IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JUNE SHEW, *et al*,	:	
	:	
Plaintiffs,	:	Case No. 3:13-cv-00739-AVC
v.	:	
DANNEL P. MALLOY, *et al*,	:	
Defendants.	:	December 10, 2013

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY TO OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs, by and through counsel, and hereby set forth the following facts, reasons, and authorities in opposition to Defendants' Motion for Summary Judgment dated October 11, 2013 (Doc. # 78) and in reply to Defendants' opposition to Plaintiffs' Motion for Summary Judgment dated October 11, 2013 (Doc.#78-1).

Dated: December 10, 2013

Respectfully Submitted,

LAW OFFICE OF STEPHEN HALBROOK

By: /s/ Stephen P. Halbrook
Stephen P. Halbrook, Esq.
Pro Hac Vice
3925 Chain Bridge Road, Suite 403
Fairfax, VA 22030
(703) 352-7276
protell@aol.com

GOLDBERG SEGALLA, LLP

By: /s/ Brian T. Stapleton
Brian T. Stapleton, Esq. (CT13418)
Matthew S. Lerner. Esq.
100 Pearl Street, Suite 1100
Hartford, CT 06103
(860) 760-3300
bstapleton@goldbergsegalla.com

Counsel For Plaintiffs

TABLE OF CONTENTS

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103

(860) 760-3307

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103

(860) 760-3307

TABLE OF AUTHORITIES

Page(s)

Cases

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103

(860) 760-3307

Statutes

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103

(860) 760-3307

Other Authorities

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY TO OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby respond to Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment (hereafter "Mem.").

INTRODUCTION

In their Memorandum of Law, Defendants take the position that "constitutional rights are not created by subjective desires, and cases are not decided on imagined and speculative needs." Mem., p. 3. As officials who have taken an oath to uphold the U.S. Constitution, it is surprising that Defendants accuse those who seek to enforce the guaranties contained within the document of such arbitrary and contrived motives. First, the right to keep and bear arms is not the product of some fanciful desire: rather, it is a right which was "inherited from our English ancestors," *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (citing *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)) and codified in the Second Amendment. The placement of the right to keep and bear arms in the Second Amendment in the U.S. Constitution did not create the right; rather, it guaranteed that the government would not infringe upon the right. By ensconcing this right (along with many other rights) into the country's fundamental charter, and by creating a cumbersome amendment process, the framers ensured that the rights of the citizens to keep and bear arms could not be infringed upon by a simple legislative majority—a constitutional amendment would be required. Second, the intention of law abiding citizens to exercise their constitutional right to keep and bear arms that have been and remain in common use throughout the entire country for lawful purposes such as self and home defense is neither imaginary nor speculative. The firearms and magazines which are being banned in the Connecticut law are in common use for such lawful purposes throughout the country, and citizens such as Plaintiffs

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

have chosen them as an appropriate and necessary means of defense. After all, the choice to exercise any constitutional right (*i.e.*, to speak or to refrain from speaking, to exercise a religious preference or to refuse to exercise such a preference, to obtain an abortion or to refrain from having one) is the decision of the individual exercising or deciding not to exercise the right. It is no more the province of the State of Connecticut to tell law abiding citizens which common weapons and magazines are suitable or appropriate to defend themselves any more than it would be to tell law abiding citizens which religion is most suitable or appropriate. Defendants' implication that Plaintiffs' preferences in the choice of how they choose to defend themselves have no relevance is akin to saying that a person's preference in religion has no relevance in a free exercise case. Rights are always about choices.

Simply put, this case involves law abiding citizens seeking what the Second Amendment guarantees: the right to choose which firearms in common use they prefer for the lawful purposes of defending themselves and their homes. Under any standard of scrutiny, the Connecticut law unconstitutionally infringes upon that right and should be declared unconstitutional.

FACTUAL BACKGROUND

A. AR-15 Rifles and Other Commonly-Possessed Firearms

Malloy's depiction of the firearms at issue is based on two fundamental misconceptions. First, he states: "The AR-15 is virtually identical to the M-16, except for the fact that it can only fire on semiautomatic." Mem. 4. But that makes all the difference in the world, and has been recognized in the law universally since machine guns were first restricted in the National Firearms Act of 1934 and various state laws, *e.g.*, C.G.S. Rev. § 8509 (1949). It was the subject of commentary by *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). And whatever the rate of fire of the AR-15 rifle, it is no different than any other semiautomatic firearm. Since

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

semiautomatic firearms in and of themselves are not banned, it is unclear why Malloy spends a great part of his brief denouncing them.

Second, Malloy makes an inaccurate assertion about the time it takes to empty a 30-round magazine in full automatic and in semiautomatic. Mem. 4. However, "it is the magazine, and not the rifle, that determines capacity." *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 536 (6th Cir. 1998). Like any other semiautomatic, an AR-15 can be used with a lower capacity magazine. The issue of magazine capacity is wholly separate from the issues involved in the type of firearm.

B. Federal Restrictions and Outlier State Laws

Malloy notes that the Gun Control Act of 1968 bars the importation of firearms that ATF deems not "particularly suitable for or readily adaptable to sporting purposes." Mem. 5, citing 18 U.S.C. § 925(d)(3). While irrelevant for Second Amendment purposes, ATF has changed its policies over time, but currently approves as sporting certain shotgun features that Connecticut bans as "assault weapons."

Thus, pistol grips on semiautomatic shotguns are banned, C.G.S. § 53-202a(1)(E) (vi)(II), but ATF states that "pistol grips for the trigger hand are prevalent on shotguns and are therefore generally recognized as particularly suitable for sporting purposes." Defendants' Exhibit 20 - ATF Study at 12 (2011). Connecticut bans a "semiautomatic shotgun that has the ability to accept a detachable magazine," § 53-202a(1)(E) (vii), but ATF concluded about that feature: "In regard to sporting purposes, the working group found no appreciable difference between integral tube magazines and removable box magazines." ATF Study at 10.

Nor do the expired federal restrictions support Connecticut's far more draconian prohibitions in any manner. The 1994 federal enactment failed to achieve any benefit, which explains why it was allowed to expire in 2004.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

Contrary to Malloy, Mem. 6, only a handful of outlier states ban "assault weapons" and magazines holding over ten rounds, including California, New York, New Jersey, and, most recently, Maryland. Malloy incorrectly includes as having "bans" the states of Hawaii, Massachusetts, Minnesota, and Virginia. Hawaii restricts transfer, not possession, only of "assault pistols." Haw. Rev. Stat. § 134-4(e). Massachusetts restricts a "large capacity weapon," but "any person" may apply for a license. M.G.L. 140 §§ 121, 131. Minnesota has a declared policy not to "to confiscate or otherwise restrict the use of" such firearms by law-abiding citizens. M.S. § 624.711. Virginia bans possession only by certain aliens. Va. Code § 18.2-308.2:01. In sum, the subject firearms are not banned in 45 states.

C. Connecticut's Ban on Ordinary Firearms and Standard Magazines

Malloy's summary of legislation in Connecticut illustrates how the word "assault weapon" morphed from a list of named guns to a description of generic features and then, in 2013, exploded into an ever-increasing number of ordinary firearms. Mem. 6-12. At each stage, more of what was considered "sporting" and "legitimate" became, with the stroke of the legislative pen, "assault weapons" that only criminals would own.

In 1993, Connecticut defined "assault weapon" by a list of makes and models, and in 2001 added generic definitions. Malloy suggests that manufacturers "circumvented" these laws by changing the names and removing the objectionable features. Mem. 7-8. All that amounted to was compliance with the law.

On December 14, 2012, a deranged man murdered defenseless schoolchildren and teachers at Newtown. He could have committed the same horrific acts with any number of firearms and magazines which remain legal in the State of Connecticut today. He could have used firearms that did not contain any of the features, which now have transformed an otherwise lawful firearm into an unlawful "assault weapon" (such as a pistol grip in which one finger is

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

under the trigger finger, a thumbhole stock, or an adjustable shoulder stock) but which do not make the firearm any more or less deadly. He could have used multiple 10-round magazines. He could have used a pistol or a shotgun.

As Malloy notes, the legislature reacted to this shooting by passing Public Act 13-3. Mem. 9-12. Overnight, all rifles having any single specified feature, regardless of the well intentioned purpose of the feature, were transformed into "weapons of war" for "mass killings." Mem. 10. This is so regardless of the fact that many of the banned features (such as certain grips and stocks) are designed for the purpose of making the firearm easier to fire accurately—which is a laudable aim of law abiding citizens using the firearms for self defense or in a shooting competition. Despite the banned firearms lacking the unique feature demanded by military forces across the globe – full automatic function – these so-called "military features" make them inappropriate for civilian use. Mem. 11. But, ultimately, all firearms have only one common feature that really matters – they shoot projectiles. Malloy may as well characterize that as a "military" feature.

D. The Present Action

Malloy claims that plaintiffs' motion for a preliminary injunction is rendered moot by plaintiffs' motion for summary judgment. Mem. 13-14, citing *USA Baseball v. City of New York*, 509 F. Supp. 2d 285, 303 (S.D. N.Y. 2007). That is not the case. In *USA Baseball*, the court found that "each of the plaintiffs' claims fail as a matter of law" and dismissed the complaint, and that rendered the motion for a preliminary injunction moot. *Id.* Certainly in cases where a court has issued a ruling that effectively disposes of a case, any motion for preliminary relief on that matter would be mooted. However, this Court has made no dispositive rulings in this case—thus Plaintiffs' claim for injunctive relief remains alive and pending.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

I. STANDARD OF REVIEW

Malloy correctly states the standard of review for summary judgment. Mem. 14.

II. THE ACT VIOLATES THE SECOND AMENDMENT

The Second Amendment "protect[s] those weapons . . . typically possessed by law-abiding citizens for lawful purposes . . . ." *Heller*, 554 U.S. at 625. The banned firearms and magazines are "typically possessed" nationwide by plaintiffs and millions of other "law abiding American citizens who possess or wish to possess such firearms and magazines "for lawful purposes."

These are facts that cannot be refuted. Malloy has presented no evidence to impeach plaintiffs' evidence that such firearms and magazines are possessed in large numbers, that plaintiffs and millions of like Americans are not criminals, or that they possess these firearms and magazines for anything but lawful purposes. While he may disagree with these choices of the American public, Malloy cannot deny the right of these citizens to choose. He refers to "Plaintiffs' absolutist interpretation of the Second Amendment in this case" as somehow conflicting with an "established framework," Mem. 15, but there is nothing "absolutist" in following the above *Heller* rule set forth by the Supreme Court.

Malloy acknowledges that the Second Amendment protects "arms 'in common use at the time' for lawful purposes like self-defense." Mem. 15, quoting *Heller*, 554 U.S. at 624. The repeatedly-used term "lawful purposes" refers to the purposes of those who possess such arms. Malloy's subjective belief that the subject firearms are not the most optimal for self-defense does not detract from the lawfulness of the purposes for which they are possessed.

Malloy wholly misinterprets the Second Circuit's statement that a "law that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense." Mem. 16,

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

quoting *United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 838 (2013). The alternative involved in *Decastro* was not a firearm of one type that was supposedly an "adequate alternative" to an entire class of banned firearms; rather, it referred to a federal statute which prohibited the transportation into a person's state of residence of firearms acquired outside the state, but did not prohibit the person from purchasing a firearm in his her home state, "which is presumptively the most convenient place to buy anything." *Id*. at 168.

Aside from misinterpreting the substantial burden which the law places upon citizens, Malloy further misstates the level of scrutiny which should be applied. *Decastro* provides "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *Decastro*, 682 F.3d at 166. That is exactly what this case involves – a "complete prohibition" of a class of firearms possessed by law-abiding persons for lawful purposes. Because the statute at issue both implicates the core Second Amendment right, and places a substantial burden on the right, the strict scrutiny applied to challenges based upon the First Amendment should be applied with equal vigor to the Connecticut statute.

A. The Firearms and Magazines at Issue are Protected by the Second Amendment

Just as a state may not simply ban material it wishes by calling it "obscenity," it may not ban any firearm it wishes just by calling it an "assault weapon." A state may also not arbitrarily set a maximum number of rounds and ban magazines that hold more as "large capacity." While Malloy uses the term "assault weapons" countless times, he says virtually nothing about any specific characteristics of these firearms and what makes them inherently "dangerous and unusual," or why a magazine loses constitutional protection if it holds over ten rounds.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

Malloy acknowledges, as he must, that *Heller* referred to "weapons that are most useful in military service – M-16 rifles and the like" – not semiautomatic firearms – as not having Second Amendment protection. Mem. 17-18, quoting *Heller*, 554 U.S. at 627. He consistently falls back on repetitious use of the word "assault weapon" as a mantra without explaining how manipulation of this ever-changing term can legitimately affect the extent of a constitutional right.

1. The Subject Firearms and Magazines are in Common Use, and Have Not Been Traditionally Banned

a. The Banned Items are Designed for Self Defense and Sport, and Are Not in the Same Class as Military Weapons

Malloy asserts that the banned guns and magazines "are designed for combat, and have the same killing capacity as modern military weapons." Mem. 19. That rhetoric, if true, would come as a big surprise to military forces world wide, which are equipped with sophisticated machine guns as service weapons. In "highlight[ing] the M-16 as exemplifying a 'dangerous and unusual' weapon" unprotected by the Second Amendment, Mem. 19, the Supreme Court did not even mention the AR-15. Certainly, there is nothing in the opinion that would categorize as "dangerous and unusual" any firearm a state might choose to call an "assault weapon."

Malloy asserts: "The AR-15 is identical to the M-16 for purposes of the Second Amendment, and is not protected for the same reasons." Mem. 19. But that argument is foreclosed by the Supreme Court in a decision Malloy fails so much as to acknowledge. *Staples v. United States*, 511 U.S. 600 (1994), decided that the rifle is in common use for lawful purposes and is not "dangerous and unusual." *Staples* contrasted the semiautomatic AR-15 "civilian" rifle with the M-16 "military" rifle, which "allows the operator . . . to choose semiautomatic or automatic fire." *Id.* at 603. The Court elaborated as follows:

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

> [W]e might surely classify certain categories of guns – no doubt including machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation – as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades in Freed. But precisely because guns falling outside of those categories traditionally have been widely accepted as lawful possessions, their destructive potential . . . cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting [26 U.S.C.] § 5861(d) as not requiring proof of knowledge of a weapon's characteristics.

Staples, 511 U.S. at 611-12 (emphasis added).

In further relation to the AR-15 rifle, *Staples* stated that "[e]ven dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation . . . ." *Id*. at 611. An AR-15 rifle can be dangerous in the wrong hands (automobiles can be dangerous too, *id*. at 614), but it is surely not unusual.

Malloy asserts that the "only" functional difference is that the AR-15 – like all other civilian firearms – fires only once per trigger pull, while the M-16 fires in full automatic. He avers that a machine gun can empty a 30-round magazine in under two seconds, while a semiautomatic takes five seconds. But the latter is impossible – no one can pull the trigger and have the action cycle so as to fire six shots per second. The source for this claim is the exaggerated testimony of lobbyist Brian Siebel at a legislative hearing, which *Heller II* uncritically repeated. Mem. 20. Elsewhere, Malloy emphasizes the "rapid fire capability" of "assault weapons," which fire no faster than other semiautomatics. Mem. 25. A pistol grip, adjustable stock, or thumbhole stock does not make a semiautomatic fire any faster. Malloy appears to suggest that semiautomatic firearms per se have no constitutional protection, but any

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

the notion that this entire class of firearms could be criminalized directly contradicts the Supreme Court's holdings in *Heller* and *McDonald*.

Siebel's testimony about rapid fire is impeached by the U.S. Army M16/M4 training manual on which Malloy relies. It shows the "Maximum Effective Rate of Fire (rounds per min)" to be 45 rounds for semiautomatic fire, which would be one round per 1 1/3 second, not six rounds per second as Siebel claimed. *See* Plaintiffs' **Exhibit M** (Rifle Marksmanship, M16-/M4-Series Weapons (Dept. of Army, 2008)), p. 2-1.[1]

As the training manual recognizes, semiautomatic fire "is superior to automatic fire in all measures: shots per target, trigger pulls per hit, and time to hit." Mem. 20, quoting Def. Exh. 54 at pp. 7.8, 7.9. By contrast, "[a]utomatic or burst fire is inherently less accurate than semiautomatic fire" and "rapidly empties ammunition magazines." *Id*. at pp. 7.12, 7.47. That is exactly why semiautomatics are appropriate for individual self defense – with accurate, aimed fire, an aggressor may be pinpointed but with a significantly reduced chance of endangering innocent bystanders that results from automatic fire. Contrary to Malloy's implication, accurate fire is a virtue, not a vice, for lawful self defense by civilians. Accuracy is enhanced by pistol grips, thumbhole stocks, and adjustable stocks. The ability to spray fire in full automatic is the true military feature that distinguishes a machine gun from a civilian gun of any kind. That feature is not present on any of the firearms that are included in the Connecticut law.

The training manual debunks the myth of "spray firing from the hip" by never mentioning such a method. It states that "unaimed fire must never be tolerated," and that one must "[k]eep the cheek on the stock for every shot, align the firing eye with the rear aperture, and focus on the front sightpost." *Id*. at p. 7-9. That means firing from the shoulder.

[1] Available at http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_22x9.pdf. *See id.* (45 per second for M-4 Series, M 16A2, A4; 45-65 per second for M16A1).

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

Malloy's claim that "the AR-15 is identical to the M-16 for the vast majority of modern combat situations" ignores that the training manual includes a major unit entitled "Automatic or Burst Fire," *id*. at p. 7-12, a topic that is extensively covered throughout the book.

Malloy next asserts that an "assault weapon" as defined by Connecticut has "features that enhance its killing capacity." Mem. 21. But "arms" are weapons with inherent "killing capacity," and they are constitutionally guaranteed to law-abiding persons to defend self, family, and community. The utility of a firearm is "enhanced" by accurate sights, a proper fit at the shoulder, and the ability to hold it in a stable manner. These are features that would be desirable to any person using a firearm, not just a criminal using the firearm illegally.

Malloy claims that "features like a pistol grip, forward pistol grip and thumbhole stock allow shooters to steady the weapon during rapid firing, easily shift from target to target, and make it easier to spray bullets from the hip or fire the weapon with only one hand." Mem. 21.[2] Given that possession of a firearm with each such feature is a felony, it would not seem too much to ask that an explanation be provided as exactly how each feature "allows" such firing. A feature allowing one to "steady the weapon" during firing is obviously legitimate, and Plaintiffs have explained how the subject features allow long guns to be held with more stability and comfort, and thus fired more accurately. But Malloy offers no explanation as to how these features make it "easier to spray bullets from the hip." Indeed, pistol grips of the same type are used in single-shot and bolt-action air guns and rifles used in the Olympics.[3] The purpose of a pistol grip or thumbhole stock on a rifle or shotgun relates to the ergonomics of firing from the

[2] For this and the following allegations about specific features, Malloy copies the same conclusory allegations, at times in identical language, from the Sweeney and Rovella affidavits, but they fail to explain why or how each feature does what they say. Mem. 21.

[3] *See* http://www.feinwerkbau.de/en/Sporting-Weapons/Air-Rifles/NEW-Model-800 (single-shot air rifly with pistol grip and adjustable stock).

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

shoulder. *See*, Plaintiffs' Local Rule 56(a)2 Statement at ¶¶ 23.1 – 23.5. And perhaps Malloy could explain how a "forward pistol grip" makes it easier to "fire the weapon with only one hand." Mem. 21.

Malloy next claims that a folding or telescoping stock makes a gun "more concealable." Mem. 21. More concealable than what? Malloy failed to respond to the fact that Connecticut elsewhere addresses concealability by restricting the overall or barrel lengths of long guns with or without such stocks.[4] If a shotgun meets the existing Connecticut law of at least 26" overall length, why would it matter if it has a telescoping stock? One can easily imagine one long gun with a non-telescoping stock and overall length of 26", and another with a telescoping stock which is 36" long at its shortest overall length.

Malloy recounts a parade of horribles about shrouds, flash suppressors, and grenade or flare launchers, Mem. 21, but cites no evidence that any of these features have ever been a factor in committing a crime. When has a flash suppressor ever helped an unlawful shooter avoid detection in the dark? A grenade launcher without a grenade is just a piece of metal, and a flare launcher could be used for its intended purpose of getting help in an emergency.

Malloy concludes that the above features "serve no purpose whatsoever in legitimate home or self defense." Mem. 22. What is not legitimate about a pistol grip, thumbhole stock, or forward pistol grip that stabilizes a gun, or a telescoping stock that adjusts to fit one's frame, all of which enhance accuracy? And how could these features be individually legitimate under the prior two-feature test, and suddenly "serve no purpose whatsoever" with the stroke of a pen under the new single-feature test?

[4] C.G.S. § 53a-211 (a) (prohibition on shotgun with barrel less than 18" or overall length less than 26"); §(pistol or revolver defined to include any firearm, including a rifle, with barrel less than 12"); § 29-35 (prohibition on unlicensed pistol or revolver).

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

Finally, Malloy asserts that "magazines capable of holding large amounts of ammunition, regardless of type, are particularly designed and most suitable for military and law enforcement applications." Mem. 22. Once again, how this could have occurred overnight with the Governor's signature is beyond rational explanation. Magazines in Connecticut went from being entirely unregulated to being "large capacity" beginning with the arbitrarily-chosen number of eleven.

B. For Over a Century, Civilians Have Lawfully Possessed Firearms that Connecticut Now Calls "Assault Weapons," and Only Outlier Jurisdictions Restrict Them

Malloy claims that "civilian use of assault weapons has been regulated or banned outright for much of the time these weapons have been in existence." Mem. 23. Not only is this statement misleading, as the definition of "assault weapons" can change on a legislative whim, it is false. Hundreds of firearms that Connecticut has deemed "assault weapons" in 2013 had never been restricted either by Connecticut or federal law (even during the time that the ineffective federal ban was in effect), and standard magazines had never been restricted in Connecticut. As noted above, only five outlier states restrict them. Moreover, semiautomatic firearms with detachable magazines along with magazines holding more than ten rounds have possessed by civilians for over a century. Judge Kavanaugh wrote in his dissenting opinion in *Heller v. District of Columbia*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) ("Heller 2"):

> The first commercially available semi-automatic rifles, the Winchester Models 1903 and 1905 and the Remington Model 8, entered the market between 1903 and 1906. . . . Many of the early semi-automatic rifles were available with pistol grips. . . . These semi-automatic rifles were designed and marketed primarily for use as hunting rifles . . . .

Magazines holding more than ten rounds have been in use for over 150 years, and they were originally mass produced for civilian use in Connecticut. As early as 1856, Volcanic lever-

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

action rifles were being marketed with 20, 25, and 30 round magazines. Harold F. Williamson, Winchester: The Gun that Won the West 13 (N.Y.: A.S. Barnes, 1952) [attached as **"Exhibit N"** to Plaintiffs' Local Rule 56(a)2 Statement]. Henry rifles came with 16 round magazines and were advertised as able to shoot "sixty shots per minute." *Id*. at 36. The Winchester Model of 1866 held 15 rounds and could be fired "two shots per second." *Id*. at 49. These rifles and similar models to come were made in Connecticut. E.g., *id*. at 421-24.

With the exception of the brief period between 1994-2004 (which Congress did not see fit to extend or renew), there have been no special federal restrictions on semiautomatic firearms have existed since they were first produced in the late 1800s. Indeed, since 1903 the federal government has sold surplus military firearms to the public through the Civilian Marksmanship Program, and continues to do so today. *Gavett v. Alexander*, 477 F. Supp. 1035, 1038-39 (1979); 36 U.S.C. § 40722. World War II-era M-1 carbines, which are semiautomatic rifles with detachable magazines that hold 15 or 30 rounds, continue to be sold to the public through the CMP.[5] There has been no longstanding American tradition of banning firearms under any of the varied definitions of "assault weapon;" on the contrary, the tradition in this country has been one of robust respect for the rights of law-abiding citizens to own and possess the identical firearms and magazines which have now been branded as illegal.

C. The Restricted Firearms are Used Disproportionately Less in Crime

Most firearms are never used in crime. For those that are, rifles and shotguns are used far less frequently than handguns. But criminal misuse fails to trump constitutional rights:

> We are aware of the problem of handgun violence in this country . . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.

[5] *See* http://www.odcmp.com/Sales/carbine.htm

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

Heller, 554 U.S. at 636.

That applies all the more to the rifles and shotguns Connecticut calls "assault weapons" which are used far less in crime than handguns.[6] While Malloy fails to distinguish long guns from handguns in making statements such as "assault weapons account for up to 6% of murders," Mem. 24, that would mean (if true) that such firearms are not used in 94% of murders. And yet he asserts that they are used "disproportionately" in crime. And even if they are used in "42% of mass public shootings," *id.*, that would mean they are not used in 58% of such shootings. And whatever the percentage of "large capacity magazines" used in crime, see Mem. 25, the cited data fails to state what percentage of such crimes the magazine capacity made any difference. On the contrary, the review panel investigating the deadliest shooting incident by a single gunman in U.S. history concluded that "10-round magazines . . . would have not made much difference in the incident." Report, p. 74.

Malloy asserts that "individuals with criminal histories—and especially those with long and violent criminal histories—purchase them [assault weapons and LCMs] much more frequently than law-abiding citizens." Mem. 25. The source cited for this does not say that at all.[7] Given that millions of such firearms and magazines are lawfully manufactured and sold to

[6] As Judge Kavanaugh wrote in *Heller 2*, 670 F.3d at 1290:

> D.C. repeatedly refers to the guns at issue in this case as "assault weapons." But if we are constrained to use D.C.'s rhetoric, we would have to say that handguns are the quintessential "assault weapons" in today's society; they are used far more often than any other kind of gun in violent crimes. *See Bureau of Justice Statistics, Pub. No. 194820, Weapon Use and Violent Crime* 3 (2003) (87% of violent crimes committed with firearms between 1993 and 2001 were committed with handguns).

[7] *See* Ex. 26, Koper Aff. at ¶25 (commenting on young purchasers of "assault pistols," without defining the term, and making no reference to long guns defined as "assault weapons" or to magazines).

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

buyers who passed the National Instant Criminal Background Check, 18 U.S.C. § 922(t), how could criminals possibly "purchase them much more frequently than law-abiding citizens"?

Finally, Malloy objects to rifles that fire "the same round used in the Colt M-16," and refers to an "armor-piercing" rifle as having been used in the Newtown massacre. Mem. 26-27. Yet the same round, .223 caliber or 5.56mm, is not powerful enough for deer hunting in Connecticut, which requires a minimum of .243 caliber or 6mm.[8] It is commonly used for target shooting and for hunting small game, such as coyote. Almost any ammunition fired from a rifle can pierce armor, which is why armor-piercing ammunition restrictions apply only to "any bullet that can be fired from a pistol or revolver" made of certain metals, excluding lead. C.G.S. § 53-202l(a)(1)(B). It goes without saying that any kind of ammunition could have been used in the Newtown murders.

D. The Subject Firearms and Magazines are not "Dangerous and Unusual" Weapons

Malloy relies on two decisions claiming that "assault weapons" – the definitions of which differ, the label seems to be all that matters – and standard magazines are "dangerous and unusual" weapons under *Heller*. Mem. 27-28. To the contrary, they flatly contradict *Heller*.

The first is *People v. James*, 94 Cal. Rptr. 3d 576, 585 (Cal. App. 2009), which noted *Heller's* statement about the M-16 and then jumped to the conclusion that an "assault weapon" has a high rate of fire and thus is not "a legitimate sports or recreational firearm." This opinion renders *Heller's* pointed discussion about the M-16 meaningless, 554 U.S. at 627. In addition, the history of the Second Amendment detailed in *Heller* makes clear that the primary purpose of the amendment is not sport or recreation; it is defense. Consequently, any discussion as to

[8]Dept. of Energy & Environmental Protection, "Deer Hunting Seasons," http://www.ct.gov/deep/cwp/view.asp?a=2700&q=514442&deepNav_GID=1633. AR-15 type rifles that meet the higher caliber requirement may still be used for hunting. *See* "Hunting and Connecticut's Gun Laws," http://www.ct.gov/deep/cwp/view.asp?a=2700&q=529614&deepNav_GID=1633.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

whether a firearm is "a legitimate sports or recreational firearm" misses the point of the amendment.

The second decision relied upon by Defendants is the district court opinion in *Heller II* that the banned items "are not in common use." *Heller v. District of Columbia*, 698 F. Supp.2d 194 (D. D.C. 2010). But that finding was reversed on appeal, based on actual data showing that "semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use' . . . ." *Heller*, 670 F.3d at 1261. The comprehensive data here shows even moreso that they are not unusual.

1. The Subject Firearms and Magazines are Commonly Used for Purposes Protected by the Second Amendment

a. The Items are Commonly Owned

What Connecticut bans in its ever-broadening definition of "assault weapon" are primarily rifles, along with some pistols and shotguns. Most of the rifles and pistols are semiautomatic. Firearms may be classified into types, including rifles, pistols, and shotguns, including those with semiautomatic actions. "[T]he Second Amendment right . . . extends only to certain types of weapons," *Heller*, 554 U.S. at 623, and that includes not just "long guns," *i.e.*, rifles and shotguns – which everyone conceded – but also handguns. *Id*. at 629. Heller's explicit statement of what is not protected by the Second Amendment – machineguns and "short-barreled shotguns," i*d*. at 624-25 – makes clear what is so protected.

Semiautomatic rifles and pistols with detachable magazines holding more than ten rounds have been in widespread use by civilians for over a century. While plaintiffs have focused on the most popular design since the 1960s, the AR-15, there have been many others, such as the M-1 carbine. Contrary to Malloy, such semiautomatic rifles – almost four million AR-15s alone – are anything but "rare." Mem. 29-30. Nor is it viable to underrate the proportion of such firearms

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

held by Americans today by citing alleged data about the number of "assault weapons" as that term was defined in the 1990s, and using that same data as applied to today's vastly expanded definitions of "assault weapon." Mem. 30.

b. The Subject Firearms and Magazines Are Commonly Possessed for Lawful Purposes, Including Self Defense

Malloy claims that the subject firearms and magazines are not appropriate for or commonly used in self defense. Mem. 31. But given that a constitutional right is at stake, it is not for the government to impose its choices and to prohibit "an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." *Heller*, 554 U.S. at 628. And just as "[t]here are many reasons that a citizen may prefer a handgun for home defense," *id.* at 629 (emphasis added), there are many reasons that another citizen may prefer a long gun. To paraphrase the reasons listed by *Heller*, *id.*: it may be just as easy to store as a handgun where it is accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker because it is held with two hands; for those with the upper-body strength, it may be lifted and aimed more accurately than a handgun. Also, in a situation in which multiple assailants are converging on a home, an autoloading rifle or a fast-firing shotgun gives more power and hit potential on multiple targets than a handgun. Handguns may be "the most popular weapon chosen by Americans for self-defense in the home," *id.*, but long guns are also popular for that purpose and are more popular for hunting and other lawful purposes.[9]

Rights under the Second Amendment are not dependent on how much firearms and magazines "are actually used for self defense," in Malloy's words, or when they are, how many

[9] While failing to address why the specific banned features do not have utility for law-abiding citizens, Malloy dismisses the detailed explanations on point by Plaintiffs' experts, finding fault with Dr. Gary Kleck because an unreported district court opinion disagreed with him. Yet Dr. Kleck's scholarship has been repeatedly cited as authority. *E.g.*, *Heller II*, 670 F.3d at 1262; *United States v. Cavera*, 550 F.3d 180, 186, 196 (2nd Cir. 2008); *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007).

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

shots may be fired. Mem. 31-32. *Heller* did not require data on any such issues and decided that citizens in general and Mr. Heller in particular had a right to keep common firearms in their homes despite the District's argument that handguns were not appropriate for or frequently used for self defense.

E. The Act Implicates the Second Amendment and is Void

Malloy argues that the prohibitions must be upheld even if they implicate the Second Amendment. He suggests that Plaintiffs have ignored Second Circuit precedents, Mem. 34, when in fact these precedents make clear that commonly-possessed firearms may not be banned from the home. *See* Mem. in Support of Pls.' Mot. for Sum. Jud. 13-14, 26. "Second Amendment guarantees are at their zenith within the home," and "[t]he state's ability to regulate firearms . . . is qualitatively different in public than in the home." *Kachalsky v. County of Westchester*, 701 F.3d 81, 94 (2nd Cir. 2012). The only reason strict scrutiny was not applied to a fee to obtain a gun permit was because it did "not ban the right to keep and bear arms but only impose[d] a burden on the right." *Kwong v. Bloomberg*, 723 F.3d 160, 168 n.16 (2d Cir. 2013). Unlike a gun fee, however, the Act bans entire classes of firearms for use in the home and otherwise.

1. The Prohibitions Substantially Burden the Right and Do Not Provide Ample Alternatives

Malloy argues that a firearm can be banned if another type of firearm is available, and that a person's "subjective preference for a certain type" of firearm is irrelevant. Mem. 35. He bases this argument on a case which upheld a federal statute prohibiting the transportation into a person's state of residence of firearms acquired outside the state, but did not prohibit the person from purchasing a firearm in his her home state. *Decastro*, 682 F.3d at 168. This is an entirely inappropriate analogy, as *Heller* stated that the types of firearms "chosen by American society"

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

are what counts. *Heller*, 554 U.S. at 628. *Heller* rejected the argument that handguns can be banned because long guns are available; certainly, the reciprocal of this amendment, that long guns can be banned because handguns are available, should also be true.[10] *Heller*, 554 U.S. at 630. Contrary to Malloy, Mem. 35 n.14, the reason handguns may not be banned was not based on the Court's subjective preference for a type of firearm, but on what "the American people have considered" to be appropriate for self defense. 554 U.S. at 630.

Malloy's wholly unrealistic "alternatives" for standard magazines that hold more then ten rounds are "multiple smaller magazines" or "a second or third loaded firearm." Mem. 36. Disregarding that criminals do not care about magazine capacity limits, they could also use multiple magazines and guns, and they always have the advantage of planning the time and place of an attack.

Malloy seeks to rely on decisions of outlier decisions upholding gun and magazine bans under state arms guarantees, Mem. 38, but they do not meet the test "used to evaluate the extent to which a legislature may regulate a specific, enumerated right" under the federal Constitution. *Heller*, 554 U.S. at 628 n.27. Further, they conflict with precedents from the same states.[11]

2. The Act is Void Under Heightened Scrutiny

[10]That "more than one thousand" makes and models of firearms may still be legal in Connecticut, Mem. 35, is no more relevant than was the fact that more than one thousand makes and models of long guns were still available under the D.C. handgun ban. *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), which the Supreme Court in *Heller* affirmed, addressed the District's argument that "since it only bans one type of firearm, 'residents still have access to hundreds more,' and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous."

[11]*Rabbitt v. Leonard*, 36 Conn. Supp. 108, 413 A.2d 489, 491 (Supr. Ct. 1979), held that "a Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to bear arms," but *Benjamin v. Bailey*, 234 Conn. 455, 465-66, 662 A.2d 1226 (Conn. 1995), adopted a "reasonable regulation" test and held that if "some types of weapons" are available, "the state may proscribe the possession of other weapons." *Compare City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744, 745 (1972) (gun ban void because governmental "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"), *with Robertson v. Denver*, 874 P.2d 325, 328 (Colo. 1994) ("this case does not require us to determine whether that right is fundamental").

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

a. Strict Scrutiny is Appropriate

Prohibiting commonly-possessed firearms and magazines, like the ban in *Heller*, categorically infringes on the right to keep and bear arms. Moreover, "the right to keep and bear arms is fundamental to our scheme of ordered liberty . . . ." *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3036 (2010). A fundamental right "requir[es] strict judicial scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973).

Second Circuit precedent precludes Malloy's argument that intermediate scrutiny applies to a ban on common firearms in the home. Mem. 40-41. While "applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home," *Kachalsky* held that a gun ban in the home, such as D.C.'s, is a "policy choice[ ]" that is "off the table." 701 F.3d at 93-94, quoting *Heller*, 554 U.S. at 636. Similarly, it was only because a license fee "does not ban the right to keep and bear arms . . . that strict scrutiny is not appropriate here." *Kwong*, 723 F.3d at 168 n.16.

b. The Ban Fails Intermediate Scrutiny

Malloy goes to great lengths to argue that the ban passes intermediate scrutiny based on speculative opinions about how crime will be reduced if the ever-changing concept of "assault weapons" and standard magazines are banned. He promises that the Act "will" – not "may" – "reduce the number of crimes" in which the subject firearms are used, and will thereby "reduce the lethality and injuriousness of gun crime . . . ." Mem. 43-44.

But repetitive use of the word "assault weapon" fails to address how banning any defined feature would reduce crime in any manner. Can it seriously be contended that crimes committed with rifles, which is already quite low, will be decreased if "any finger on the trigger hand in addition to the trigger finger" is not "directly below any portion of the action of the weapon when firing"? *See* C.G.S. § 53-202a(1)(E)(i)(II). Or that murders will go down if one can no

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

longer put one's thumb into a thumbhole stock? Or that violence will plummet, or decrease one iota, if shoulder stocks are made so they will not adjust to fit one's arm length?

The same may be said about magazines. Anyone willing to commit murder would have no problem breaking a law against having a magazine that holds more than ten rounds. But law-abiding persons would.

Malloy makes the classical logical fallacy of "after that, therefore because of that": "the criminal use of assault weapons declined substantially after the federal ban was enacted," and "it would have had an even more substantial impact in that regard had it not been allowed to expire in 2004." Mem. 44. But the homicide rate had been falling since almost two years before the enactment of the federal law, and has continued to remain low since the law expired in 2004. Firearm-related homicides declined 39%, from 18,253 in 1993 to 11,101 in 2011. *See*, Bureau of Justice Statistics, Firearm Violence, 1993-2011, at 1 (2013). One may just as well say that the expiration of the federal law kept crime at a low level.

Malloy promises even more crime reduction because Connecticut changed the two-feature test to a one-feature test. Mem. 45. Again, can it seriously be contended that crime will drop if one must fire a rifle with the non-trigger finger forward or behind, but not below, the action, and the shoulder stock is not adjustable?

The premise of the law is that use of the banned firearms and magazines in crimes will decrease. Mem. 46-48. This assumes that criminals who disregard the basic sanctity of human life will abide by a law creating mere possessory crimes. It further assumes that those would do not simply acquire weapons and magazines on the black market or out of state will not acquire and use substitute firearms that are just as capable of misuse. Malloy's prediction that the law will "prevent a substantial number of gunshot victimizations in Connecticut," Mem. 47, is pure,

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

unwarranted speculation, and certainly not sufficient to satisfy either a strict or intermediate standard of heightened scrutiny.[12]

III. PLAINTIFFS STATE VALID EQUAL PROTECTION CLAIMS

A. The Challenged Provisions Treat Similarly Situated Persons Differently

Plaintiffs and other non-law enforcement or non-military citizens are similarly situated to members and employees of various state or local agencies and to members of the military when they are all off duty and in their homes. Plaintiffs complain about the special privileges accorded to the latter to possess the subject firearms and magazines when such possession is not in the course of employment. Malloy responds that law enforcement officers are always "on duty." Mem. 50-52 This assertion is contradicted by the language of the statute and its application. First, the statute refers to these officers possessing the guns and magazines while "off duty."[13] Second, other governmental employees, armored car drivers, and nuclear facility security personnel are not always "on duty." Members of the military have none of the domestic law enforcement duties discussed by Malloy and may have any magazine for personal purposes unrelated to their duties. C.G.S. § 53-202p(d)(3).

Malloy says that no evidence exists that "Connecticut citizens have used firearms to defend against criminal attacks," or have "used an assault weapon or fired more than 10 shots." Mem. 50. Citizens have defended themselves with firearms since Connecticut became a colony, and have used a variety of weapons to do so.

Without any basis, Malloy describes citizens as irresponsible persons with "no training" who would harm "innocent bystanders," such as by "over-penetration of walls of a dwelling with

[12] Malloy claims in this regard that Plaintiffs and their *amici* have "grossly mischaracterized" Koper's work. Mem. 48. Yet Dr. Koper explicitly stated that the federal legislation had no perceptible effect on crime and no predictions could be made that it would do so if renewed. *See*, Koper 2013 at 158, 164.

[13] C.G.S. §§ 53-202p(d)(2), 53-202c(b)(2).

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

ammunition such as the .223 caliber round commonly used in the AR-15 rifle . . . ." Mem. 51. In fact, 9mm pistol rounds have more penetrating power than .223 rifle rounds. *See*, Plaintiffs Local Rule 56(a)2 Statement at ¶¶ 109.1, 109.2.

While we agree that many "law enforcement officers are called upon on a daily basis to actively engage and apprehend dangerous criminals," Mem. 51, military members and other exempt persons are not. For all of these exempt persons, even law enforcement officers who may never truly be "off-duty," Mem. 52, no requirement exists that any of the firearms and magazines they acquire have anything to do with their duties. They can amass quantities thereof for home defense, collecting, or recreation. And while "law enforcement must be permitted to carry their service weapons off-duty," Mem. 52, everyone has the same interest in defending themselves and their families in their own homes.

Malloy suggests that "members of the military are not similarly situated to the general public because they are governed by applicable federal and military laws, which the State appropriately chose not to contravene or even encroach upon." Mem. 53. To the contrary, the exemption could have been limited to duty purposes, just as is the prohibition on carrying a pistol without a permit, which exempts "any member of the armed forces of the United States . . . or of this state . . . when on duty or going to or from duty . . . ." C.G.S. § 29-35(a).

While an off-duty exemption may be warranted for officers who may be "compelled to perform law enforcement functions in various circumstances," *Silveira v. Lockyer*, 312 F.3d 1052, 1089 (9th Cir. 2002), that does not apply to military members and the other exempted persons who have no such duties.

B. The Exemptions Fail Rational Basis Review

Malloy asserts that "the Act does not implicate any fundamental rights under the Second Amendment," Mem. 53-54, but *McDonald* held that gun bans do implicate fundamental rights.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

130 S.Ct. at 3036. The Act must thereby be "reviewed under the strict scrutiny standard." *Dandamudi v. Tisch*, 686 F.3d 66, 72 (2d Cir. 2012). Applying that standard, the exemptions surely run afoul of the Equal Protection Clause. But the discriminations here fail even the lowest standard of review: "Having a conceivable legitimate governmental interest is, alone, not sufficient for rational basis review." *Windsor v. United States*, 699 F.3d 169, 197 (2d Cir. 2012).

1. The Purchase and Possession Exemptions Have No Rational Basis

Malloy denies that the "off-duty" exemptions violate equal protection as follows: "There is nothing in the statutory text to indicate that the law enforcement exemption allows for purely personal use of the weapons, which must be purchased for official purposes under the statute." Mem. 56. But the statute explicitly exempts from the magazine ban on purchase and possession members or employees of agencies and the military "for use in the discharge of their official duties or when off duty . . . ." C.G.S. § 53-202p(d)(1) (emphasis added). They can obviously purchase and possess the magazines when off duty for personal purposes, for otherwise the off-duty reference would be redundant with the reference to use in the discharge of official duties.

The ban on possession of an "assault weapon" does not apply to various members of state and local agencies "in the discharge of" their "official duties or when off duty," § 53-202c(b)(3), or to "a member of the military or naval forces of this state or of the United States," § 53-202c(b)(4), without any reference to official duties. All such persons may possess "assault weapons" without restriction for any reason whatever.

The above exemptions have the same defect as in *Silveira*: "The exception does not require that the transfer be for law enforcement purposes, and the possession and use of the weapons is not so limited." *Silveira v. Lockyer*, 312 F.3d 1052, 1090 (9th Cir. 2002), cert. denied, 540 U.S. 1046 (2003). Contrary to Malloy, Mem. 56, and unlike here, in *Silveira*: "The

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

off-duty officer exception provides that an off-duty officer permitted to possess and use the assault weapons must do so only for 'law enforcement purposes.'" *Id*. at 1089 (quoting statute); see also id. at 1059. "As set forth in the text, inclusion of the limitation that the assault weapons are to be used for law enforcement purposes only renders the provision a rational one." *Id*. at 1089 n.54. The lack of any rational basis is even more evident in the exception for members of the military, who are issued all the guns and magazines they need for employment by the military itself.

2. The Certificate of Possession and Declaration of Possession Exemptions Are Irrational

Malloy has suggested no actual reason for allowing a "person who retires or is otherwise separated from service" from specified governmental and private entities to declare and keep the subject magazines and guns without regard to any deadline. § 2(a)(2), P.A. 13-220 (magazines); C.G.S. § 53-202d(a)(1)(B) & (2)(B) ("assault weapons"). Of those exempt persons, he refers only to retired law enforcement officers, and offers no basis for the exemption: "The State's interest in requiring the officer to register a weapon that has been purchased for official duties only arises if the officer wishes to keep the firearm or magazine after he or she retires or is separated from service." Mem. 57. Nor does he offer any basis for allowing military members who move into the state, but not other newcomers, to declare and possess the subject guns and magazines. *See id*. at 57.

As Malloy concedes, "the provision at issue in *Silveira* allowed law enforcement officers to initially purchase an assault weapon upon their retirement for purely personal purposes." Mem. 57-58, citing *Silveira*, 312 F.3d at 1090-91. The exempted persons here may keep the guns and magazines they acquired before retirement for purely personal purposes. And members of the military may bring such items into the state anytime for purely personal purposes.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

Finally, as Plaintiffs have shown, the unconstitutional provisions here discriminating in favor of selected classes may not simply be excised from the Act, because the Act does not make it a crime for the favored classes to possess the subject firearms and magazines. Since these void provisions may not be severed from the prohibitions applicable to ordinary citizens, all of the restrictions on the subject firearms and magazines must be declared void in their entirety. Plaintiffs fully briefed this issue. Mem. in Support of Mot. for Sum. Jud. 28-29. Since Malloy has not responded to this issue, he concedes that the provisions cannot be severed.

IV. THE ACT IS UNCONSTITUTIONALLY VAGUE

A. Plaintiffs May Bring a Facial Challenge

Plaintiffs may bring a facial challenge for two reasons. First, fundamental Second Amendment rights are at stake. Second, the Act imposes severe criminal penalties and lacks scienter. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982), distinguished "enactments with civil rather than criminal penalties," asking about the latter whether there is "a scienter requirement" to "mitigate a law's vagueness," and noted the separate enquiry of whether the law "threatens to inhibit the exercise of constitutionally protected rights." Such rights were not implicated in the ordinance, which restricted sale of drug paraphernalia, and as it had a scienter element, the "facial challenge fails because . . . the ordinance is sufficiently clear . . . ." Id. at 499-500. *See* further Pls.' Mem. in Support of Mot. for Sum. Jud. 29-31.

> *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983), reiterated:
> First . . . we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." Second, where a statute imposes criminal penalties, the standard of certainty is higher. This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. (Citation omitted.)[14]

[14]*Kolender* invalidated an anti-loitering statute despite circumstances in which the requirement to provide "credible and reliable" identification would not be vague, i.e., the refusal to provide any identification. *Id.* at 371-72 (White, J., dissenting)..

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

Malloy would change "constitutionally protected rights" to "First Amendment rights." Mem. 58-59. *Hoffman Estates* did not do so, nor did *United States v. Rybicki*, 354 F.3d 124 (2d Cir.2003) (en banc). *Rybicki* sought to reconcile the dicta about "vagueness in all applications" in *United States v. Salerno*, 481 U.S. 739, 745 (1987), with the "permeated with vagueness" standard in *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality op.), ultimately declining "to suggest [a] preference for" either test, and considered the law at issue under both the "vague in all applications" and the "permeated with vagueness" standards. *Rybicki*, 354 F.3d at 132.

Malloy relegates the Second Circuit's en banc decision in *Rybicki* to a footnote and argues that it should not be followed: "Although the Second Circuit did analyze a facial challenge under both standards in *Rybicki*, it did so only because it was clear that the law satisfied both standards." Mem. 60 n.26. This Court should decide whether that Act satisfies both standards, and should invalidate it if it fails under either of them..

Malloy suggests (Mem. 60) that *Rybicki* has been superseded by *United States v. Farhane*, 634 F.3d 127, 138-39 (2d Cir. 2011),[15] which stated: "To the extent the Supreme Court has suggested that a facial challenge may be maintained against a statute that does not reach conduct protected by the First Amendment, the identified test . . . requir[es] the defendant to show 'that the law is impermissibly vague in all of its applications.'" *Id*., quoting *Hoffman Estates*, 455 U.S. at 497. But the Supreme Court used the First Amendment only as an example when it broadly asked "whether it [a law] threatens to inhibit the exercise of constitutionally

[15]*Farhane* was a criminal prosecution, so its statement about "cases of pre-enforcement facial vagueness challenges," *id*. at 139, was dictum. In any event, the *Farhane* panel could not overrule the en banc court in *Rybicki*.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

protected rights," adding: "If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id*. at 499.

Malloy's argument that a ban on common firearms "does not burden any fundamental rights under the Second Amendment," Mem. 59, is not viable in the post-*Heller* epoch.[16] Indeed, even pre-*Heller* courts that were unwilling to decide that the Second Amendment protected an individual right recognized that "due process protects our citizens from vague legislation even when that legislation regulates conduct which otherwise does not enjoy constitutional protection." *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 539 (6th Cir. 1998) ("PRO") (citing *Hoffman Estates*, 455 U.S. at 497-99) (invalidating "assault weapon" ordinance as vague).

B. The Offenses Lack Scienter

The gun and magazine bans here impose severe criminal penalties but include no scienter requirements. *See* Pls.' Mem. in Support of Mot. for Sum. Jud. 31. The only decision on point rejected the argument that the state must prove "that the defendant was aware of the offending characteristics of the weapon that made it a proscribed assault weapon," and that, given that these are "police regulatory statutes," the court "will not infer a mens rea element in § 53-202c where one is not stated." *State v. Egan*, No. CR 10251945, 2000 WL 1196364, *3-4 (Conn. Super. July 28, 2000).

Malloy ignores this decision and asserts that no appellate court has held that the prohibitions lack scienter. Mem. 61-62 n.28. That is because no appellate court has ruled on the issue. One can only rely on the statutory text and the *Egan* decision. Malloy adds that a scienter

[16] Malloy relies on *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 685 (2d Cir.1996), Mem. 60, but that court held that a ban on firearms "does not relate to a fundamental constitutional right . . . ." *Id*. at 684. That reflected the Second Circuit's pre-*Heller* position that a firearm law "passes constitutional muster if it rests on a rational basis, . . . since the right to possess a gun is clearly not a fundamental right . . . ." *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984).

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

element may be implied in a criminal statute, citing *State v. Swain*, 245 Conn. 442, 454 (1998), but the holding in that case was quite the contrary. *Swain* held that knowledge that one's license is suspended is not an element of the crime of driving with a suspended license, based on the "absence of any specific language regarding knowledge" and the fact that often "the requirement of criminal intent has been omitted from police regulatory or public welfare statutes." *Id*. at 453-54 (citation omitted).[17]

The "legislature clearly knew how to include a scienter requirement but chose not to" do so. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1017 (9th Cir. 2013). Although Malloy "opines that the statute will be interpreted to impose such a requirement, there is no evidence that this is anything more than a litigation position." *Id*. n.8. He "has not produced any evidence that [Connecticut] law enforcement or [Connecticut] courts have interpreted or will interpret the provision in this manner." *Id*.

C. The Assault Weapons Provisions Are Vague

1. Some of the Enumerated Firearms Provisions Are Vague

a. Names Listed in the Statute are Not Vague Only if they Correspond Exactly to the Make and Model Names Engraved on the Firearms

Malloy correctly states as to guns that "have identifying information engraved directly on the gun," that a person "will be able to determine whether their firearm is prohibited by simply locating the make and model engravings that most firearms have." Mem. 64. That statement is valid if and only if the make and model names in the statute are identical, word for word, as those engraved on the firearm. Any divergence would not give adequate notice.[18]

[17]There is a presumption of mens rea in those crimes having their origin in the common law." *Id*. at 454 n.16. Possession of a gun or a magazine is hardly a common-law crime.

[18]Malloy argues that person does not need to know if a firearm is banned by name if it is also banned based on the generic definitions. Mem. 64. That would depend on whether the generic definitions are not vague.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

However, Malloy then asserts that where "such engravings do not exist," a person "can identify the weapon's make and model based on its serial number . . . ." Mem. 64-65. How the number alone could so inform a person is not stated, including in the affidavits Malloy cites. Alternatively, Malloy suggests that a person can find out the make and model "by simply calling the manufacturer, a federally licensed firearms dealer ("FFL"), or the Special Licensing and Firearms Unit at DESPP."[19] Mem. 65. That is not an adequate way to give notice to a person that possession of a firearm is a felony.

Finally, there are firearms that are engraved with make and model names that do not correspond with the names listed in the statute either word for word or at all, but which Malloy suggests are banned.[20] Mem. 63 n.30. For instance, the list includes "Colt AR-15 and Sporter" and "Colt Match Target Rifles." C.G.S. § 53-202a(1)(A)(i), (B)(xxii). Would that include a "Colt AR-15 Sporter H-BAR rifle," which another state excludes from such terms?[21] Or would it include the "Colt California Compliant Carbine"?[22]

b. The "Copies and Duplicates" Language In The Enumerated Weapons Provisions Is Vague

"Assault weapon" is defined in part as 116 named firearms, together with "any copies or duplicates thereof with the capability of any such [firearms], that were in production prior to or

[19]The affidavits cited in support of this statement make vague generalizations that are insufficiently concrete and certain to support the statement. *See* Delehanty Aff. at ¶35 (claiming that unidentified "manufacturers" may give information about firearms); Cooke Aff. at ¶8 (same); Mattson Aff. at ¶¶20-21 (same, adding that "there are procedures in place for an owner to contact the SLFU to determine the information on file regarding his or her firearm").

[20]*See State v. Kalman*, 93 Conn. App. 129, 133, 136, 887 A.2d 950 (2006) (upholding conviction for "Avtomat Kalashnikov AK-47 type" for rifle named "Maadi MISR").

[21]*See* Md. Code, Public Safety Article, § 5-101(r)(2) (defining "assault weapon" to include "Colt AR–15, CAR–15, and all imitations except Colt AR-15 Sporter H-BAR rifle").

[22]http://www.coltsmfg.com/Catalog/ColtRifles/ColtCaliforniaCompliantCarbines.aspx. *Id*. at 653.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

on the effective date of this section." C.G.S. § 53-202a(1)(B), (C), & (D). On its face this fails to inform whether the phrase "that were in production" refers just to the "copies or duplicates," or also refers to the named firearms. Without any analysis of the grammar or sentence structure, Malloy asserts that "a plain reading of the statute makes clear that it applies to both." Mem. 65 n.32. Gun owners are thus expected to know the production dates of potentially countless firearms.

Malloy makes no attempt to explain the meaning of "the capability of any such [firearms]" or how a person would know that a possible "copy or duplicate" has "the capability" of one of 116 named firearms. One might say that two rifles in the same caliber and the same barrel length and diameter might have the same "capability" in that the ballistics, range, rate of fire, and accuracy might be the same. That would be the case if one rifle had a pistol grip, thumbhole stock, or adjustable stock and the other did not. In the features that really count, for instance, an unregulated .223 caliber Ruger Mini-14 semiautomatic rifle with detachable magazine and traditional wood stock could be said to have the same "capability" as a .223 caliber AR-15 type rifle.

Malloy suggests that "it is unlikely that any individual will ever need to know whether a firearm is a 'copy or duplicate,'" apparently because one could look to "the applicable features test" to decide if it is an "assault weapon." Mem. 66. But that assumes the term "capability" means something on which the text is silent. Nothing in the term "capability" suggests that it means how a firearm is held but does not mean, e.g., how far and with what accuracy it shoots. If Malloy seriously believes that the "copies or duplicates" are one and the same as the generic

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

definitions, then no concern should exist about this Court declaring the redundant "copies or duplicates" language vague.[23]

A law defining an "assault weapon" as thirty-four specific rifles and some shotguns and pistols, or "[o]ther models by the same manufacturer with the same action design that have slight modifications or enhancements," was declared unconstitutionally vague on its face in *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994). Malloy asserts that "[t]hat language leaves far more room for interpretation than does the narrower and more specific 'copy and duplicate' with the same 'capability language at issue in this case." Mem. 66-67 n.34. To the contrary, far more vagueness issues are raised by the language here, which fails to define "capability" and requires knowledge of specific production dates of scores of firearms.

Springfield Armory suggested that vagueness may be avoided by "greater specificity" in "a general definition of the type of weapon banned," 29 F.3d at 253, but that meant a definition that was not vague. *See* Mem. 67. That statement "was merely an attempt to illustrate the possibility of using generic definitions," but that did not save generic definitions that were vague. PRO, 152 F.3d at 538.

Malloy denies vagueness here because "to be a copy or duplicate a firearm must essentially be a reproduction of, and basically identical to, at least one of the listed firearms." Mem. 67. But that raises the question of how an ordinary person is expected to know that a specific firearm is a reproduction of or basically identical to one of 116 named firearms, which presupposes intimate knowledge of the designs and features of each. And given that the named

[23]Malloy would rely on *Wilson v. County of Cook*, 2012 IL 112026, 968 N.E.2d 641, 652-53 (2012), but the law in that case did not include the "capability" or "production" language here. Further, the court failed to explain *how* a person would know that any specific firearms were "imitations or reproductions" of listed firearms. *Id*. at 653.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

firearms are unlawful to possess and are thus unavailable, how is a person to compare them with an unlisted firearm to decide if the latter is a copy or duplicate?[24]

Malloy denies "that ordinary individuals have no way of knowing the 'production date' of their firearm," and asserts that, using the serial number, "the individual generally can obtain the firearm's production date using the same processes described above for identifying firearm's make and model." Mem. 68. But the issue is far broader than "their firearm," as it typically arises when a person wishes to obtain a firearm that is not already possessed. Malloy already stated that one must know the production dates both of the 116 named firearms and of the firearm that could be a copy or duplicate. Mem. 65 n.32. And he unreasonably presupposes that one can get the information needed to avoid committing a felony by providing serial numbers to manufacturers and hoping to get an answer. Yet a state may not, consistent with due process, fail to define what is prohibited and to tell citizens to find out from other sources suggested in litigation.

c. The "Part or Combination of Parts" Language Is Vague

A list of 116 named "assault weapons" ends with the clauses "a part or combination of parts designed or intended to convert a firearm into an assault weapon," and "any combination of parts from which an assault weapon . . . may be assembled." C.G.S. § 53-202a(1)(F). A listing of 67 named "assault weapons" concludes with "any combination of parts from which an assault weapon . . . may be rapidly assembled . . . ." C.G.S. § 53-202a(1)(A).

How an ordinary person or police officer could possibly have that knowledge is beyond imagination. Malloy does not suggest how, and instead claims that virtually identical language

[24]In *Kalman,* 93 Conn. App. at 139, the unlisted Maadi MISR rifle was held to be an "Avtomat Kalashnikov AK-47 type" based on a comparison by the state police expert of how the two rifles looked and worked, and "whether the parts could be interchanged" between the two. That presupposed technical expertise and access to both rifles.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

was upheld by *Richmond Boro Gun Club*, 97 F.3d at 684, 685-86. Mem. 69. But the definitions in that case were wholly different. "Assault weapon" was defined generically as certain rifles and shotguns with features like a folding stock, pistol grip, or bayonet mount, and "[a]ny part, or combination of parts, designed or redesigned or intended to readily convert a rifle or shotgun into an assault weapon." *Id.* at 683. A bayonet mount, for instance, could be such a part. But the Act here refers not to a short list of parts, but to 116 named guns, and requires a person to know all of their parts.

Malloy urges this Court to reject the reasoning in *PRO*, 152 F.3d at 538, under which the definitions at issue would be vague, because that court supposedly applied a heightened level of review. Mem. 70. But *PRO* was based on Supreme Court precedents holding that "a criminal statute may be facially invalid even if it has some conceivable application." *Id.* at 533, citing *Kolender*, 461 U.S. at 358-59 n.8; *Hoffman Estates*, 455 U.S. at 495; *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979). Furthermore, those decisions were rendered both before *Morales* applied a "permeated with vagueness" standard, 527 U.S. at 55, and before *McDonald* held that gun bans implicate fundamental constitutional rights. 130 S.Ct. at 3036.

Malloy asserts about "parts or combinations of parts" that are "designed or intended" to convert a firearm into an "assault weapon": "A person clearly would fall within the challenged language if he or she possesses a telescoping stock, a flash suppressor, a grenade launcher or any other prohibited feature that can be added to an otherwise legal semiautomatic firearm with a detachable magazine that is in the same person's possession." Mem. 71. But all of these dual-use parts can be used on guns that are not semiautomatic and do not meet the threshold requirements of being "assault weapons, including single shots, pumps, bolt actions, and even air guns. Indeed, an AR-15 receiver can be used to make a rifle that does not have a detachable

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

magazine, or can be made into a single-shot rifle by not installing a gas tube and by using a barrel with no gas port drilled. Any such rifles could use each of the parts Malloy listed, but none would be a semiautomatic with a detachable magazine and thus not an "assault weapon."[25]

d. The Pistol Grip Language Is Vague

A rifle or shotgun is banned in part if "[a]ny grip of the weapon" allows one "to grip the weapon" in which "any finger" besides the trigger finger is "directly below any portion of the action of the weapon when firing . . . ." C.G.S. § 53-202a(1)(E)(i)(II), (vi)(II) (emphasis added). This is vague because it could apply to any rifle or shotgun depending on how it is held "when firing." Waterfowl hunters normally fire their shotguns in a vertical position at ducks and geese when they fly over, resulting in a grip in which the non-trigger fingers are below the action. *See*, Supplemental Declaration of Guy Rossi, attached to Plaintiffs' Local Rule 56(a)2 Statement. That makes them "assault weapons."

Malloy responds that this is "absurd" because "the normal firing position . . . is horizontal." Mem. 72. Apparently he has never hunted in a blind and had birds fly over. This is not a "ridiculous hypothetical scenario," Mem. 73, as the statute refers to where the fingers are held "when firing," not "when holding the firearm horizontally."

D. The Large Capacity Magazine Provisions Are Vague

1. The "Can Be Readily Restored or Converted to Accept" And "Permanently Altered" Phrases Are Vague

A "large capacity magazine" includes a device that "can be readily restored or converted to accept" more than ten rounds, excluding one that "has been permanently altered" not to do so.

[25]Malloy claims that a person would possess "an assault weapon if he or she possessed the completed upper and lower receivers of an assault weapon . . . ." Mem. 71. Apparently this law has no bounds, for the definition of "assault weapon" does not include the mere receiver thereof, any more than it includes the barrel, and it is unclear how a receiver would meet the "part or combination of parts" language.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

C.G.S. § 53-202p(a)(1). "No standard is provided for what 'may be restored' means, such as may be restored by the person in possession, or may be restored by a master gunsmith using the facilities of a fully-equipped machine shop." *PRO*, 152 F.3d at 537 (brackets omitted). "[P]ermanently altered" adds no clarity, because it differs from what may not be "readily" altered.

Malloy seeks to rewrite the statute to say that a magazine "can be readily restored or converted" if a "an ordinary person can quickly and easily" do so, but is not "if it requires the services of a gunsmith to perform such a restoration or conversion." Mem. 74. This litigation assurance with no basis in the statutory text gives no guidance to the ordinary person, and is subject to arbitrary enforcement at the whim of the enforcing authority—the exact evil that the vagueness cases attempt to combat. Just looking at the outside of a magazine tells one nothing, leaving a person with no reason to attempt to disassemble it. Further, there are countless magazine designs, and the ordinary person knows little about them. No requirement exists that the possessor have knowledge of the characteristics of the magazine such that it "can be readily restored or converted," words that themselves set no standard.

Malloy cites cases on definitions in the National Firearms Act. Mem. 75. *United States v. Carter*, 465 F.3d 658, 663-64 (6th Cir. 2006), held certain definitions not to be vague, but "readily restored" was not even at issue. *United States v. Drasen*, 845 F.2d 731, 733 (7th Cir. 1988) did not address whether "readily restored" was itself vague, and the holding of that decision was criticized and rejected in *United States v. Thompson/Center Arms Co.*, 924 F.2d 1041, 1048-49 (Fed. Cir. 1991), aff'd, 504 U.S. 505 (1992).[26] The courts are otherwise in disarray. One court said that "readily restorable" could mean eight hours in "a properly equipped

[26]The district court cases cited by Malloy make no attempt to define "readily." *E.g., United States v. M-K Specialties Model M-14 Machinegun*, 424 F. Supp.2d 862, 872 (N.D. W. Va. 2006).

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

machine shop," *United States v. Smith*, 477 F.2d 399, 400 (8th Cir. 1973), while another said that holding "presses the notion of 'ready restoration' near or beyond its distal boundary." *United States v. Aguilar-Espinosa*, 57 F. Supp.2d 1359, 1362 (M.D. Fla. 1999).

In short, Malloy has set forth no explanation of how an ordinary person would know whether a magazine "can be readily restored or converted" to accept more than ten rounds.

2. "More Than Ten Rounds" Is Vague as Applied to Tubular Magazines

The Act criminalizes a magazine that "has a capacity of . . . more than 10 rounds of ammunition." C.G.S. § 53-202p(a)(1). In addition, "assault weapon" includes: "A semiautomatic, centerfire rifle that has a fixed magazine with the ability to accept more than ten rounds of ammunition." *Id.* § 53-202a(1)(E)(ii). Given that the number of rounds a tubular magazine will accept varies with the length of cartridges, which vary, these provisions are unconstitutionally vague as applied to tubular magazines.

Malloy concedes that "it is true that the maximum capacity of tubular magazines can vary," but incorrectly argues that there is a "standard round" of only one length for each magazine. Mem. 76-78. But the statute refers to "rounds of ammunition," not "standard rounds of ammunition. Further just as there is no "standard length" of a vehicle, there is no such thing as a "standard length" of a round of ammunition.

For instance, 12 gauge shotgun shells are available in 2", 2 ½", 2 ¾", and 3 ½" lengths. *PRO*, 152 F.3d at 535 n.15. A magazine that is about 22" in length would hold only six 3 ½" shells, but would hold eleven 2" shells. "This provision is a trap for the unwary. It imposes criminal liability regardless of whether a shotgun owner knows of the existence of shorter length rounds." *PRO, id.* at 535.

While most gun owners are probably unaware of the existence of 2" shells, they are commercially available. A shotgun barrel may be stamped with, and its owner's manual may

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

refer to, gauges like 2 ¾", and 3 ½", but the 2" shells would still fit in its magazine. *See*, Supplemental Declaration of Guy Rossi, attached to Plaintiffs' Local Rule 56(a)2 Statement.

As a further example, some tubular magazines for rifles can be loaded with .357 Magnum caliber cartridges, but they will also hold .38 Special caliber cartridges, which are shorter. Indeed, the .38 cartridges are available as "wadcutters," in which the bullet does not even protrude from the cartridge case. There is no such thing as a "standard" length cartridge – many lengths are commercially available. But a gun owner may not possess or even be aware of the shorter lengths, which could cause a magazine to hold more than ten rounds and thus ultimately make the unsuspecting owner a felon. *See*, Supplemental Declaration of Guy Rossi, attached to Plaintiffs' Local Rule 56(a)2 Statement.

In sum, the number of rounds a tubular magazine will hold varies by the length of the rounds. There is no one "standard" round a gun owner can try to see if a magazine holds more than ten. Thus, the magazine restrictions are unconstitutionally vague as applied to such magazines.

CONCLUSION

For the many reason stated above in the previously filed Motion for Summary Judgment, it is apparent that the Act violates numerous provisions of the U.S. Constitution. It unconstitutionally infringes upon a constitutional right, it violates equal protection through its scheme of unjustified exemptions, and it suffers from such vagueness that arbitrary and capricious enforcement is a certainty. This Court should grant summary judgment in favor of Plaintiffs and permanently enjoin the unconstitutional provisions of the Act, and deny Defendants' motion for summary judgment.

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307

Dated: December 10, 2013

Respectfully Submitted,

LAW OFFICE OF STEPHEN HALBROOK

By: /s/ Stephen P. Halbrook
Stephen P. Halbrook, Esq.
Pro Hac Vice
3925 Chain Bridge Road, Suite 403
Fairfax, VA 22030
(703) 352-7276
protell@aol.com

GOLDBERG SEGALLA, LLP

By: /s/ Brian T. Stapleton
Brian T. Stapleton, Esq. (CT13418)
Matthew S. Lerner. Esq.
100 Pearl Street – Suite 1100
Hartford, CT 06103
(860) 760-3300
bstapleton@goldbergsegalla.com

Counsel For Plaintiffs

CERTIFICATION

I hereby certify that on December 10, 2013, a copy of the foregoing **MEMORANDUM OF LAW** 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.

GOLDBERG SEGALLA, LLP

By: /s/ Brian T. Stapleton
Brian T. Stapleton, Esq. (CT13418)

GOLDBERG SEGALLA LLP
100 Pearl Street, Ste. 1100
Hartford, CT 106103
(860) 760-3307