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**STATE OF COLORADO**  
**DEPARTMENT OF LAW**

State Services Section

October 21, 2015

Elisabeth Shumaker, Clerk  
United States Court of Appeals for the Tenth Circuit  
The Byron White U.S. Courthouse  
1823 Stout Street  
Denver, CO 80257

RE: Notice of supplemental authority, *Colorado Outfitters Assn. et al. v. Hickenlooper*, Case No. 14-1290; *Beicker, et al. v. Hickenlooper*, Case No. 14-1292

Dear Ms. Shumaker:

Attached is the Second Circuit's opinion in *New York State Rifle and Pistol Ass'n, et al. v. Cuomo*, Nos. 14-36-cv and 14-319-cv (2d Cir. Oct. 19, 2015) ("*NYSRPA*").

*NYSRPA* involved challenges to laws enacted in New York and Connecticut in 2013 that, among other things, banned possession of magazines capable of accepting more than ten rounds of ammunition. Applying intermediate scrutiny, the Second Circuit affirmed the constitutionality of the ten-round magazine capacity limitations.

The Second Circuit's articulation of the intermediate scrutiny standard is consistent with the formulation advanced by the Governor here. The court held that "[t]o survive intermediate scrutiny, the fit between the challenged regulation and the government interest need only be substantial, not perfect." Slip op. at 37 (internal quotations and alteration omitted). It rejected the notion that intermediate scrutiny in the Second Amendment context requires a showing "that the statute is 'narrowly tailored' or the 'least restrictive available means to serve the stated governmental interest,'" and emphasized that the court's role

was “only to assure ourselves that, in formulating their respective laws, New York and Connecticut have “drawn reasonable inferences based on substantial evidence.” *Id.* (internal quotations omitted).

In affirming the district court’s ruling, the Second Circuit also cited record evidence that large-capacity magazines “are disproportionately used in mass shootings,” and that shootings involving the use of LCMs result in “more shots fired, persons wounded, and wounds per victim than do other gun attacks.” *Id.* at 43. The Governor made a similar evidentiary showing in this case, one that “fairly support[ed]” the Colorado General Assembly’s rationale.<sup>1</sup> *Id.* at 38.

Because it upheld two state laws that are substantially more restrictive than those challenged here, the Second Circuit’s opinion in *NYSRPA* supports affirmance of the district court’s holding.

Sincerely,

FOR THE ATTORNEY GENERAL

*s/ Matthew D. Grove*

MATTHEW D. GROVE

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cc: All counsel of record (submitted via CM/ECF)

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<sup>1</sup> The Second Circuit also struck down a “load limit” law that permitted ownership of ten-round magazines but prohibited them from being *loaded* with more than seven rounds. Slip op. at 43-44. This law, unlike the high-capacity magazine ban, did not serve the state’s interests because it would not “reduce the number of ten-round magazines in circulation.” *Id.*

14-36-cv(L); 14-319-cv  
New York State Rifle & Pistol Ass'n, Inc., et al. v. Cuomo, et al.  
Connecticut Citizens' Defense League, et al. v. Malloy, et al.

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In the  
United States Court of Appeals  
for the Second Circuit

\_\_\_\_\_

AUGUST TERM 2014

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□

Nos. 14-36-cv (Lead); 14-37-cv (XAP)

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, ROGER HORVATH,

Plaintiffs-Appellants-Cross-Appellees,

v.

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

Defendants-Appellees-Cross-Appellants,

□

1 □ GERALD J. GILL, in his official capacity as Chief of Police for the Town □  
2 □ of Lancaster, New York, LAWRENCE FRIEDMAN, □

3 □ □  
4 □ Defendants-Appellees, □

5 □ □  
6 □ FRANK A. SEDITA, III, in his official capacity as District Attorney for □  
7 □ Erie County, □

8 □ □  
9 □ Defendant. □

10 □ □  
11 □ On Appeal from the United States District Court □  
12 □ for the Western District of New York □

13 □ □ □ □  
14 □ □  
15 □ No. 14-319-cv □

16 □ □  
17 □ THE CONNECTICUT CITIZENS' DEFENSE LEAGUE, THE COALITION OF □  
18 □ CONNECTICUT SPORTSMEN, JUNE SHEW, RABBI MITCHELL ROCKLIN, □  
19 □ STEPHANIE CYPHER, PETER OWENS, BRIAN MCCLAIN, ANDREW □  
20 □ MUELLER, HILLER SPORTS, LLC, MD SHOOTING SPORTS, LLC, □

21 □ □  
22 □ Plaintiffs-Appellants, □

23 □ □  
24 □ v. □

25 □ □  
26 □ DANIEL P. MALLOY, in his official capacity as Governor of the State □  
27 □ of Connecticut, KEVIN T. KANE, in his official capacity as Chief □  
28 □ State's Attorney of the State of Connecticut, DORA B. SCHIRO, in her □  
29 □ official capacity as Commissioner of the Connecticut Department of □  
30 □ Emergency Services and Public Protection, DAVID I. COHEN, in his □  
31 □ official capacity as State's Attorney for the Stamford/Norwalk □  
32 □ Judicial District, Geographical Areas Nos. 1 and 20, JOHN C. SMRIGA, □

1 □ in his official capacity as State's Attorney for the Fairfield Judicial □  
2 □ District, Geographical Area No. 2, MAUREEN PLATT, in her official □  
3 □ capacity as State's Attorney for the Waterbury Judicial District, □  
4 □ Geographical Area No. 4, KEVIN D. LAWLOR, in his official capacity □  
5 □ as State's Attorney for the Ansonia/Milford Judicial District, □  
6 □ Geographical Areas Nos. 5 and 22, MICHAEL DEARINGTON, in his □  
7 □ official capacity as State's Attorney for the New Haven Judicial □  
8 □ District, Geographical Area Nos. 7 and 23, PETER A. MCSHANE, in his □  
9 □ official capacity as State's Attorney for the Middlesex Judicial □  
10 □ District, Geographical Area No. 9, MICHAEL L. REGAN, in his official □  
11 □ capacity as State's Attorney for the New London Judicial District, □  
12 □ Geographical Area Nos. 10 and 21, PATRICIA M. FROELICH, GAIL P. □  
13 □ HARDY, in her official capacity as State's Attorney for the Hartford □  
14 □ Judicial District, Geographical Areas Nos. 12, 13, and 14, BRIAN □  
15 □ PRELESKI, in his official capacity as State's Attorney for the New □  
16 □ Britain Judicial District, Geographical Area Nos. 15 and 17, DAVID □  
17 □ SHEPACK, in his official capacity as State's Attorney for the Litchfield □  
18 □ Judicial District, Geographical Area No. 18, MATTHEW C. GEDANSKY, □  
19 □ in his official capacity as State's Attorney for the Tolland Judicial □  
20 □ District, Geographical Area No. 19, STEPHEN J. SEDENSKY III, in his □  
21 □ official capacity as State's Attorney for the Danbury Judicial District, □  
22 □ Geographical Area No. 3, □

23 □ □  
24 □ Defendants-Appellees. □  
25 □ □

26 □ On Appeal from the United States District Court □  
27 □ for the District of Connecticut □

28 □           □          □          □

29 □ □

30 □ ARGUED: DECEMBER 9, 2014 □

31 □ DECIDED: OCTOBER 19, 2015 □

32 □           □          □          □

1 Before: CABRANES, LOHIER, and DRONEY, Circuit Judges.

2 \_\_\_\_\_

3 \_\_\_\_\_

4 Before the Court are two appeals challenging gun-control  
5 legislation enacted by the New York and Connecticut legislatures in  
6 the wake of the 2012 mass murders at Sandy Hook Elementary  
7 School in Newtown, Connecticut. The New York and Connecticut  
8 laws at issue prohibit the possession of certain semiautomatic  
9 “assault weapons” and large-capacity magazines. Following the  
10 entry of summary judgment in favor of defendants on the central  
11 claims in both the Western District of New York (William M.  
12 Skretny, Chief Judge) and the District of Connecticut (Alfred V.  
13 Covello, Judge), plaintiffs in both suits now press two arguments on  
14 appeal. First, they challenge the constitutionality of the statutes  
15 under the Second Amendment; and second, they challenge certain  
16 provisions of the statutes as unconstitutionally vague. Defendants in  
17 the New York action also cross-appeal the District Court’s  
18 invalidation of New York’s seven-round load limit and voiding of  
19 two statutory provisions as facially unconstitutionally vague.

20 We hold that the core provisions of the New York and  
21 Connecticut laws prohibiting possession of semiautomatic assault  
22 weapons and large-capacity magazines do not violate the Second  
23 Amendment, and that the challenged individual provisions are not  
24 void for vagueness. The particular provision of New York’s law  
25 regulating load limits, however, does not survive the requisite  
26 scrutiny. One further specific provision—Connecticut’s prohibition  
27 on the non-semiautomatic Remington 7615—unconstitutionally  
28 infringes upon the Second Amendment right. Accordingly, we  
29 AFFIRM in part the judgment of the District Court for the District of  
30 Connecticut insofar as it upheld the prohibition of semiautomatic  
31 assault weapons and large-capacity magazines, and REVERSE in  
32 part its holding with respect to the Remington 7615. With respect to

1 □ the judgment of the District Court for the Western District of New  
2 □ York, we REVERSE in part certain vagueness holdings, and we  
3 □ otherwise AFFIRM that judgment insofar as it upheld the  
4 □ prohibition of semiautomatic assault weapons and large-capacity  
5 □ magazines and invalidated the load limit. □

6 □           □          □  
7 □ □

8 □ DAVID THOMPSON, Charles J. Cooper, Peter  
9 □ A. Patterson, Cooper & Kirk, PLLC, □  
10 □ Washington DC, AND Brian T. Stapleton, □  
11 □ Matthew S. Lerner, Goldberg Segalla LLP, □  
12 □ White Plains, NY, Stephen P. Halbrook, □  
13 □ Fairfax, VA, for Plaintiffs-Appellants. □

14 □ □  
15 □ BARBARA D. UNDERWOOD, Solicitor General □  
16 □ of the State of New York (Anisha S. □  
17 □ Dasgupta, Claude S. Platton, Office of the □  
18 □ Solicitor General, on the brief), for Eric T. □  
19 □ Schneiderman, Attorney General for the □  
20 □ State of New York, New York, NY, for □  
21 □ Defendants-Appellees-Cross-Appellants □  
22 □ Andrew M. Cuomo, et al. □

23 □ □  
24 □ MAURA B. MURPHY OSBORNE, Assistant □  
25 □ Attorney General of the State of □  
26 □ Connecticut (Perry Zinn Rowthorn, □  
27 □ Michael K. Skold, Gregory T. D’Auria, □  
28 □ Office of the Attorney General, on the brief), □  
29 □ for George Jepsen, Attorney General of the □  
30 □ State of Connecticut, Hartford, CT, for □  
31 □ Defendants-Appellees Daniel P. Malloy, et al. □

32 □           □          □

1 □ JOSÉ A. CABRANES, Circuit Judge: □

2 □ □

3 □ Before the Court are two appeals challenging gun-control  
4 □ legislation enacted by the New York and Connecticut legislatures in  
5 □ the wake of the 2012 mass murders at Sandy Hook Elementary  
6 □ School in Newtown, Connecticut. The New York and Connecticut  
7 □ laws at issue prohibit the possession of certain semiautomatic  
8 □ “assault weapons” and large-capacity magazines. Following the  
9 □ entry of summary judgment in favor of defendants on the central  
10 □ claims in both the Western District of New York (William M.  
11 □ Skretny, Chief Judge) and the District of Connecticut (Alfred V.  
12 □ Covello, Judge), plaintiffs in both suits now press two arguments on  
13 □ appeal. First, they challenge the constitutionality of the statutes  
14 □ under the Second Amendment; and second, they challenge certain  
15 □ provisions of the statutes as unconstitutionally vague. Defendants in  
16 □ the New York action also cross-appeal the District Court’s  
17 □ invalidation of New York’s separate seven-round load limit and  
18 □ voiding of two statutory provisions as facially unconstitutionally  
19 □ vague. □

20 □ We hold that the core provisions of the New York and  
21 □ Connecticut laws prohibiting possession of semiautomatic assault  
22 □ weapons and large-capacity magazines do not violate the Second  
23 □ Amendment, and that the challenged individual provisions are not  
24 □ void for vagueness. The particular provision of New York’s law  
25 □ regulating load limits, however, does not survive the requisite  
26 □ scrutiny. One further specific provision—Connecticut’s prohibition  
27 □ on the non-semiautomatic Remington 7615—unconstitutionally □



1 infringes upon the Second Amendment right. Accordingly, we  
2 AFFIRM in part the judgment of the District Court for the District of  
3 Connecticut insofar as it upheld the prohibition of semiautomatic  
4 assault weapons and large-capacity magazines, and REVERSE in  
5 part its holding with respect to the Remington. With respect to the  
6 judgment of the District Court for the Western District of New York,  
7 we REVERSE in part certain vagueness holdings, and we otherwise  
8 AFFIRM that judgment insofar as it upheld the prohibition of  
9 semiautomatic assault weapons and large-capacity magazines and  
10 invalidated the load limit.

11 BACKGROUND

12 I. Prior “Assault Weapon” Legislation

13 New York and Connecticut have long restricted possession of  
14 certain automatic and semiautomatic firearms that came to be  
15 known as “assault weapons.” In 1993, Connecticut’s General  
16 Assembly adopted the state’s first assault-weapon ban, which  
17 criminalized the possession of firearms “capable of fully automatic,  
18 semiautomatic or burst fire at the option of the user,” including  
19 specifically enumerated semiautomatic firearms.<sup>1</sup>

20 The following year, after five years of hearings on the harms  
21 thought to be caused by certain firearms, the U.S. Congress enacted  
22 legislation restricting the manufacture, transfer, and possession of

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<sup>1</sup>1993 Conn. Pub. Acts 93-306, § 1(a) (J.A., No. 14-319-cv, at 943).

1 □ certain “semiautomatic assault weapons.”<sup>2</sup> The 1994 federal statute □  
2 □ defined “semiautomatic assault weapons” in two ways. First, it □  
3 □ catalogued 18 specifically prohibited firearms, including, as relevant □  
4 □ here, the Colt AR-15. Second, it introduced a “two-feature test,” □  
5 □ which prohibited any semiautomatic firearm that contained at least □  
6 □ two listed military-style features, including a telescoping stock, a □  
7 □ conspicuously protruding pistol grip, a bayonet mount, a flash □  
8 □ suppressor, and a grenade launcher. The federal statute also □  
9 □ prohibited magazines with a capacity of more than ten rounds of □  
10 □ ammunition, or which could be “readily restored or converted to □  
11 □ accept” more than 10 rounds.<sup>3</sup> The federal assault-weapons ban □  
12 □ expired in 2004, pursuant to its sunset provision.<sup>4</sup> □

13 □ Following the passage of the federal assault-weapons ban, □  
14 □ both New York, in 2000, and Connecticut, in 2001, enacted □  
15 □ legislation that closely mirrored the federal statute, including the □  
16 □ two-feature test for prohibited semiautomatic firearms.<sup>5</sup> Unlike the □  
17 □ federal statute, however, these state laws contained no sunset □



<sup>2</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XI, subtit. A § 110102(b), 108 Stat. 1796, 1997. □

<sup>3</sup> Id. § 110103. □

<sup>4</sup> Id. § 110105. □

<sup>5</sup> See Act of Aug. 8, 2000, ch. 189, § 10, 2000 N.Y. Laws 2788, 2792 (J.A., No. 14-36-cv, at 923-30); 2001 Conn. Pub. Acts 01-130, § 1 (J.A., No. 14-319-cv, at 949-60). Like the federal statute, the 2000 New York statute also restricted the possession of certain large-capacity magazines. □

1 □ provisions and thus remained in force until amended by the statutes  
2 □ at issue here. □

3 □ On December 14, 2012, a gunman shot his way into Sandy  
4 □ Hook Elementary School in Newtown, Connecticut and murdered  
5 □ twenty first-graders and six adults using a semiautomatic AR-15-  
6 □ type rifle with ten large-capacity magazines. This appalling attack,  
7 □ in addition to other recent mass shootings, provided the immediate  
8 □ impetus for the legislation at issue in this appeal.<sup>6</sup> □

9 □ II. The New York Legislation □

10 □ New York enacted the Secure Ammunition and Firearms  
11 □ Enforcement Act (SAFE Act) on January 15, 2013.<sup>7</sup> The SAFE Act  
12 □ expands the definition of prohibited “assault weapons” by replacing  
13 □ the prior two-feature test with a stricter one-feature test. As the  
14 □ name suggests, the new test defines a semiautomatic firearm as a  
15 □ prohibited “assault weapon” if it contains any one of an enumerated  
16 □ list of military-style features, including a telescoping stock, a  
17 □ conspicuously protruding pistol grip, a thumbhole stock, a bayonet  
18 □ mount, a flash suppressor, a barrel shroud, and a grenade launcher.<sup>8</sup> □

□  
□  
□

<sup>6</sup> See Defendants’ Br., No. 14-36-cv, at 10-11; Defendants’ Br., No. 14-319-  
cv, at 11 & n.3. □

<sup>7</sup> Act of Jan. 15, 2013, ch. 1, 2013 N.Y. Laws 1, amended by Act of Mar. 29,  
2013, ch. 57, pt. FF, 2013 N.Y. Laws 290, 389. □

<sup>8</sup> The prohibited features depend on whether the semiautomatic weapon  
is a rifle, pistol, or shotgun, though the lists overlap significantly: □

“Assault weapon” means □

□

□

- 1 □ This □ statutory □ definition □ encompasses, □ and □ thereby □ bans, □ the □
- 2 □ semiautomatic □ weapon □ used □ by □ the □ mass-shooter □ at □ Sandy □ Hook. □
- 3 □ New □ York □ law □ makes □ the □ possession, □ manufacture, □ transport, □ or □
- 4 □ disposal □ of □ an □ “assault □ weapon” □ a □ felony.<sup>9</sup> □ Pursuant □ to □ the □ SAFE □

=====

(a) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least one 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 thumbhole stock; (iv) a second hand grip or a protruding grip that can be held by the non-trigger hand; (v) a bayonet mount; (vi) a flash suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator; (vii) a grenade launcher; or □

(b) a semiautomatic shotgun that has at least one of the following characteristics: (i) a folding or telescoping stock; (ii) a thumbhole stock; (iii) a second hand grip or a protruding grip that can be held by the non-trigger hand; (iv) a fixed magazine capacity in excess of seven rounds; (v) 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 one of the following characteristics: (i) a folding or telescoping stock; (ii) a thumbhole stock; (iii) a second hand grip or a protruding grip that can be held by the non-trigger hand; (iv) capacity to accept an ammunition magazine that attaches to the pistol outside of the pistol grip; (v) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward hand grip, or silencer; (vi) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the non-trigger hand without being burned; (vii) a manufactured weight of fifty ounces or more when the pistol is unloaded; or (viii) a semiautomatic version of an automatic rifle, shotgun or firearm □.□.□.□

N.Y. Penal Law § 265.00(22) (emphasis supplied). □

<sup>9</sup>Id. §§ 265.02(7), 265.10. □

1 Act's grandfather clause, however, pre-existing lawful owners of  
2 banned assault weapons may continue to possess them if they  
3 register those weapons with the New York State Police.<sup>10</sup> □

4 The SAFE Act also bans magazines that can hold more than  
5 ten rounds of ammunition or that can be readily restored or  
6 converted to accept more than ten rounds.<sup>11</sup> Although New York  
7 had restricted possession of such magazines since 2000, the SAFE  
8 Act eliminated a grandfather clause for magazines manufactured  
9 before September 1994. □

10 The SAFE Act's large-capacity-magazine ban contains an  
11 additional, unique prohibition on possession of a magazine loaded  
12 with more than seven rounds of ammunition.<sup>12</sup> (For the purpose of  
13 this definition, a round is a single unit of ammunition.) As originally  
14 enacted, the SAFE Act would have imposed a magazine capacity  
15 restriction of seven rounds. Because very few seven-round  
16 magazines are manufactured, however, the law was subsequently  
17 amended to impose a ten-round capacity restriction coupled with a  
18 seven-round load limit. Thus, as amended, the statute permits a New  
19 York gun owner to possess a magazine capable of holding up to ten □



<sup>10</sup> Id. § 265.00(22)(g)(v). □

<sup>11</sup> Id. § 265.00(23)(a). □

<sup>12</sup> Id. § 265.37. □

1 rounds, but he may not fully load it outside of a firing range or  
2 official shooting competition.<sup>13</sup>

### 3 III. The Connecticut Legislation

4 Several months after New York passed the SAFE Act, and  
5 after extensive public hearings and legislative and executive study,  
6 Connecticut adopted “An Act Concerning Gun Violence Prevention  
7 and Children’s Safety” on April 4, 2013, and later amended the  
8 statute on June 18, 2013.<sup>14</sup> Like its New York analogue, the  
9 Connecticut legislation replaced the state’s two-feature definition of  
10 prohibited “assault weapons” with a stricter one-feature test,<sup>15</sup> using  
11 a list of military-style features similar to New York’s, including a  
12 telescoping stock, a thumbhole stock, a forward pistol grip, a flash  
13 suppressor, a grenade launcher, and a threaded barrel capable of  
14 accepting a flash suppressor or silencer.<sup>16</sup> Unlike its counterpart in

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<sup>13</sup>Id. § 265.20(a)(7-f).

<sup>14</sup>2013 Conn. Pub. Act 13-3, as amended by 2013 Conn. Pub. Act 13-220.

<sup>15</sup>Conn. Gen. Stat. § 53-202a(1)(E).

<sup>16</sup>Id. §§ 53-202a(1)(E), 53-202b(a)(1), 53-202c(a). Like New York’s SAFE Act, Connecticut’s statute differentiates among semiautomatic rifles, pistols, and shotguns:

“Assault weapon” means [a]ny semiautomatic firearm that meets the following criteria:

- (i) A semiautomatic, centerfire rifle that has an ability to accept a detachable magazine and has at least one of the following: (I) A folding or telescoping stock; (II) Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an

- 1 New York, the Connecticut legislation additionally bans 183
- 2 particular assault weapons listed by make and model, as well as
- 3 “copies or duplicates” of most of those firearms.<sup>17</sup> The Connecticut

individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing; (III) A forward pistol grip; (IV) A flash suppressor; or (V) A grenade launcher or flare launcher; or

(ii) A semiautomatic, centerfire rifle that has a fixed magazine with the ability to accept more than ten rounds; or

(iii) A semiautomatic, centerfire rifle that has an overall length of less than thirty inches; or

(iv) A semiautomatic pistol that has an ability to accept a detachable magazine and has at least one of the following: (I) An ability to accept a detachable ammunition magazine that attaches at some location outside of the pistol grip; (II) A threaded barrel capable of accepting a flash suppressor, forward pistol grip or silencer; (III) A shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to fire the firearm without being burned, except a slide that encloses the barrel; or (IV) A second hand grip; or

(v) A semiautomatic pistol with a fixed magazine that has the ability to accept more than ten rounds; or

(vi) A semiautomatic shotgun that has both of the following: (I) A folding or telescoping stock; and (II) Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing; or (vii) A semiautomatic shotgun that has the ability to accept a detachable magazine; or (viii) A shotgun with a revolving cylinder

Id. § 53-202a(1) (emphasis supplied).

<sup>17</sup>Id. at § 53-202a(1); see also Plaintiffs’ Br., No. 14-319-cv, at 5; Defendants’ Br., No. 14-319-cv, at 14. Of these 183 specifically enumerated prohibited

1 law makes it a felony to transport, import, sell, or possess  
2 semiautomatic “assault weapons,” and it also contains a grandfather  
3 clause permitting pre-existing owners of assault weapons to  
4 continue to possess their firearms if properly registered with the  
5 state.<sup>18</sup>

6 The June 2013 amendment to the Connecticut legislation  
7 criminalizes the possession of “[l]arge capacity magazine[s]” that  
8 can hold, or can be “readily restored or converted to accept,” more  
9 than ten rounds of ammunition.<sup>19</sup> Unlike its New York counterpart,  
10 however, the Connecticut legislation contains no additional “load  
11 limit” rule.

12 IV. Procedural History

13 Plaintiffs—a combination of advocacy groups, businesses, and  
14 individual gun owners—filed suit against the governors of New  
15 York and Connecticut and other state officials, first in the Western  
16 District of New York on March 21, 2013 and then in the District of  
17 Connecticut on May 22, 2013. In both actions, plaintiffs sought  
18 declaratory and injunctive relief for alleged infringement of their

\_\_\_\_\_

weapons, all but one are semiautomatic weapons. The single non-semiautomatic  
firearm is the Remington Tactical Rifle Model 7615, a pump-action rifle.  
Defendants’ Br., No. 14-319-cv, at 58.

<sup>18</sup> Conn. Gen. Stat. § 53-202d(a)(2)(A).

<sup>19</sup> Id. § 53-202w(a)(1). As with prohibited firearms, pre-ban owners of  
prohibited magazines can retain them if registered with the state. Id. § 53-  
202x(a)(1).



1 □ constitutional □ rights. □ Specifically, □ plaintiffs □ contended □ that □ the □  
2 □ statutes' □ prohibitions □ on □ semiautomatic □ assault □ weapons □ and □ large-  
3 □ capacity □ magazines □ violate □ their □ Second □ Amendment □ rights, □ and □  
4 □ that □ numerous □ specific □ provisions □ of □ each □ statute □ are □  
5 □ unconstitutionally □ vague. □ In □ the □ New □ York □ action, □ plaintiffs □ also □  
6 □ challenged □ the □ seven-round □ load □ limit □ as □ a □ violation □ of □ the □ Second □  
7 □ Amendment.<sup>20</sup> □

8 □       Following □ plaintiffs' □ motions □ for □ preliminary □ injunctions, □  
9 □ parties □ in □ both □ suits □ cross-moved □ for □ summary □ judgment. □ On □  
10 □ December □ 31, □ 2013, □ Chief □ Judge □ Skretny □ of □ the □ Western □ District □ of □  
11 □ New □ York □ granted □ in □ part □ and □ denied □ in □ part □ the □ cross-motions □ for □  
12 □ summary □ judgment.<sup>21</sup> □ Specifically, □ the □ District □ Court □ found □ that □  
13 □ New □ York's □ ban □ on □ assault □ weapons □ and □ large □ capacity □ magazines □  
14 □ burdened □ plaintiffs' □ Second □ Amendment □ rights, □ but □ did □ not □ violate □  
15 □ the □ Second □ Amendment □ upon □ application □ of □ so-called □ intermediate □  
16 □ scrutiny.<sup>22</sup> □ The □ Court □ also □ held, □ however, □ that □ the □ seven-round □ load □  
17 □ limit □ did □ not □ survive □ intermediate □ scrutiny. □ The □ Court □ further □ found □  
18 □ that □ three □ specific □ provisions □ were □ unconstitutionally □ vague, □ and □



<sup>20</sup> Plaintiffs brought additional claims for violation of the Commerce Clause (in the New York action) and the Equal Protection Clause (in the Connecticut action). The District Courts dismissed these claims, which are not at issue on appeal. □

<sup>21</sup> New York State Rifle & Pistol Ass'n, Inc. v. Cuomo ("NYSRPA"), 990 F. Supp. 2d 349 (W.D.N.Y. 2013). □

<sup>22</sup> See post Section V.d-V.e for further discussion of intermediate scrutiny analysis. □

1 hence void,<sup>23</sup> but denied plaintiffs’ motion regarding the remaining  
 2 provisions challenged for vagueness.<sup>24</sup> In sum, Chief Judge Skretny  
 3 upheld as constitutional, upon intermediate scrutiny, the core  
 4 provisions of New York’s SAFE Act restricting semiautomatic  
 5 assault weapons and large-capacity magazines, but struck down  
 6 certain marginal aspects of the law.

7 On January 30, 2014, Judge Covello of the District of  
 8 Connecticut granted defendants’ motion for summary judgment in  
 9 its entirety.<sup>25</sup> Like his counterpart in New York, Judge Covello held



<sup>23</sup> The three voided provisions of New York’s SAFE Act were (1) the prohibition on pistols with a detachable magazine that are “a semiautomatic version of an automatic rifle, shotgun or firearm,” N.Y. Penal Law § 265.00(22)(c)(viii); (2) the identification of the misspelled military-style feature “muzzle break,” *id.* § 265.00(22)(a)(vi), which defendants conceded has no accepted meaning and was intended to read “muzzle brake,” *see* Defendants’ Br., No. 14-36-cv, at 22; and (3) an erroneous “and if” clause appearing in N.Y. Penal Law § 265.36, which the District Court found to be “incomplete and entirely indecipherable.” NYSRPA, 990 F. Supp. 2d at 376. Defendants do not challenge on appeal the District Court’s ruling on this third (“and if”) provision.

<sup>24</sup> As relevant here, the District Court dismissed plaintiffs’ vagueness claims as to the following provisions: (1) the prohibition of magazines that “can be readily restored or converted to accept” more than ten ammunition rounds, N.Y. Penal Law § 265.00(23)(a); (2) the prohibition on semiautomatic shotguns with a “fixed magazine capacity in excess of seven rounds,” *id.* § 265.00(22)(b)(iv); and (3) the exclusion from restriction of semiautomatic shotguns “that cannot hold more than five rounds of ammunition in a fixed or detachable magazine,” *id.* § 265.00(22)(g)(iii). The Court also rejected four additional vagueness challenges that plaintiffs do not pursue on appeal. *See* NYSRPA, 990 F. Supp. 2d at 374-78.

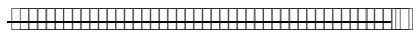
<sup>25</sup> *Shew v. Malloy*, 994 F. Supp. 2d 234 (D. Conn. 2014).

1 that the Connecticut legislation burdened plaintiffs’ Second  
2 Amendment rights, applied intermediate scrutiny, and concluded  
3 that the prohibition on semiautomatic assault weapons and large-  
4 capacity magazines was fully consistent with the Second  
5 Amendment. He also dismissed all of plaintiffs’ vagueness claims.<sup>26</sup>

6 Plaintiffs thereafter appealed. In the New York action only,  
7 defendants cross-appeal the District Court’s judgment insofar as it  
8 invalidated the SAFE Act’s seven-round load limit and voided as  
9 unconstitutionally vague the SAFE Act’s prohibitions on the  
10 misspelled “muzzle break”<sup>27</sup> and “semiautomatic version[s]” of an  
11 automatic rifle, shotgun, or firearm.<sup>28</sup>

12 DISCUSSION

13 These appeals present two questions: first, whether the Second  
14 Amendment permits the regulation of the assault weapons and  
15 large-capacity magazines at issue here; and second, whether the  
16 challenged provisions of the statutes provide constitutionally  
17 sufficient notice of the conduct proscribed.



<sup>26</sup> Because both judges resolved the parties’ motions for summary judgment, they simultaneously denied as moot plaintiffs’ respective motions for preliminary injunctions.

<sup>27</sup> N.Y. Penal Law § 265.00(22)(a)(vi); see ante note 23 and accompanying text.

<sup>28</sup> Id. § 265.00(22)(c)(viii); see ante note 23 and accompanying text.

1 □ We review *de novo* a district court’s order granting summary  
2 □ judgment, construing the evidence in the light most favorable to the  
3 □ non-moving party.<sup>29</sup> As relevant here, we also “review *de novo* the  
4 □ district court’s legal conclusions, including those interpreting and  
5 □ determining the constitutionality of a statute.”<sup>30</sup> Pursuant to Federal  
6 □ Rule of Civil Procedure 56(a), summary judgment is appropriate  
7 □ where “there is no genuine dispute as to any material fact and the  
8 □ movant is entitled to judgment as a matter of law.” □

9 □ V. Second Amendment Challenge □

10 □ We conclude that the core challenged prohibitions of assault  
11 □ weapons and large-capacity magazines do not violate the Second  
12 □ Amendment. Guided by the teachings of the Supreme Court, our  
13 □ own jurisprudence, and the examples provided by our sister circuits,  
14 □ we adopt a two-step analytical framework, determining first  
15 □ whether the regulated weapons fall within the protections of the  
16 □ Second Amendment and then deciding and applying the  
17 □ appropriate level of constitutional scrutiny. Only two specific  
18 □ provisions—New York’s seven-round load limit, and Connecticut’s  
19 □ prohibition on the non-semiautomatic Remington 7615—are  
20 □ unconstitutional. □

21 □ □



<sup>29</sup> *Delaney v. Bank of America Corp.*, 766 F.3d 163, 167 (2d Cir. 2014). □

<sup>30</sup> *United States v. Stewart*, 590 F.3d 93, 109 (2d Cir. 2009). □



□

1 □ Court noted that “handguns are the most popular weapon chosen  
2 □ by Americans for self-defense in the home,” where, the Court  
3 □ observed, “the need for defense of self, family, and property is most  
4 □ acute.”<sup>37</sup> □

5 □ Heller stopped well short of extending its rationale to other  
6 □ firearms restrictions. Indeed, Heller explicitly identified as  
7 □ “presumptively lawful” such “regulatory measures” as  
8 □ “prohibitions on the possession of firearms by felons and the  
9 □ mentally ill, . . . laws forbidding the carrying of firearms in sensitive  
10 □ places such as schools and government buildings, [and] laws  
11 □ imposing conditions and qualifications on the commercial sale of  
12 □ arms.”<sup>38</sup> Most importantly here, Heller also endorsed the “historical  
13 □ tradition of prohibiting the carrying of dangerous and unusual  
14 □ weapons.”<sup>39</sup> □

15 □ Aside from these broad guidelines, Heller offered little  
16 □ guidance for resolving future Second Amendment challenges. The  
17 □ Court did imply that such challenges are subject to one of “the  
18 □ standards of scrutiny that we have applied to enumerated  
19 □ constitutional rights,” though it declined to say which,<sup>40</sup> accepting □



<sup>37</sup>Id. at 628-29. □

<sup>38</sup>Id. at 626-27 & n.26. □

<sup>39</sup>Id. at 627 (internal quotation marks omitted). □

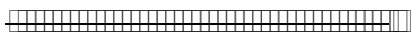
<sup>40</sup>Id. at 628. □

1 □ that many applications of the Second Amendment would remain “in  
2 □ doubt.”<sup>41</sup> □

3 □ That doubt persisted after *McDonald v. City of Chicago*, in  
4 □ which the Supreme Court invalidated municipal statutes banning  
5 □ handguns in the home.<sup>42</sup> *McDonald* was a landmark case in one  
6 □ respect—the Court held for the first time that the Fourteenth  
7 □ Amendment “incorporates” the Second Amendment against the  
8 □ states.<sup>43</sup> Otherwise, *McDonald* did not expand upon *Heller*’s analysis  
9 □ and simply reiterated *Heller*’s assurances regarding the viability of  
10 □ many gun-control provisions.<sup>44</sup> Neither *Heller* nor *McDonald*, then,  
11 □ delineated the precise scope of the Second Amendment or the  
12 □ standards by which lower courts should assess the constitutionality  
13 □ of firearms restrictions. □

14 □ □

15 □ □



<sup>41</sup> *Id.* at 635. □

<sup>42</sup> 561 U.S. 742 (2010). See, e.g., Joseph Blocher, *New Approaches to Old Questions in Gun Scholarship*, 50 *TULSA L. REV.* 477, 478 (2015) (“*Heller* and *McDonald* provoked as many questions as they answered,” creating a “resulting void [that] invites and practically demands more scholarship.”) □

<sup>43</sup> See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1317 (3d ed. 2000) (describing the process by which Amendments initially designed to limit the powers of the federal government came to be applied to actions of the states). □

<sup>44</sup> 561 U.S. at 786 (opinion of Alito, J.). □

1 □                    b. Analytical Rubric □

2 □                Lacking more detailed guidance from the Supreme Court, this  
3 □ Circuit has begun to develop a framework for determining the  
4 □ constitutionality of firearm restrictions.<sup>45</sup> It requires a two-step  
5 □ inquiry. □

6 □                First, we consider whether the restriction burdens conduct  
7 □ protected by the Second Amendment.<sup>46</sup> If the challenged restriction  
8 □ does not implicate conduct within the scope of the Second  
9 □ Amendment, our analysis ends and the legislation stands. □  
10 □ Otherwise, we move to the second step of our inquiry, in which we  
11 □ must determine and apply the appropriate level of scrutiny.<sup>47</sup> □

12 □                This two-step rubric flows from the dictates of Heller and  
13 □ McDonald and our own precedents in *Kachalsky* and *Decastro*.<sup>48</sup> It also  
14 □ broadly comports with the prevailing two-step approach of other  
15 □ courts, including the Third, Fourth, Fifth, Sixth, Seventh, Ninth,  
16 □ Tenth, Eleventh, and D.C. Circuits,<sup>49</sup> and with the approach used in  
17 □ “other areas of constitutional law.”<sup>50</sup> □



<sup>45</sup> See *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012). □

<sup>46</sup> *Kachalsky*, 701 F.3d at 93. □

<sup>47</sup> See *id.* □

<sup>48</sup> See ante note 45. □

<sup>49</sup> See *Georgia Carry.Org, Inc. v. U.S. Army Corps of Eng’rs*, 788 F.3d 1318, □  
1322 (11th Cir. 2015); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); □  
□



□

1 □ c. First Step: Whether the Second Amendment Applies □

2 □ As an initial matter, then, we must determine whether the  
3 □ challenged legislation impinges upon conduct protected by the  
4 □ Second Amendment. The Second Amendment protects only “the  
5 □ sorts of weapons” that are (1) “in common use”<sup>51</sup> and (2) “typically  
6 □ possessed by law-abiding citizens for lawful purposes.”<sup>52</sup> We  
7 □ consider each requirement in turn. □

8 □ i. Common Use □

9 □ The parties contest whether the assault weapons at issue here □  
10 □ are commonly owned. Plaintiffs argue that the weapons at issue are □  
11 □ owned in large numbers by law-abiding Americans. They present □  
12 □ statistics showing that nearly four million units of a single assault □  
13 □ weapon, the popular AR-15, have been manufactured between 1986 □

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Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 702-03 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800-01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010). □

<sup>50</sup> Decastro, 682 F.3d at 167; see Heller, 554 U.S. at 595; Kachalsky, 701 F.3d at 94. □

<sup>51</sup> Heller, 554 U.S. at 627. □

<sup>52</sup> Id. at 625. In addition, the weapons must actually be used lawfully. Id. □  
Because the laws at issue restrict the mere possession of assault weapons, and □  
not how or why they are used, we need not consider that additional limitation. □

1 □ and March 2013.<sup>53</sup> Plaintiffs further assert that only 7.5 percent of  
2 □ assault-weapon owners are active law enforcement officers,<sup>54</sup> and  
3 □ that most owners of assault weapons own only one or two such  
4 □ weapons, such that the banned firearms are not concentrated in a  
5 □ small number of homes, but rather spread widely among the gun-  
6 □ owning public.<sup>55</sup> Defendants counter that assault weapons only  
7 □ represent about two percent of the nation's firearms (admittedly  
8 □ amounting to approximately seven million guns).<sup>56</sup> Moreover,  
9 □ defendants argue that the statistics inflate the number of individual  
10 □ civilian owners because many of these weapons are purchased by  
11 □ law enforcement or smuggled to criminals, and many civilian gun  
12 □ owners own multiple assault weapons. □

13 □ This much is clear: Americans own millions of the firearms  
14 □ that the challenged legislation prohibits. □

15 □ The same is true of large-capacity magazines, as defined by  
16 □ the New York and Connecticut statutes. Though fewer statistics are  
17 □ available for magazines, those statistics suggest that about 25 million  
18 □ large-capacity magazines were available in 1995, shortly after the  
19 □ federal assault weapons ban was enacted, and nearly 50 million such



<sup>53</sup> J.A., No. 14-319-cv, at 146. □

<sup>54</sup> J.A., No. 14-36-cv, at 162. □

<sup>55</sup> Plaintiffs' Reply Br., No. 14-36-cv, at 6-7. □

<sup>56</sup> See J.A., No. 14-36-cv, at 1091; J.A., No. 14-319-cv, at 2251. □

1 □ magazines—or nearly two large-capacity magazines for each gun □  
2 □ capable of accepting one—were approved for import by 2000.<sup>57</sup> □

3 □ Even accepting the most conservative estimates cited by the □  
4 □ parties and by amici, the assault weapons and large-capacity □  
5 □ magazines at issue are “in common use” as that term was used in □  
6 □ *Heller*. The D.C. Circuit reached the same conclusion in its well-  
7 □ reasoned decision in *Heller II*, which upheld the constitutionality of a □  
8 □ District of Columbia gun-control act substantially similar to those at □  
9 □ issue here.<sup>58</sup> □

10 □ To be sure, as defendants note, these assault weapons and □  
11 □ large-capacity magazines are not as commonly owned as the □  
12 □ handguns at issue in *Heller*, which were “the most popular weapon □  
13 □ chosen by Americans for self-defense in the home.”<sup>59</sup> But nothing in □  
14 □ *Heller* limited its holding to handguns; indeed, the Court □  
15 □ emphasized that “the Second Amendment extends, *prima facie*, to □  
16 □ all instruments that constitute bearable arms,” not just to a small □  
17 □ subset.<sup>60</sup> □

18 □ □



<sup>57</sup> J.A., No. 14-319-cv, at 578. □

<sup>58</sup> *Heller II*, 670 F.3d at 1261 (finding that the AR-15 and magazines with □  
capacities exceeding ten rounds were in “common use” as defined by *Heller*). □

<sup>59</sup> *Heller*, 554 U.S. at 629. □

<sup>60</sup> *Id.* at 582 (emphasis supplied). □





1           Ultimately, then, neither the Supreme Court’s categories nor  
2 the evidence in the record clearly resolves the question of whether  
3 semiautomatic assault weapons and large-capacity magazines are  
4 “typically possessed by law-abiding citizens for lawful purposes.”<sup>69</sup>  
5 Confronting this record, Chief Judge Skretny reasonably found that  
6 reliable empirical evidence of lawful possession for lawful purposes  
7 was “elusive,”<sup>70</sup> beyond ownership statistics.<sup>71</sup> We agree.

8           In the absence of clearer guidance from the Supreme Court or  
9 stronger evidence in the record, we follow the approach taken by the  
10 District Courts and by the D.C. Circuit in *Heller II* and assume for  
11 the sake of argument that these “commonly used” weapons and  
12 magazines are also “typically possessed by law-abiding citizens for  
13 lawful purposes.”<sup>72</sup> In short, we proceed on the assumption that  
14 these laws ban weapons protected by the Second Amendment. This  
15 assumption is warranted at this stage, because, as explained post  
16 Section V.e, the statutes at issue nonetheless largely pass  
17 constitutional muster.<sup>73</sup>

██

<sup>69</sup>Heller, 554 U.S. at 625.  
<sup>70</sup>NYSRPA, 990 F. Supp. 2d at 365.

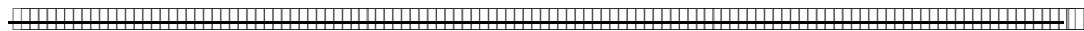
<sup>71</sup>On a substantially similar record, Judge Covello of the District of Connecticut came to the same conclusion, finding only that the relevant weapons were “presumably[] used for lawful purposes.” Shew, 994 F. Supp. 2d at 246 (emphasis supplied).

<sup>72</sup>See *Heller II*, 670 F. 3d at 1260-61 (quoting *Heller*, 554 U.S. at 625).

<sup>73</sup>Though we assume without deciding that the bulk of the challenged legislation is entitled to Second Amendment protection, we decide as much with

1 d. Second Step: Level of Scrutiny

2 Having concluded that the statutes impinge upon Second  
3 Amendment rights, we must next determine and apply the  
4 appropriate level of scrutiny.<sup>74</sup> We employ the familiar “levels of



respect to Connecticut’s prohibition of the Remington Tactical 7615, a non-  
semiautomatic pump-action rifle. See Defendants’ Br., No. 14-319-cv, at 58.

Heller emphasizes that the “the Second Amendment extends, *prima facie*,  
to all instruments that constitute bearable arms.” Heller, 554 U.S. at 582. In other  
words, it identifies a presumption in favor of Second Amendment protection,  
which the State bears the initial burden of rebutting. See Ezell, 651 F.3d at 702-03  
 (“If the government can establish that a challenged firearms law regulates activity  
falling outside the scope of the Second Amendment . . . then the analysis can stop  
there . . .” (emphasis supplied)); cf. Virginia v. Black, 538 U.S. 343, 369 (2003)  
(Scalia, J., concurring in part, concurring in the judgment in part, and dissenting  
in part) (defining “*prima facie* evidence” as that which, “if unexplained or  
uncontradicted, is sufficient to sustain a judgment in favor of the issue which it  
supports” (quoting Black’s Law Dictionary ¶ 190 (6th ed. 1990)). Because the State,  
focused on semiautomatic weapons, see post note 12, has failed to make any  
argument that this pump-action rifle is dangerous, unusual, or otherwise not  
within the ambit of Second Amendment protection, the presumption that the  
Amendment applies remains unrebutted.

To be sure, Heller also noted that certain “presumptively lawful  
regulatory measures” ostensibly fall outside of the Second Amendment’s *prima*  
*facie* protections. Id. at 627 n.26. Nonetheless, like the D.C. Circuit in Heller II, we  
conclude that these particular restrictions are not entitled to “a presumption of  
validity.” Heller II, 670 F.3d at 1260 (emphasis supplied).

We emphasize that our holding with respect to the Remington 7615—at  
both steps of our analysis—reflects the State’s failure to present any argument at  
all regarding this weapon or others like it. We do not foreclose the possibility  
that States could in the future present evidence to support such a prohibition.

<sup>74</sup> Plaintiffs’ effort to avoid the two-step framework laid out here is  
unavailing. They argue that the application of means-ends scrutiny in this case

1 scrutiny” analysis introduced in the famous Footnote Four of United  
2 States v. Carolene Products Co.,<sup>75</sup> and begin by asking which level of  
3 judicial “scrutiny” applies. □

4 Though Heller did not specify the precise level of scrutiny □  
5 applicable to firearms regulations, it rejected mere rational basis □  
6 review as insufficient for the type of regulation challenged there.<sup>76</sup> □

would be an “exercise in futility.” Plaintiff’s Br., No. 14-36-cv, at 13 (quoting □  
Kachalsky, 701 F.3d at 89 n.9); Plaintiff’s Br., No. 14-319-cv, at 12 (same). We reject □  
that argument. As plaintiffs themselves concede, this Court made very clear in □  
Kachalsky that “Heller’s reluctance to announce a standard of review” should not □  
be interpreted as a “signal that courts must look solely to the text, history, and □  
tradition of the Second Amendment to determine whether a state can limit the □  
right without applying any sort of means-end scrutiny.” 701 F.3d at 89 n.9. On □  
the contrary, Heller indicated that the typical “standards of scrutiny” analysis □  
should apply to regulations impinging upon Second Amendment rights, but that □  
D.C.’s handgun ban would fail “[u]nder any of the standards of scrutiny.” 554 □  
U.S. at 628. □

<sup>75</sup> 304 U.S. 144, 152 n.4 (1938); see Heller, 554 U.S. at 628 n.27. □

<sup>76</sup> 554 U.S. at 628 n.27. At the same time, Heller’s approval of certain □  
“presumptively lawful regulatory measures,” id. at 627 n.26, has been construed □  
by some to rule out strict scrutiny as well. Indeed, Justice Breyer’s dissent states, □  
without opposition from the Court’s opinion, that “the majority implicitly, and □  
appropriately, reject[ed] th[e] suggestion [to apply strict scrutiny to gun □  
regulations] by broadly approving a set of laws . . . whose constitutionality under □  
a strict scrutiny standard would be far from clear.” Id. at 688 (Breyer, J., □  
dissenting). Chief Judge Skretny cited this interpretation with approbation. □  
NYSRPA, 990 F. Supp. 2d at 366. Upon closer inspection, however, we think it □  
likely that the Heller majority identified these “presumptively lawful” measures □  
in an attempt to clarify the scope of the Second Amendment’s reach in the first □  
place—the first step of our framework—but not to intimate a view as to whether □  
strict scrutiny applies in the second step. □



1 □ At the same time, this Court and our sister Circuits have suggested □  
2 □ that heightened scrutiny is not always appropriate. In determining □  
3 □ whether heightened scrutiny applies, we consider two factors: (1) □  
4 □ “how close the law comes to the core of the Second Amendment □  
5 □ right” and (2) “the severity of the law’s burden on the right.”<sup>77</sup> Laws □  
6 □ that neither implicate the core protections of the Second □  
7 □ Amendment nor substantially burden their exercise do not receive □  
8 □ heightened scrutiny. □

9 □ i. The Core of the Right □

10 □ By their terms, the statutes at issue implicate the core of the □  
11 □ Second Amendment’s protections by extending into the home, □  
12 □ “where the need for defense of self, family and property is most □  
13 □ acute.”<sup>78</sup> Semiautomatic assault weapons and large-capacity □  
14 □ magazines are commonly owned by many law-abiding Americans, □  
15 □ and their complete prohibition, including within the home, requires □  
16 □ us to consider the scope of Second Amendment guarantees “at their □  
17 □ zenith.”<sup>79</sup> At the same time, the regulated weapons are not nearly as □  
18 □ popularly owned and used for self-defense as the handgun, that



<sup>77</sup>See *Ezell*, 651 F.3d at 703. □

<sup>78</sup>*Heller*, 554 U.S. at 628. This conclusion is predicated on our earlier □  
assumption that the commonly used firearms at issue are also typically used for □  
self-defense or other lawful purposes, and thus the prohibitions implicate the □  
Second Amendment right. See ante V.c.ii. □

<sup>79</sup>*Kachalsky*, 701 F.3d at 89. □

□

1 □ “quintessential self-defense weapon.”<sup>80</sup> Thus these statutes implicate □  
2 □ Second Amendment rights, but not to the same extent as the laws at □  
3 □ issue in *Heller* and *McDonald*. □

4 □                                   ii. The Severity of the Burden □

5 □           In *Decastro*, we explained that heightened scrutiny need not □  
6 □ apply to “any marginal, incremental or even appreciable restraint on □  
7 □ the right to keep and bear arms.”<sup>81</sup> Rather, “heightened scrutiny is □  
8 □ triggered only by those restrictions that (like the complete □  
9 □ prohibition on handguns struck down in *Heller*) operate as a □  
10 □ substantial burden on the ability of law-abiding citizens to possess □  
11 □ and use a firearm for lawfully purposes.”<sup>82</sup> Our later decision in □  
12 □ *Kachalsky* confirmed this approach, concluding that “some form of □  
13 □ heightened scrutiny would be appropriate” for regulations that □  
14 □ impose a “substantial burden” on Second Amendment rights.<sup>83</sup> □

15 □           The practice of applying heightened scrutiny only to laws that □  
16 □ “burden the Second Amendment right substantially” is, as we noted □  
17 □ in *Decastro*, broadly consistent with our approach to other □  
18 □ fundamental constitutional rights, including those protected by the □  
19 □ First and Fourteenth Amendments.<sup>84</sup> We typically require a □

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<sup>80</sup> *Heller*, 554 U.S. at 629. □

<sup>81</sup> *Decastro*, 682 F.3d at 166. □

<sup>82</sup> *Id.* (emphasis supplied). □

<sup>83</sup> 701 F.3d at 93. □

<sup>84</sup> *Decastro*, 682 F.3d at 166-67 (emphasis supplied). □

1 □ threshold □ showing □ to □ trigger □ heightened □ scrutiny □ of □ laws □ alleged □ to □  
2 □ implicate □ such □ constitutional □ contexts □ as □ takings, □ voting □ rights, □ and □  
3 □ free □ speech.<sup>85</sup> □ Though □ we □ have □ historically □ expressed □ “hesitan[ce] □ to □  
4 □ import □ substantive □ First □ Amendment □ principles □ wholesale □ into □  
5 □ Second □ Amendment □ jurisprudence,”<sup>86</sup> □ we □ readily □ “consult □ principles □  
6 □ from □ other □ areas □ of □ constitutional □ law, □ including □ the □ First □  
7 □ Amendment” □ in □ determining □ whether □ a □ law □ “substantially □ burdens □  
8 □ Second □ Amendment □ rights.”<sup>87</sup> □□

9 □       The □ scope □ of □ the □ legislative □ restriction □ and □ the □ availability □ of □  
10 □ alternatives □ factor □ into □ our □ analysis □ of □ the □ “degree □ to □ which □ the □  
11 □ challenged □ law □ burdens □ the □ right.”<sup>88</sup> □ No □ “substantial □ burden” □  
12 □ exists—and □ hence □ heightened □ scrutiny □ is □ not □ triggered—“if □  
13 □ adequate □ alternatives □ remain □ for □ law-abiding □ citizens □ to □ acquire □ a □  
14 □ firearm □ for □ self-defense.”<sup>89</sup> □□

15 □       The □ laws □ at □ issue □ are □ both □ broad □ and □ burdensome. □ Unlike □  
16 □ statutes □ that □ “merely □ regulate □ the □ manner □ in □ which □ persons □ may □



<sup>85</sup> *Id.* □

<sup>86</sup> *Kachalsky*, 701 F.3d at 91 (emphasis in original). □

<sup>87</sup> *Decastro*, 682 F.3d at 167. □

<sup>88</sup> *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010). □

<sup>89</sup> *Decastro*, 682 F.3d at 168; see also *Heller II*, 670 F.3d at 1262 (drawing the □  
comparison to First Amendment speech restrictions, whereby “severe burdens” □  
that “don’t leave open ample alternative channels” trigger strict scrutiny, while □  
restrictions that “leave open ample alternative channels” are merely “modest □  
burdens” and require only “a mild form of intermediate scrutiny”). □□



1 acknowledge that there is no class of firearms known as  
 2 “semiautomatic assault weapons”—a descriptor they call purely  
 3 political in nature.<sup>95</sup> Plaintiffs nonetheless argue that the legislation  
 4 does prohibit “firearms of a universally recognized type—  
 5 semiautomatic.”<sup>96</sup> Not so. Rather, both New York and Connecticut  
 6 ban only a limited subset of semiautomatic firearms, which contain  
 7 one or more enumerated military-style features. As Heller makes  
 8 plain, the fact that the statutes at issue do not ban “an entire class of  
 9 ‘arms’” makes the restrictions substantially less burdensome.<sup>97</sup> In  
 10 both states, citizens may continue to arm themselves with non-  
 11 semiautomatic weapons or with any semiautomatic gun that does  
 12 not contain any of the enumerated military-style features. Similarly,  
 13 while citizens may not acquire high-capacity magazines, they can  
 14 purchase any number of magazines with a capacity of ten or fewer  
 15 rounds. In sum, numerous “alternatives remain for law-abiding  
 16 citizens to acquire a firearm for self-defense.”<sup>98</sup> We agree with the

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<sup>95</sup> Plaintiffs’ Br., No. 14-36-cv, at 17; Plaintiffs’ Br., No. 14-319-cv, at 16.  
<sup>96</sup> Plaintiff’s Br., No. 14-319-cv, at 31.  
<sup>97</sup> See 554 U.S. at 628.

<sup>98</sup> Decastro, 682 F.3d at 168. Plaintiffs’ related argument—that the availability of unbaned firearms “is irrelevant under Heller,” see Plaintiffs’ Br., No. 14-36-cv, at 32—rests on a misapprehension of the Supreme Court’s logic. To be sure, Heller did indicate that “[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.” 554 U.S. at 629. But Heller went on to explain that handguns are protected as “the most popular weapon chosen by Americans for self-defense in the home.” Id. Of course, the same cannot be said of the weapons at issue here. Heller explicitly endorsed prohibitions against any “weapons not



1 D.C. Circuit that “the prohibition of semi-automatic rifles and large-  
2 capacity magazines does not effectively disarm individuals or  
3 substantially affect their ability to defend themselves.”<sup>99</sup> The burden  
4 imposed by the challenged legislation is real, but it is not “severe.”<sup>100</sup>

5 Accordingly, we conclude that intermediate, rather than strict,  
6 scrutiny is appropriate. This conclusion coheres not only with that  
7 reached by the D.C. Circuit when considering substantially similar  
8 gun-control laws, but also with the analyses undertaken by other  
9 courts, many of which have applied intermediate scrutiny to laws  
10 implicating the Second Amendment.<sup>101</sup>

11 e. Application of Intermediate Scrutiny

12 Though “intermediate scrutiny” may have different  
13 connotations in different contexts,<sup>102</sup> here the key question is  
14 whether the statutes at issue are “substantially related to the

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typically possessed by law-abiding citizens for lawful purposes,” including, for  
example, short-barreled shotguns. *Id.* at 625. Our consideration of available  
alternatives for self-defense thus squares with Heller’s focus on protecting that  
“core lawful purpose” of the Second Amendment right. *Id.* at 630.

<sup>99</sup>Heller II, 670 F.3d at 1262.

<sup>100</sup>See *id.*

<sup>101</sup>See, e.g., Chovan, 735 F.3d at 1138; Nat’l Rifle Ass’n of Am., 700 F.3d at  
207; Chester, 628 F.3d at 683; Reese, 627 F.3d at 802; Marzzarella, 614 F.3d at 97.

<sup>102</sup>Ernst J. v. Stone, 452 F.3d 186, 200 n.10 (2d Cir. 2006) (noting that  
intermediate scrutiny carries different meanings depending on the area of law in  
which it arises, and then applying the same definition of intermediate scrutiny  
used here).

□

1 □ achievement of an important governmental interest.”<sup>103</sup> It is beyond □  
2 □ cavil that both states have “substantial, indeed compelling, □  
3 □ governmental interests in public safety and crime prevention.”<sup>104</sup> We □  
4 □ need only inquire, then, whether the challenged laws are □  
5 □ “substantially related” to the achievement of that governmental □  
6 □ interest. We conclude that the prohibitions on semiautomatic assault □  
7 □ weapons and large-capacity magazines meet this standard. □

8 □ i. Prohibition on “Assault Weapons” □

9 □ To survive intermediate scrutiny, the “fit between the □  
10 □ challenged regulation [and the government interest] need only be □  
11 □ substantial, not perfect.”<sup>105</sup> Unlike strict scrutiny analysis, we need □  
12 □ not ensure that the statute is “narrowly tailored” or the “least □  
13 □ restrictive available means to serve the stated governmental □  
14 □ interest.”<sup>106</sup> Moreover, we have observed that state regulation of the □  
15 □ right to bear arms “has always been more robust” than analogous □  
16 □ regulation of other constitutional rights.<sup>107</sup> So long as the defendants □



<sup>103</sup> Kachalsky, 701 F.3d at 96. □

<sup>104</sup> Id. at 97; see also Schall v. Martin, 467 U.S. 253, 264 (1984) (“The □  
legitimate and compelling state interest in protecting the community from crime □  
cannot be doubted.” (internal quotation marks omitted)). □

<sup>105</sup> Kachalsky, 701 F.3d at 97 (internal quotation marks omitted). □

<sup>106</sup> Id. □

<sup>107</sup> Id. at 100. States are permitted to restrict the right to bear arms by □  
felons and the mentally ill, while equivalent restrictions on the right to speech or □  
religious freedoms among those populations would unquestionably be □  
unconstitutional. Id. □

1 produce evidence that “fairly support[s]” their rationale, the laws  
2 will pass constitutional muster.<sup>108</sup>

3 In making this determination, we afford “substantial  
4 deference to the predictive judgments of the legislature.”<sup>109</sup> We  
5 remain mindful that, “[i]n the context of firearm regulation, the  
6 legislature is ‘far better equipped than the judiciary’ to make  
7 sensitive public policy judgments (within constitutional limits)  
8 concerning the dangers in carrying firearms and the manner to  
9 combat those risks.”<sup>110</sup> Our role, therefore, is only to assure  
10 ourselves that, in formulating their respective laws, New York and  
11 Connecticut have “drawn reasonable inferences based on substantial  
12 evidence.”<sup>111</sup>

13 Both states have done so with respect to their prohibitions on  
14 certain semiautomatic firearms.<sup>112</sup> At least since the enactment of the

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<sup>108</sup>City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002) (plurality).

<sup>109</sup>Kachalsky, 701 F.3d at 97 (quoting Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n, 520 U.S. 180, 195 (1997) (brackets omitted)).

<sup>110</sup>Kachalsky, 701 F.3d at 97 (quoting Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n, 512 U.S. 622, 665 (1994)) (opinion of Kennedy, J.).

<sup>111</sup>Turner Broad. Sys., 520 U.S. at 195.

<sup>112</sup>Though Connecticut’s ban on semiautomatic firearms passes intermediate scrutiny, its prohibition of a single non-semiautomatic weapon, the Remington 7615, does not. Focused as it was on the rationale for banning semiautomatic weapons, Connecticut fails to set forth the requisite “substantial evidence” with respect to the pump-action Remington 7615. *Id.* at 195; see also



□

1 federal assault-weapons ban, semiautomatic assault weapons have

2 been understood to pose unusual risks. When used, these weapons

3 tend to result in more numerous wounds, more serious wounds, and

4 more victims.<sup>113</sup> These weapons are disproportionately used in

5 crime, and particularly in criminal mass shootings like the attack in

6 Newtown.<sup>114</sup> They are also disproportionately used to kill law

7 enforcement officers: one study shows that between 1998 and 2001,

8 assault weapons were used to gun down at least twenty percent of

9 officers killed in the line of duty.<sup>115</sup>

10       The record reveals that defendants have tailored the

11 legislation at issue to address these particularly hazardous weapons.

12 The dangers posed by some of the military-style features prohibited

13 by the statutes—such as grenade launchers and silencers—are

14 manifest and incontrovertible.<sup>116</sup> As for the other enumerated

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ante note 73. Accordingly, we hold that this singular provision of Connecticut's

legislation is unconstitutional.

<sup>113</sup> See Defendant's Br., No. 14-36-cv, at 48 (quoting *J.A.*, No. 14-36-cv, at 733-34).

<sup>114</sup> See *id.* at 49 (citing *J.A.*, No. 14-36-cv [565, 727, 729]).

<sup>115</sup> See *J.A.*, No. 14-36-cv, at 1261 (citing Violence Policy Center study).

<sup>116</sup> Indeed, plaintiffs have not seriously attempted to argue—either here or before the District Court—that such features are protected by the Second Amendment at all, much less that their prohibition should fail intermediate scrutiny. See *NYSRPA*, 990 F. Supp. 2d at 369-70 (“Plaintiffs do not explicitly argue that the Act’s regulation of firearms with [grenade launchers, bayonet mounts, or silencers] violates the Second Amendment.”); cf. *Norton v. Sam’s Club*, 145 F.3d 114, 119 (2d Cir. 1998) (“Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.”); *United*

□

1 □ military-style □ features—such □ as □ the □ flash □ suppressor, □ protruding □  
2 □ grip, □ and □ barrel □ shrouds—New □ York □ and □ Connecticut □ have □  
3 □ determined, □ as □ did □ the □ U.S. □ Congress, □ that □ the □ “net □ effect □ of □ these □  
4 □ military □ combat □ features □ is □ a □ capability □ for □ lethality—more □ wounds, □  
5 □ more □ serious, □ in □ more □ victims—far □ beyond □ that □ of □ other □ firearms □ in □  
6 □ general, □ including □ other □ semiautomatic □ guns.”<sup>117</sup> □ Indeed, □ plaintiffs □  
7 □ explicitly □ contend □ that □ these □ features □ improve □ a □ firearm’s □  
8 □ “accuracy,” □ “comfort,” □ and □ “utility.”<sup>118</sup> □ This □ circumlocution □ is, □ as □  
9 □ Chief □ Judge □ Skretny □ observed, □ a □ milder □ way □ of □ saying □ that □ these □  
10 □ features □ make □ the □ weapons □ more □ deadly.<sup>119</sup> □

11 □       The □ legislation □ is □ also □ specifically □ targeted □ to □ prevent □ mass □  
12 □ shootings □ like □ that □ in □ Newtown, □ in □ which □ the □ shooter □ used □ a □  
13 □ semiautomatic □ assault □ weapon. □ Plaintiffs □ complain □ that □ mass □  
14 □ shootings □ are □ “particularly □ rare □ events” □ and □ thus, □ even □ if □ successful, □  
15 □ the □ legislation □ will □ have □ a □ “minimal □ impact” □ on □ most □ violent □

States v. Amer, 10 F.3d 873, 879 (2d Cir. 1997) (finding that defendant forfeited □  
one of his constitutional arguments by failing to raise it before the District Court). □

<sup>117</sup> I.A., No. 14-36-cv, at 733-34. □

<sup>118</sup> Plaintiffs’ Br., No. 14-36-cv, at 20; Plaintiffs’ Br., No. 14-319-cv, at 19-20. □

<sup>119</sup> NYSRPA, 990 F. Supp. 2d at 368. □



1 □ Ultimately, “[i]t is the legislature’s job, not ours, to weigh  
2 □ conflicting evidence and make policy judgments.”<sup>125</sup> We must  
3 □ merely ensure that the challenged laws are substantially—even if  
4 □ not perfectly—related to the articulated governmental interest. The  
5 □ prohibition of semiautomatic assault weapons passes this test.<sup>126</sup> □

6 □ ii. Prohibition on Large-Capacity Magazines □

7 □ The same logic applies a fortiori to the restrictions on large-  
8 □ capacity magazines.<sup>127</sup> The record evidence suggests that large-  
9 □ capacity magazines may “present even greater dangers to crime and  
10 □ violence than assault weapons alone, in part because they are more  
11 □ prevalent and can be and are used □□□ in both assault weapons and  
12 □ non-assault weapons.”<sup>128</sup> Large-capacity magazines are  
13 □ disproportionately used in mass shootings, like the one in □

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<sup>125</sup> Id. at 99. □

<sup>126</sup> Cf. *Heller II*, 670 F.3d at 1263 (“[T]he evidence demonstrates a ban on assault weapons is likely to promote the Government’s interest in crime control □□□”). Again, our holding is limited insofar as it does not apply to Connecticut’s prohibition of the non-semiautomatic Remington 7615. □

<sup>127</sup> Amici argue that large-capacity magazines are entirely outside of Second Amendment protection for the independent reason that such magazines constitute firearm “accessories” rather than protected “arms.” See Br. of Amici Curiae Law Center To Prevent Gun Violence and New Yorkers Against Gun Violence, No. 14-36-cv, at 8-13; Br. of Amici Curiae Law Center To Prevent Gun Violence, Connecticut Against Gun Violence, and Cleveland School Remembers, No. 14-319-cv, at 10-14. Because we conclude that the prohibition of large-capacity magazines would survive the requisite scrutiny, we need not reach the merits of this additional argument. □

<sup>128</sup> I.A., No. 14-319-cv, at 1400. □

□

1 □ Newtown, □ in □ which □ the □ shooter □ used □ multiple □ large-capacity □  
2 □ magazines □ to □ fire □ 154 □ rounds □ in □ less □ than □ five □ minutes.<sup>129</sup> □ Like □ assault □  
3 □ weapons, □ large-capacity □ magazines □ result □ in □ “more □ shots □ fired, □  
4 □ persons □ wounded, □ and □ wounds □ per □ victim □ than □ do □ other □ gun □  
5 □ attacks.”<sup>130</sup> □ Professor □ Christopher □ Koper, □ a □ firearms □ expert □ relied □  
6 □ upon □ by □ all □ parties □ in □ both □ states, □ stated □ that □ it □ is □ “particularly” □ the □  
7 □ ban □ on □ large-capacity □ magazines □ that □ has □ the □ greatest □ “potential □ to □  
8 □ prevent □ and □ limit □ shootings □ in □ the □ state □ over □ the □ long-run.”<sup>131</sup> □

9 □ We □ therefore □ conclude □ that □ New □ York □ and □ Connecticut □ have □  
10 □ adequately □ established □ a □ substantial □ relationship □ between □ the □  
11 □ prohibition □ of □ both □ semiautomatic □ assault □ weapons □ and □ large-  
12 □ capacity □ magazines □ and □ the □ important—indeed, □ compelling—state □  
13 □ interest □ in □ controlling □ crime. □ These □ prohibitions □ survive □  
14 □ intermediate □ scrutiny. □

15 □ iii. Seven-Round Load Limit □

16 □ Though □ the □ key □ provisions □ of □ both □ statutes □ pass □ constitutional □  
17 □ muster □ on □ this □ record, □ another □ aspect □ of □ New □ York’s □ SAFE □ Act □ does □  
18 □ not: □ the □ seven-round □ load □ limit, □ which □ makes □ it □ “unlawful □ for □ a □

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<sup>129</sup> Defendants’ Br., No. 14-319-cv, at 11, 38-39. □

<sup>130</sup> Heller II, 670 F.3d at 1263 (internal quotation marks omitted); see also □  
Defendants’ Br., No. 14-36-cv, at 59-60. □

<sup>131</sup> J.A., No. 14-319-cv, at 1410. □

1 person to knowingly possess an ammunition feeding device where  
2 such device contains more than seven rounds of ammunition.”<sup>132</sup>

3 As noted above, the seven-round load limit was a second-best  
4 solution. New York determined that only magazines containing  
5 seven rounds or fewer can be safely possessed, but it also recognized  
6 that seven-round magazines are difficult to obtain commercially. Its  
7 compromise was to permit gun owners to use ten-round magazines  
8 if they were loaded with seven or fewer rounds.<sup>133</sup>

9 On the record before us, we cannot conclude that New York  
10 has presented sufficient evidence that a seven-round load limit  
11 would best protect public safety. Here we are considering not a  
12 capacity restriction, but rather a load limit. Nothing in the SAFE Act  
13 will outlaw or reduce the number of ten-round magazines in  
14 circulation. It will not decrease their availability or in any way  
15 frustrate the access of those who intend to use ten-round magazines  
16 for mass shootings or other crimes. It is thus entirely untethered  
17 from the stated rationale of reducing the number of assault weapons  
18 and large capacity magazines in circulation.<sup>134</sup> New York has failed  
19 to present evidence that the mere existence of this load limit will  
20 convince any would-be malefactors to load magazines capable of  
21 holding ten rounds with only the permissible seven.



<sup>132</sup> N.Y. Penal Law § 265.37; see ante notes 12-13 and accompanying text.

<sup>133</sup> See Defendants’ Br., No. 14-36-cv, at 15-16.

<sup>134</sup> See id. at 55.



1 □ criminal offense with sufficient definiteness that ordinary people can □  
2 □ understand what conduct is prohibited and in a manner that does □  
3 □ not encourage arbitrary and discriminatory enforcement.”<sup>138</sup> Statutes □  
4 □ carrying criminal penalties or implicating the exercise of □  
5 □ constitutional rights, like the ones at issue here, are subject to a □  
6 □ “more stringent” vagueness standard than are civil or economic □  
7 □ regulations.<sup>139</sup> However, the doctrine does not require “meticulous □  
8 □ specificity” of statutes, recognizing that “language is necessarily □  
9 □ marked by a degree of imprecision.”<sup>140</sup> □

10 □ Because plaintiffs pursue this “pre-enforcement” appeal □  
11 □ before they have been charged with any violation of law, it □  
12 □ constitutes a “facial,” rather than “as-applied,” challenge.<sup>141</sup> Under □  
13 □ the standard set forth by the Supreme Court in *United States v. □*  
14 □ *Salerno*, to succeed on a facial challenge, “the challenger must □  
15 □ establish that no set of circumstances exists under which the Act □



<sup>138</sup> *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). □

<sup>139</sup> *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, □  
498-99 (1982). □

<sup>140</sup> *Thibodeau v. Portuondo*, 486 F.3d 61, 66 (2d Cir. 2007) (quoting *Grayned □*  
*v. City of Rockford*, 408 U.S. 104, 110 (1972)). □

<sup>141</sup> See *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 685-86 □  
(2d Cir. 1996). □

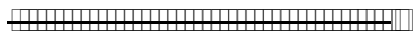


1 □ would be valid.”<sup>142</sup> □ As a result, a facial challenge to a legislative □  
2 □ enactment is “the most difficult challenge to mount successfully.”<sup>143</sup> □

3 □ Seeking to avoid this prohibitively high bar, plaintiffs urge us □  
4 □ to follow the different approach that a plurality of the Supreme □  
5 □ Court took in *City of Chicago v. Morales*.<sup>144</sup> □ In that case, three Justices □  
6 □ held that a criminal law lacking a mens rea requirement and □  
7 □ burdening a constitutional right “is subject to facial attack” “[w]hen □  
8 □ vagueness permeates the text of such a law.”<sup>145</sup> □ This Court, however, □  
9 □ has determined that, because the test set forth by the Morales □  
10 □ plurality has not been adopted by the Supreme Court as a whole, we □  
11 □ are not required to apply it.<sup>146</sup> □ We have previously declined to □  
12 □ specify a preference for either test,<sup>147</sup> and we need not do so here, □  
13 □ because the challenged provisions are sufficiently clear to survive a □  
14 □ facial challenge under either approach. □

15 □ □

16 □ □



<sup>142</sup> 481 U.S. 739, 745 (1987) (emphasis supplied). □

<sup>143</sup> *Id.* □

<sup>144</sup> 527 U.S. 41 (1999); see also Plaintiffs’ Br., No. 14-319-cv, at 52-54; □  
Plaintiffs’ Br., No. 14-36-cv, at 52-56. □

<sup>145</sup> 527 U.S. at 55. □

<sup>146</sup> *United States v. Rybicki*, 354 F.3d 124, 131-32 (2d Cir. 2003) (en banc). □

<sup>147</sup> *Id.* at 132 n.3. □

1 □ b. Application □

2 □ i. “Can be readily restored or converted to accept” □

3 □ Both the New York and Connecticut statutes criminalize the  
4 □ possession of magazines that “can be readily restored or converted  
5 □ to accept” more than ten rounds of ammunition.<sup>148</sup> In both suits,  
6 □ plaintiffs allege that the phrase is unconstitutionally vague because  
7 □ whether a magazine “can be readily restored or converted” depends  
8 □ upon the knowledge, skill, and tools available to the particular  
9 □ restorer, and the statutes are silent on these details.<sup>149</sup> □

10 □ This statutory language dates at least to the 1994 federal  
11 □ assault-weapons ban and later appeared in New York’s 2000 law. As  
12 □ Chief Judge Skretny noted, there is no record evidence that it has  
13 □ given rise to confusion at any time in the past two decades.<sup>150</sup> This  
14 □ Court found a similar phrase in another gun law—“may readily be  
15 □ converted”—to be “sufficiently definite” as to provide “clear[]  
16 □ warn[ing]” of its meaning.<sup>151</sup> Plaintiffs’ reliance on a Sixth Circuit □



<sup>148</sup> N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.36; Conn. Gen. Stat. § 53-202w(a)(1). □

<sup>149</sup> Plaintiffs’ Br., No. 14-36-cv, at 58-59; Plaintiffs’ Br., No. 14-319-cv, at 58-60. □

<sup>150</sup> NYSRPA, 990 F. Supp. 2d at 376. □

<sup>151</sup> U.S. v. 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns, 443 F.2d 463, 464-65 (2d Cir. 1971) (rejecting a vagueness challenge in a civil forfeiture context, and finding that the phrase clearly meant a gun “which can be converted by a relatively simple operation taking only a few minutes”). □





1 □ two independent means by which an individual may determine if  
2 □ his firearm is prohibited: he may consult the list of illegal models  
3 □ and, if still concerned that the firearm may be an unlawful “copy or  
4 □ duplicate,” he may cross-reference the list of prohibited military-  
5 □ style features. □

6 □ In this manner, the Connecticut legislation avoids the  
7 □ deficiency of an assault-weapons ban struck down by a sister Circuit  
8 □ as unconstitutionally vague in *Springfield Armory, Inc. v. City of*  
9 □ *Columbus*.<sup>158</sup> In *Springfield*, the municipal ordinance at issue defined  
10 □ assault weapons simply by naming 46 individual models and  
11 □ extending the prohibition to weapons with “slight modifications or  
12 □ enhancements” to the listed firearms. The Sixth Circuit explained  
13 □ that the ordinance was invalid because it “outlaw[ed] certain brand  
14 □ names without including within the prohibition similar assault  
15 □ weapons of the same type, function or capability [and] □ □ □ without  
16 □ providing any explanation for its selections [of prohibited  
17 □ firearms].”<sup>159</sup> The Sixth Circuit found it significant that the ordinance  
18 □ offered no “explanation for drafting the ordinance in terms of brand  
19 □ name rather than generic type or category of weapon.”<sup>160</sup> In the  
20 □ instant case, by contrast, Connecticut has provided not only an

notes 73 and 112, plaintiffs’ challenge to the “copies or duplicates” provision is  
moot regarding copies or duplicates of the Remington 7615 itself. □

<sup>158</sup> 29 F.3d 250, 252 (6th Cir. 1994). □

<sup>159</sup> *Id.* □

<sup>160</sup> *Id.* □

1 □ itemized list of prohibited models but also the military-style features □  
2 □ test, which functions as an explanation of the “generic type or □  
3 □ category of weapon” outlawed. □

4 □ We therefore agree with Judge Covello that the “copies or □  
5 □ duplicate” provision of the Connecticut statute at issue here is □  
6 □ sufficiently definite to survive a void-for-vagueness challenge. □

7 □ iv. “Version” □

8 □ We apply similar logic to our analysis of New York’s □  
9 □ prohibition of semiautomatic pistols that are “semiautomatic □  
10 □ version[s] of an automatic rifle, shotgun or firearm.”<sup>161</sup> In this case, □  
11 □ Chief Judge Skretny held that the provision was unconstitutionally □  
12 □ vague, reasoning that “an ordinary person cannot know whether □  
13 □ any single semiautomatic pistol is a ‘version’ of an automatic one.”<sup>162</sup> □  
14 □ The District Court also expressed concern that the lack of criteria □  
15 □ might encourage arbitrary and discriminatory enforcement.<sup>163</sup> □

16 □ We disagree. The SAFE Act’s terminology has been used in □  
17 □ multiple state and federal firearms statutes, including the 1994 □  
18 □ federal assault-weapons ban, as well as in government reports, □  
19 □ judicial decisions, and published books.<sup>164</sup> Plaintiffs have shown no □



<sup>161</sup> N.Y. Penal Law § 265.00(22)(c)(viii). □

<sup>162</sup> NYSRPA, 990 F. Supp. 2d at 377. □

<sup>163</sup> *Id.* □

<sup>164</sup> Defendants’ Br., No. 14-36-cv, at 81-83. □

1 evidence of confusion arising from this long-standing formulation.  
2 Though plaintiffs are correct that, as a general proposition,  
3 repetition does not save a vague term, in the particular  
4 circumstances presented here—repeated use for decades, without  
5 evidence of mischief or misunderstanding—suggests that the  
6 language is comprehensible. Further, the SAFE Act provides  
7 additional notice of prohibited conduct by requiring the creation of a  
8 website listing unlawful weapons and containing additional  
9 information.<sup>165</sup> If, in fact, as the District Court fears, this language  
10 results in arbitrary and discriminatory enforcement, those charged  
11 under the statute can and should seek recourse in an “as applied”  
12 challenge. We cannot conclude, however, that the provision is vague  
13 in all circumstances or permeated with vagueness on its face. We  
14 therefore reverse so much of the District Court’s judgment as holds  
15 New York Penal Law § 265.00(22)(c)(viii) void because of vagueness.

16 v. “Muzzle Break”

17 Finally, Chief Judge Skretny also struck down as  
18 impermissibly vague a provision of New York’s SAFE Act that listed  
19 among prohibited military-style features such muzzle attachments  
20 as “a flash suppressor, muzzle break, muzzle compensator, or  
21 threaded barrel designed to accommodate a flash suppressor, muzzle



<sup>165</sup> N.Y. Penal Law § 400.00(16-a)(b). The New York State Police also maintains a telephone line to answer the questions of gun owners. See Defendants’ Reply Br., No. 14-36-cv, at 26.

1 break, or muzzle compensator.”<sup>166</sup> All parties agree that a “muzzle  
2 brake” is a firearm attachment that reduces recoil. However, the  
3 SAFE Act misspelled the term as “muzzle break.” On the basis of this  
4 misspelling, the District Court held the references to muzzle  
5 “breaks” to be unconstitutionally vague, reasoning that “an ordinary  
6 person cannot be informed as to what the State commands or  
7 forbids.”<sup>167</sup>

8 This is, in our view, an overstatement. Because the misspelled  
9 homophone “muzzle break” has no accepted meaning, there is no  
10 meaningful risk that a party might confuse the legislature’s intent.  
11 Further, its placement within a list of muzzle attachments makes the  
12 misspelled term’s meaning even clearer. What is more, because the  
13 adjacent statutory term “muzzle compensator” is synonymous with  
14 muzzle brake, and thus independently covers the prohibited  
15 conduct, this issue is of little moment. Nonetheless, vagueness  
16 doctrine requires only that the statute provide “sufficiently definite  
17 warning as to the proscribed conduct when measured by common  
18 understanding and practices.”<sup>168</sup> This provision has done so.  
19 Accordingly, we reverse so much of the District Court’s judgment as  
20 holds New York Penal Law § 265.00(22)(a)(vi) unconstitutionally  
21 vague.

██

<sup>166</sup> N.Y. Penal Law § 265.00(22)(a)(vi) (emphasis supplied).

<sup>167</sup> NYSRPA, 990 F. Supp. 2d at 377 (quoting Cunney, 660 F.3d at 620).

<sup>168</sup> United States v. Farhane, 634 F.3d 127, 139 (2d Cir. 2011) (internal quotation marks omitted).



1 □ CONCLUSION □

2 □ □ To summarize, we hold as follows: □

3 □ (1) The core prohibitions by New York and Connecticut of  
4 □ assault weapons and large-capacity magazines do not  
5 □ violate the Second Amendment. □

6 □ (a) We assume that the majority of the prohibited  
7 □ conduct falls within the scope of Second  
8 □ Amendment protections. The statutes are  
9 □ appropriately evaluated under the constitutional  
10 □ standard of “intermediate scrutiny”—that is,  
11 □ whether they are “substantially related to the  
12 □ achievement of an important governmental  
13 □ interest.” □

14 □ (b) Because the prohibitions are substantially related  
15 □ to the important governmental interests of public  
16 □ safety and crime reduction, they pass  
17 □ constitutional muster. □

18 □ We therefore AFFIRM the relevant portions of the  
19 □ judgments of the Western District of New York and the  
20 □ District of Connecticut insofar as they upheld the  
21 □ constitutionality of state prohibitions on semiautomatic  
22 □ assault weapons and large-capacity magazines. □

23 □ (2) We hold that the specific prohibition on the non-  
24 □ semiautomatic Remington 7615 falls within the scope of

1 □ Second Amendment protection and subsequently fails □  
2 □ intermediate scrutiny. Accordingly, we REVERSE that □  
3 □ limited portion of the judgment of the District of □  
4 □ Connecticut. In doing so, we emphasize the limited □  
5 □ nature of our holding with respect to the Remington □  
6 □ 7615, in that it merely reflects the presumption required □  
7 □ by the Supreme Court in *District of Columbia v. Heller* □  
8 □ that the Second Amendment extends to all bearable □  
9 □ arms, and that the State, by failing to present any □  
10 □ argument at all regarding this weapon or others like it, □  
11 □ has failed to rebut that presumption. We do not □  
12 □ foreclose the possibility that States could in the future □  
13 □ present evidence to support such a prohibition. □

14 □ (3) New York’s seven-round load limit does not survive □  
15 □ intermediate scrutiny in the absence of requisite record □  
16 □ evidence and a substantial relationship between the □  
17 □ statutory provision and important state safety interests. □  
18 □ We therefore AFFIRM the judgment of the Western □  
19 □ District of New York insofar as it held this provision □  
20 □ unconstitutional. □

21 □ (4) No challenged provision in either statute is □  
22 □ unconstitutionally vague. Accordingly, we AFFIRM the □  
23 □ judgments of the District of Connecticut and the □  
24 □ Western District of New York insofar as they denied □  
25 □ vagueness challenges to provisions involving the □  
26 □ capacity of tubular magazines, “copies or duplicates,” □

□

1 □                    or a firearm’s ability to “be readily restored or  
2 □                    converted.” We REVERSE the judgment of the Western  
3 □                    District of New York insofar as it found language  
4 □                    pertaining to “versions” and “muzzle breaks” to be  
5 □                    unconstitutionally vague. □

United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007

ROBERT A. KATZMANN  
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE  
CLERK OF COURT

Date: October 19, 2015

Docket #: 14-36cv

Short Title: New York State Rifle and Pisto v. Cuomo

DC Docket #: 13-cv-291

DC Court: WDNY (BUFFALO)

DC Judge: Skretny

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- \* be filed within 14 days after the entry of judgment;
- \* be verified;
- \* be served on all adversaries;
- \* not include charges for postage, delivery, service, overtime and the filers edits;
- \* identify the number of copies which comprise the printer's unit;
- \* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- \* state only the number of necessary copies inserted in enclosed form;
- \* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- \* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit  
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VERIFIED ITEMIZED BILL OF COSTS

Counsel for

\_\_\_\_\_

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

\_\_\_\_\_

and in favor of

\_\_\_\_\_

for insertion in the mandate.

Docketing Fee \_\_\_\_\_

Costs of printing appendix (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing reply brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

(VERIFICATION HERE)

\_\_\_\_\_  
Signature