforcement Officer.”

If the weapon was acquired by the officer after January 15, 2013, and the officer does not meet the requirements as a “Qualified Retired” officer (set forth below), he or she will not be able to possess the weapon while retired because there would be no authority to register an Assault Weapon acquired after that date. Likewise, if, by April 15, 2014, an officer had not registered an Assault Weapon that he or she possessed on or before January 15, 2013, and he or she does not qualify as a retired officer as set forth below, the officer would have lost the opportunity to keep the weapon after retirement.

B. Qualified Retired Enforcement Officers

A retired officer who meets the definition of a Qualified Retired New York or Federal Law Enforcement Officer may possess a registered assault weapon or large capacity magazine that would otherwise be unlawful if all of the following conditions are met:

1. The officer **must be retired** and not merely separated from service.
2. The weapon or magazine must have been issued to or **purchased by the officer** in the course of his or her official duties.
3. The device must be **personally owned** by the officer at the time of retirement or he or she must own “**comparable replacements** for such devices;” and,
4. The officer must have been **qualified by his or her agency** in the use of the weapon within the previous year before he or she retired; and,
5. The retired officer must have qualified again within 3 years of retirement and within every 3 years thereafter. (If the officer had been retired for 18 months or more on January 15, 2013, he or she has until July 15, 2014 to meet these post retirement qualification standards. However, he or she must still have been qualified by the agency in the use of the weapon before retirement.)

C. Assault Weapon Denial Procedures – Law Enforcement Responsibilities

In order to register an Assault Weapon, a person must be eligible to possess a rifle or shotgun. During the registration process, checks will be run through federal and state databases to ensure that the person who is attempting to register is not prohibited from possessing a weapon. If a person fails this check, notice will be sent to the local law enforcement agency having jurisdiction so that the weapon(s) may be recovered from the individual who is determined to be ineligible.

If the person is determined to be ineligible because of a mental health disqualifier or due to an order of protection, the statute provides that he or she will be afforded the opportunity to arrange for the lawful transfer or sale of that weapon. The law enforcement agency assigned will secure the weapon for safekeeping until the person has made these arrangements in accordance with the procedure set forth in Penal Law 400.05 (6). If the subject fails to make these arrangements, the weapon automatically becomes a nuisance weapon and must be destroyed or rendered useless for its intended purpose.

If the person is determined to be ineligible due to a criminal conviction, the local law enforcement agency assigned will recover the weapon using whatever procedures are currently in place for members of that agency upon discovering that a convicted felon is unlawfully possessing a weapon. In such case, the weapon is automatically classified as a nuisance weapon and the weapon will be destroyed. Unlike the other situations, possession of any rifle or shotgun by a person who has been convicted of a felony or serious offense is a crime for which an arrest may be made. As such, there is no opportunity for the person to arrange for a lawful sale or transfer of the weapon.

A person who is denied due to a mental health disqualifier will have the opportunity to sell or transfer the weapon to a person who may lawfully possess it, such as a dealer.

III. MAGAZINES

1. Capacity

Under the previous law, a magazine manufactured before September 13, 1994 was specifically exempted from the definition of large capacity ammunition feeding device in PL 265.00 (23). As such, a person with a pre-94 magazine could not be charged with the class D felony of Criminal Possession of a Weapon in the third degree under PL 265.02 (8). This exemption has been removed by the Safe act.

However, the exemption has been relocated by the Safe Act and is now found in the body of PL 265.02 (8) itself. It will now only exempt a person from criminal liability if the person acquired the magazine before January 15th, 2013. In other words, if someone obtains a pre-94 magazine now, of the same type that was formerly lawful under the old exemption, or obtained it anytime after the Safe Act became law on January 15th, that person could be charged with the class D felony under PL 265.02 (8) because the pre-94 exemption would not apply to him or her.

Possession of some pre-94 magazines may not be felonies, but they are still illegal under the Safe Act.

It is important to understand that the existence of the exemption in amended PL 265.02 (8) does not mean that possession of a pre-94 magazine with a capacity of more than 10 rounds is still lawful for those who legally possessed them before January 15, 2013. It is not. By taking the exemption out of the definition in 265.00 (23) and moving it to PL 265.02 (8), the legislature merely established a system that imposes a lesser penalty on those who retained their pre-94 magazines and did not modify them so that their capacity is 10 rounds or less. To accomplish this, the Legislature created new Penal Law section 265.36 set forth below.

2. **New Penal Law section 265.36 / Unlawful Possession of a Large Capacity Ammunition Feeding Device / class A misdemeanor**

This reduced charge only applies to those who, before January 15th, 2013, lawfully possessed an ammunition feeding device having a capacity of more than 10 rounds. Penal Law section 265.36 prohibits the knowing possession of these previously exempt magazines (manufactured before 1994 having a capacity of more than 10 rounds). A violation of this section is a class A misdemeanor.

But ... there's a catch...

If a person 1) **mistakenly believed** that possession of a pre-94 magazine was still legal; and if, 2) he or she either surrenders the magazine or lawfully disposes of it within 30 days after being notified by law enforcement or a county official that the magazine is unlawful, he or she may not be charged with this offense. A person may lawfully dispose of the device by:

1. Transferring it to a dealer; or,
2. Transferring it to a person who is exempt from the statute, such as a police officer; or
3. Permanently modifying it to reduce its capacity to 10 rounds or less.

3. Relationship between new Penal Law section 265.36 and amended Penal Law section 265.00 (22) (h).

Although new Penal Law section 265.36, which became effective in March of 2013, indicates that a person could be charged with possession after the 30 day warning period has expired, new paragraph (h) of Penal Law section 265.00 (22) creates a grandfather provision that allows people to lawfully possess these magazines until January 15, 2014:

*An individual who transfers any such large weapon or large capacity ammunition feeding device to an individual inside New York state without complying with the provisions of this paragraph shall be guilty of a class A misdemeanor **unless such large capacity ammunition feeding device, the possession of which is made illegal by the chapter of the laws of two thousand thirteen which added this paragraph, is transferred within one year of the effective date of [the Safe Act].***

Because of this provision, new section 265.36 is not enforceable until after January 15, 2014. Even then, a person possessing one of these magazines should only be arrested if the police officer can show that the person knew that the magazine was unlawful. If the person has a reasonable, mistaken belief that the pre-94 magazine was lawful, he or she is entitled to the 30 day grace period with which to transfer it.

4. Certain Tubular Devices / Curios and Relic Exemptions

Possession of an ammunition feeding device that has a capacity of more than 10 rounds is still legal under the Safe Act if:

- a. It is an attached **tubular device** designed to accept, and capable of operating only with .22 caliber rimfire ammunition; or,
- b. It qualifies as a **curio or relic**. In order for a magazine to be a curio or relic it must:
 - i. Have been manufactured at least 50 years prior to the current date; and,
 - ii. Is capable of being used exclusively in a weapon that was manufactured at least 50 prior to the current date; and,
 - iii. the possessor is not prohibited from possessing a firearm; and,
 - iv. the magazine is registered with the State Police

Curios and relics may still be legally purchased and brought into the State but they must be registered within 30 days of their transfer into New York. The restrictions on transfers, applicable to Assault Weapons, do not apply to relics or curios.

5. Possessing a magazine loaded with more than 7 rounds / New PL section 265.37

Although a person may continue to possess magazines *with a capacity of* 10 rounds, the SAFE Act prohibits having more than 7 rounds loaded in any particular magazine. New Penal Law section 265.37 provides that it is unlawful for a person to knowingly possess an ammunition feeding device where such device contains more than seven rounds of ammunition.

a. Exception to the 7 Round Rule: Range and Sporting Events

The Safe Act added a new subdivision 7-f to the exemptions in PL 265.20 to authorize the possession and use of a magazine containing 8, 9 or 10 rounds at a firing range, at a collegiate, Olympic or target shooting competition approved by the NRA, or at an organized match sanctioned by the International Handgun Metallic Silhouette Association.

6. Penalties (possessing more than 7 rounds in magazine) PL 265.37

- If the violation occurs **within the home** of the person:
 - 1st offense = violation, subject to \$200 fine
 - Subsequent offense = class B misdemeanor / subject to \$200 fine / up to three months imprisonment
- If the violation occurs in **any other location**:
 - 1st offense = class B misdemeanor / subject to \$200 fine / up to six months imprisonment
 - Subsequent offense = class A misdemeanor / up to one year imprisonment

EFFECT ON POLICE (Magazine Laws)

A. Police exemptions

Police officers remain exempt from the provisions of 265.02 and may continue to possess large capacity ammunition feeding devices for as long as they are serving police officers. In addition, two new exemptions have been created to exempt police officers from the provisions of PL 265.36 (the new reduced charge for pre- 94 magazines) and PL 265.37 (loading with more than 7 rounds).

B. Visiting police officers from other states

Police officers from other states who are conducting business within New York have been exempt from the laws relating to the possession of firearms and magazines under PL 265.20 (11). This exemption also covers the new crimes and offenses created by the Safe Act.

C. Retired police exemption

For a discussion of the retired police exemption, see page 5.

D. Right to check and inspect magazines v. firearms

Absent some indication of criminal activity, there is no right to inspect the contents of a magazine to ensure that it meets the requirements under the Safe Act. If an officer has probable cause to believe that a particular magazine is unlawful, he or she may seize and inspect it. If there is founded suspicion of criminal activity, the officer may ask for consent to check the magazine. However, the mere existence of a magazine, which may or may not be legal, does not provide probable cause to believe that any law is being broken.

If the weapon is one for which a permit is required, police will be justified in checking the permit to ensure that the person lawfully possesses the firearm. If a permit cannot be produced, the officer would be legally justified in seizing the firearm and conducting an inventory of its contents. In this case, the inventory would include checking the magazine in order to account for each round. However, if the person produces a permit and there are no indications of unlawful conduct, an inspection of the magazine would be unnecessary. In this case, the weapon should be secured temporarily, in the same condition as it was found, for the duration of the stop and returned to the motorist at the conclusion of the encounter.

Unless there is probable cause to believe the law is being violated, there is no justification for checking a magazine to determine whether or not it contains more than 7 rounds.

IV. PRIVATE SALES

The Safe Act extended the requirement of a NICS check (National Instant Criminal Background Check System), which was previously limited to commercial weapons sales, to private sales through a new Article 39-DDD of the General Business Law (GBL).

1. General Business Law Article 39-DDD

GBL Article 39- DDD requires that all private sales of firearms, rifles or shotguns be conducted through a licensed importer, manufacturer or dealer. Before any private sales may be made, a NICS check must be conducted by a dealer on the purchaser. While a dealer is not required to facilitate a private sale, if a dealer chooses to do so, he or she must create and maintain records relating to private sales to prove that the background checks were conducted. These records may be inspected by a police officer and are not subject to public disclosure under the FOIL provisions. The Safe Act provides that a dealer may charge up to \$10 for facilitating these private transactions.

2. Immediate Family Exemption

There is an exception to the requirement of a background check for transfers of weapons between immediate family members. The term “immediate family members” is limited by statute to:

- Spouses
- Domestic Partners
- Children
- Step-children

3. Potential Charges

GBL Section 898 (6) / Unlawful Private Sale of a Firearm, Rifle or Shotgun.

A knowing violation of these new provisions of the General Business Law, regulating the private sale of firearms, is a class A misdemeanor. The enforceable subdivision is subdivision (6) of GBL section 898.

EFFECT ON POLICE

There is no exemption applicable to serving or retired law enforcement officers from these new provisions regulating private sales. Unless the officer transfers the weapon to an immediate family member, the sale must be made through a dealer and the purchaser must submit to a NICS check.

Police are not exempt from the requirements relating to private sales of firearms

V. PISTOL PERMITS

1. Recertification Process

The Safe Act has amended section 400.00 of the Penal Law to require that all pistol permits be renewed, or recertified, every 5 years beginning in January of 2014. Every existing permit holder will be required to recertify using a quick, free process that will begin in early 2014 on a staggered basis. Failure to recertify acts as a revocation of the license by operation of law.

During the renewal process, the database will be checked to ensure that the licensee is still qualified to possess the weapon. Detailed recertification procedures are currently being developed and will be explained to all permit holders in 2014.

2. Pistol Permit records to be confidential / “Opt Out” Forms

All state records relating to the Safe Act, including pistol permit renewal records, are specifically exempt from disclosure by statute. In addition, county permit records will not be subject to disclosure if the permit holder files an “Opt Out” form with the county. This form is available at <http://www.nysafeact.com> or <http://www.troopers.ny.gov/optoutfoil>.

3. Becoming ineligible at later time results in revocation

If a licensee at any time becomes ineligible to hold a license, the license is considered to be revoked under an amendment to PL 400.00 (11). In such case, the person is required to surrender his or her license to the appropriate licensing official and any and all firearms, rifles or shotguns owned or possessed by the person must be surrendered to a law enforcement agency.

EFFECT ON POLICE

Removal of weapons not surrendered

If the license and weapons are not surrendered, they will be removed by a police officer and declared a nuisance. At that point, the person would lose the ability to lawfully transfer the weapon.

If a licensee becomes ineligible to hold a pistol permit, the Safe Act requires the person to surrender all firearms to police, including all rifles and shotguns for which no license or registration is required.

VI. MENTAL HYGIENE LAW - 9.46 REFERRAL

The Safe Act added a new section 9.46 to the Mental Hygiene Law that requires a mental health professional to report, as soon as practicable, to his or her director of community services, any person under his or her care if the professional believes such person “is likely to engage in conduct that would result in serious harm to self or others.”

The director of community services must, if he or she agrees with this determination, report the subject person to DCJS personnel, who will make an initial screening to determine if the subject potentially has a NYS-issued firearms license or has applied for one. If so, DCJS will notify the State Police to confirm the existence of the license and the licensing authority will be notified so they can make a determination as to whether to suspend or revoke the subject’s license.

The licensing authority, and the appropriate local law enforcement agency, will handle the suspension and the recovery of any weapons in the same manner as they do now in the event the licensing authority revokes a firearms license.

VII. NEW CRIMES / Penal Law and General Business Law

Unlawful Possession of a Large Capacity Ammunition Feeding Device / PL 265.36

After January 15, 2014, a person who knowingly possesses a magazine having a capacity of more than 10 rounds, that he or she lawfully possessed before the Safe Act, and which was previously exempt under the former law (manufactured before September of 1994) will be committing a class A misdemeanor. This crime may not be charged until after January 15th of 2014 because those who possess these devices have one year from the enactment of the Safe Act to transfer, dispose of, or permanently modify the magazines to a capacity of 10 rounds or less. This criminal statute would only apply to a person who knows that his or her magazine is illegal. The Safe Act requires police to provide a 30 day warning period to a person who reasonably, but mistakenly, believes that his or her magazine is lawful.

Unlawful Possession of Certain Ammunition Feeding Devices / PL 265.37

The Safe Act created a new crime that prohibits the possession of any magazine when that magazine is actually loaded with more than 7 rounds. The penalty depends on the location of the violation. If a person violates this statute in his or her own home, the offense will be punished as a violation for a first offense and as a class B misdemeanor for any subsequent offense. If the violation takes place in any other location, the offense will be punished as a class B misdemeanor for a first offense and as a class A misdemeanor for any subsequent offense. This law is currently effective.

Transferring a firearm, rifle or shotgun outside the provisions of GBL 39-DDD – requiring a NICS check for private sales.

Transferring a weapon to another person who is not an immediate family member is a crime under General Business Law section 898 (6) unless the transfer is conducted through a gun dealer who conducts a NICS check on the purchaser. A violation of this law, which is currently effective, will be punished as a class A misdemeanor.

Assault 2d / Injury to child by firearm / Penal Law 120.05 (4-a)

The Safe Act amended PL 120.05 (Assault 2nd), by adding a new subdivision 4-a, to provide that recklessly causing physical injury to a child under 18 by intentionally discharging a rifle, shotgun or firearm constitutes Assault 2nd (a class D felony). This law is currently effective.

Aggravated Murder / Murder 1st / Penal Law 125.26 (1) (a) (ii-a) / 125.27 (1) (a) (ii-a)

The Act extend the class of victims for which Aggravated Murder or Murder 1 may be charged to include, in addition to police, peace and correction officers, any other individual, such as a firefighter, EMT, paramedic, etc., who is murdered while engaging in his or her emergency response duties. This law is currently effective.

Possession of a rifle, shotgun or firearm on school grounds or on a school bus without written authorization of the school. / Penal Law 265.01-a

Subdivision (3) has been deleted from Penal Law section 265.01, relating to possessing a rifle, shotgun or firearm on school property. That law is now in a new Penal Law section, 265.01-a. The statute has the same language and elements as former subdivision (3), but has been elevated to a class E felony. This law is currently effective.

Criminal Possession of a Firearm / Penal Law 265.01-b

A new Penal Law section 265.01-b entitled, “Criminal Possession of a Firearm,” (a class E felony) may be charged when a person possesses any firearm (even unloaded) and does not have a permit or the benefit of an exemption listed in section 265.20. Subdivision (2) of this section, relating to the failure to register an assault weapon, is negated by an amendment to PL section 265.20 (a) (3) which provides that failing to register may only be punished as a misdemeanor “notwithstanding any other section of this title.” As both sections are within Title P of the Penal Law, 265.01-b (2) is therefore ineffective. Subdivision (1) is currently effective.

Straw Purchases / Penal Law 265.17

The Safe Act amended section 265.17 of the Penal Law to increase the penalty for straw purchases from a class A misdemeanor to a class D felony. Under the new amendments, this section is violated when a person actually purchases or disposes of a firearm, rifle or shotgun to another who he or she knows is disqualified from possessing one. The language of the former law prohibiting the “attempt” to purchase the weapon has been removed. Accordingly, an “attempt” to commit this crime would now be charged one degree lower, as a class E felony. This law is currently effective.

Drug Trafficking Felony / Penal Law 10.00 (21)

A new subdivision 21 has been added to the Penal Law to define the term “Drug Trafficking Felony.” A person who commits a drug trafficking felony while possessing an illegal loaded firearm will be subjected to harsher punishment under the Safe Act (see PL 265.19 below). A “drug trafficking felony” includes any of the following crimes: Criminal Sale of a Controlled Substance (any degree), Using a Child to Commit a Controlled Substance Offense (PL 220.28), Criminal Sale of a Controlled Substance in or near School Grounds (PL 220.44), Unlawful

Manufacture of Methamphetamine in the first or second degree (PL 220.74 / 220.75), or Operating as a Major Trafficker (PL 220.77). This law is currently effective.

Aggravated Criminal Possession of a Weapon / Penal Law 265.19

A new section 265.19 to the Penal Law entitled “Aggravated Criminal Possession of a Weapon,” a class C felony, may be charged when a person unlawfully possesses a loaded firearm, outside of his or her home or business, and at the same time commits a Violent Felony offense or a Drug Trafficking Felony as described above. This law is currently effective.

Safe Storage of Rifles, Shotguns and Firearms / Penal Law 265.45

New PL section 265.45 prohibits a person from storing a rifle, shotgun or firearm, that is not securely locked in a safe or other secure container when such person resides with another who he or she knows is prohibited from possessing a firearm due to a felony conviction, an involuntary commitment, an order of protection or a conviction for a domestic violence misdemeanor listed in CPL 370.15. A violation of this law is a class A misdemeanor. This law is currently effective.

Aggravated Enterprise Corruption / Penal Law 460.22

The Safe Act added a new Penal Law section 460.22, Aggravated Enterprise Corruption, an A-1 felony, to be charged when a person commits the existing crime of Enterprise Corruption (PL 460.20) and when the underlying crimes committed are armed felonies. This law is currently effective.

Appendix: INDEX OF CRIMES AND OFFENSES RELATED TO THE NY SAFE ACT

Crime or Offense	Chargeable Section	Class	Sec	Eff Date
Violating the provisions of Gen Bus. Law, Art 39 – DDD Private Sales	GBL 898 (6)	A Misd	17	3/15/13
Criminal Facilitation for providing a community gun under circumstances that the person believes it probably that he or she is rendering aid to a person who intends to commit a crime. The element of “conduct” in the statutes may be fulfilled by providing a community gun, defined in this section.	Whatever the appropriate underlying facilitation section is	Varies	31	3/15/13
Assault 2d – by recklessly causing physical injury to a child under 18 by intentionally discharging a firearm , rifle or shotgun.	PL 120.05 (4-a)	D Felony	32	3/15/13
Adds job titles of first responders to the list of murder victims for which Aggravated Murder and Murder 1 may be charged.	PL 125.26 / PL 126.27	A-I Felony	35 36	3/15/13
Unlawful transfer of previously lawful Assault Weapon or Large Capacity Ammunition Feeding Device within New York State (after a one year grace period)	PL 265.00 (22) (h)	A Misd	37	1/15/13 ¹
Criminal Possession of a Weapon on School Grounds	PL 265.01-a	E Felony	41	3/15/13
Criminal Possession of a Firearm – possessing any firearm without a license or exemption.	PL 265.01-b (1)	E Felony	41-a	3/15/13
Possession of an unloaded firearm while committing a drug trafficking felony ² (added to Crim Possession of a Weapon 4 th)	PL265.02 (9)	D Felony	41-b	3/15/13
Possession of an unloaded firearm and while committing a violent felony offense defined in PL 70.02 (1) (added to Crim Possession of a Weapon 4 th).	PL 265.02 (10)	D Felony	41-b	3/15/13
Criminal Purchase or disposal of a weapon. Providing or disposing of a firearm , rifle or shotgun to one he or she knows is ineligible to lawfully possess same. <i>Note: Criminal purchase of a weapon has been raised from a class A misdemeanor to a class D felony. “Attempts” are no longer chargeable under this section.</i>	PL 265.17 (3)	D Felony	43	3/15/13
Aggravated Criminal Possession of a Weapon. Violated when a person commits Crim Poss Weapon 2 nd and also commits any violent felony offense or a drug trafficking felony in the same criminal transaction.	PL 265.19	C Felony	45	3/15/13

Unlawful Possession of a Large Capacity Ammunition Feeding Device³. - Only applies to those previously exempt large capacity magazines (made before September of 1994 and more than 10 round capacity) when the person acquired and possessed it before the enactment of the Safe Act (1/15/13). If these conditions do not apply, the person should be charged with Criminal Possession of a Weapon 3 rd (PL 265.02 (8)).	PL 265.36	A Misd – <i>see note 4 for special charging restrictions</i>	46-a	3/15/13 – but not enforceable until 1/15/14 ⁴
Unlawful Possession of Certain Ammunition Feeding Devices. (a/k/a Being loaded with more than 7 rounds). No magazine may contain more than 7 rounds, regardless of its capacity unless the person is exempt or at a range or sporting event.	PL 265.37	B Misd – ⁵ <i>see note below</i>	46-a	3/15/13
Safe Storage of Rifles, Shotguns and Firearms, requiring a person who lives with another and knows the other is disqualified from possessing a firearm under certain federal provisions, to maintain the weapon securely	PL 265.45	A Misd	47	3/15/13
Knowingly Failing to Register an Assault Weapon – This section applies when a person failed to register an Assault Weapon, that was lawfully acquired and possessed by such person on or before 1/15/13, and is the type of weapon that was made an Assault Weapon by the Safe Act.	PL 400.00 (16-a) (c)	A Misd	48	4/15/14

¹ The effective date of this section is actually January 15, 2013, but since the statute PL 265.00 (22) (h) does not allow for criminal sanctions for the transfer of a large capacity ammunition feeding device until one year after the effective date, the transfer of these magazines will not become unlawful until after January 15, 2014.

² A drug trafficking felony is defined in new Penal Law section 10.00 (21) as any violation offenses; PL 220.28 (Use of a Child in a Controlled Subst Offense); PL 220.34, 39, 41, 43 (Crim Sale of Controlled Subst in the 4th, 3rd, 2nd and 1st degrees); PL 220.44 (Crim Sale Contr Subst on or near School Grounds); PL 220.75 and 220.75 (unlawful Manufacture of Methamphetamine 2nd, 1st degree); and PL 220.77 (Operating as a Major Drug Trafficker).

³ An individual who reasonably believes that the magazine is legal has 30 days after being told that it is illegal by a police officer to dispose of the device.

⁴ The effective date of this part of the Safe Act is 3/15/13 but PL 265.00 (22) (h) provides a person with one year to transfer the magazine within NY State. Therefore, police officers should not charge this section until 1/15/14.

⁵ If the possession occurs in the person's home, the offense is only a violation with a fine of \$200 for a first offense and a class B misdemeanor for a subsequent offense. If the possession occurs in any other place the offense is punished by a class B misdemeanor for a 1st offense and as a class A misdemeanor for subsequent offenses.