

# Cooper & Kirk

Lawyers

A Professional Limited Liability Company

1523 New Hampshire Avenue, N.W.

Washington, D.C. 20036

Charles J. Cooper  
ccooper@cooperkirk.com

(202) 220-9600  
Fax (202) 220-9601

March 17, 2015

## **VIA ELECTRONIC FILING**

Catherine O'Hagan Wolfe, Clerk of Court

United States Court of Appeals

for the Second Circuit

40 Foley Square

New York, NY 10007

Re: *Shew v. Malloy*, No. 14-319.

Dear Ms. Wolfe:

The State cites *Fyock v. City of Sunnyvale*, 2015 WL 897747 (9th Cir. Mar. 4, 2015), in which the Ninth Circuit affirmed a decision declining to preliminarily enjoin a local ordinance banning ammunition magazines capable of holding more than ten rounds of ammunition. For several reasons, *Fyock* should not affect this Court's resolution of this case.

*First*, *Fyock* addressed only a magazine ban, so to the extent it is relevant at all, it is relevant only to the issue of the State's magazine ban. The Ninth Circuit's decision provides no support for the State's additional assertion that it has the constitutional authority to label popular, semiautomatic firearms "assault weapons" and ban them.

*Second*, *Fyock* did not purport to resolve the merits of the magazine issue. Because the *Fyock* appeal was from the denial of a preliminary injunction, the Ninth Circuit emphasized that it was "*not* called upon ... to determine the ultimate merits of *Fyock*'s claim" and cautioned that "our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits ...." Slip Op. 8–9 (emphasis added). Thus, the Court repeatedly made clear that it was reviewing the district court's decision only for an abuse of discretion. *See* Slip Op. 5, 8, 9, 10, 11, 13, 15, 16, 18, 21.

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*Third, Fyock* is undermined by many of the same errors in reasoning that undermine the district court's decision in this case, including (a) that an interest-balancing, levels-of-scrutiny analysis may be used to justify a wholesale ban on arms protected by the Second Amendment, *compare* Slip Op. 16 *with* Brief for Plaintiffs-Appellants at 29–33 (“Pls.’ Br.”); (b) that a law that “may implicate the core of the Second Amendment” by banning law-abiding, responsible citizens from possessing protected arms in the home may be tested by anything less than strict scrutiny, *compare* Slip. Op. 16–18 *with* Pls.’ Br. 35–41; and (c) that a magazine ban like Sunnyvale’s or Connecticut’s could possibly meet any level of heightened scrutiny, *compare* Slip Op. 18–21 *with* Pls.’ Br. 41–52.

Sincerely,

s/ Charles J. Cooper

Charles J. Cooper

COOPER & KIRK, PLLC

1523 New Hampshire Avenue, N.W.

Washington, D.C. 20036

Tel: (202) 220-9600

Fax: (202) 220-9601

*Attorney for Plaintiffs-Appellants*

cc: Counsel of record (via ECF)