IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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

PLAINTIFFS' SUR-REPLY MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

As set forth in Plaintiffs' Motion for Leave to File Sur-Reply, Plaintiffs submit this Memorandum of Law for two reasons: (I) to respond to the Supplemental Affidavit of Christopher Koper first submitted by Defendants on reply, and (II) to address the decision in *New York State Rifle & Pistol Ass'n v. Cuomo*, 2013 WL 6909955 (W.D.N.Y. Dec. 31, 2013), which was raised by Defendants in reply and was not issued until after Plaintiffs' previous submissions.

I. RESPONSE TO SUPPLEMENTAL AFFIDAVIT OF CHRISTOPHER KOPER

Defendants criticize Plaintiffs as having "resort[ed] to dismissive characterizations of the evidence as 'inherently unreliable' and mere 'hopeful statements.'" Yet Defendants' own reply submissions themselves show that Defendants prior submissions are not simply "inherently unreliable"—they are flat out wrong.

In reply, Defendants submitted the Supplemental Affidavit of Christopher Koper,[1] which acknowledges that Koper's prior Affidavit[2] drew conclusions from a *Mother Jones* article that applied an imprecise and erroneously overbroad definition of the term "assault weapon." As Defendants' now admit, a result of the overbroad definition of "assault weapon," used by *Mother Jones* was that it included "some firearms that either were not clearly identified, did not have military-style features, or were not semiautomatic."[3] In other words, the *Mother Jones* article deemed as "assault weapons" firearms that are simply not "assault weapons" under Connecticut law and therefore overstated the prevalence of assault weapons in certain statistics.

Indeed, as Koper now admits in a footnote,[4] in applying the definition of "assault weapon" that accords with Connecticut law, the presence of assault weapons in mass shooting drops substantially. Specifically, as noted in the accompanying Supplemental Declaration of Gary Kleck, after adjusting for the definitional error, the presence of assault weapons at shootings included within the *Mother Jones* data drops 46%.

While Koper admits to error in his prior Affidavit, Defendants nonetheless continue to cite to that Affidavit, along with the now admittedly incorrect *Mother Jones* article, in their Reply Brief. Thus, Plaintiffs have every reason to point to Defendants' statements as, at best, inherently unreliable and, at worst, flat-out wrong.

Moreover, as addressed in more detail in the accompanying Supplemental Declaration of Gary Kleck, the Supplemental Affidavit of Christopher Koper contains further errors, namely it: (a) provides no rationale for why the firearms ban would produce the claimed benefits and makes

[1] Exhibit 70 at Document 117-2.

[2] Exhibit 26 at Document 80-1 (Page 92 of 386 through Page 113 of 386).

[3] *See* Supplemental Affidavit of Christopher Koper at ¶ 8.

[4] *Id.* at footnote 4.

incorrect comparisons between types of firearms; (b) it ignores the probability that the associations Koper reports are completely spurious; and (c) it includes statistical outliers that distort the data to grossly overstate the number of deaths per assault weapon related incident. Accordingly, this Court should disregard the Koper Affidavits, as well as the now admittedly erroneous resources upon which Defendants rely.

II. ANALYSIS OF THE DECISION IN *NYSRPA V. CUOMO*

As noted by Defendants, a challenge to a New York law with some similar issues as raised here was recently decided in *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, No. 13–CV–291S, 2013 WL 6909955 (W.D.N.Y. Dec. 31, 2013) (hereafter "*NYSRPA*"). While Plaintiffs disagree with much of that decision, it correctly found that the banned firearms and magazines are "in common use," held that an arbitrary round limit for magazines violates the Second Amendment, and held a provision to be unconstitutionally vague that is comparable to a provision at issue here. *Id*. at *1-2.

A. *Heller*'s Common-Use Test Applies

NYSRPA correctly described *Heller* as holding that the Second Amendment protects the right to arms that are in "common use at the time," including arms that a citizen would use in militia service. *Id*. at *6, quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). Obviously, having a feature that is useful for "militia" purposes does not preclude the same feature for other purposes such as self defense. The court further noted: "The salient question for the *Heller* Court, then, was . . . what weapons are in common use today. Weapons that meet that test – that are 'in common use at the time' – are protected . . . by the Second Amendment." *Id*., quoting *Heller*, 554 U.S. at 625.

The court found "the archetypal AR-15" rifle to be in common use. *Id*. at *10. The court continued:

> It is also popular. According to Plaintiffs, since 1986 (when record-keeping began) "at least 3.97 million AR-15 type rifles have been manufactured in the United States for the commercial market." . . . In 2011, AR-15s accounted for 7% of all firearms sold. . . . Plaintiffs also assert that the AR-15 rifles are regularly used for self defense, hunting, and sporting competitions.

Id.

Moreover, "tens of thousands of Americans own these guns and use them exclusively for lawful purposes such as hunting, target shooting, and even self-defense." *Id*. at *11. Thus, "this Court will assume that the weapons at issue are commonly used for lawful purposes." *Id*. Finally, given that acquisition of the subject firearms was unlawful, "the restrictions at issue more than 'minimally affect' Plaintiffs' ability to acquire and use the firearms, and they therefore impose a substantial burden on Plaintiffs' Second Amendment rights." *Id*.

The court further found:

> Large-capacity magazines are also popular, and Defendants concede they are in common use nationally. . . . Indeed, the "standard magazine" for an AR-15 holds 20 or 30 rounds. . . . Given their popularity in the assumably law-abiding public, this Court is willing to proceed under the premise that these magazines are commonly owned for lawful purposes.

Id.

Finally, the court found "that a restraint on the amount of ammunition a citizen is permitted to load into his or her weapon – whether 10 rounds or seven – is also more than a 'marginal, incremental or even appreciable restraint' on the right to keep and bear arms." *Id*. Given that "the firearm itself implicates the Second Amendment, so too must the right to load that weapon with ammunition. Round restrictions, whether seven or 10, are therefore deserving of constitutional scrutiny." *Id*.

B. *NYSRPA* Erred in Applying Intermediate Scrutiny

NYSRPA gave three reasons for applying intermediate scrutiny instead of a categorical approach or strict scrutiny. *Id*. at *12-13.

First, intermediate scrutiny has been applied in some other cases. *Id*. at *12. But none of the cases cited involve possession of a common firearm by a law-abiding citizen in the home, where "Second Amendment guarantees are at their zenith." *Kachalsky* v. *County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012).[1]

Second, *Heller* recognized some "presumptively lawful regulatory measures," such as the ban on felon gun possession, which Justice Breyer's *Heller* dissent suggested that the majority thereby "implicitly" rejected strict scrutiny. 2013 WL 6909955, *12, quoting *Heller*, 554 U.S. at 688 (Breyer, J., dissenting). Yet a dissenting view about the majority's dictum is not a holding, and restrictions like the felon gun ban appear consistent with strict scrutiny.[2] *NYSRPA* also relied on the rejection of strict scrutiny by a district court based on *Heller* purportedly not holding the right to be "fundamental,"[3] but *McDonald* held that "the right to keep and bear arms is fundamental to *our* scheme of ordered liberty," and is "deeply rooted in this Nation's history and tradition . . . ." *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3036 (2010).

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[1] *See United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010) (upholding ban on firearms with obliterated serial numbers only because that did not "limit the possession of any class of firearms."); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (*en banc*) (persons convicted of domestic violence); *United States v. Walker*, 709 F. Supp.2d 460, 466 (E.D. Va. 2010) (contrasting the right of "law-abiding, responsible citizens to use arms," with a person convicted of domestic violence asserting a right to possess a firearm for hunting); *United States v. Lahey*, No. 10-CR-765 KMK, 2013 WL 4792852, at *17 (S.D. N.Y. Aug. 8, 2013) (prohibition on firearm in course of one's employment for a felon).

[2] See *State v. Draughter*, No. 2013–KA–0914, 2013 WL 6474419, *10 (La. Dec. 10, 2013) (upholding a ban on felon gun possession under strict scrutiny).

[3] *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 187 (D. D.C. 2010) (*Heller II*).

Third, *NYSRPA* suggested that the prohibition was "akin to a time, place, and manner restriction" such as in First Amendment jurisprudence. 2013 WL 6909955, *13. But the subject firearms and magazines were banned in every time, place, and manner. The court further noted that "alternative channels for the possession of substitute firearms exist," and the ban "does not totally disarm New York's citizens . . . ." *Id.* But that was the District's argument that *Heller* rejected. *Heller*, 554 U.S. at 630 ("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."). *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").

C. The Specific Features in Common Use by Law-Abiding Citizens Cannot Be Banned Because Criminals May Misuse Them

A telescoping stock, pistol grip, and other features make long guns fit better and increase comfort. 2013 WL 6909955, *14. But if "the banned features increase the utility for self-defense," then "the features increase their lethality." *Id.*, citing *McDonald*, 130 S.Ct. at 3107 (Stevens, J., dissenting). But Justice Stevens was arguing that *Heller* was wrongly decided. *Id.* & n.33. "Maybe what he [Justice Stevens] means is that the right to keep and bear arms imposes *too great* a risk to others' physical well-being." *Id.* at 3055 (Scalia, J., concurring). *McDonald* rejected Justice Stevens' view based on such arguments. *McDonald*, 130 S. Ct. at 3045.[4] Arms that are in common use cannot be banned because they work well.

D. Arbitrary Capacity Limits for Magazines Violate the Second Amendment

NYSRPA correctly invalidated New York's seven-round loaded limit for magazines under the Second Amendment. 2013 WL 6909955, *18-19. "It stretches the bounds of this Court's

[4]*See Illinois Ass'n of Firearms Retailers v. City of Chicago*, No. 10 C 04184, 2014 WL 31339, *12 (N.D. Ill. Jan. 6, 2014) ("whatever burdens the City hopes to impose on criminal users also falls squarely on law-abiding residents who want to exercise their Second Amendment right.").

deference to the predictive judgments of the legislature to suppose that those intent on doing harm . . . will load their weapon with only the permitted seven rounds." *Id*. at *18. The restriction has "a disturbing perverse effect, pitting the criminal with a fully loaded magazine against the law-abiding citizen limited to seven rounds." *Id*. at *18. The seven-round limit is "a largely arbitrary number." *Id*. at *19.

Everything the court said about a seven-round limit applies to a ten-round limit, beginning with the arbitrariness of either number. Instead of an arbitrary number test, *Heller* held the test to be what is in common use by law-abiding citizens.

E. Like New York's "Version," Connecticut's "Copies or Duplicates" is Vague

NYSRPA invalidated as unconstitutionally vague a definition of "assault weapon" as a semiautomatic pistol with detachable magazine that is "a semiautomatic version of an automatic rifle, shotgun or firearm . . . ."[5] This is "excessively vague, as an ordinary person cannot know whether any single semiautomatic pistol is a 'version' of an automatic one." 2013 WL 6909955, *24. "The statute provides no criteria to inform this determination, and . . . New York fails to point to any evidence whatsoever that would lend meaning to this term." *Id*. The law thus failed to provide fair warning and encouraged arbitrary and discriminatory enforcement. *Id*.

Connecticut has a comparable vague definition that is far more complex. "Assault weapon" is defined 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 on the effective date of this section." C.G.S. § 53-202a(1)(B), (C), & (D). The term "copies or duplicates" is similar to New York's "version," but the additional elements of "capability" and the "production" timeline would baffle the world's gun experts.

[5]N.Y. Penal Law § 265.00(22)(c)(viii).

CONCLUSION

For the reasons stated above and in Plaintiffs' prior submissions, 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.

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Respectfully Submitted,

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