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

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants-Cross-Appellees,

(For Continuation of Caption See Inside Cover)

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

JOINT APPENDIX
Volume 9 of 9 (Pages A-2230 to A-2415)

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(For Continuation of Appearances See Inside Cover)

– v. –

ANDREW M. CUOMO, Governor of the State of New York, ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, JOSEPH A. D'AMICO, Superintendent of the New York State Police,

Defendants-Appellees-Cross-Appellants,

FRANK A. SEDITA, III, District Attorney for Erie County, GERALD J. GILL, Chief of Police for the Town of Lancaster, New York, LAWRENCE FRIEDMAN,

Defendants-Appellees.

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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, LLC; William Nojay; Thomas Galvin; and Roger Horvath, Plaintiffs, -against- Andrew M. Cuomo, Governor of the State of New York; Eric T. Schneiderman, Attorney General of the State of New York; Joseph A. D'Amico, Superintendent of the New York State Police; Lawrence Friedman, District Attorney for Genesee County; and Gerald J. Gill, Chief of Police for the Town of Lancaster, New York, Defendants.	**Civil Action Number: 1:13-cv-00291 (WMS)**

SUPPLEMENTAL DECLARATION of CHRISTOPHER S. KOPER

Christopher S. Koper, Ph.D., declares and states, under penalty of perjury, as follows:

1. I am an Associate Professor for the Department of Criminology, Law and Society at George Mason University, in Fairfax, Virginia, and a senior fellow at George Mason's Center for Evidence-Based Crime Policy.

2. I previously submitted an expert declaration in this action, dated June 21, 2013, in support of the cross-motion to dismiss and/or for summary judgment filed by 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") and in opposition to Plaintiffs' motion for a

preliminary injunction. (A copy of my June 21, 2013 declaration ("Koper June Decl.") is attached hereto as Exhibit A).

3. As I noted in my prior declaration, to my knowledge, I have authored the only published academic studies to have examined the impact and efficacy of the federal government's bans on assault weapons and large-capacity magazines (or "LCMs"), which were in effect nationwide from 1994 until 2004 (referred to hereinafter as the "federal assault weapons ban" or the "federal ban"). First, in 1997, my colleague Jeffrey Roth and I conducted a study on the impact of the federal ban for the United States Department of Justice and the United States Congress.[1] Then, in 2004, I updated the original 1997 study.[2] And, most recently, I revisited the issue again by re-examining my 2004 report in 2013.[3]

4. In my prior declaration, I summarized some of the key findings of those detailed studies regarding the federal ban and its impact on crime prevention and public safety. As I stated in that prior declaration, and I reiterate here, based upon my findings in those studies, as well as my nineteen years as a criminologist studying firearms generally, it is my considered opinion that New York's recently strengthened bans on assault weapons and large-capacity

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[1] Jeffrey A. Roth & Christopher S. Koper, *Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994: Final Report* (1997) (hereinafter, "*Koper 1997*"). (A copy of my 1997 report was attached as Exhibit B to my prior declaration in this action). I note that throughout their submissions in this case Plaintiffs incorrectly cite to my 1997 report as "Koper 2007." To be clear, there is no 2007 report, and these references all are (or appear to be) to my 1997 report.

[2] Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003* (2004) (hereinafter, "*Koper 2004*"). (A copy of my 2004 report was attached as Exhibit C to my prior declaration in this action).

[3] Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994-2004: Key Findings and Implications*, ch. 12, pp. 157-171 in Reducing Gun Violence in America: Informing Policy with Evidence (Daniel S. Webster & Jon S. Vernick eds. 2013) (hereinafter "*Koper 2013*"). (A copy of my 2013 report was attached as Exhibit D to my prior declaration in this action).

magazines, particularly its LCM ban and its seven-round load limit for magazines, are likely to advance the State's interest in protecting public safety -- and, in particular, are likely to advance New York's interest in protecting its populace from the dangers of gunfire incidents involving high numbers of shots fired, including random, mass shootings in its public spaces, as well as the State's interest in protecting its law enforcement officers from being murdered, or otherwise overwhelmed, in criminal confrontations.

5. I submit this supplemental declaration in further support of the State Defendants' cross-motion to dismiss and/or for summary judgment and in opposition to the Plaintiffs' cross-motion for summary judgment to: (i) specifically address certain instances where Plaintiffs, as well as *amici curiae* who have submitted memoranda of law in support of Plaintiffs, have misconstrued and misused my work in their submissions in this action; (ii) bring to the Court's attention a very recent analysis conducted by a George Mason graduate student, working under my direction, which found both an increase in gunshot victimizations in mass shootings involving an assault weapon and an increase in the numbers of fatalities and casualties in mass shootings conducted with a large-capacity magazine; and (iii) briefly reiterate some of the core findings and conclusions summarized in my prior declaration and set forth in my reports.

I. Plaintiffs' Misconstruction and Misuse of My Reports on the Federal Ban

6. I have reviewed the Plaintiffs' memorandum of law in support of their motion for preliminary injunction (Document No. 23-1), their memorandum of law submitted in support of their motion for summary judgment (Document No. 114), and their Local Rule 56(a)(2) counterstatement (Document No. 116). I also have reviewed the briefs submitted by *amici curiae* in support of the Plaintiffs' motions (Documents Nos. 46, 56, and 119).

7. Each of these documents filed in this action attempts to rely on my studies of the federal assault weapons ban, citing to portions of my 1997 and 2004 reports.[4] Plaintiffs' and their *amici*'s reliance on, and characterizations of, my reports constitutes a misconstruction of my findings and conclusions.

8. As a general matter, Plaintiffs and their *amici* frequently cherry-pick isolated statements from my studies and take them out of context. While the majority of their references to my works accurately quote from the passages they cite, Plaintiffs' and their *amici*'s selective and incomplete use of my reports does not reflect the totality of my findings or the conclusions that I actually reached. Plaintiffs and *amici* also rely heavily on my 1997 report which was, for the most part, superseded by the more complete and up to date evidence contained in my 2004 and 2013 reports. I respond to some of the specific, and most serious, misuses of my reports by Plaintiffs and their *amici* below.

9. First, Plaintiffs cite to my work for the propositions that assault weapons are "not used disproportionately in crimes," that they "are not 'disproportionately used' in murders of any kind," and that police officers are rarely murdered with assault weapons. (Doc. 114 at 15, 31; Doc. 116 ¶¶ 28, 37). But, in truth, my studies showed that assault pistols were used disproportionately in crime in general, and that assault weapons more broadly were disproportionately involved in murder and other serious crimes in some data sources I analyzed. (*See Koper 2004*, pp. 15, 17). As I set forth clearly in my prior declaration, assault weapons and LCMs have been used disproportionately in the murders of law enforcement officers and mass shootings, crimes for which weapons with greater firepower are particularly useful. (*See* Koper

[4] My 2013 report is only briefly mentioned, in one footnote in the *amicus* brief filed by Pink Pistols. And while three of these documents (Docs. 114, 116, and 119) were filed afterwards, none of the documents discusses the prior declaration I submitted in this action.

June Decl. ¶¶ 8, 11-14, 20-21). And there is also some evidence to suggest that assault weapons are more attractive to criminals, due to the weapons' military-style features and particularly large magazines. (*See id.* ¶¶ 15-16).

10. Second, Plaintiffs, as well their *amicus* Pink Pistols, assert that my reports support the conclusion that "this kind of legislation has no discernible impact on firearms violence." (Doc. 119 at 18-20; *see* Doc. 114 at 4-5; Doc. 116 ¶ 60). They selectively quote a variety of statements primarily from my 1997 and 2004 reports to the effect that the federal assault weapons ban had no discernible effect on crime generally and that there is little evidence that such bans will have an impact on the lethality and injuriousness of gun violence based on indicators such as the number of victims per gun homicide incident, the number of gunshot wounds per victim, or the proportion of gunshot victims with multiple wounds. (Doc. 119 at 18-20; Doc. 114 at 4-5; Doc. 116 ¶¶ 45-61). In doing so, Plaintiffs and their *amicus* fail to fully and accurately convey my conclusions.

11. My research revealed that gun crimes involving assault weapons and other guns with LCMs do result in more shots fired, more victims shot, more gunshots per victim, and more lethal injuries. (*See* Koper June Decl. ¶¶ 7, 22-26, 51, 62). Although it is true that my research team and I cannot clearly credit the federal ban with decreasing gunshot victimizations during the time it was in effect, as explained in my prior declaration, that is due in large part to the delay in the ban's effectiveness caused by its grandfather provision and the large stock of pre-ban LCMs that remained in circulation.[5] (*See* Koper June Decl. ¶¶ 47, 59). In other words,

[5] Pink Pistols cites my 1997 report for the proposition that "in fact, both 'victims per incident' and 'the average number of gunshot wounds per victim' *actually increased* under the Ban -- although not by a statistically significant margin." (Doc. 19 n.55, citing *Koper 1997* at 85-86, 88, 91). Notably, the increase to which I referred in my 1997 report occurred during a period in which we also saw an increase in the use of LCMs in gun crime due to the

had the federal ban remained in effect long enough to reduce the stock of those pre-ban LCMs -- which the *Washington Post* study I discussed in my prior declaration suggests it may have begun to do just as it expired in 2004 (*see* Koper June Decl.¶¶ 49-50, 59) -- it is more likely that we would have seen a corresponding drop in the gun violence lethality indicators referenced above.[6]

12. Pink Pistols quotes, and Plaintiffs cite, my 2004 report for the proposition that, "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement" and my 1997 report for the proposition that "the evidence is not strong enough for us to conclude that there was any meaningful effect [on gun murders] (i.e., that the effect was different from zero)," and Pink Pistols also quotes my 2004 report for the proposition that "there is not a clear rationale for expecting the ban to reduce assaults and robberies with guns." (Doc. 119 at 18-20; *see* Doc. 116 ¶¶ 44, 61). While those are accurate quotes, they do not fully reflect the conclusions in my report on the efficacy of this

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federal ban's grandfathering provision and the large numbers of LCMs being imported into the country. (*See* Koper June Decl. ¶ 36). If anything, therefore, that finding corroborates the link between LCMs and increased lethality of gunshot victimizations.

[6] Pink Pistols contends that I concluded in my 2013 report that the *Washington Post* study nevertheless "showed no discernible reduction in the lethality or injuriousness of gun violence during the post-ban years." (Doc. 119 at 20 n.59, quoting *Koper 2013*, p. 165). That is incorrect. My research team and I did not examine the *Washington Post* data to determine whether the drop in LCM use in Virginia during the last years of the federal ban correlated to a drop in the lethality or injuriousness of gun crime in that jurisdiction. Rather, our examination of the lethality of gun crime in the 2004 report was based on national data and data from a selected number of localities outside of Virginia. Further, the analyses in the 2004 report were limited to the first several years of the federal ban (they covered different portions of the 1995-2002 period, and most extended only through the late 1990s or through 2001), during which time we had not yet observed a reduction in the use of LCMs in crime. The *Washington Post* data suggests that LCM use may have declined more appreciably by 2004, but this was beyond the period I had studied for the 2004 report to the U.S. Department of Justice. Consequently, my conclusion that there was "no discernible reduction in the lethality or injuriousness of gun violence" during earlier portions of the ban when we had not seen a drop in LCM use in gun crime has no bearing on whether there would be such a reduction once the number of LCMs used in crime began to drop.

kind of legislation.

13. Because criminals and mass shooters will be able to substitute legal firearms for the banned assault weapons and LCMs, it is true that this kind of legislation may not substantially reduce the overall number or rate of gun crimes committed. One should not conclude from that, however, that such bans will have no effect on public safety. As noted in my prior declaration, if allowed to operate over the long run, such bans on assault weapons and LCMs seem likely to reduce the number and lethality of gunshot victimizations by forcing criminals to substitute assault weapons and other weapons with LCMs with less destructive firearms. (*See* Koper June Decl. ¶¶ 43-45, 50-51, 58-65). The effects on gun deaths and injuries overall would likely be small in percentage terms (and thus could be difficult to measure reliably), but, as noted in my prior declaration, even small reductions in gunshot victimizations could produce significant societal benefits. (*See id.* ¶¶ 45 n.21, 51).

14. Pink Pistols similarly cites to my 2004 report for the proposition that "[s]tudies of state-law bans on AWs and LCMs likewise found that such bans 'have not reduced crime.'" (Doc. 119 at 19 & n.57, quoting *Koper 2004*, p. 81 n.95). That, again, does not accurately reflect my conclusions in the 2004 report. In discussing the effect of state assault weapons bans, I noted that there are a few studies that have suggested that such bans have not reduced crime. I specifically noted, however, that it is hard to draw definitive conclusions from these studies for the following reasons: (1) there is little evidence on how state assault weapon bans affect the availability and use of assault weapons; (2) studies have not always examined the effects of these laws on gun homicides and shootings, the crimes that are arguably most likely to be affected by assault weapon bans; and (3) the state assault weapon bans that were passed prior to the federal ban (those in California, New Jersey, Hawaii, Connecticut, and Maryland)

were in effect for only three months to five years (two years or less in most cases) before the imposition of the federal ban, after which they became largely redundant with the federal legislation and their effects more difficult to predict and estimate. Perhaps more importantly, most of these state laws either lacked LCM bans or had LCM bans that were less restrictive than that of the federal ban or New York's ban. Pink Pistols ignores these important qualifications that undermine the usefulness of the cited studies.

15. Second, both the National Rifle Association ("NRA") and the New York State Sheriffs' Association ("NYSSA") argue that banning large-capacity magazines will not advance public safety. In support of that conclusion they cite the findings in my reports that assailants fire an average of less than four shots in gun crimes, and rarely fire more than ten shots. (Doc. 46 at 19; Doc. 56 at 12). Plaintiffs also cite to my reports for this point. (Doc. 116 ¶¶ 53, 56). While those references to my studies are correct, they also do not fully reflect my conclusions.

16. Based on my study with Darin Reedy of handgun attacks in Jersey City, New Jersey, I found that assailants fired more than ten shots in 2.5% to 3% of gunfire incidents. My report specifically explains, however, that those incidents had a 100% injury rate, and were responsible for 4.7% of the gunshot victimizations in our sample. The *amici* and Plaintiffs ignore this crucial piece of data, which was the whole point of that aspect of my discussion in the report. It shows that, while rare, incidents in which more than ten shots are fired are especially lethal and injurious. They produce a disproportionate share of gunshot victimizations and are more likely to result in gunshot injuries or deaths. (*See* Koper June Decl. ¶ 24; *Koper 2004*, pp. 3, 84-85, 90-91).

17. In addition to taking that data out of context, Plaintiffs and *amici* completely

ignore one of my central conclusions: gun crimes involving assault weapons and other weapons with LCMs tend to result in more victims wounded, more wounds per victim, and more lethal injuries than do gun crimes committed with other weapons. They likewise ignore the evidence that both assault weapons and other guns with LCMs are used disproportionately in mass killings and murders of law enforcement officers.

18. Third, Plaintiffs and their *amici* argue that assault weapons bans are not likely to reduce overall gun violence based on the finding in my reports that such weapons are only used in between 2% and 8% of gun crimes. (Doc. 114 at 15; Doc. 25 ¶¶ 25, 61; Doc. 46 at 13-14; Doc. 56 at 11; Doc. 119 at 18 & nn. 53, 54). While these selective references to my studies technically are correct (*i.e.*, studies prior to the 1994 federal ban did show that assault weapons were used in between about 2% and 8% of all gun crimes), they omit important considerations. It ignores the fact that assault weapons were used in a higher share of mass murders and killings of law enforcement officers. It ignores the level of LCM use in gun crime. It also ignores the fact that gun crimes involving semiautomatics -- including assault weapons and other firearms with LCMs -- generally result in more shots fired, more victims, and more wounds per victim. Thus, although reducing the number of such weapons may not reduce the overall number of gun crimes due to the weapon substitution effect, it could reduce the number and lethality of gunshot victimizations in crimes in which such weapons otherwise would have been used. Any such reduction in gun crime or gun crime lethality -- even if difficult to measure precisely relative to the overall level of gun violence in the nation -- would have a meaningful impact for the victims of such crimes, and for society more broadly.

II. Recent Analysis Conducted Under My Direction of Assault Weapons and LCMs Used in Mass Shootings

19. In my prior declaration, I discussed a recent investigation by reporters at *Mother Jones* magazine that analyzed and compiled data on 62 public mass shooting incidents that involved the death of four or more people, over the period 1982-2012. (*See* Koper June Decl. ¶¶ 13 & n.12, 21 & n.14).

20. Working under my direction, a graduate student at George Mason University recently analyzed the *Mother Jones* data for his Master's thesis, and compared the number of deaths and fatalities of the 62 mass shootings, identified therein, to determine how the presence of assault weapons and large capacity magazines impacted the outcome. With regard to assault weapons, although he found no difference in the average number of fatalities, he did find an increase in gunshot victimizations. Specifically, he found that an average of 11.04 people were shot in public mass shootings involving assault weapons, compared to 5.75 people shot in non-assault weapon cases. This is a statistically significant finding, meaning that it was not likely due to chance. As a result, the total average number of people killed and injured in assault weapon cases was 19.27, compared to 14.06 in non-assault weapon cases.[7]

21. He also compared cases where an LCM was known to have been used (or at least possessed by the shooter) against cases where either an LCM was not used or not known to have been used. He found that the LCM cases (which included assault weapons) had significantly higher numbers of fatalities and casualties: an average of 10.19 fatalities in LCM cases compared to 6.35 fatalities in non-LCM/unknown cases. He found an average of 12.39 people were shot but not killed in public mass shootings involving LCMs, compared to just

[7] *See* Dillon, Luke. (2013). *Mass Shootings in the United States: An Exploratory Study of the Trends from 1982 to 2012*. Master's thesis. Fairfax, VA: Department of Criminology, Law and Society, George Mason University.

3.55 people shot in the non-LCM/unknown LCM shootings. These findings reflect a total victim differential of 22.58 killed or wounded in the LCM cases compared to 9.9 in the non-LCM/unknown LCM cases.[8] All of these differences were statistically significant and not a result of mere chance.

22. These differences are also significant in terms of the potential monetary cost savings from medical care of gunshot injuries. Some studies have shown that the lifetime medical costs for gunshot injuries are about $28,894 (adjusted for inflation). Thus, even a 1% reduction in gunshot victimizations at the national level would result in roughly $18,781,100 in lifetime medical costs savings from the shootings prevented each year. (*See* Koper June Decl. ¶ 51; *Koper 2013*, pp. 166-67; *see also Koper 2004*, p. 100 n.18).

23. The cost savings potentially could be substantially higher if one looks beyond just medical costs. For example, some estimates suggest that the full societal costs of gun violence -- including medical, criminal justice, and other government and private costs (both tangible and intangible) -- could be as high as $1 million per shooting. Based on those estimates, even a 1% decrease in shootings nationally could result in roughly $650 million in cost savings to society from shootings prevented each year. (*See* Koper June Decl. ¶ 51; *Koper 2013*, pp. 166-67).

III. Brief Summary of My Findings and Conclusions

24. As noted, my findings and conclusions regarding the federal ban and its impact on crime prevention and public safety, as well as my conclusions regarding the likely impact of New York's recently strengthened bans on assault weapons and large-capacity magazines, are

[8] *See id.* The patterns were also very similar when comparing the LCM cases against just those cases in which it was clear that an LCM was not used (though this was a very small number).

discussed in my prior declaration in this action. I do not repeat all of that discussion here, but I note, once again, a few of the key points:

- Assault weapons pose particular dangers to public safety because of their disproportionate involvement in mass shootings and killings of law enforcement officers (*see* Koper June Decl. ¶¶ 11-14);
- In addition, there is evidence that assault weapons are more attractive to criminals because of their military-style features and their ability to accommodate LCMs (*see id.* ¶¶ 15-16);
- LCMs present an even greater danger because they can be used either with an assault weapon, or other firearms, and allow in either instance, increased firing capacity (*see id.* ¶¶ 17-26);
- Like assault weapons, guns with LCMs have also been used disproportionately in murders of police and in mass public shootings (*see id.* ¶¶ 20-23);
- The available evidence also shows that gun attacks with semiautomatics -- especially assault weapons and other guns equipped with large capacity magazines -- tend to result in more shots fired, more persons wounded, and more wounds per victim, than do gun attacks with other firearms; there is evidence that victims who receive more than one gunshot wound are substantially more likely to die than victims who receive only one wound; and thus, it appears that crimes committed with these weapons are likely to result in more injuries, and more lethal injuries, than crimes committed with other firearms (*see id.* ¶¶ 22-26; *Koper 2004*, p. 87);

- The federal ban's exemption of millions of pre-ban assault weapons and LCMs meant that the effects of the law would occur only gradually, and that those effects were still growing when the ban expired in 2004. Nevertheless, while the ban did not appear to have a measurable effect on the overall number or rate of gun crimes committed (due to criminals' ability to substitute other guns in their crimes), the evidence does suggest a significant impact on the number of gun crimes involving assault weapons. Had it remained in effect over the long-term, moreover, it could have had a potentially significant impact on the number of crimes involving LCMs. (*See* Koper June Decl. ¶ 50);

- Moreover, there is evidence that, had the federal ban remained in effect longer (or were it renewed), it could conceivably have yielded significant additional benefits as well, potentially preventing hundreds of gunshot victimizations annually and producing millions of dollars of cost savings per year in medical care alone (*see* Koper June Decl. ¶ 51); and

- New York's recent strengthening of its bans on assault weapons and LCMs -- by eliminating the grandfathering of pre-ban LCMs, limiting to seven the number of rounds of ammunition that may be loaded into a magazine, and moving from a two-feature to a one-feature test for its assault weapons ban -- addresses some of the weaknesses that were present in the federal ban. Thus, New York's law appears to have even greater potential for reducing gun deaths and injuries, and doing so more immediately, than did the federal ban. (*See id.* ¶¶ 58-65).

25. Accordingly, as I stated in my prior declaration, it is my considered opinion that

New York's recently strengthened bans on assault weapons and large-capacity magazines, particularly its LCM ban and its seven-round load limit for magazines, are likely to advance the State's interest in protecting public safety. In particular, they are likely to advance New York's interest in protecting its law enforcement personnel from being overwhelmed and murdered in criminal confrontations and in reducing the number and severity of shootings involving high numbers of shots and victims, including mass public shootings.

Pursuant to 28 U.S.C. § 1746 I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on September 23, 2013

Christopher S. Koper

Christopher S. Koper, Ph.D.

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

SUPPLEMENTAL DECLARATION OF WILLIAM J. TAYLOR, JR.

WILLIAM J. TAYLOR, JR., an attorney duly admitted to practice before this Court, declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an Assistant Attorney General in the office of 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") in the above-captioned action.

2. I submit this supplemental declaration in further support of the State Defendants' Cross-Motion to Dismiss and/or for Summary Judgment and in Opposition to the Plaintiffs' Cross-Motion for Summary Judgment, for the limited purpose of providing the Court with true and accurate copies of the following documents contained in the annexed Appendix, and referenced in the accompanying (i) Reply Memorandum of Law in Further Support of the State Defendants' Cross-Motion to Dismiss and/or for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment, dated September 24, 2013; and, (ii) State Defendants' Response to the Plaintiffs' Local Civil Rule 56(a)(2) Counter-Statement:

Exhibit	**Exhibit Description**
71	Memorandum of Decision, *Benjamin* v. *Bailey*, CV 93-0063723 (Conn. Super. Ct. June 30, 1994).
72	Printouts of information from the U.S. Centers for Disease Control regarding: • *2000-2010 United States Violence-Related Firearm Deaths and Rates per 100,000*, obtained from the National Center for Injury Prevention & Control, U.S. Centers for Disease Control and Prevention, *Web-Based Injury Statistics Query & Reporting System (WISQARS) Injury Mortality Reports, 1999-2010, for National, Regional, and States, available at* http://webappa.cdc.gov/sasweb/ncipc/dataRestriction_inj.html (visited Sept. 24, 2013).
73	Appellants' Notice of Supplemental Authority under Fed. R. App. P. 28(j), *Kwong* v. *Bloomberg*, No. 12-1578 (2d Cir.), dated Jan. 17, 2013.
74	Aaron Smith, *New Rifle Mimics Machine Gun's Rapid Fire – and It's Legal*, CNNMoney.com, Sept. 12, 2013, *available at* http://finance.yahoo.com/news/new-rifle-mimics-machine-gun-s-rapid-fire----and-it-s-legal-145153186.html#.
75	New York Pattern Criminal Jury Instructions 2d, Penal Law § 265.02(7), Criminal Possession of a Weapon Third Degree, Possession of Assault Weapon, *available at* http://www.nycourts.gov/judges/cji/2-PenalLaw/265/265-02%287%29.pdf.

A-2246

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct

Dated: New York, New York
September 24, 2013

/s/ *William J. Taylor, Jr.*
William J. Taylor, Jr.

EXHIBIT 71

APPENDIX C

CV 93-0063723	:	SUPERIOR COURT
DeFOREST H. BENJAMIN, JR., ET AL.	:	JUDICIAL DISTRICT OF LITCHFIELD
V.	:	AT LITCHFIELD
JOHN M. BAILEY, ET AL.	:	JUNE 30, 1994

MEMORANDUM OF DECISION

The issue before the court is the constitutionality of 1993 Connecticut Public Act No. 93-306, Connecticut's "Assault Weapon Law." On June 8, 1993, after lengthy debate, the Connecticut legislature enacted P.A. 93-306 ("the Act").[1] The Act became effective on October 1, 1993 and prohibits the sale, transfer, and possession of certain firearms and firearms parts collectively described as "assault weapons."

Any person who lawfully possesses an "assault weapon" prior to October 1, 1993 can keep the weapon by obtaining a certificate of possession from the department of public safety. P.A. 93-306, §4(a). A person who violates the possession element of the Act, except for a first time offender who presents proof that he lawfully possessed the weapon before October 31, 1993, is guilty

[1] Lieutenant Governor Eunice S. Groark provided the tiebreaking vote after an 18-18 vote in the Senate.

of a Class D felony and shall be sentenced to a term of imprisonment of which one year may not be suspended or reduced. P.A. 93-306, §3(a). A person who violates the sale or transfer element of the Act is guilty of a class C felony and shall be sentenced to a term of imprisonment of which two years may not be suspended or reduced. P.A. 93-306 §2(a)(1). The Act further provides that a person who commits any class A, B, or C felony while armed with or threatening the use of an "assault weapon", shall be imprisoned for a term of eight years, which shall not be suspended or reduced. P.A. 93-306, §8. The Act specifies limited exceptions for certain individuals, such as police officers and members of the armed forces. P.A. 93-306, §3(b).

Sec. 1(a)(1) of the Act defines an "assault weapon." It states:

> As used in this act, "assault weapon" means: (1) Any selective-fire firearm capable of fully automatic, semiautomatic or burst fire at the option of the user or any of the following specified semiautomatic firearms: Algimec Agmi; Armalite AR-180; Australian Automatic Arms SAP Pistol; Auto-Ordnance Thompson type; Avtomat Kalashnikov AK-47 type; Barrett Light Fifty model 82A1; Beretta AR-70; Bushmaster Auto Rifle and Auto Pistol; Calico models M-900, M-950 and 100-P; Chartered Industries of Singapore SR-88; Colt AR-15 and Sporter; Daewoo K-1, K-2, Max-1 and Max-2; Encom MK-IV, MP-9 and MP-45; Fabrique Nationale FN/FAL, FN/LAR, or FN/FNC; FAMAS MAS 223; Feather

AT-9 and Mini-AT; Federal XC-900 and XC-450; Franchi SPAS-12 and LAW-12; Galil AR and ARM; Goncz High-Tech Carbine and High-Tech Long Pistol; Heckler & Koch HK-91, HK-93, HK-94 and SP-89; Holmes MP-83; MAC-10, MAC-11 and MAC-11 Carbine type; Intratec TEC-9 and Scorpion; Iver Johnson Enforcer model 3000; Ruger Mini-14/5F folding stock model only; Scarab Skorpion; SIG 57 AMT and 500 series; Spectre Auto Carbine and Auto Pistol; Springfield Armory BM59, SAR-48 and G-3; Sterling MK-6 and MK-7; Steyr AUG; Street Sweeper and Striker 12 revolving cylinder shotguns; USAS-12; UZI Carbine, Mini-Carbine and Pistol; Weaver Arms Nighthawk; Wilkinson "Linda" Pistol.

P.A 93-306 §1(a)(1).

The plaintiffs in the present action are Deforest Benjamin, a gun dealer and gunsmith in the town of Cornwall; Robert Suprenant, a citizen of Colebrook who wishes to purchase a Colt Sporter; Bertcelis Morales, a resident of Bridgeport and an owner of an Intratec TEC DC-9; Michelle and Bradford Palmer, residents of Manchester who allege that Michelle is the owner of a single Colt Sporter and pursuant to the Act, she can not shoot with her father; Bruce Kaufman, a resident of Windsor and the owner of a Colt AR-15; Frank D'Andrea, a firearms dealer in Stratford; and Navegar Inc., d/b/a Intratec, a Florida corporation which manufacturers the Intratec TEC-9 and Scorpion.

The defendants are John M. Bailey, the Chief State's Attorney of Connecticut; Frank Maco, the State's Attorney

for the Judicial District of Litchfield; and Nicholas Cioffi, the Commissioner of Public Safety for the State of Connecticut.

On October 12, 1993, the plaintiffs filed their initial complaint. Thereafter, the plaintiffs filed an amended complaint, and, eventually filed an amendment to their amended complaint. In their amended complaint, which contains five counts, the plaintiffs seek a declaratory judgment that the Act is void under the Connecticut Constitution. The plaintiffs also seek to enjoin the enforcement of the Act pending the resolution of the case.

The plaintiffs allege in counts one and two that the Act violates their constitutional rights to equal protection and due process under the Connecticut Constitution. Count three states that the Act is void for vagueness. In count four, the plaintiffs allege that the Act is unconstitutional because it attaints specific manufacturers who make particular weapons while not similarly affecting other manufacturers who make "similar, identical, or functionally identical" weapons. Count five states that the Act infringes on the plaintiffs' right to bear arms under Article First, §15

of the Connecticut Constitution.

I.

FACTS

The court conducted an evidentiary hearing on divers days between January 20, 1994 and February 1, 1994. Thereafter, post-trial briefs were filed, and both counsel have made subsequent submissions with respect to recently decided case law, affecting the issues presented herein. Final argument was heard on March 2, 1994.

The following plaintiffs testified. Michelle Palmer, a petite woman, who explained that she preferred to shoot competitively with her father using the Colt Sporter, made no claim in her testimony that she used the firearm in self-defense. Her claimed injury was that she was prevented by this statute from using her firearm of choice, one which was comfortable for a person of her body size, and one with which she could enter specific competitions. The impact of the legislation did not extinguish her right to bear arms, but compromised it to the extent that she claimed injury.

Robert Suprenant testified that he desired to purchase a Colt Sporter. On cross-examination, he was asked if that was the only gun he wanted to buy.

Bruce Kaufman used his Colt AR-15 to scare away an intruder in September of 1982. The intruder was never apprehended. Mr. Kaufman testified that he collected military style weapons, and had a collection valued at over One Hundred Thousand ($100,000.00) Dollars, which he and his father used in a gun dealing business. Mr. Kaufman's interest in the litigation was clearly as a dealer, and his claim that the AR-15 was necessary for the defense of his mother, his home, and himself, was incidental to his other real pursuit.

DeForest Benjamin makes his living as a gunsmith and dealer. He testified that the Act had adversely affected his business, although there was absolutely no proof of that absent his statement. He testified further that he often reconstructed firearms, and that he was unclear from the statutes, as to which alterations he would now be allowed to make. He testified that he was confused about his ability to use a folding stock on some of the weapons. For a gunsmith, he appeared to be confused over very simple gun parts. His confusion was not credible to the court.

Frank D'Andrea is a gun dealer, and has been so employed for over twenty years. He expressed confusion

over whether he was permitted under the statute to sell certain firearms. He understood that he could not sell the listed firearms, but others were so similar that he felt he might offend the statute if he did engage in a practice of selling those firearms. He indicated that thirty (30%) percent of his stock was in assault weapons. He testified that he did not recall an individual named Rubin Calazzo entering his store and buying several firearms, for cash, for an individual named Danny Melendez, who was later convicted in the Federal District Court for illegal sale of firearms. He testified that he sold ammunition at a discount if purchased in large quantities. He further testified that large capacity magazines were a very saleable commodity for gun dealers. Mr. D'Andrea's interest in this litigation clearly stemmed from his economic interest. The subject firearms, he conceded, could be sold outside the State of Connecticut.

Ms. Morales acquired an Intratec DC-9 from her husband just prior to the passage of the statute under review. She claimed that she possessed the firearm to protect herself, her family, and her home. She claimed that she heard an intruder at her front door in December,

and that she had the gun. She also testified that she did not confront the intruder, or call out that she had a firearm. She testified that she turned on the porch light, and the intruder fled. She testified further that she had only tried shooting the banned weapon twice, at close range, and more importantly, that she had never possessed or fired any other weapon before. The court finds her claim of a possessory interest in this banned weapon unworthy of belief.

Carl Miguel Garcia, president of Navegar, Inc., the manufacturer of the Intratec-9 and DC-9, and Scorpion, testified that to his knowledge, both New Jersey and California had passed laws banning the sale or transfer of his listed weapons. Mr. Garcia complained that the statute had had a serious economic impact on his business, and that he and his company had received much negative press concerning the listed firearms. He indicated that they functioned in many ways like unlisted pistols and revolvers, and in fact used a generic magazine, similar to those used in Glocks, the firearm of choice of many police departments around the country.

On cross-examination, Mr. Garcia admitted that his revenues had steadily increased over the past three

years, despite the bans in some states. He agreed that the promotional literature contained slogans such as "easily concealed" and "tough as your toughest customer." No police departments utilize these products because they do not contain safeties. He agreed that the listed firearms were designed for maximum firepower, were inexpensive, and capable of rapid fire. Mr. Garcia claimed that the weapon could not be concealed, but upon cross-examination, the Attorney General demonstrated that, with a large magazine, the weapon, could in fact be concealed. Mr. Garcia denied that his listed firearms were the "gun of choice of drug dealers."

Mr. Robert Reese, president of Springfield Armory, Inc., testified that he founded his company after the government arsenal at Springfield, Illinois was shut down in 1969. Mr. Reese acquired much of the machinery from the arsenal. He adopted that name, and testified that he spent five (5) years acquiring the right to use the name for his company. His story of developing his company, and the historical perspective of the World War II Garand was of interest to the court. After World War II, the NATO forces contracted with the Italian company, Baretta, to overhaul the Garand, and it became known as the

Baretta Modification, 1959, or BM-59. In 1979, Mr. Reese negotiated with Baretta to acquire forty tons of surplus parts from which the private Springfield Armory built its BM-59. Mr. Reese and his company developed military weapons for civilian use and collection, and identified Plaintiffs' exhibits 45-58 as by-products of the United States M-1 Garand from the government Springfield Armory. He pointed to the similarities in the Baretta Garand M-1, the BM-59 Italia, to the banned Sringfield Armory BM-59.

On cross-examination, he testified that the BM-59 was a readily identifiable firearm, and that it was capable of firing .30 calibre "powerful" cartridges which could pierce five to six walls in a house. The firearm with that calibre cartridge could hit and kill a person distant from the shooter. The firearm was capable of firing four hundred (400) rounds of ammunition per minute, and a "good" shooter, could reload a magazine in ten (10) seconds.

Charles Fagg was qualified as an expert witness for the plaintiffs. In addition to identifying the banned firearms, he led the plaintiffs through a description of similar, and yet not banned firearms, that were distinguishable by brand name and slight design

differences. There seemed to be little controversy in this litigation that there are copies of the banned firearms, either by companies in foreign countries, or in this country, and that the industry markets firearms by changing numerical designation, name, and accessories. Mr. Reese testified that the industry had little control over the changes in designation of firearms, and that those changes appeared for each new marketing cycle. It appears that specific designation even within the industry may be an unattainable goal.

Mr. Fagg testified that flash suppressors had a legitimate civilian, and non-criminal purpose. Hunting at dawn or dusk made that a desired option for many hunters. He agreed that a flash suppressor also had the ability to mask the position of the shooter, and control recoil to a certain extent upon rapid fire at a target. He conceded that the civilian use of those options was limited, but that those options might well be more important to criminal use. On cross-examination, he was able to testify as to the maximum magazine that the listed firearms could hold, at least in most instances. In testimony that was a bit too coy, he testified that he did not know what an Algimec Agmi, the first on the list

of banned weapons, was. It was clear later that this was an Algimec AGM-1, so the statute contained a mere typographical error.[2] The little "mystery" that surrounded that particular firearm, which no witness has ever seen, was somewhat unnecessary for a court trial.

Mr. Fagg's testimony was technical and unemotional. He described certain features of firearms for the record. He compared the banned weapons with others not mentioned in the statute, and responded to questions on cross-examination in an equally professional manner. As earlier noted, there seemed to be little contest with respect to his description of the firearms brought into the court room, photographs of which remain as exhibits for review. It is clear that there are many firearms which fit the general designation of "assault weapons", and which are virtually identical to the banned weapons, but which do not appear on the list.

Professor Kleck was called as an expert witness by the plaintiffs. His testimony centered on the self-defense capabilities of semi-automatic weapons. His testimony was biased and did not help the inquiry of the

[2] The court finds that the legislature should correct this typographical error.

court with respect to the legal claims. His testimony focused on the public debate, which will continue on the airwaves, the town greens, and in the legislatures. This court is not permitted to substitute the judgment of the legislature, only to assess the claims of the parties. The decision of this court, and the decision on the appeal, will only be another step in the public dialogue concerning this issue. The statistics proposed were countered by the defendants, and the court was not swayed by either.

The defendants offered a videotape of various firearms being fired at the State Police range. Automatic fire, selective fire, semiautomatic fire, and bolt action fire were described. (Defendants' Ex. 14) During the testimony of Chief Thomas Sweeney of the Bridgeport Police Department, a video was offered (Defendants' Ex. 3) of street life in Bridgeport on November 27, 1993, at Hallock and Shelton Streets from 11:25 p.m. - 12:13 a.m. on November 28. The Green Top Posse had been raided and within a short time, was rearmed with assault-type weapons. The raid had secured two loaded AK-47s and a Colt Sporter with a flash suppressor, among other firearms. The Chief testified

that "straw purchasers" would acquire the guns legally and then transfer them illegally. The Chief testified further concerning gang hits near a school, on the first day of school, when a new middle school was being opened, when children going to school had to walk past a crime scene. At that crime scene, seventy-six (76) bullet casings were found near the body of Alexander Aponte, a suspected gang member.

Chief Sweeney pointed to the increase in seizure of assault weapons. In 1991, twenty-eight of the weapons seized as a result of police activity were assault weapons, and in 1992, that number increased to 49. While the evidence is clear that assault weapons do not make up the majority of weapon seizures, their numbers are increasing at a steady rate. He also described assaults on police officers, which included the use of an Intratec 22, one an M-11 type, and a crime scene which included Seven Hundred Sixty-two (762) spent rounds of 9 mm ammunition. That police officer was struck with a 9 mm round. Annette Richardson was killed, and it appeared from the investigation that she was not an intended victim. The Chief cited further examples of over penetration in dense population areas, which create a

grave risk to the citizenry. He claimed further that the possession of guns in the home for self-protection gave the homeowner a false sense of security and posed a risk to members of the household.

Col. Leonard Supenski is the Chief of the Technical Bureau of the Baltimore County Police Department. He is a gun owner and has competed with firearms as sport. He conducts training courses for police and citizens interested in self defense. He testified that he is familiar with the term "assault weapon" and opined that these lightweight military-style weapons were changed so that armies could move more effectively. He stated that the Kalishnikov, AK-47, originally made in the U.S.S.R. in 1947 by Kalishnikov, was the precursor of all of the military- style weapons on the list. His opinion was that there was not legitimate civilian use for these weapons, and that in a compressed urbanized society, they constituted a hazard to bystanders.

Col. Supenski testified about the report and recommendations of the Bureau of Alcohol, Tobacco, and Firearms ("BATF") (Defendants' Ex. 12) and provided the information contrary to Professor Kleck's testimony. He felt that the ordinarily intelligent citizen could access

documents necessary to sufficiently warn that citizen of which weapons were banned. He mentioned Shooting Digest and Gun World. The plaintiffs later offered into evidence, the manual published by the State of California to assist citizens in recognizing their banned firearms. (Plaintiffs' Ex. 67).

He testified concerning the BATF's tracing of firearms seized by law enforcement, and indicated that the Intratec Tec 9 was the leading gun seized, and the combination of the Tec 9, the Cobra MAC-11, the AK-47, and the Colt AR-15 comprised thirty-seven (37%) percent of all assault weapons seized. Among characterizations of individuals from whom such weapons were seized were drug dealers, disturbed individuals, street gangs, and hate groups. He reiterated Chief Sweeney that most of these weapons are purchased legally and then come onto a secondary market of unregulated sales by straw purchasers selling to criminals. He insisted that these weapons were a serious risk to police officers and to the public safety.

On cross examination, he conceded that a semi-automatic rifle or handgun could be used defensively. He added that the use would require considerable training.

He conceded some discrepancies from his deposition testimony.

Major John Bardelli of the Connecticut State Police testified concerning the investigation of the murder of Trooper Russell Bagshaw by a burglar using the Wilkinson "Linda", a firearm on the list. He testified that the public safety is affected adversely by the named weapons, in that they pose a danger to police officers. He testified that urban undercover officers are encountering these weapons more and more. The Colt AR-15 is issued to the Connecticut State Police SWAT team, but is not standard issue. There is required special equipment and training for that team.

II.

DECLARATORY JUDGMENT

"The purpose of a declaratory judgment action... is to 'secure an adjudication of rights where there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties.'" (Citation omitted.) **Wilson v. Kelley**, 224 Conn. 110, 115, 617 A.2d 433 (1992). The declaratory judgment procedure is peculiarly well adapted to the judicial determination

of controversies concerning constitutional rights and, as in this case, the constitutionality of state legislative action. Horton v. Meskill, 172 Conn. 615, 626, 376 A.2d 359 (1977). "The statute authorizing the Superior Court to render declaratory judgments is as broad as it well could be made." Sigal v. Wise, 114 Conn. 297, 301, 158 A. 891 (1932).

> The declaratory judgment procedure may be employed in a justiciable controversy where the interests are adverse, where there is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement, and where all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof.

Practice Book §390.

The jurisdiction of the trial court over declaratory judgment actions depends upon compliance with the notice requirement of Practice Book §390. Serrani v. Board of Ethics, 225 Conn. 305, 308, 622 A.2d 1009 (1993). Failure to comply with the notice requirement of Practice Book §390 deprives the trial court of subject matter jurisdiction to render a declaratory judgment. See, e.g. Connecticut Ins. Guaranty Assn. v. Raymark Corporation, 215 Conn. 224, 229, 575 A.2d 693 (1990). Accordingly, the court finds that the plaintiffs have complied with the

procedural requirements of a declaratory judgment action. All persons having an interest in the subject matter of this action are now parties to the action or have reasonable notice thereof.

III.

STANDARD OF REVIEW

"Ordinarily, a trial court's analysis of a constitutional attack on an otherwise validly enacted statute begins with certain underlying principles of statutory construction." **State v. Leary**, 41 Conn. Sup. 525, 526-27, 590 A.2d 494 (1991, Mottolese, J.) One of the most fundamental of these is "that a strong presumption of constitutionality attaches to acts of a legislature." (Citations omitted.) **Peck v. Jacquemin**, 196 Conn. 53, 64, 491 A.2d 1043 (1985). To overcome this presumption, the party attacking a validly enacted statute bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt and the court will indulge in every presumption in favor of the statute's constitutionality. **State v. Breton**, 212 Conn. 258, 269, 652 A.2d 1060 (1989). "In choosing between two constructions of a statute, one valid and one

constitutionally precarious, we will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent..." (Citations omitted.) Id.

IV.

EQUAL PROTECTION AND THE RIGHT TO BEAR ARMS (COUNTS 1, 2 & 5)

The plaintiffs rely solely on state constitutional grounds to invalidate the Act. The court is not bound by federal precedents in interpreting our own state constitutional provisions. **State v. Geisler**, 222 Conn. 672, 684, 610 A.2d 1225 (1992). "It is well established that federal constitutional... law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights..." (Internal quotation marks and citations omitted.) **State v. Miller**, 227 Conn. 363, 377-87, 630 A.2d 1315 (1993). "[F]ederal decisional law is not a lid on the protections guaranteed under our state constitution." **Doe v. Maher**, 40 Conn. Sup. 394, 419, 515 A.2d 134 (1986). Nevertheless, in the interpretation of our state constitution, the court is

not precluded from consulting the case law under the federal constitution. **Daly v. Delponte**, 225 Conn. 499, 512-13, 624 A.2d 876 (1993).

Article I, §20 of the Connecticut Constitution is the modern equal protection clause. It provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." Conn. Const. Art. I, §20.

The equal protection clause provides for varying levels of judicial review to determine whether a state statute passes constitutional muster. **Daly v. DelPonte**, supra, 513. Our Supreme Court has held, in accordance with the federal framework of analysis that state action concerning social and economic regulation will survive an equal protection challenge if it satisfies a rational basis test. **Id.** citing **Laden v. Warden**, 169 Conn. 540, 542-43, 363 A.2d 1063 (1975). If, however, state action invidiously discriminates against a suspect class or affects a fundamental right, the action passes constitutional muster under the state constitution only

if it survives strict scrutiny. See Id., 542.

The plaintiffs allege in count one of their complaint that the Act must be declared unconstitutional because it lacks a rational basis. In count two, the plaintiffs allege that the Act should be "strictly scrutinized." The plaintiffs do not claim that the Act should be subject to a strict scrutiny test because it discriminates against a suspect class. Rather, the plaintiffs allege that the right to bear arms is a fundamental right and therefore legislation which affects that right should be subject to strict scrutiny.

A. The Reasonableness Test

The Connecticut Constitution, Article first, §15 states: "[e]very citizen has a right to bear arms in defense of himself and the state." Conn. Const. Art. I, §15. All constitutional rights, however, are not absolute. For example, Conn. Const. Art. I, §3 guarantees the free exercise and enjoyment of religion. However, it is well recognized that this right is not absolute, religious conduct remains subject to regulation for the protection of society. **Cantwell v. State of Connecticut**, 310 U.S. 296, 303-04, 60 S.Ct. 900, 84 L.Ed 1213 (1940).

Further, the protection of speech found in the First Amendment and Conn. Const. Art. I §4, while fundamental, is not absolute. The First Amendment does not protect one who yells "fire" in a crowded theater, nor does it protect one who speaks "fighting words." **Chaplinsky v. New Hampshire**, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942).

Another example can be found in Conn. Const. Art. I, § 8 which guarantees, in pertinent part, that in all criminal prosecutions, the accused shall have the right to be heard "... by himself and by counsel..." However, once a defendant is supplied with counsel, the core right is exhausted, and additional protections claimed under the Sixth Amendment can be severely circumscribed. **Wheat v. United States**, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). As a result, a defendant does not have a constitutional right to counsel of choice where other societal interests are compromised. **Id.**; **United States v. Vasquez**, 966 F.2d 254, 261 (7th Cir. 1992); **Johnson v. Warden**, 218 Conn. 773, 790-91, 591 A.2d 399 (1991).

On each occasion that the Connecticut courts have addressed the meaning of the "right to bear arms"

provision, they have indicated that the right is not absolute, but is a limited right, subject to the reasonable exercise of the state's police power. **State v. Bailey**, 209 Conn. 322, 346, 551 A.2d 1206 (1988); **State v. Banta**, 15 Conn. App. 161, 184, 544 A.2d 1226 (1988); **Rabbitt v. Leonard**, 36 Conn. Sup. 108, 116, 413 A.2d 489 (1979); **Johnsey v. Board of Firearms Permit Exam**, Superior Court, J.D. of New Haven, Docket # 299478 (1991, Schaller, J.) (It was not unreasonable for the Board of Firearm Permit Examiners to conclude that the appellant was an unsuitable person to be granted a pistol permit.).

In **Bailey**, the court held, inter alia, that the requirement that a person obtain a permit to carry a pistol places a reasonable restriction on a citizen's right to bear arms. The court, in pertinent part, stated, "It is beyond serious dispute that the legislature has the authority to place reasonable restrictions on a citizen's right to bear arms." **State v. Bailey**, supra, 346.

In **Banta**, the court denied the defendant's claim that a statute which prohibits a felon from possessing a firearm was unconstitutional under the state constitution. The court stated:

> ....our limited review of the record in this case convinces us that the defendant's claims are not truly of constitutional dimension. He claims that the state constitutional provision regarding the right to bear arms; Conn. Const., art. I, 15; confers on him an individual constitutional right to possess a pistol. Even if we assume without deciding that there is such an individual constitutional right, similar constitutional provisions in other states have been repeatedly interpreted to be subject to reasonable limitation....The defendant has not established that this prohibition applicable to convicted felons is unreasonable.

(Citations omitted.) **State v. Banta**, supra, 184.

In Rabbit, the plaintiff complained of the revocation of his pistol permit without prior notice and an opportunity to be heard. The court, Saden, J., stated that a Connecticut citizen has a fundamental right to bear arms in self defense. **Rabbit v. Leonard,** supra, 112. Nevertheless, the court applied a standard of reasonableness in finding that the state had the right to revoke the plaintiff's pistol permit. Id., 116.

Other jurisdictions with similar constitutional provisions guaranteeing the right to bear arms have consistently held that the right to bear arms is not an unlimited right and is subject to reasonable

regulation.[1] See, e.g. People v. Brown, 253 Mich. 537, 235 N.W. 245, 246 (1931); Carfield v. State, 649 P.2d 865, 871-72 (Wyo. 1982); People v. Blue, 190 Colo. 95, 102-03, 544 P.2d 385 (1975); Robertson, et al. v. City of Denver, et al., ____Colo.____(May 2, 1994); State v. Cartwright, 246 Or. 120, 134-36, 418 P.2d 822 (1966); State v. Smith, 132 N.H. 756, 571 A.2d 279, 281 (1990); State v. Kessler, 289 Or. 359, 614 P.2d 94, 99 (1980).

In the recently decided Robertson case, supra, the majority refused to categorize the Colorado right to bear arms as fundamental, but remained silent on that issue. They applied the reasonableness standard to the constitutional test of the Denver ordinance banning assault weapons. They cited the body of law that exists in Colorado where courts have applied the reasonableness standard to any statute which invoked the police power as a restriction on the right to bear arms, without a determination as to the nature of that right. Robertson v. City of Denver, supra, 13-14. They point out that Connecticut is one of two jurisdictions to refer to the right as fundamental, citing Rabbitt, supra. Id., 12.

[1] These states have right to bear arms provisions which focus on a citizens right to bear arms for self defense and defense of the state.

That decision of our court was handed down in 1979, and consistently since that time, the Connecticut Supreme Court has applied the reasonableness standard to any legislation that has regulated the right to bear arms.

For all of the foregoing reasons, the court finds that Conn. Const. Art. I §15 explicitly grants citizens of Connecticut a right to bear arms. However, it does not grant an unlimited right to possess assault weapons. Therefore, the proper constitutional test is whether the Act is a reasonable exercise of the state's police power.

Police power generally means the power to govern and belongs to every sovereignty. **Snyder v. Newtown**, 147 Conn. 374, 389, 161 A.2d 770 (1960). "It is a universally accepted rule of constitutional law that the legislative department in the use of its police power is the judge, within reasonable limits, of what the public welfare requires." (Citations omitted.) **Cutlip v. Connecticut Motor Vehicles Commissioner**, 168 Conn. 94, 100, 357 A.2d 918 (1975).

> The court's function in examining the constitutional aspect of police legislation is to decide whether the purpose of the legislation is a legitimate one and whether the particular enactment is designed to accomplish that purpose in a fair and reasonable way. If an enactment meets this test, it satisfies the constitutional

> requirement of due process and equal protection of the laws.... Courts cannot question the wisdom of police legislation and must accord to the legislature a liberal discretion, especially in matters involving potentialities generally recognized as dangerous.

Pierce v. Albanese, 144 Conn. 241, 249, 149 A.2d 606 (1957).

All of the facts that have been received on this record were contained in the public debate in the legislature concerning the appropriateness, as a political matter, of regulating firearms in any way. The legislature focused on the perceived public need to control the use of large capacity, rapid fire automatic, selective fire, and some semiautomatic firearms. The evidence indicates an escalation in that use, and while not the predominant number of firearms seized, the banned weapons have appeared more frequently as a risk factor to police officers on the street, and to innocent victims in densely-populated areas.

The court finds that Public Act 93-306 is a reasonable exercise of the State's police power. The court finds further that the legislature designed the Act to accomplish that purpose in a fair and reasonable manner. Accordingly, it satisfies the constitutional requirement of due process and equal protection.

V.

VOID FOR VAGUENESS (COUNT 3)

In count three of their amended complaint, the plaintiffs assert that the Act is unconstitutionally vague in violation of Article I, §8 and §10 of the Connecticut Constitution. Specifically, the plaintiffs attack Section 1(a)(1) of the Act which defines an "assault weapon".

The void for vagueness doctrine, which is derived from the constitutional guarantee of due process, embodies two central precepts: the right to fair warning of the effect of a governing statute or regulation and the guarantee against standardless law enforcement. **State v. Schriver**, 207 Conn. 456, 460, 542 A.2d 686 (1988); **Smith v. Goguen**, 415 U.S. 566, 572-73, 94 S.Ct. 1242, 39 L.Ed. 2d 605 (1974); **State Management Assn. of Connecticut Inc. v. O'Neill**, 204 Conn. 746, 757, 529 A.2d 1276 (1987).

As a matter of the due process of law required by our federal and state constitutions, "a penal statute must be sufficiently definite to enable a person to know what conduct he must avoid." (Citations omitted.) **State v. Proto**, 203 Conn. 682, 696, 526 A.2d 1297 (1987).

Legislatures must set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." **Smith v. Goguen**, supra, 572-73. A statute must afford a person of ordinary intelligence a reasonable opportunity to know what is permitted or prohibited. **McKinney v. Coventry**, 176 Conn. 613, 618, 410 A.2d 453 (1979). A statute which forbids the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, violates the first essential of due process of law. **State v. Cavallo**, 200 Conn. 664, 667,, 513 A.2d 646 (1986).

It is not necessary, however, that a statute list the precise conduct prohibited or required. **State v. Eason**, 192 Conn. 37, 47, 470 A.2d 688 (1984). It is recognized that the law may be general in nature; the constitution requires no more than "a reasonableness of certainty." **State v. White**, 204 Conn. 410, 415, 528 A.2d 811 (1987). "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." (Citation omitted.) Id., 415-16. "A statute is not void for vagueness unless it clearly and

unequivocally is unconstitutional, making every presumption in favor of its validity." (Citation omitted.) State Management Assn. of Connecticut, Inc. v. O'Neill, supra, 758.

Where a penal statute implicates rights protected by the First Amendment, the statute's constitutionality is tested for vagueness on its face. State v. Pickering, 180 Conn. 54, 58 n.3, 428 A.2d 322 (1980). However, in non-First Amendment contexts, "the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the particular facts at issue." Id., 57. This case does not involve the alleged infringement of First Amendment freedoms, therefore, the plaintiffs' vagueness challenge must be examined in the light of the facts of this case. Hence, the court is not free to speculate as to whether under hypothetical circumstances, the Act may be vague. Springfield Armory, Inc. v. City of Columbus, 805 F. Supp. 489, 497 (S.D. Ohio 1992).

The plaintiffs contend that the Act is unconstitutionally vague because it fails to define "assault weapon" in terms of any understandable categories except for the selective guns which are

listed. The plaintiffs allege further that the Act neglects to define "type" and "series," words which the Act uses to define assault weapons.

The definition of "assault weapons" in the statute is clear. This court does not find credible, any claim that a person purchasing a firearm would be unaware of its firing capabilities. This court finds that a person of ordinary intelligence is capable of understanding whether his or her firearm is a fully automatic, selective-fire, burst fire, or semi-automatic firearm. The definition of "assault weapon" is not vague.

The plaintiffs cite **State v. Defrancesco**, 34 Conn. App. 741, __ A.2d __ (1994), in support of their claim that the words "series" and "type" are not terms of art in the firearms industry, or at law, sufficient to allow the public to understand the prohibition in the statute.

Colt, in its promotional catalogue (Plaintiffs' Ex. 2) refers to certain combinations of firearms as a "group". Springfield Armory refers to "series" or "models" for groupings of similar firearms (Plaintiffs' Ex. 3), while Eagle Arms prints an entire catalogue for the EA-15 series.

This marketing literature is found to be readily

available to the general public, to those of ordinary intelligence, who would likely review catalogues prior to making a purchase. Clearly, gun dealers who have such literature and knowledge of the industry, know when a firearm is derived from another, with certain alterations that do not change the essential form of the firearm. Therefore, the court finds that the use of the word "series" in the statute is not vague.

The term "type" appears in none of the marketing or promotional literature that has been made an exhibit for the record. Furthermore, the definition does not appear in Black's Law Dictionary, but only in Webster's. It is not a word that lends itself to statutory construction, absent a review of the legislative history. When the court is unable to find the legislative intent from the language of the statute, the court must look to the legislative history for guidance. see **State v. Defrancesco**, supra, 750.

The legislative history discloses that the word "type" was used in conjunction with the AK-47 to include all copies of that firearm. **Senate Proceedings**, PP. 2988 (May 27, 1993, Jepson, S.). However, the legislative history is silent with respect to the use of the word

"type" as it pertains to the Auto Ordnance Thompson type. Despite the legislative history which addresses the use of the word "type" in conjunction with the AK-47, the court finds that the use of the word "type" in this statute is vague. That finding, however, is not dispositive of the constitutionality of the entire statute.

> Whenever a portion of a statute appears to be void for vagueness on its face, thereby threatening to produce a chilling effect on the remainder of the statute which might otherwise be valid, Connecticut courts, like the federal courts, have, whenever possible, applied a 'judicial gloss' to the statute to save it from infection and inevitable invalidation.

State v. Leary, 41 Conn. Sup. 525, 526-27, 590 A.2d 494 (1991, Mottolese, J.).

The court must now determine if the statute can be read consistently with its intent, if the vague word is deleted. The invalidity of one provision of the act does not necessarily result in the entire act being invalid. **Kellems v. Brown**, 163 Conn. 478, 495-96, 313 A.2d 53 (1972); citing **State v. Wheeler**, 25 Conn. 290, 299 (1856). The test is whether they are so mutually connected and dependent as to indicate a legislative intent that they should stand or fall together. **Kellems v. Brown**, supra, citing **Branch v. Lewerenz**, 75 Conn. 319,

324, 52 A. 658 (1902). In this case, the court finds no such dependence, and no mutual connection with respect to the list of firearms, and with respect to the AK-47. However, the use of the word "type" following Auto Ordnance Thompson is connected, and that designation is subject to being void for vagueness. Auto Ordnance Corporation makes a variety of pistols and long guns which are not further described in the statute. (Plaintiffs' Ex. 1). Deleting the word "type" from the description does not cure the problem with vagueness for this listing. If the legislature sees fit, it has the option to revise the statute to deal with which of the Auto Ordnance firearms they feel are subject to the statute. At this time, the court has no ability or authority to substitute its judgment. The excision of the word "type" where noted will not defeat the statute, nor prevent its reasonable use as dictated by the legislature. By narrowing the construction of the statute, by deleting the vague term "type" and "Auto Ordnance Thompson type", therein, the statute passes constitutional muster.

VI.

BILL OF ATTAINDER (COUNT 4)

Article First, §13 of the Connecticut Constitution states: "No person shall be attainted of treason or felony by the legislature." Art. I §10 of the United States Constitution provides in pertinent part that "[n]o state shall... pass any Bill of Attainder." These Bill of Attainder provisions prohibit the state or federal legislatures from assuming judicial functions and conducting trials. **United States v. Brown**, 381 U.S. 437, 462, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). The key features of a bill of attainder are that the challenged law "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." **Nixon v. Administrator of General Services.**, 433 U.S. 425, 468, 97 S.Ct. 2777, 2803, 53 L.Ed. 2d 867 (1977); see also **State v. Washburn**, 34 Conn. App. 557, 563, __ A.2d __ (1994).

A plaintiff challenging a legislative act on the ground that it is an unconstitutional bill of attainder must prove three elements: nonjudicial infliction of punishment; specificity as to the identity of individuals

affected; and lack of a judicial trial. **Springfield Armory, Inc. v. City of Columbus**, supra, 493; See 16A Am. Jur.2d Constitutional Law § 655 (1979). These elements must be established by the "clearest proof." (Citations omitted.) **Id.**

The plaintiffs allege that the manufacturers of guns named in the Act have been singled out for adverse treatment and legislatively condemned because of a relationship with an undesirable name. As a result, the plaintiffs claim that any manufacturer who makes and any citizen who owns or possesses a named gun have been attainted.

Specificity alone does not establish that the law is an unconstitutional bill of attainder. **Nixon v. Administrator of General Services**, supra, 470-72. The court in **Nixon** concluded that "the Act's specificity, the fact that it refers to [President Nixon] by name, does not automatically offend the Bill of Attainder Clause. **Id.**, 471-72. Similarly, the present Act's specificity in naming weapons made by Colt, Springfield Armory, Heckler and Koch, Intratech, and other gun manufacturers does not render the Act a bill of attainder. **Fresno Rifle and Pistol Club Inc. v. Van De Kamp**, 965 F.2d 723, 727-28

9th Circuit 1992.)

Furthermore, "[s]imply because a law places burdens on citizens does not make those burdens punishment." (Citation omitted.) **State v. Washburn**, supra, 563. Three tests have been identified as applicable to the determination whether the burden imposed by the legislature is punishment for bill of attainder purposes: the historical test; the functional test; and the motivational test. **Nixon v. Administrator of General Services**, supra, 473-84.

A. The Historical Test

The historical test requires the court to examine whether the burden imposed by the legislature falls within the category of punishments traditionally judged to be prohibited by the Bill of Attainder Clause. Id., 473-74. These are: the death sentence; imprisonment; banishment; confiscation of property; and barring individuals or groups from participating in specified employments or vocations. Id.

Plaintiffs' witnesses Benjamin, D'Andrea, and Carlos Garcia, the President of Intratech, offered testimony that their businesses have suffered as a result of

passage of the Act. The plaintiffs, however, have not proven that the Act bars them from participating in their specified employments or livelihood. The Act does not prevent plaintiff Intratech from manufacturing or selling firearms in general. Nor does it prevent Intratech from manufacturing the banned "assault weapons" and selling them in places other than Connecticut. Moreover, the Act does not prohibit plaintiffs D'Andrea or Benjamin from selling or working on firearms and parts in the State of Connecticut other than those affected by the Act. For the foregoing reasons, the historical test for punishment has not been satisfied. See **Springfield Armory, Inc. v. City of Columbus**, supra, 494.

B. The Functional Test

The functional test requires the court to analyze whether the challenged law, viewed in terms of the type and severity of burdens imposed, can be said to further nonpunitive purposes. **Nixon v. Administrator of General Services**, supra, 475-76. Where legitimate legislative purposes do not appear, it is reasonable to conclude that punishment was the purpose of the legislation. Id., 476. The plaintiff bears the burden of proving "that the

legislature's action constituted punishment and not merely the legitimate regulation of conduct." Id., n. 40.

The defendants assert that the Act was passed in light of legislative recognition that "assault weapons" are being used in street crime across Connecticut and that the proliferation of these guns is an intolerable threat to public safety. Defendants also argue that the Act will prevent tragedies such as the 1991 killing of State Police Trooper Russell Bagshaw.

The court finds that the Act was designed to serve a nonpunitive purpose, namely the protection of the citizens of Connecticut from the perceived danger posed by certain firearms. As stated previously, this is a reasonable exercise of the state's police power. Furthermore, in relation to the potential harm sought to be averted by the Act, the severity of the burden on the plaintiffs is slight. The functional test for punishment has not been satisfied. See **Springfield Armory, Inc. v. City of Columbus**, supra, 495.

C. The Motivational Test

The motivational test requires the court to determine whether the legislative history of the Act

evinces an intent to punish. **Nixon v. Administrator of General Services**, supra, 478. In determining intent the court should also consider whether less burdensome alternatives were available. Id., 482.

The plaintiffs have not offered, nor has the court found, any evidence of a legislative intent to punish the plaintiffs. To the contrary, the motivation of the legislature is clearly focused on public safety. see **State v. Washburn**, supra, 564. The plaintiffs have failed to establish punishment under the motivational test.

The plaintiffs have failed to prove that the burden imposed by the Act fits within any of the categories of punishment prohibited by the federal or state bill of attainder clause. The Act is not an unconstitutional bill of attainder.

VI.

CONCLUSION

The plaintiffs' action for a declaratory judgment that the Act is void under the Connecticut Constitution, is denied. The court finds all issues in favor of the defendants subject to the narrowing construction of the statute contained herein.

The application for a temporary injunction is denied.

DRANGINIS, J.

EXHIBIT 72

A-2291

2000 - 2010, United States
Violence-Related Firearm Deaths and Rates per 100,000
All Races, Both Sexes, All Ages

ICD-10 Codes: X72-X74,X93-X95,Y35.0, *U01.4

Number of Deaths	Population***	Crude Rate	Age-Adjusted Rate**
325,449	3,251,668,036	10.01	9.90

Download Results in a Spreadsheet (CSV) File Help with Download

Reports for All Ages include those of unknown age.

* Rates based on 20 or fewer deaths may be unstable. Use with caution.

** Standard Population is 2000, all races, both sexes.

*** Population estimates are aggregated for multi-year reports to produce rates.

Produced by: National Center for Injury Prevention and Control, CDC
Data Source: NCHS Vital Statistics System for numbers of deaths. Bureau of Census for population estimates.

A-2292

EXHIBIT 73

DAVID JENSEN PLLC

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17 January 2013

VIA ELECTRONIC CASE FILING (ECF)

Katherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, New York 10007

Re: *Kwong v. Bloomberg*, no. 12-1578
Notice of supplemental authority under FRAP 28(j)

Dear Ms. Wolfe:

Plaintiffs-Appellees write to supplement the authorities previously provided (Appellants' Brief pp. 14-20) with this Court's recent decision in *Kachalsky v. Cacace*, 701 F.3d 81, 2012 U.S. App. LEXIS 24363 (2d Cir. 2012). *Kachalsky* concerned burdens on the carry of concealed handguns in public, and hence, it concerned a different "scope" of Second Amendment activity than does the present case. However, the decision is still instructive on two points.

First, *Kachalsky* teaches that the framework of intermediate and strict scrutiny applies when a law substantially burdens the ability of law-abiding citizens to possess and use firearms for self-protection. *See id.* at __, 2012 U.S. App. LEXIS 24363 at *30-31. The burden in *Kachalsky* was "substantial" because it "place[d] substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public," and because "there are no alternative options for obtaining a license to carry a handgun." *Id.* at __, 2012 U.S. App. LEXIS 24363 at *30.

Second, *Kachalsky* indicates that a higher level of scrutiny should apply to laws that burden "the 'core' protection of self-defense in the home." *Id.* at __, 2012 U.S. App. LEXIS 24363 at *31. This Court reasoned that there was "a critical difference" between laws that burden the ability to keep guns at home and laws that burden the ability to carry them in public. *See id.* at __, 2012 U.S. App. LEXIS 24363 at *33. This Court applied intermediate scrutiny because the burden concerned "the carrying of firearms in public." *Id.* at __, 2012 U.S. App. LEXIS 24363 at *41.

Respectfully submitted,

David D. Jensen

DAVID JENSEN PLLC

cc: Susan Paulson
New York City Law Department
By e-mail to *spaulson@law.nyc.gov*

Simon Heller
New York State Office of the Attorney General
By e-mail to *simon.heller@ag.ny.gov*

The body of the foregoing letter is 257 words.

EXHIBIT 74

New Rifle Mimics Machine Gun's Rapid Fire -- and It's Legal

CNNMoney

By Aaron Smith | CNNMoney.com – 1 hour 53 minutes ago

NEW YORK -- Machine guns are illegal in the U.S. for most people, but one small company has found a way around that.

Slide Fire, based in Moran, Texas, plans to sell a semiautomatic rifle that mimics the rapid fire of a machine gun and is also fed bullets from a belt, which provides a huge capacity for ammunition -- potentially thousands of rounds.

Brandon Renner, sales and marketing manager for Slide Fire, says the belt-fed rifle, called the SFS BFR, will be available this fall and sell for $6,000.

"It sprays like a fire hose," said Renner. "We recommend no more than 30 rounds on the belt, but one person could make it as big as they want."

Can that be legal?

number and the only one that requires a background check to purchase. Slide Fire modifies the trigger and the stock -- the butt of the gun that sits against the shooter's shoulder.

Slide Fire's technology uses the recoil of the rifle shot to "bump" the gun, speeding up the rate of fire without changing the gun's classification as a semiautomatic, which requires that only one round is fired each time the trigger is pulled.

In a 2010 letter posted on Slide Fire's website, the ATF wrote: "We find that the 'bump-stock' is a firearm part and is not regulated as firearm under the Gun Control Act or the National Firearms act."

"I can confirm that ATF did approve the device referenced in the letter and that the Slide Fire is legal," said ATF spokesman Christopher Amon.

Slide Fire already sells bump-stocks for $370 that speed up the rate of fire for semiautomatics. The company also sells semiautomatic rifles that have already been accessorized for bump-fire, costing between $1,150 to $1,950. But these guns use magazines, not belts, and thus have limited ammo capacity.

A spokeswoman for Wal-Mart (WMT), one of the largest gun sellers in America, said the company does not sell Slide Fire products, and will not be offering the belt-fed rifle.

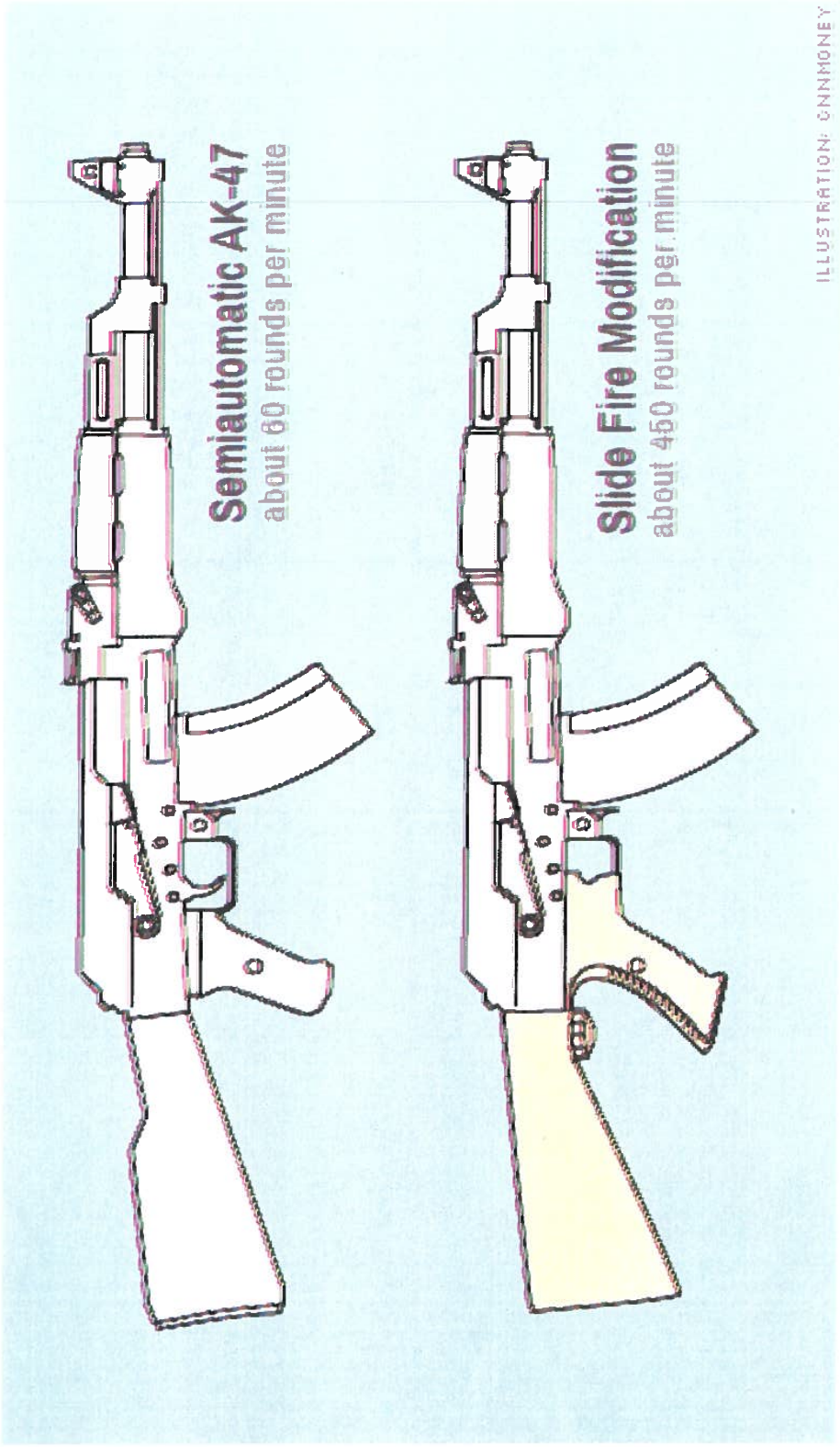
Another major dealer, Cabela's (CAB), did not return messages from CNNMoney about Slide Fire. But the company's website listed Slide Fire products for sale.

James Hill, owner of the Abilene Indoor Gun Range, located about 50 miles away from Slide Fire's headquarters, said he

because he doesn't believe there will be much of a demand for it.

He said the Slide Fire rifle is a bit more challenging to fire than a fully automatic weapon, but the "learning curve" can be corrected with a bit of practice.

"It's not as easy [as full auto], but it's fairly idiot proof," he said.


Semiautomatic AK-47
about 60 rounds per minute
Slide Fire Modification
about 450 rounds per minute
ILLUSTRATION: CNNMONEY

A-2300

EXHIBIT 75

CRIMINAL POSSESSION OF A WEAPON
THIRD DEGREE
(D Felony)
(Possession of Assault Weapon)
PENAL LAW 265.02(7)
(Committed on or after Nov. 1, 2000)

The _____ count is Criminal Possession of a Weapon in the Third Degree.

Under our law, a person is guilty of Criminal Possession of a Weapon in the Third Degree when that person knowingly [1] possesses an assault weapon.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "assault weapon" "possess," and "knowingly."

ASSAULT WEAPON [2] means

Select as appropriate:

"Assault weapon" means (a) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least two of the following characteristics:

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a bayonet mount;

(iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor;

(v) a grenade launcher; or

---

[1]The word "knowingly" has been added to this definition to comport with statutory law (Penal Law § 15.05(2)) and with case law. *People v. Ford,* 66 NY2d 428, 440 (1985); *People v. Marino,* 212 AD2d 735, 736 (2d Dept. 1995); *People v. Cohen,* 57 AD2d 790 (1st Dept. 1977).

[2]*See* Penal Law § 265.00(22).

(b) a semiautomatic shotgun that has at least two of the following characteristics:

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a fixed magazine capacity in excess of five rounds;

(iv) an ability to accept a detachable magazine; or

(c) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least two of the following characteristics:

(i) an ammunition magazine that attaches to the pistol outside of the pistol grip;

(ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;

(iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned;

(iv) a manufactured weight of fifty ounces or more when the pistol is unloaded;

(v) a semiautomatic version of an automatic rifle, shotgun or firearm; or

(d) any of the weapons, or functioning frames or receivers of such weapons, or copies or duplicates of such weapons, in any caliber, known as:

(i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models);

(ii) Action Arms Israeli Military Industries UZI and Galil;

(iii) Beretta Ar70 (SC-70);

(iv) Colt AR-15;

(v) Fabrique National FN/FAL, FN/LAR, and FNC;

(vi) SWD M-10, M-11, M-11/9, and M-12;

(vii) Steyr AUG;

(viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and

(ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12;

NOTE: Add and Select as appropriate:

(e) provided, however, that such term does not include: (i) any rifle, shotgun or pistol that (A) is manually operated by bolt, pump, lever or slide action; (B) has been rendered permanently inoperable; or (C) is an antique firearm as defined in 18 U.S.C. 921(a)(16);

(ii) a semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition;

(iii) a semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine;

(iv) a rifle, shotgun or pistol, or a replica or a duplicate thereof, specified in Appendix A to section 922 of 18 U.S.C. as such weapon was manufactured on October first, nineteen hundred ninety-three. The mere fact that a weapon is not listed in Appendix A shall not be construed to mean that such weapon is an assault weapon; or

(v) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or any of the weapons defined in paragraph (d) of this subdivision lawfully possessed prior to September fourteenth, nineteen hundred ninety-four.

NOTE: The charge continues at this point as follows:

The assault weapon need not be loaded, but it must be operable. To be operable, an assault weapon must be capable of discharging ammunition.[3]

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.[4]

---

[3] *See People v. Longshore,* 86 NY2d 851, 852 (1995); *People v. Ansare,* 96 AD2d 96 (4th Dept. 1983). *Cf. People v. Saunders,* 85 NY2d 339, 341-42 (1995).

[4] *See* Penal Law § 10.00(8). Where constructive possession is alleged, or where the People rely on a statutory presumption of possession, insert the appropriate instruction from the "Additional Charges" section at the end of this article.

A person KNOWINGLY possesses an assault weapon when that person is aware that he or she is in possession of such weapon..[5]

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, each of the following three elements:

1. That on or about *(date)*, in the county of *(county)*, the defendant, *(defendant's name)* possessed an assault weapon;

2. That the defendant did so knowingly; and

3. That the assault weapon was operable.

Therefore, if you find that the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of the crime of Criminal Possession of a Weapon in the Third Degree as charged in the _____ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of the crime of Criminal Possession of a Weapon in the Third Degree as charged in the _____ count.

---

[5]*See* Penal Law § 15.05(2). An expanded definition of "knowingly" is available in the General Charges section under Culpable Mental States.

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 RICHARD LYNCH

RICHARD LYNCH declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am a Major in the Division of State Police and currently the Director of its Planning and Research section, which is responsible for the posting of information and guidance on the Division Intranet, an internal web page accessible to employees of the Division of State Police. I submit this declaration in support of the Motion by 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") for Permission to Submit Additional Authority and a Supplemental Exhibit.

2. Specifically, I submit this declaration to provide the Court with information regarding the Guide to the New York SAFE Act for Members of the Division of State Police (the "NY State Police Guide to the SAFE Act"), a copy of which is attached as Exhibit C to the Declaration of William J. Taylor, Jr., dated October 8, 2013.

3. The NY State Police Guide to the SAFE Act was prepared by the Office of Division Counsel, 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, as they enforce and apply the provisions of the Secure Ammunition and Firearms Enforcement Act, 2013 N.Y. Laws, ch. 1 (the "SAFE Act").

4. The NY State Police Guide to the SAFE Act was submitted to my office, the Division's Planning and Research Section, on September 25, 2013. It was subsequently approved for posting by the Division of State Police on September 26, 2013. My office then posted the document on the Division Intranet, thus making it available to members and employees of the State Police, on September 27, 2013.

5. In my capacity as the Director of Planning and Research, I am responsible for the maintenance of all directives, orders, policies, and procedures of the State Police. The NY State Police Guide to the SAFE Act is not a directive or order, but is instead one of many Field Guides, Legal Guides, or Legal Bulletins that the Office of Division Counsel routinely issues to members of the State Police, on various issues of law. This includes providing regular legal guidance with respect to broader areas of law like search and seizure, vehicle stops, and the right to counsel; with respect to recent court decisions; and with respect to new legislation like the

SAFE Act.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Albany, New York
October 8, 2013

Richard Lynch

Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NEW YORK STATE RIFLE AND PISTOL ASSOCIATION, INC., et al, Plaintiffs.	:	
v.	:	Civil No.: 1:13-cv-00291-WMS
ANDREW M. CUOMO, Governor of the State of New York, et al, Defendants.	:	

SUPPLEMENTAL DECLARATION OF GARY KLECK

I, Gary Kleck, declare as follows:

1. I am a Professor of Criminology and Criminal Justice at Florida State University where I focus my scholarship and research on gun control and violence.

2. I previously submitted a Declaration in this matter on April 15, 2013. My prior Declaration addressed a range of topics relating to the issues raised in this case.

3. Specifically, in Part I of that Declaration, I outlined my experience and training as a nationally recognized expert and award winning scholar on the subjects of violence and gun control. In Part II, I summarized the changes to New York law made by the New York Secure Ammunition and Firearms Enforcement Act (the "Act") and discussed the consequences of those changes. Finally, in Part III, I discussed the Act's new restrictions on the stock and grips of rifles and shotguns.

4. In Section A.1. of Part III, I noted that while "some semi-automatic firearms are banned, other semi-automatic firearms are left legally available . . . . Thus, firearms will continue to be available that function in essentially identical ways as the banned firearms—i.e., they can

accept detachable magazines (including LC [large capacity] magazines), can be fired just as fast, and can fire rounds that are, shot-for-shot, just as lethal as rounds fired from the banned firearms. Consequently, criminals can substitute mechanically identical firearms for banned [assault weapons], commit the same crimes they otherwise would have committed with the banned firearms, with the same number of wounded or killed victims." Defendants, however, now misconstrue this statement as meaning "that there are hundreds of alternative firearms available for self-defense purposes—including, according to Plaintiffs, those that 'function in essentially identical ways as the banned firearms.'"

5. Defendants' interpretation grossly distorts my statement. Specifically, my statement regarding the availability of firearms that "function in essentially identical ways as the banned firearms" referenced specifically the fact that some unbanned firearms can still accept (now banned) LC magazines and be used to fire rounds that are just as lethal as those of the banned firearms. Since unbanned firearms can still be misused by criminals to accept LC magazines, the Act therefore puts a distinct disadvantage to those who would use firearms lawfully for self-defense.

6. Moreover, while it is true that there are many alternative firearms available for self-defense purposes, this is true because of shared functions across all firearms. It is misleading to imply that the banned and unbanned firearms are equally useful in all respects for self-defense purposes. I never stated that, nor do I believe it.

7. More specifically, I wrote my Declaration in the context of a discussion concerning the significance of LC magazines being used by either offenders or crime victims, and I certainly did not state or even imply that LC magazines confer no advantages for lawful self-defense. Quite the contrary – I cited existing evidence that (1) 800,000 violent crimes are

committed each year in which there are multiple offenders, and that (2) even police officers hit an aggressor with the defensives shots they fire in only 37% of the events in which they fire their guns, implying an even lower "hit rate" among ordinary civilian defenders (Kleck Declaration, sworn to April 15, 2013 at pp. 2-3). Having more than seven rounds ready to quickly fire at multiple criminal aggressors would be essential to a crime victim being able to shoot the criminal aggressors, and thus to effectively defend themselves against an attack by aggressors who can only be stopped by shooting them.

8. Defendants' suggestion that the Act does not place law-abiding citizens at a distinct advantage in using firearms for self-defense purposes is simply not supported.

I declare under the penalty of perjury under the laws of the United States of America pursuant to 28 USC § 1746 that the foregoing is true and correct.

Dated: October 8, 2013

Dr. Gary Kleck

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 supplemental declaration in further support of the State Defendants' Cross-Motion to Dismiss and/or for Summary Judgment and in Opposition to the Plaintiffs' Cross-Motion for Summary Judgment, for the limited purpose of providing the Court with true and accurate copies of the following additional authority:

Exhibit	**Exhibit Description**
A	Transcript of Proceedings, *Tardy* v. *O'Malley*, Civil No. CCB-13-2841 (D. Md. Oct. 1, 2013).
B	Order, *Tardy* v. *O'Malley*, Civil No. CCB-13-2841 (D. Md. Oct. 1, 2013).

3. In its Order of October 15, 2013, the Court granted the State Defendants permission to present this additional authority in this action and directed that they file this authority with the Court by October 18, 2013 (Docket No. 134).

Dated: New York, New York
October 18, 2013

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

EXHIBIT A

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

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.

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

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

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

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

THE COURT: All right.

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

THE COURT: Sure, wherever you are comfortable.

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

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

Maryland Licensed Firearms Dealers Association.

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

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

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

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

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

take effect.

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

under Chester and Masciandaro.

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

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

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

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

MS. WOODWARD: Well, Your Honor --

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

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

THE COURT: Uh-huh.

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

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

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

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

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

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

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

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

THE COURT: Yes.

MS. WOODWARD: But that's within the licensing

scheme, not the ban, not a ban.

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

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

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

THE COURT: Uh-huh.

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

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

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

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

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

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

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

desire.

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

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

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

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

The Fourth Circuit --

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

Do you mean the Supreme Court case?

MS. WOODWARD: Yes, yes.

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

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

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

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

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

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

THE COURT: Right.

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

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

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

THE COURT: I know which one you mean.

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

THE COURT: I do.

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

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

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

THE COURT: Well, as you --

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

THE COURT: Okay. Because Masciandaro assumes,

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

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

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

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

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

The State doesn't disclose to the Court a

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

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

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

Just some of the mechanics here, Your Honor.

THE COURT: Uh-huh.

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

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

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

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

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

MS. WOODWARD: Correct, Your Honor.

THE COURT: Okay.

MS. WOODWARD: That's correct.

A couple more points on these mechanics.

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

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

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

self-defense in the home.

If I may touch upon magazine capacities, Your Honor?

THE COURT: Sure.

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

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

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

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

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

THE COURT: Do you think that's unconstitutional?

MS. WOODWARD: We are not challenging that

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

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

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

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

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

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

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

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

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

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

Our plaintiffs and members of association

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

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

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

THE COURT: Right.

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

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

The ban unfairly favors retired law enforcement officers.

THE COURT: What's the suspect classification,

suspect category?

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

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

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

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

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

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

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

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

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

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

It is not to be left --

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

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

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

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

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

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

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

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

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

MS. WOODWARD: Right, right.

THE COURT: I mean I'm asking you.

MS. WOODWARD: Right.

THE COURT: May we can get to that later.

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

THE COURT: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. WOODWARD: I am concluding, Your Honor.

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

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

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

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

Thank you, Your Honor.

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

Mr. Fader.

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

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

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

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

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

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

THE COURT: That's true.

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

THE COURT: Right.

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

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

Second, the law also applies to their copies.

THE COURT: Right.

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

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

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

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

don't.

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

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

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

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

I've just confirmed that there have been no

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

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

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

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

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

I wanted to clarify that as well.

THE COURT: Sure.

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

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

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

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

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

Heller about M16 rifles.

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

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

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

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

Taking first the factor of irreparable harm, I

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

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

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

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

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

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

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

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

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

not to strict scrutiny, but to intermediate scrutiny.

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

MR. FADER: Certainly, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I addressed the vagueness issue I think already.

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

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

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

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

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

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

THE COURT: That's fine.

MR. FADER: Thank you.

THE COURT: Thank you.

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

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

THE COURT: Sure.

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

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

THE COURT: Okay.

MS. WOODWARD: Thank you, Your Honor.

THE COURT: Thank you.

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

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

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

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

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

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

I submit, Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SWEENEY: I am suggesting -- I'm sorry. Excuse me, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now one thing very important, and I want to be

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

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

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

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

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

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

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

Thank you.

THE COURT: Thank you, Mr. Sweeney.

Mr. Fader.

MR. FADER: Thank you, Your Honor.

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

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

system in keeping guns out of the hands of criminals.

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

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

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

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

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

that. The process is underway for the application.

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

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

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

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

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

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

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

October 1st.

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

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

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

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

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

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

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

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

Unless Your Honor has any questions, thank you.

THE COURT: Thank you.

Mr. Sweeney.

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

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

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

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

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

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

Thank you, Your Honor.

THE COURT: Thank you very much.

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

(A recess was taken.)

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

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

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

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

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

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

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

The new law also generally prohibits sale and

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

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

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

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

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

The Second Amendment, as the Supreme Court

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

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

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

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

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

means-end scrutiny.

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

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

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

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

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

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

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

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

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

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

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

self-defense as well.

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

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

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

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

D.C. case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

further proceedings on that issue.

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

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

MS. WOODWARD: Thank you, Your Honor.

MR. FADER: Nothing further, Your Honor.

THE COURT: All right. Thank you all.

(The proceedings concluded.)

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

Y

EXHIBIT B

A-2408

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAWN J. TARDY, ET AL.	:	
	:	
v.	:	CIVIL NO. CCB-13-2841
	:	
MARTIN J. O'MALLEY, ET AL.	:	

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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

12/23/2013	139	TEXT ORDER On November 22, 2013, Plaintiffs requested a hearing on the pending motions. 137 . But given the breadth and thoroughness of the briefing by the parties and amici already submitted to this Court, it is prepared to resolve the pending motions without a hearing. Further, this Court is fully cognizant of the impending deadlines instituted by the SAFE Act and the possible effects those deadlines may have on the public and government administration. Therefore, considering both that the issues have been comprehensively briefed and that various deadlines imposed by the Act will soon take effect, this Court will issue a decision on the merits in advance of the deadline dates. SO ORDERED. Issued by William M. Skretny, Chief Judge on 12/23/2013. (MEAL) (Entered: 12/23/2013)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
Buffalo Division

NEW YORK STATE RIFLE AND PISTOL ASSOCIATION, INC., et al.,	)	
Plaintiffs,	)	Case No.: 1:13-cv-00291-WMS
v.	)	
ANDREW M. CUOMO, et al.,	)	
Defendants.	)	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that 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 in the above-captioned case, hereby appeal to the United States Court of Appeals for the Second Circuit from those portions of the District Court Decision and Order, entered December 31, 2013 (ECF Doc. No. 140), and the District Court Judgment, entered January 2, 2014 (ECF Doc. No. 141) that denied Plaintiffs' Motion for Summary Judgment; granted Defendant Andrew M. Cuomo, Eric T. Schneiderman, and Lawrence Friedman's Motion for Summary Judgment and Motion to Dismiss; and granted Defendant Gerald Gill's Motion for Summary Judgment and Motion to Dismiss.

(continued on next page)

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Dated: January 3, 2014

Respectfully Submitted,

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CERTIFICATION

I hereby certify that on January 3, 2014, a copy of the foregoing NOTICE OF APPEAL was filed electronically and served by mail upon anyone unable to accept electronic filing. Notice of this filing was will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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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

NOTICE OF CROSS-APPEAL

PLEASE TAKE NOTICE that 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 hereby cross-appeal to the United States Court of Appeals for the Second Circuit from the District Court Decision and Order, entered

A-2415

December 31, 2013 (Docket No. 140), and the District Court Judgment, entered January 2, 2014 (Docket No. 141).

Dated: New York, New York
January 3, 2014

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