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.	:	August 23, 2013

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs, by and through counsel, and hereby set forth the following facts, reasons, and authorities in support of their Motion for Summary Judgment dated August 23, 2013 (Doc. # 60).

Dated: August 23, 2013

Respectfully Submitted,

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INTRODUCTION

This is a classic case of "an Alice-in-Wonderland world where words have no meaning." *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring). Connecticut's fundamental premise in passing the Act Concerning Gun Violence Prevention and Children's Safety ("the Act") is that any firearm it wishes to ban loses Second Amendment protection as long as it is demeaned as an "assault weapon."

The firearms and magazines subject to the Act are possessed and enjoyed by millions of law-abiding citizens in Connecticut and the United States as the firearms of choice for self-defense, hunting and sporting competitions. But with the passage of the Act, virtually overnight countless numbers of ordinary firearms were declared to be "assault weapons" based on a single generic characteristic, and, having been so labeled, are argued to have lost their Second Amendment protection. Yet nothing about these arms changed, other than how the term "assault weapon" was used.

The test for Second Amendment protection is not based on what a legislature may call various arms, but on whether they are "in common use" and "typically possessed by law-abiding citizens for lawful purposes . . . ." *District of Columbia v. Heller*, 554 U.S. 570, 624-25 (2008).

There is no question of fact that the firearms and magazines banned by the Act are typically possessed and commonly used by plaintiffs and millions of other peaceful, law-abiding citizens for legitimate, legal pursuits like self-defense, sport, and hunting. Moreover, under the undisputed facts, the Act violates the Equal Protection Clause and is unconstitutionally vague as a matter of law. For these reasons, summary judgment should be granted to the Plaintiffs, the Court should issue a declaratory judgment that the Act is unconstitutional, and a permanent injunction should issue.

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STATEMENT OF FACTS

The relevant facts of this matter that support the granting of summary judgment are contained in Plaintiffs' Local Rule 56(a)1 Statement of Undisputed Material Facts ("Plaintiffs' SOF") that accompany this Memorandum, and in the affidavits and exhibits attached thereto.

SUMMARY JUDGMENT STANDARDS

Summary judgment is warranted upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden is on the moving party to establish the absence of any material factual issues. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In determining whether there are genuine issues of material fact, the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Stern v. Trustees of Columbia Univ. in City of New York*, 131 F.3d 305, 312 (2d Cir. 1997).

The Second Circuit will affirm the grant of summary judgment where the movant establishes a set of facts in support of his claim which would entitle him to relief. *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 685 (2d Cir. 2001). In the normal course, the trial court's responsibility is "limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue resolution." *B.F. Goodrich v. Betoski*, 99 F.3d 505, 522 (2d Cir. 1996) (quoting *Gallo v. Prudential Servs., L.P.*, 22 F.3d 1219, 1224 (2d Cir. 1994)). But here, the facts in dispute (to the extent any are material) are legislative facts, that is, facts that pertain to broader questions of public policy, and resolution of such facts is appropriate at the summary judgment stage since any findings will be subject to de novo review on appeal. *See, e.g., Indiana Harbor Belt R. Co. v. Am. Cyanamid*

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Co., 916 F.2d 1174, 1182 (7th Cir. 1990); *see also Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 227 (1908) (Holmes, J.).

STATUTORY PROVISIONS AT ISSUE

This action challenges as an infringement of the right to keep and bear arms under the Second Amendment and as a denial of equal protection and due process under the Fourteenth Amendment certain provisions banning firearms and magazines in An Act Concerning Gun Violence Prevention and Children's Safety, Public Act 13-3, effective on April 4, 2013, and amended by Public Act 13-220, effective June 18, 2013.

Prohibitions on Commonly Possessed Rifles, Pistols, and Shotguns

The Act pejoratively defines as "assault weapons" commonly possessed semiautomatic firearms, which fire only a single round with each pull of the trigger. CONN. GEN. STAT. § 53-202a. They include modern sporting rifles, pistols, and shotguns, which are typically kept for self defense, hunting, target shooting, and other lawful purposes in Connecticut: there are numerous shooting competitions for non-military personnel that have taken place throughout the State of Connecticut for years that regularly and legally used the firearms now classified as "assault weapons" to compete. *See* Declaration of Scott Wilson ("Wilson Decl."), attached as "Exhibit G" to Plaintiffs' SOF; Supplemental Declaration of June Shew ("Shew Supp'l Decl."), attached as "Exhibit I" to Plaintiffs' SOF; Declaration of Gary Roberts, attached as "Exhibit K" to Plaintiffs' SOF. *See also* Plaintiffs' SOF, ¶¶ 112-114. For example, timed competitions known as "3 Gun Shoots" and "2 Gun Shoots" were regularly held at such places as the Metacon Gun Club in Weatogue, CT, and the Rockville Fish & Game Club in Vernon, CT. *Id.* These matches were and are extremely popular, have been taking place throughout Connecticut for years, and have been attended throughout the years by hundreds (and likely thousands) of individual and member plaintiffs. *Id.* These firearms are

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not "machine guns," which fire automatically with a single pull of the trigger as long as the trigger remains depressed and the gun has ammunition. *See* Declaration of Mark Overstreet ("Overstreet Decl.") [attached to Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction as Exhibit A) (Doc. #15-15)] at 2.

Effective on April 4, 2013, a person who "distributes, transports or imports into the state, keeps for sale, or offers or exposes for sale, or who gives any assault weapon," with certain exceptions, commits a class C felony, and "shall be sentenced to a term of imprisonment of which two years may not be suspended or reduced by the court." CONN. GEN. STAT. § 53-202b(a)(1).

Possession of a firearm defined as an "assault weapon" is a Class D felony, and a person so convicted "shall be sentenced to a term of imprisonment of which one year may not be suspended or reduced by the court," subject to certain exceptions. CONN. GEN. STAT. § 53-202c(a). A person who on April 4, 2013, lawfully possessed an "assault weapon" as defined by § 53-202a(1)(b) to (f) may apply to the Department of Emergency Services and Public Protection (DESPP) for a certificate of possession by January 1, 2014. CONN. GEN. STAT. § 53-202d(a)(2)(A).[1] A person who obtains such certificate of possession may continue to possess the firearm, limited to narrowly-defined places or purposes. CONN. GEN. STAT. § 53-202d(f), (g).

Members or employees of the DESPP, police departments, the Department of Correction, and various state or local agencies may possess otherwise banned "assault weapons." CONN. GEN. STAT. § 53-202c(b). "[A] member of the military or naval forces of this state or of the United States" may also possess an "assault weapon" without any requirement that it be for duty purposes. CONN. GEN. STAT. § 53-202c(b)(3).

[1]The owner of a firearm defined as an "assault weapon" by § 53-202a(a)(3) or (4) of the general statutes, revision of 1958, revised to January 1, 2013, that was lawfully purchased on or after April 4, 2013, but prior to June 18, 2013, must submit an application to the DESPP for a certificate of possession by January 1, 2014. CONN. GEN. STAT. § 53-202d(a)(2)(A).

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A person who moves into Connecticut in lawful possession of a firearm defined as an "assault weapon" must, within ninety days, render it permanently inoperable, sell it to a licensed gun dealer, or remove it from the State. However, a member of the military or naval forces of Connecticut or of the United States who moves into the State may declare possession of such firearm and keep it. CONN. GEN. STAT. § 53-202d(d). Moreover, members and employees of various state or local agencies may possess any magazines and "assault weapons," even for personal use "when off duty." CONN. GEN. STAT. § 53-202p(d)(2) (magazines); § 53-202c(b)(2) ("assault weapons").

As amended by the Act, CONN. GEN. STAT. § 53-202a(1)(E) radically broadened the definition of "assault weapon" by deleting the "two-features" generic test in prior law and substituting a "one-feature" test as follows:

Rifles

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 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;

   V. A grenade launcher or flare launcher.

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

iii. A semiautomatic, centerfire rifle that has an overall length of less than thirty inches….

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Pistols

iv. A semiautomatic pistol that has the ability to accept a detachable magazine and has at least one of the following:

I. An ability to accept a detachable magazine that attaches at some location outside 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.

Shotguns

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. . . .[2]

[2]The above provisions replaced the definitions under prior law, which required that a firearm have two, rather than just one, of the listed features, but did not require that rifles and pistols be "centerfire." The original Act thus removed .22 rimfire rifles and pistols, which are used primarily for target shooting and hunting small game, from the definition of "assault weapon." However, § 3 of P.A. 13-220 amends the Act to include in the definition: "(ix) Any semiautomatic firearm that meets the criteria set forth in subdivision (3) or (4) of subsection (a) of section 53-202a of the general statutes, revision of 1958, revised to January 1, 2013 . . . ." The practical result is again to restrict .22 rimfire rifles and pistols if they have two of any of the above-listed generic features.

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The term "assault weapon" includes the prior law's list of 67 named firearms, CONN. GEN. STAT. § 53-202a(1)(A), to which are added an additional 116 named firearms, together with "any copies or duplicates thereof with the capability of any such [firearms], that were in production prior to or on the effective date of this section." CONN. GEN. STAT. § 53-202a(1)(B), (C), & (D). That brings to a total of 183 firearms banned by name plus an unlimited number of "copies or duplicates."

The term further includes a "part or combination of parts designed or intended to convert a firearm" into an "assault weapon," or "a combination of parts from which" an "assault weapon" may be assembled ("rapidly" in some cases). CONN. GEN. STAT. §§ 53-202a(1)(A)(ii) & (F).

Prohibitions on Standard Magazines

The Act bans standard magazines in common use that it calls "large capacity magazines," defined to include devices "that ha[ve] the capacity of, or can be readily restored or converted to accept, more than 10 rounds of ammunition." CONN. GEN. STAT. § 53-202p(a)(1). The purchase, transfer, distribution, keeping for sale, offering or exposing for sale, or importation into the State of such magazine is a Class D felony. CONN. GEN. STAT. § 53-202p(b). Starting January 1, 2014, possession of such magazine is a Class D felony. If it was obtained before April 5, 2013, a first offense for possessing it is an infraction subject to a fine; any subsequent offense is a Class D felony. CONN. GEN. STAT. § 53-202p(c).

Members or employees of the DESPP, police departments, the Department of Correction, and various state or local agencies may possess, purchase, or import the otherwise banned "large capacity magazines" regardless of whether it is for use in discharging their official duties or for personal use "when off duty." CONN. GEN. STAT. § 53-202p(d)(2). "A member of the military or naval forces of this state or of the United States" may also possess, purchase, or import such magazines without any requirement that it be for duty purposes. CONN. GEN. STAT. § 53-202p(d)(3).

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A person who lawfully possessed a subject magazine before April 5, 2013, may apply to declare possession thereof to the DESPP by January 1, 2014. CONN. GEN. STAT. § 53-202p(e)(4). Possession thereof is limited to certain narrowly-defined places, and if possessed at one's place of business or other property or under a permit to carry a pistol, such magazine may contain "not more than ten bullets." CONN. GEN. STAT. § 53-202q(f), (g).

However, a "person who retires or is otherwise separated from service" from various state and local agencies, nuclear facilities, or an armored car service may declare possession of, and keep, a "large capacity magazine" originally obtained for official use, without regard to the deadline of January 1, 2014. § 2(a)(2), P.A. 13-220.

A person who moves into Connecticut in lawful possession of a subject magazine must, within ninety days, render it permanently inoperable, sell it to a licensed gun dealer, or remove it from the State. However, a member of the military or naval forces of Connecticut or of the United States transferred into the state after January 1, 2014, may declare possession of such magazine and keep it. CONN. GEN. STAT. § 53-202p(d).

ARGUMENT

I. THE ACT INFRINGES ON SECOND AMENDMENT RIGHTS

A. The Second Amendment Protects Firearms "Typically Possessed by Law-Abiding Citizens for Lawful Purposes"

"[T]he Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *District of Columbia v. Heller,* 554 U.S. 570, 582 (2008). The right is thus not dependent on arbitrarily-defined features such as how the arms are held and the capacity of their magazines. *Heller* explained:

> The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically

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> possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.

Id. at 624-25, citing *United States v. Miller*, 307 U.S. 174, 178 (1939).

Indeed, the Second Amendment declares that the right to keep and bear arms promotes "a well regulated militia." That is why it protects "ordinary military equipment" if it is the type "supplied by [militiamen] themselves and of the kind in common use at the time." *Heller*, 554 U.S. at 624. At the founding, "weapons used by militiamen and weapons used in defense of person and home were one and the same."[3] *Id*. at 625.

Thus, "the sorts of weapons protected were those 'in common use at the time.' . . . We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[4] *Id*. at 627. Other than that, *Heller* refers to longstanding restrictions, but none involve a prohibition on firearm possession by law-abiding persons. *Id*. at 626-27. As *Heller* explained:

> It may be objected that if weapons that are most useful in military service – M-16 rifles and the like – may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty.

Id. at 627 (also referring to "sophisticated arms that are highly unusual in society at large").

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[3]That continues to be the case for some firearms, such as the Beretta 9mm semiautomatic pistol. *United States v. Emerson*, 270 F.3d 203, 216, 227 n.22 (5th Cir. 2001).

[4]*Heller* cites, *inter alia*, 4 Blackstone 148-149 (1769) ("The offense of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land"); *O'Neill v. State*, 16 Ala. 65, 67 (1849) ("if persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offence"). The offense thus involved "going armed" with such weapons to terrify others, not on possessing them in the home.

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Thus, *Heller* was referring to "M-16 rifles and the like," which are fully automatic machine guns.[5] But *Heller* does not suggest that *any* "military" feature disqualifies a firearm from Second Amendment protection – the original militia would "bring the sorts of lawful weapons that they possessed at home to militia duty."[6] *Id*. at 627. At any rate, one could just as well say that having a barrel on a rifle is "military-style," as it is found on every military rifle, and it is far more significant than the shape of a grip or stock.

Accordingly, *Heller* held: "The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose [self-defense]." *Id*. at 628. And they also choose rifles and shotguns, such as Connecticut now bans. *See,* Plaintiffs' SOF, ¶¶ 112-114. In *Heller*, the District and its amici argued that handguns may be banned because persons could defend themselves with rifles and shotguns, which were argued to be superior for self defense.[7] *Heller* responded: "It 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. . . . There are many reasons that a citizen may prefer a handgun for home defense . . . ." *Heller,* 554 U.S. at 630. Reasons also exist why a citizen may prefer a rifle, including a rifle with specific features. That other

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[5]Given *Heller*'s holding that "the Second Amendment does not protect weapons not typically possessed by law-abiding citizens for lawful purposes," it "does not protect . . . personal possession of machine guns." *United States* v. *Zaleski*, 489 Fed. Appx. 474, 475 (2d Cir. 2012).

[6]That included a musket or firelock, bayonet, and ammunition, which "every free able-bodied white male citizen" aged 18-45 years old was required to "provide himself with" under the first federal Militia Act. 1 *Statutes at Large* 271-72 (1792). If the bayonet made the musket "military style," that did not remove it from Second Amendment protection.

[7]Brief for Respondent, No. 07-290, *District of Columbia v. Heller*, at 54 (2008) (the District "adopted a focused statute that continues to allow private home possession of shotguns and rifles, which some gun rights' proponents contend are actually the weapons of choice for home"); Brief of Violence Policy Center, *id*., at 30 ("shotguns and rifles are much more effective in stopping" a criminal; "handguns – compared with larger shotguns and rifles that are designed to be held with two hands – require a greater degree of dexterity").

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firearms with other features are available proves nothing. Newspapers may not be banned because magazines are available.[8]

Staples v. United States, 511 U.S. 600, 603 (1994), noted the fundamental difference between common semiautomatic rifles and machine guns: "The AR-15 is . . . a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire." Acknowledging "a long tradition of widespread lawful gun ownership by private individuals in this country," *Staples* noted: "Even 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. . . . [D]espite their potential for harm, guns generally can be owned in perfect innocence. " *Id*. at 610-11. "Automobiles . . . might also be termed 'dangerous' devices . . . ." *Id*. at 614. Contrasting ordinary firearms, such as the AR-15 rifle, from "machineguns, sawed-off shotguns, and artillery pieces," the Court noted that "guns falling outside those [latter] categories traditionally have been widely accepted as lawful possessions . . . ." *Id*. at 612.

Plaintiffs and millions of Americans possess the banned guns for hunting and target shooting. *See* Plaintiffs' SOF, ¶¶ 112-114. AR-15 type rifles are lawfully and widely used for hunting. *See* Plaintiffs' SOF, ¶¶ 123-124. AR-15 type rifles are the leading type of firearm used in the National Matches and in other matches sponsored by the Civilian Marksmanship Program (CMP), which Congress established "to instruct citizens of the United States in marksmanship" and "to promote practice and safety in the use of firearms . . . ." 36 U.S.C. § 40722(1) & (2). Connecticut has long promoted CMP programs by making state-owned rifle ranges available for practice. *E.g*., C.G.S. § 27-35 (use of ranges by "members of rifle or gun clubs who are affiliated with the National Rifle

[8] *See Cincinnati v. Discovery Network, Inc*., 507 U. S. 410, 418 (1993) (invalidating "a categorical prohibition on the use of newsracks to disseminate commercial messages").

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Association of America, which are conducted under rules prescribed by the National Board for the Promotion of Rifle Practice").

Rifles such as AR-15 are "widely owned by private citizens today for legitimate purposes," including "for self-defense, hunting, and target shooting . . . ." Michael P. O'Shea, "The Right to Defensive Arms after *District Of Columbia v. Heller*," 111 W. Va. L. Rev. 349, 388 (Winter 2009). As O'Shea concluded:

> These rifles usually come equipped with standard, detachable magazines holding twenty to thirty rounds. . . . [T]he arms are indeed "in common use" at this time for a broad range of legitimate purposes. . . . These arms, too, should be deemed constitutionally protected . . . .

Id. at 389.

The line drawn between semiautomatics and machine guns follows a long tradition in American law. Possession of an unregistered machine gun is a serious crime under federal law and the laws of most states, including Connecticut. *E.g*., 26 U.S.C. §§ 5845(b), 5861. But semiautomatic rifles, pistols, and shotguns "are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property . . . ." *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972). *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007), which *Heller* affirmed, noted: "The modern handgun – and for that matter the rifle and long-barreled shotgun – is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon, and it passes *Miller* 's standards." Rifles in particular have been long held to be constitutionally protected.[9]

[9] *People v. Raso,* 9 Misc.2d 739, 742, 170 N.Y.S.2d 245 (Cnty. Ct. 1958) ([the Legislature] carefully avoided including rifles [for restrictions] because of the Federal constitutional provision")*; State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921) (protected arms include "the rifle, the musket, the shotgun, and the pistol"); *Andrews v. State*, 50 Tenn. 165, 179 (1871) ("the rifle of all descriptions, the shotgun, the musket, and repeater, are such [protected] arms").

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The firearms and magazines that Connecticut bans are lawfully manufactured (many in Connecticut itself) and are lawfully purchased by millions of Americans after passing the National Instant Criminal Background Check, see 18 U.S.C. § 922(t), as well as state-required checks. *See also* Plaintiffs' SOF, ¶¶ 112-114. They are in common use by plaintiffs and millions of law-abiding citizens for self-defense, sport, and hunting. *Id.* Restrictions on such guns and magazines are anything but long-standing, and remain outliers nationwide. The laws of most states and federal law have no restrictions on magazine capacity or the number of rounds that may be loaded in a magazine, nor do they restrict guns that some choose to call "assault weapons."[10]

B. The Act Prohibits Commonly-Possessed Firearms and Magazines In The Home, Where Second Amendment Guarantees Are At Their Zenith

The prohibitions on firearms and magazines here apply to mere possession in the home, yet "Second Amendment guarantees are at their zenith within the home." *Kachalsky v. County of Westchester,* 701 F.3d 81, 88 (2d Cir. 2012), citing *Heller*, 554 U.S. at 628-29. Addressing the issue at hand, *Kachalsky* continued:

> New York's licensing scheme affects the ability to carry handguns only in public, while the District of Columbia ban applied in the home "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628 . . . . This is a critical difference. The state's ability to regulate firearms and, for that matter, conduct, is qualitatively different in public than in the home. *Heller* reinforces this view. In striking D.C.'s handgun ban, the Court stressed that banning usable handguns in the home is a "policy choice[ ]" that is "off the table," *id*. at 636.

Kachalsky, 701 F.3d at 94.

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[10] See Bureau of Alcohol, Tobacco, Firearms and Explosives, *State Laws and Published Ordinances – Firearms* (31st edition, 2010-2011), https://www.atf.gov/files/publications/download/p/atf-p-5300-5-31st-editiion/2010-2011-atf-book-final.pdf. Since the ATF published this book, a handful of states have enacted new or additional restrictions on magazine capacity and/or firearms labeled "assault weapons." *See* CONN. GEN. STAT. §§ 53-202a(1)(E), 53-202b(a)(1), 53-202c(a), & 53-202p(a)(1); H.B. 13-1224, 69th Gen. Assemb., Leg. Sess. (Co. 2013); N.Y. Penal Law §§ 265.00(22) & 265.37; Md. Code Ann.. Crim. Law § 4-305 (2013). While this publication does not include 2013 enactments, the statement above remains valid.

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Kachalsky decided that, even outside the home, "some form of heightened scrutiny would be appropriate." *Id*. at 93. However, "*Heller* explains that the 'core' protection of the Second Amendment is the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Id*., quoting *Heller* at 634-35. That is the right that the Act violates here. The court favored "applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home," *id*. at 93, implying that strict scrutiny applies to a possession ban in the home.

Accordingly, a higher standard than intermediate scrutiny applies to prohibitions on possession of firearms and magazines in the home.[11] "[H]eightened 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)." *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012), citing *inter alia*, *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) ("a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end"); *United States v. Marzzarella*, 614 F.3d 85, 94–95 (3d Cir. 2010) ("de minimis" burden on the right might not warrant heightened scrutiny), *cert. denied*, 131 S. Ct. 958 (2011).

Marzzarella upheld a ban on firearms with obliterated serial numbers because that did not ban a class of firearms: "Because unmarked weapons are functionally no different from marked weapons, [the prohibition] does not limit the possession of any class of firearms." *Id*. at 94. The Act here does ban the possession of classes of firearms, and in the home at that.

[11]For restrictions on mere possession of firearms, intermediate scrutiny applies to convicted criminals, not law-abiding persons. *United States v. Skoien,* 614 F.3d 638, 641-42 (7th Cir. 2010) (*en banc*); *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010) ("intermediate scrutiny is more appropriate than strict scrutiny for" persons with a criminal history).

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Decastro concluded that a prohibition on transportation into one's state of residence of a firearm acquired outside the state "does not substantially burden his right to keep and bear arms" because "it does nothing to keep someone from purchasing a firearm in her home state . . . ." 682 F.3d at 168. By contrast, the Act here substantially burdens the fundamental Second Amendment right because it bans mere possession of common firearms and magazines in one's own home.

In sum, like the handgun ban in *Heller*, the ban on common firearms and magazines here is categorically void under the Second Amendment. Alternatively, and at a minimum, since the Act prohibits exercise of a fundamental right in the home, it must be evaluated by the highest levels of scrutiny. (See further Part F, *infra*.)

C. Firearms Do Not Lose Second Amendment Protection Based on an Overnight Legislative Re-labeling of Them with the Pejorative Term "Assault Weapon"

Connecticut apparently assumes that any firearm it wishes to ban loses Second Amendment protection as long as the legislature calls it by the pejorative term "assault weapon." However, "no pronouncement of a Legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act . . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

Since "the right of the people to keep and bear arms, shall not be infringed," U.S. Const., Amend. II, possession of an ordinary rifle, pistol, or shotgun cannot lose its constitutional status by mere manipulation of words. The term "assault weapon" normally means a weapon used in an assault.[12] Military usage refers to certain fully automatic machine guns as "assault rifles,"[13] not the

[12] *See People v. Alexander*, 189 A.D.2d 189, 193, 595 N.Y.S.2d 279 (4th Dept. 1993) ("a tire iron that was believed to be the assault weapon").

[13] "Assault rifles are . . . capable of delivering effective full automatic fire . . . ." Harold E. Johnson, *Small Arms Identification & Operation Guide – Eurasian Communist Countries* (Defense

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semiautomatic guns banned here.[14] Now it has become "a political term, developed by anti-gun publicists" to ban firearms "on the basis of undefined 'evil' appearance." *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (citation omitted).

In 1993, Connecticut restricted a list of 67 named firearms as "assault weapons." Public Acts 1993, No. 93-306, § 1. By contrast, in 1994, Congress passed a law narrowly defining "assault weapon" to include a list of only 22 named firearms as well as certain firearms with two specified generic characteristics.[15] It did not restrict possession of such firearms that were lawfully possessed on its effective date. The law expired ten years later and was not reenacted.[16] Meanwhile, in 2001, Connecticut expanded "assault weapon" to include certain firearms with two defined generic features. Public Acts 2001, 01-130, § 1. Finally, in 2013, virtually overnight, countless more firearms were declared to be "assault weapons" based on 88 additional names (with unlimited numbers of "copies or duplicates") and on a single generic characteristic. Yet nothing changed other than how the word was used.[17]

Intelligence Agency 1980), p. 105. *See Christianson v. Colt Industries Operating Corp*., 486 U.S. 800, 804 (1988) (describing the M-16 selective fire rifle as the "standard assault rifle").

[14]"[T]he guns subject to this law are not military weapons, but merely look like military weapons, since they are identical in action to sporting guns and are not capable of full automatic fire." *Citizens for a Safer Community v. Rochester,* 164 Misc.2d 822, 826, 627 N.Y.S.2d 193 (1994).

[15]Chapter XI, Subchapter A of the Violent Crime Control and Law Enforcement Act, P.L. 103-322, 108 Stat. 1796 (1994), codified at 18 U.S.C. §§ 921(a)(30), 922(v) (expired 2004).

[16]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." Bureau of Justice Statistics, *Firearm Violence, 1993-2011*, at 1 (May 2013). Moreover, while the banned "assault weapons" are mostly rifles, they are used in disproportionately fewer crimes: "About 70% to 80% of firearm homicides and 90% of nonfatal firearm victimizations were committed with a handgun from 1993 to 2011." *Id.* http://www.bjs.gov/content/pub/pdf/fv9311.pdf (visited July 17, 2013).

[17]As *TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978) states:

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Constitutional rights may not be extinguished by use of derogatory names. The test for Second Amendment protection is not based on what a legislature may call various arms, but on whether they are "in common use" and "typically possessed by law-abiding citizens for lawful purposes . . . ." *Heller,* 554 U.S. at 624-25.[18]

D. No Justification Exists To Ban the Specific Features that are Singled Out

Rifles and shotguns with telescoping stocks, pistol grips, and thumbhole stocks are used by millions of law-abiding citizens throughout Connecticut and the United States for the defense of hearth and home. Handguns and long guns with magazines holding more than ten rounds are used by countless millions for self-defense. Prior decisions upholding such bans fail to question such common use and also fail to analyze each specific feature to determine the basis of prohibiting such feature.

Two post-*Heller* courts have upheld such bans, but neither conducts any searching analysis of the particular features at issue. *People v. James*, 174 Cal. App.4th 662, 94 Cal. Rptr.3d 576, 585 (2009), asserted that the Second Amendment "does not protect the right to possess assault weapons . . . ." It relied solely on legislative statements that some of the banned guns had been used in crime, something that could be said for any type of firearm. It concluded: "These are not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport

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This recalls Lewis Carroll's classic advice on the construction of language: "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what *I* choose it to mean – neither more nor less." *Through the Looking Glass*, in *The Complete Works of Lewis Carroll* 196 (1939).

[18]This test also renders irrelevant the opinion of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which has constantly changed, on whether certain firearms may be imported based on whether they are "particularly suitable for or readily adaptable to sporting purposes." 18 U.S.C. § 925(d)(3). The Second Amendment is not confined to firearms that a government agency deems sporting.

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hunting or self-defense . . . ." *Id*. at 586. The court offered no evidence whatsoever for that proposition.

The majority in *Heller v. District of Columbia,* 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*"), upholds such a ban, despite its following acknowledgment that should have resolved the case based on *Heller*:

> We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in "common use," as the plaintiffs contend. Approximately 1.6 million AR-15s alone have been manufactured since 1986 . . . . As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds . . . .

Id. at 1261 (citing Mark Overstreet declaration).

Based on the same evidence, Judge Kavanaugh noted in dissent that "[t]he AR-15 is the most popular semi-automatic rifle," and that "[s]emi-automatic rifles are commonly used for self-defense in the home, hunting, target shooting, and competitions." *Id*. at 1287-88 (Kavanaugh, J., dissenting).[19] "Whether we apply the *Heller* history- and tradition-based approach or strict scrutiny or even intermediate scrutiny, D.C.'s ban on semi-automatic rifles fails to pass constitutional muster." *Id*. at 1285.

As Judge Kavanaugh wrote, "semi-automatics actually fire two-and-a-half times slower than automatics," and "semi-automatic rifles fire at the same general rate as semi-automatic handguns. And semi-automatic handguns are constitutionally protected under the Supreme Court's decision in

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[19]Like semi-automatic pistols, which cannot be banned under *Heller*, semi-automatic rifles are used by law-abiding persons for lawful purposes:

> There is no reason to think that semi-automatic rifles are not effective for self-defense in the home, which *Heller* explained is a core purpose of the Second Amendment right. The offense/defense distinction thus doesn't advance the analysis here, at least in part because it is the person, not the gun, who determines whether use of the gun is offensive or defensive.

Id. at 1290.

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Heller." *Heller II*, 670 F.3d at 1289. Yet "semi-automatic handguns are used in connection with violent crimes far more than semi-automatic rifles are." *Id.* at 1269-70.

In the final analysis, the status of being semiautomatic is a non-sequitur, in that the District, like Connecticut, did not ban any firearm for that feature alone. The single features that cause a semiautomatic firearm to be banned are innocuous designs to make a firearm more easily held and fired in a comfortable, accurate manner.

Connecticut bans a pistol grip or thumbhole stock that allows one to grip a rifle or shotgun with "any finger on the trigger hand in addition to the trigger finger being directly below" the action when firing. CONN. GEN. STAT. § 53-202a(1)(E)(i)(II), (vi)(II). Yet making it a felony to possess a long gun based on one finger being below another finger trivializes the Second Amendment. *Every* semiautomatic rifle or shotgun has this capability depending on how horizontal or vertical it is being fired.

Pistol grips and thumbhole stocks enable a person to fire accurately and comfortably from the shoulder. *See* Plaintiffs' SOF, ¶¶ 103-109. *Heller II* ignored evidence of that fact and instead deferred to the testimony of a lobbyist at a committee hearing that the purpose of a pistol grip is "to spray-fire from the hip position." 670 F.3d at 1262-63. A pistol grip makes it *more difficult* to hold a rifle at the hip because the wrist is twisted in an awkward, downward position. *See* Plaintiffs' SOF, ¶¶ 103-109. A rifle with a straight stock may be held more comfortably at the hip. *See* Plaintiffs' SOF, ¶¶ 103-109. Any such firing is unlikely to hit the target. *Id.*

The majority in *Heller II* did not seek to justify a single one of the other generic features which rendered a firearm an "assault weapon." It was enough that the legislature called it that.

Connecticut bans "a folding or telescoping stock" on the subject rifles and shotguns. CONN. GEN. STAT. § 53-202a(1)(E)(i)(I), (vi)(I). A telescoping stock allows adjustments to fit the person's

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size so the gun can be held more comfortably. *See* Plaintiffs' SOF, ¶¶ 100-101. A folding stock makes a gun easier to transport such as in an ATV. *Id.* Concealability is not relevant, as the gun could be ten feet long with the stock folded or retracted and it would still be illegal. Connecticut elsewhere addresses concealability by restricting the overall or barrel lengths of long guns with or without such stocks. CONN. GEN. STAT. § 53a-211(a) (prohibition on shotgun with barrel less than 18" or overall length less than 26"); § 29-27 (pistol or revolver defined to include any firearm with barrel less than 12"); § 29-35 (prohibition on unlicensed pistol or revolver). No conceivable justification exists for banning a folding or telescoping stock.

Another banned feature is "a semiautomatic shotgun that has the ability to accept a detachable magazine." CONN. GEN. STAT. § 53-202a(1)(E)(vii). This is a safety feature allowing the gun to be unloaded simply by removing the magazine, in contrast with tubular magazines which may be unloaded by running each shell through the firing chamber. Again, no justification exists for this restriction.

Wilson v. County of Cook, 968 N.E.2d 641, 656 (Ill. 2012), held that "it cannot be ascertained at this stage of the proceedings whether these arms *with these particular attributes* as defined in this Ordinance are well suited for self-defense or sport or would be outweighed completely by the collateral damage resulting from their use, making them 'dangerous and unusual' as articulated in *Heller*." (Emphasis added.) As to the suspect legislative declaration that the banned guns were "military" weapons and were most likely to be used in crime (*id.* at 656), "a legislative declaration does not preclude inquiry by the judiciary into the facts bearing on an issue of constitutional law." *Id.* at 657, citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

Similarly, rejecting the prosecution's use of the term "assault weapon," a district court noted that "the SKS (or M59/66) is a legal, common semi-automatic rifle that is used as a hunting rifle,"

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and "is owned by American gun owners in the hundreds of thousands." *United States v. Huet*, No. 08-0215, 2010 WL 4853847, *4, *11 (W.D. Pa. Nov. 22, 2010), *rev'd on other grounds*, 665 F.3d 588, 597 n.7 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 422 (2012).

There are pre-*Heller* decisions upholding "assault weapon" bans from courts that believed that the Second Amendment did not protect an individual right.[20] These courts failed to articulate even a rational basis for banning the specific features at issue.

Pre-*Heller* state court decisions upholding gun and magazine bans under state arms guarantees do not meet the standard of review required for the Second Amendment by *Heller* and *McDonald*, not to mention that they conflict with prior decisions in those same states. *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."[21] *See also Cincinnati v. Langan*, 94 Ohio App.3d 22, 29-30, 640 N.E.2d 200 (1994) (despite "evidence that the weapons had a legitimate use for target-shooting competition and defensive purposes," ban upheld).

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[20] *See Richmond Boro Gun Club*, 97 F.3d at 684 ("the statute does not relate to a fundamental constitutional right"); *Kasler v. Lockyer*, 23 Cal.4th 472, 507-08, 2 P.3d 581 (2000) (no mention of Second Amendment or discussion of specific features); *Olympic Arms v. Buckles*, 301 F.3d 384, 389 (6th Cir. Mich. 2002) ("Second Amendment does not create an individual right to bear arms"; no discussion of specific features).

[21] *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"). The general rule that strict scrutiny applies to fundamental rights, *Harrold v. Collier*, 107 Ohio St.3d 44, 836 N.E.2d 1165 (2005), was transformed into a "reasonableness test" when applied to the "fundamental right" to have arms. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993).

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In sum, none of the specific generic features that cause a subject firearm to be defined as an "assault weapon" removes such a firearm from Second Amendment protection. No evidence exists that the specific banned features have any relation to crime. Has a rifle with a thumbhole stock even been used in a crime? Is a stock that is adjustable so that it fits one's size really a danger to public safety? Is a grip really that treacherous if a finger is below the trigger finger when a gun is fired? These are wholly innocuous features which Americans nationwide prefer, and which Connecticut has no basis to criminalize.

E. The Ban on Standard Magazines and the Ten-Round Load Limit for Self Defense Violate the Second Amendment

Standard magazines holding more than ten rounds and loaded with more than ten rounds are the norm nationwide. *See* Plaintiffs' SOF, ¶¶ 84-94. A large proportion, perhaps a majority, of pistols are manufactured with magazines holding more than ten rounds. *Id.* With the exception of New York and Connecticut, none of the other forty-eight states limit the number of rounds in a lawfully-possessed magazine, and not one shred of evidence suggests that it is common to do so anywhere. The Act, not the magazines, is "unusual." As for being "dangerous," a magazine in itself is not even a weapon. "We think it clear enough in the record that . . . magazines holding more than ten rounds are indeed in 'common use,' as the plaintiffs contend." *Heller II*, 670 F.3d at 1261. That should have ended the discussion.

Rifles, without regard to whether they have magazines holding more than ten rounds, are used in a disproportionately small number of crimes. *See* Plaintiffs' SOF, ¶¶ 16-19. While handguns are used in most firearm homicides, "the American people have considered the handgun to be the quintessential self-defense weapon." *Heller,* 554 U.S. at 629.

No question exists that magazines holding more than ten rounds have been in common use in Connecticut. The Act imposes the first magazine restrictions ever. Moreover, *Heller* set a national

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standard for common use – lack of common use of handguns in D.C., which banned them, was irrelevant. Like handguns, magazines holding more than ten rounds are "overwhelmingly chosen by American society" for self defense. *Heller*, 554 U.S. at 628. Even grandfathered magazines holding more than ten rounds will remain in common use in Connecticut.

Nor may it be suggested that the chances are low that citizens would ever "need" standard magazines or magazines loaded with more than ten rounds for self defense, or that multiple shots may need to be fired for self defense. Hopefully plaintiffs will never have to use a firearm for protection at all, but that does not extinguish their constitutional right to be ready to do so. *Heller* invalidated the District's ban on having a firearm operable for self defense without any showing that a specific plaintiff was likely to be attacked, or that shots would need to be fired: "This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." 554 U.S. at 630. The issue is whether it is possible for a citizen to exercise the right, not the likelihood that she may need to do so.

It bears recalling that "the failure to provide, or the inadequacy of, police protection usually does not give rise to a cause of action in tort . . . ." *Gordon v. Bridgeport Housing Authority*, 208 Conn. 161, 180, 544 A.2d 1185 (1988). Plaintiffs are responsible to provide for their own protection.

That magazines holding more than ten rounds are well-suited for self-defense is demonstrated by the fact that they are issued to law enforcement officers, who the Act exempts from its prohibitions, and are preferred by law-abiding citizens, who also use them for target shooting, competitions, and other sporting activities. The suggestion that citizens cannot be trusted to have available more than the arbitrarily-dictated ten rounds because too many rounds may be fired,

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wholly neglects self-defense against an aggressor, who will be quite glad for the victim to run out of ammunition.

In sum, the banned magazines are components of "arms" that the people commonly "keep and bear," and their right to do so "shall not be infringed." To say that these ordinary arms are outside the scope of the Second Amendment simply disregards the constitutional text and the choices made by the law-abiding citizens who exercise this right.

F. The Prohibitions Are Void Under Any Level of Scrutiny

The ban on guns and magazines here categorically fails constitutional muster "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights . . . ." *Heller,* 554 U.S. at 628. If a standard of review must be applied, it would be strict scrutiny. But the Act does not even pass intermediate scrutiny.

"[T]he right to keep and bear arms is fundamental to *our* scheme of ordered liberty," is "deeply rooted in this Nation's history and tradition," and thus applies equally against the states. *McDonald v. City of Chicago*, 130 S. Ct. 3036 (2010). A right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973). "[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). "Under the strict-scrutiny test," the government has the burden to prove that a restriction "is (1) narrowly tailored, to serve (2) a compelling state interest." *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002).

Heller rejected Justice Breyer's "judge-empowering 'interest-balancing inquiry,'" which would allow "arguments for and against gun control" and the upholding of a handgun ban "because handgun violence is a problem . . . ." *Heller,* 554 U.S. at 634. *Heller* explained:

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> Like the First, it [the Second Amendment] is the very *product* of an interest-balancing by the people . . . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Id. at 635.

The "interest-balancing" approach was a form of, and relied on cases applying, intermediate scrutiny. *Id*. at 690 (Breyer, J., dissenting), citing, *inter alia*, *Burdick v. Takushi*, 504 U.S. 428 (1992). Justice Breyer relied on statements in a committee report and empirical studies about the alleged role of the banned guns in crime, rejecting contrary studies questioning the effectiveness of the ban and focusing on lawful uses of handguns. *Id*. at 693-703. *Heller* and *McDonald* entirely disregarded such legislative statements and studies.

McDonald rejected the view "that the Second Amendment should be singled out for special – and specially unfavorable – treatment." 130 S.Ct. at 3043. It refused "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees . . . ."[22] *Id*. at 3044.

True intermediate scrutiny has teeth – it requires that a law be "*substantially* related to the achievement of an important governmental objective." *Kachalsky*, 701 F.3d at 96-97 (emphasis added). The Act here comes nowhere near that standard.

Moreover, "it is [the Court's] task in the end to decide whether [the legislature] has violated the Constitution," and thus "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law . . . ." *Sable Commcns. of Cal., Inc. v. FCC,* 492 U.S. 115, 129 (1989). Assertions by bill sponsors cannot override a constitutional right.

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[22]No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

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Heller made no mention of legislative findings. *McDonald*, which rejected the power "to allow state and local governments to enact any gun control law that they deem to be reasonable," 130 S.Ct. at 3046, barely mentioned Chicago's legislative finding about handgun deaths and accorded it no discussion. *Id*. at 3026. Instead, *McDonald* noted that "the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials." *Id.* at 3049.

Even if a lesser standard is applied, such as that applied to adult bookstores under the First Amendment, a legislature cannot "get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 438-39 (2002).

The government must do more than offer "plausible *reasons* why" a gun restriction is substantially related to an important government goal, it must also "offer sufficient *evidence* to establish a substantial relationship between" the restriction and that goal to determine whether the restriction "violated the Second Amendment by application of the intermediate scrutiny test." *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (emphasis in original).

In sum, the Act categorically violates the Second Amendment under any standard of scrutiny applicable to constitutional rights. If a standard of review is to be applied, strict scrutiny is most appropriate, but the ban fails muster even if intermediate scrutiny applies.

II. THE ACT DENIES EQUAL PROTECTION OF THE LAWS

"Under the Fourteenth Amendment, a law that 'impermissibly interferes with the exercise of a fundamental right . . .' is reviewed under the strict scrutiny standard." *Dandamudi v. Tisch*, 686 F.3d 66, 72 (2d Cir. 2012) (citation omitted). "Where no . . . fundamental right [is] infringed upon by government conduct, the constitutional guarantee of equal protection is satisfied where a

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classification bears a rational relationship to an appropriate governmental interest." *Windsor v. United States*, 699 F.3d 169, 196 (2d Cir. 2012). "Having a conceivable legitimate governmental interest is, alone, not sufficient for rational basis review. To survive rational basis review, a law must also have a rational relationship to the asserted legitimate governmental interest." *Id*. at 197. The Act's discriminations against ordinary citizens and in favor of privileged classes fail any of these tests.

The Act imposes felony penalties on ordinary citizens for possession and transfer of the subject firearms and magazines. Those who possessed them before April 4, 2013, must declare them by January 1, 2014. By contrast, members and employees of various state or local agencies may have all the magazines and "assault weapons" they want, even for personal use "when off duty." CONN. GEN. STAT. § 53-202p(d)(2) (magazines); § 53-202c(b)(2) ("assault weapons"). Persons in the military may also have any magazine, without any requirement that it be for duty purposes. CONN. GEN. STAT. § 53-202p(d)(3).

Further, a "person who retires or is otherwise separated from service" from specified governmental and private entities may declare and keep the subject magazines and guns without regard to any deadline. § 2(a)(2), P.A. 13-220 (magazines); CONN. GEN. STAT. § 53-202d(a)(1)(B) & (2)(B) ("assault weapons").

An ordinary person who moves to Connecticut may not declare and keep a banned magazine or firearm, but a member of the military can. CONN. GEN. STAT. § 53-202q(1)(A) (magazine); § 53-202d(d) ("assault weapon").

Similar discriminations were held violative of equal protection in *Silveira v. Lockyer*, 312 F.3d 1052, 1089 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003). *Silveira* invalidated, as lacking any "clearly rational basis," a California law exempting from an "assault weapon" ban

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transfers to retired law enforcement officers. "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." *Id*. at 1090. The court held that "the retired officers exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others, including Plaintiffs." *Id*. at 1092.

A state cannot "arbitrarily establish categories of persons who can or cannot buy the weapons." *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152, 1157-58 (3rd Cir. 1981) (invalidating requirement that two freeholders identify a firearm purchaser). Such a requirement "is not more constitutionally permissible than a requirement that only Catholics or Blacks or Indians can identify purchasers of handguns." *Id*. at 1160.[23]

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. A law from which a portion is stricken remains fully operative only if "its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation." *United States v. Jackson*, 390 U.S. 570, 586 (1968). Declaring only the discriminations in favor of selected classes void would criminalize that which the legislature has not criminalized. "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *United States v. Reese,* 92 U.S. (2 Otto) 214, 221 (1875) (holding provisions not severable). *Accord*, *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (rule reaffirmed).

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[23] *See also Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (finding "no rational distinction" between persons who registered "on the basis of little more than a hunch that their firearms might constitute 'assault weapons'" and those who did not); *Citizens for a Safer Community v. Rochester,* 164 Misc.2d 822, 838 N.Y.S.2d 193 (1994) ("assault weapon" ban denied equal protection because"two citizens could potentially be treated in a wholly unequal fashion if they possessed identical AR-15's . . . . One would be subject to imprisonment, fine and loss of property; and the other would not be breaking the law.").

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Since the discriminatory, unconstitutional provisions may not be severed from the prohibitions applicable to ordinary citizens, the following provisions must be declared void in their entirety: CONN. GEN. STAT. § 53-202p(b) (prohibiting transactions in magazines); § 53-202p(c) (prohibiting possession of magazines); § 53-202b(a)(1) (prohibiting transactions in "assault weapons"); § 53-202c(a) (prohibiting possession of "assault weapons").

III. PORTIONS OF THE ACT ARE UNCONSTITUTIONALLY VAGUE

A. A Law Permeated With Vagueness is Facially Vague

Due process "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954). Various provisions of the Act are facially vague and are vague as applied.

Facial vagueness may be shown not only if a law is vague in all applications, but also if "the law is 'permeated' with vagueness . . . ." *United States v. Rybicki*, 354 F.3d 124, 131 (2d Cir.2003) (*en banc*). *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 494-95 (1982), favored the "as-applied" approach where "the enactment implicates no constitutionally protected conduct," particularly where it is just an economic regulation with only civil, and not criminal penalties, especially without a scienter requirement. *Id*. at 498-99. Some courts followed dicta in *United States v. Salerno*, 481 U.S. 739, 745 (1987), and narrowed constitutionally protected conduct to the First Amendment, restricting other vagueness challenges to an as-applied approach. *Rybicki*, 354 F.3d at 130-31.

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That was questioned in *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality op.), which held about "a criminal law that contains no mens rea requirement, . . . and infringes on constitutionally protected rights": "When vagueness permeates the text of such a law, it is subject to facial attack." *Rybicki* summarized the *Morales* approach as follows:

> [T]o invalidate as unconstitutionally vague on its face a statute that does not implicate First Amendment rights and might be valid under some set of circumstances, a court would have to conclude that the law is "permeated" with vagueness, and, perhaps, that it infringes on a constitutional right and has no mens rea requirement . . . ."

Rybicki, 354 F.3d at 131.

The *en banc* court in *Rybicki* concluded about the two approaches: "We therefore need not adopt, and do not mean to suggest our preference for, either." *Id*. at 132. It proceeded to consider the law at issue under both the vague in all applications and the permeated with vagueness standards. *Id*. This court should do the same.

This is not negated by the panel decision in *United States* v. *Farhane*, 634 F.3d 127, 139 (2d Cir. 2011), which stated: "In practice, the *Hoffman Estates/Salerno* rule warrants hypothetical analysis of 'all applications' only in cases of pre-enforcement facial vagueness challenges." *Id*., citing *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681 (2d Circ. 1996). This was dicta, because *Farhane* was a criminal case, not a pre-enforcement civil case. The *en banc Rybicki* decision allows a "permeated with vagueness" analysis, and in any event *Farhane* distinguished *Morales*. 634 F.3d at 139 n.10.

Richmond Boro Gun Club stated that a local "assault weapon" ban "does not infringe upon a fundamental constitutional right. Courts rarely invalidate a statute on its face because of alleged vagueness if the statute does not relate to a fundamental constitutional right . . . ." *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d at 684. *Heller* and *McDonald* held the Second Amendment right to be fundamental.

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The gun and magazine bans here impose severe criminal penalties but include no scienter elements. Purchase or transfer of a banned magazine is a Class D felony. Conn. Gen. Stat. § 53-202p(b). Effective January 1, 2014, possession of any such magazine is a Class D felony. § 53-202p(c). Similarly, distribution or transport into the state of an "assault weapon" is a class C felony with mandatory imprisonment of two years. § 53-202b(a)(1). Possession of an "assault weapon" is a Class D felony with one-year mandatory imprisonment. § 53-202c(a). The term "knowingly" does not appear in the statute.

The only decision on point rejected the argument that "the state must allege and prove that the defendant knowingly possessed the Ruger Mini-14/5F Folding Stock Model rifle and also must allege and prove that the defendant was aware of the offending characteristics of the weapon that made it a proscribed assault weapon." *State v. Egan*, No. CR 10251945, 2000 WL 1196364, *3 (Conn. Super. July 28, 2000). "The court considers §§ 53-202a through 53-202d containing the assault weapons ban to be police regulatory statutes and will not infer a *mens rea* element in § 53-202c where one is not stated." *Id*. at *4.

In sum, the Act implicates constitutional rights, is a criminal law with severe penalties, and has no element of scienter. Plaintiffs are entitled to challenge it both facially and as applied.

B. Specific Terms are Vague

A grip allowing a non-trigger finger to be below the action when firing

A semiautomatic rifle or shotgun is an "assault weapon" if: "*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 . . . ." CONN. GEN.

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STAT. § 53-202a(1)(E)(i)(II), (vi)(II) (emphasis added). *Every* rifle and shotgun meets that definition, depending on how horizontal or vertical it is being held.

Waterfowl shotguns are typically fired vertically when ducks or geese are flying over a blind. When pointed upward for firing, all four fingers are directly below the action of the shotgun. By contrast, a rifle with some types of pistol grips or thumbhole stocks (depending on the configuration), when held at an angle downward to fire at a deer in a valley, may be tilted sufficiently that the non-trigger fingers are not directly below the action.

Accordingly, this provision is vague because it applies or does not apply to every rifle and shotgun depending on how it is being held, but fails to give notice of any assumption that it is being held in a specific manner.

"Copies or Duplicates" with the "Capability" of Other Firearms "in Production" by the Effective Date

To know whether a specific firearm is lawful under the Act, the ordinary person is expected to know the features of 183 named models. CONN. GEN. STAT. § 53-202a(1). The person must also know if a firearm that is not named is a "copy or duplicate" of any of 116 listed firearms "with the capability of any such [firearms], that were in production prior to or on the effective date of this section . . . ." § 53-202a(1)(B), (C), & (D). Ordinary people and police officers have no such knowledge of the design history of these scores of firearms.

An ordinary person or an officer cannot be expected to (a) be intimately familiar with each of the 88 listed models of rifles, 27 models of pistols, and 1 model of a shotgun; (b) know which versions of the listed models were in production prior to or on the effective date of April 4, 2013, and which were not; (c) know whether a gun in question is a "copy" or "duplicate" of any one of these named models (and not vice versa), without having any defined criteria or features for such

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determination; and (d) know whether a gun in question has "the capability of any such" listed firearm, again with no criteria for what "capability" is to be considered.

While the Act bans "copies" or "duplicates" of the listed guns, the listed guns are banned and thus unavailable for comparison. Even if they were available, the provision fails to explain which features on the listed firearms cannot be copied or duplicated. Given that all firearms have common features, one is left to speculate what would make one a "copy" or "duplicate" of another. Just consider a single part, the barrel. To be a copy or duplicate, must the barrel be the same caliber, length, diameter, metallic composition, and hardness? If not, how much divergence is permissible? Similar questions must be answered for every other part of the firearm.

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). "In the present case, the ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge." *Id*. at 252. Besides banning "only an arbitrary and ill-defined subset" of guns, the generic catch-all clause provided no guidance: "Nor does the ordinance define 'same action design' or 'slight modifications.'" *Id*. Similar vagueness arises with "capability" and "copies or duplicates" here.

As for the term "slight modifications": "How is the ordinary consumer to determine which changes may be considered slight? A weapon's accuracy, magazine capacity, velocity, size and shape and the caliber of ammunition it takes can all be altered."[24] *Id.* at 253. The term "modification" was

[24]The court asked, *id*. at 253:

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vague because "ordinary consumers cannot be expected to know the developmental history of a particular weapon":

> Nothing in the ordinance provides sufficient information to enable a person of average intelligence to determine whether a weapon they wish to purchase has a design history of the sort which would bring it within this ordinance's coverage. *See Robertson v. Denver*, 874 P.2d 325, 335 (Colo. 1994) (holding similar provision invalid because "ascertaining the design history and action design of a pistol is not something that can be expected of a person of common intelligence.") The record indicates that the average gun owner knows very little about how his gun operates or its design features.

Id. at 253. Given the use of such ill-defined terminology, *Springfield Armory* concluded that the ordinance was invalid on its face. *Id*. at 254.

Nor is it reasonable to suggest that gun owners can conduct research and tests to determine whether a specific gun is somehow a copy or duplicate of some other gun: "Whether persons of ordinary intelligence must necessarily guess as to an ordinance's meaning and application does not turn on whether some source exists for determining the proper application of a law." *Robertson*, 874 P.2d at 334-35. As that court added, "the assault weapon ordinance does not specify any source which would aid in defining what an assault pistol is, nor does it state where such a source can be found." *Id*. at 335. The same applies here.

Accordingly, the references to "copies or duplicates thereof with the capability of any such [firearms], that were in production prior to or on the effective date of this section" in CONN. GEN. STAT. § 53-202a(1)(B),§ 53-202a(1)(C), and § 53-202a(1)(D) are unconstitutionally vague.

> For example, the Colt Sporter Lightweight is a 5.56mm caliber weapon equipped with a 16 inch barrel, a 5-round magazine capacity, a 14.5 inch sight radius and weighs 6.7 lbs. . . . If Colt modifies this weapon so that it takes a 9mm cartridge, has a 20 inch barrel, a 20-round magazine capacity, a 19.75 inch sight radius and weighs 10 lbs., would this new weapon be a slight modification?

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Inaccurately Named Firearms

The Act lists "assault weapons" by reference to 183 different names. CONN. GEN. STAT. § 53-202a(1)(A)-(D). The listed names in many cases do not correspond to the names that are actually engraved on specific firearms, leaving a person without knowledge of what is prohibited.[25] Yet "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 452-53 (1939).

Because of the "long tradition of widespread lawful gun ownership by private individuals in this country," the Supreme Court read federal firearms laws as applied to semiautomatic firearms not "to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms . . . ." *Staples*, 511 U.S. at 613-14, 620. While the validity of all of the listed names cannot be litigated in this case, the court should declare that, consistent with due process, the Act's prohibitions may not be applied to firearms that are not engraved with the precise names listed in the Act.[26]

Provisions on the Modification, Alteration, or Assembly of Magazines and Components

Several provisions in the Act refer to the potential to "restore," "convert," "assemble" or "alter" magazines or parts in a given way. CONN. GEN. STAT. § 53-202p(a)(1). Others refer to doing so "readily" or "rapidly." CONN. GEN. STAT. § 53-202a(1)(A). "All is in the eye of the beholder, and prone to endless manipulation." *Descamps v. United States*, 133 S. Ct. 2276, 2292 (2013).

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[25]Indeed, it even includes a pump action rifle, the Remington Tactical Rifle Model 7615, in the list of "semiautomatic centerfire rifles . . . . . ." CONN. GEN. STAT. § 53-202a(1)(B)(xxxv). See http://www.remington.com/en/products/archived/centerfire/pump-action/model-7615.aspx.

[26]By analogy, a felon was "on notice" that a firearm had traveled in interstate commerce based on its markings: "The pistol is imprinted with the words 'Made in West Germany.'" *United States v. Carter*, 981 F.2d 645, 648 (2nd Cir. 1992), *cert. denied*, 507 U.S. 1023 (1993).

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A "large capacity magazine" includes a device that "can be readily restored or converted to accept, more than ten rounds of ammunition," excluding "a feeding device that has been permanently altered so that it cannot accommodate more than ten rounds of ammunition." CONN. GEN. STAT. § 53-202p(a)(1). An ordinary person or police officer will only know how many rounds fit into a magazine in its present form. To engage in "restoration" or "conversion," a person needs the knowledge and ability to disassemble, manipulate, reassemble, and experiment with a magazine, which may be of an intricate design. Cutting, filing, or other alteration may be required, and it may destroy the magazine. Whether a restoration or conversion may be done "readily" is anyone's guess.

The Act's definition of an "assault weapon" as a collection of unassembled parts involves components that an ordinary person may not even recognize as firearm-related. A listing of 67 named "assault weapons" concludes with "any combination of parts from which an assault weapon . . . may be rapidly assembled . . . ." CONN. GEN. STAT. § 53-202a(1)(A). Another list of 116 named guns ends with "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." CONN. GEN. STAT. § 53-202a(1)(F).

This piles layer after layer of unattainable knowledge on another. One must be intimately familiar with 183 listed firearms, must be able to identify all of the parts thereof, and must know that combinations of some parts may be "rapidly assembled" into 67 firearms under one category, or may be "designed or intended to convert" or "may be assembled" into 116 firearms under three other categories. The world's top gun designers do not possess this kind of knowledge, let alone the ordinary person and the police officer.

Peoples Rights Organization, Inc. v. City of Columbus, 152 F.3d 522, 538 (6th Cir. 1998), *aff'g in part & rev'g in part*, 925 F. Supp. 1254 (S.D. Ohio 1996) ("*PRO*"), held as vague

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comparable, but far less complex, definitions. Here, as in that case, no knowledge requirement exists, yet "in the absence of a scienter requirement . . . [a] statute is little more than 'a trap for those who act in good faith.'" *Id*. at 534 (quoting *Colautti v. Franklin*, 439 U.S. 379, 395 (1979)).

PRO held that the definition of "assault weapon" as "any firearm which may be restored to an operable assault weapon" to be vague because: "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." *Id.* at 537 (brackets omitted). The same applies here to the definition of a magazine that "can be readily restored or converted" to hold over ten rounds.

PRO further invalidated as vague the terms "any combination of parts from which an assault weapon . . . may be readily assembled if those parts are in the possession or under the control of the same person." *Id*. "[T]he phrase 'may be readily assembled' does not provide sufficient information to enable a person of average intelligence to determine whether a particular combination of parts is within the ordinance's coverage." *Id*. at 538. As the plaintiffs' expert explained, an ordinary person has no way to know "how much time is included in 'readily'" or by whom parts "may be readily assembled," terms which did not inform whether they mean "may be readily assembled by the person in possession, or may be readily assembled by a master gunsmith using the facilities of a fully-equipped machine shop." *PRO*, 925 F. Supp. at 1269. The similar terms here are equally vague.

Accordingly, the clause "can be readily restored or converted to accept," CONN. GEN. STAT. § 53-202p(a)(1), and the catch-all clauses about "combinations of parts," § 53-202a(1)(A) & (F), are unconstitutionally vague.

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Capacity to Accept More Than Ten Rounds

The Act criminalizes an ammunition feeding device that "has a capacity of . . . more than" ten rounds of ammunition. CONN. GEN. STAT. § 53-202p. In addition, the definition of "assault weapon" includes: "A semiautomatic, centerfire rifle that has a fixed magazine with the ability to accept more than ten rounds . . . ." *Id.* § 53-202a(1)(E)(ii). These provisions are unconstitutionally vague as applied to tubular magazines.

Many rifles and shotguns have tubular magazines in which cartridges are inserted one behind the other. Cartridges of the same caliber come in different lengths. Thus, the capacity of to accept cartridges in tubular magazines varies with the length of the rounds inserted therein. They may hold no more than ten of one length, but more than ten of another length. *Peoples Rights Organization* invalidated a ban on "any semiautomatic shotgun with a magazine capacity of more than six rounds" based on the characteristics that all tubular magazines have:

> Shotgun rounds are available in different lengths. . . . Rounds of a short length may cause a shotgun's magazine capacity to exceed six rounds. Conversely, rounds of a longer length (which may be all the owner possesses or is aware of) will result in a capacity that is less than six rounds. 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. Hence, we find this definition unconstitutionally vague.[27]

152 F.3d at 536.

For the same reasons, as applied to tubular magazines, the references to "capacity" and "ability to accept" "more than ten rounds" in CONN. GEN. STAT. § 53-202p and 53-202a(1)(E)(ii) are unconstitutionally vague.

[27] 12 gauge shotgun shells are available in 2", 2 ½", 2 ¾", and 3 ½" lengths. *Id.* at 535 n.15.

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CONCLUSION

WHEREFORE, for the reasons set forth herein, the Court should grant the Plaintiffs' Motion for Summary Judgment for Declaratory Judgment that the Act is unconstitutional, and grant a Permanent Injunction.

Dated: August 23, 2013

Respectfully Submitted,

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CERTIFICATION

I hereby certify that on August 23, 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.

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