14-0319-cv

United States Court of Appeals

for the

Second Circuit

THE CONNECTICUT CITIZENS DEFENSE LEAGUE, THE COALITION OF CONNECTICUT SPORTSMEN, JUNE SHEW, RABBI MITCHELL ROCKLIN, STEPHANIE CYPHER, PETER OWENS, BRIAN MCCLAIN, ANDREW MUELLER, HILLER SPORTS, LLC AND MD SHOOTING SPORTS, LLC,

Plaintiffs-Appellants,

v.

DANNEL P. MALLOY, in his official capacity as Governor of the State of Connecticut, KEVIN T. KANE, in his official capacity as Chief State's Attorney of the State of Connecticut, DORA B. SCHRIRO, in her official capacity as Commissioner of the Connecticut Department of Emergency Services and Public Protection, DAVID I. COHEN, in his official capacity as State's Attorney for the Stamford/Norwalk Judicial District, Geographic Areas Nos. 1 and 20,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Defendants-Appellees.

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I. Connecticut's Ban Is Flatly Unconstitutional Because It Bans Protected Arms.

If the Second Amendment right "*applies* to" particular firearms, then "citizens *must* be permitted to use [them] for the core lawful purpose of self-defense." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (emphases added) (quotation marks omitted). Because Connecticut cannot show that the semiautomatic firearms and ammunition magazines it bans lack constitutional protection, the State's ban is unconstitutional.

1. Plaintiffs do not bear a burden to "demonstrate that assault weapons and large capacity magazines" are protected by the Second Amendment. State Br. 47. Because "the Second Amendment extends, prima facie, to *all* instruments that constitute bearable arms," *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (emphasis added), the *State* bears the burden to establish that the arms it seeks to ban are not protected. *See United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) (placing burden on the government to demonstrate that law fell outside scope of Second Amendment's protection); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (same); *Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011) (same). The State must show that the arms it bans are "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625.

There is no independent inquiry into whether firearms typically possessed for lawful purposes are "dangerous and unusual" weapons, State Br. 28, because such firearms by definition are not dangerous and unusual. *See Heller*, 554 U.S. at 627.

2. The State does not dispute that the AR-15 rifle, the "quintessential" firearm "targeted" by its ban, State Br. 3, is the "most popular semi-automatic rifle" in the United States. *Heller v. District of Columbia*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting). Indeed, a survey of firearms retailers found that, on average, over 20% of *all* firearms sold in 2012 were AR-15s or other "modern sporting rifles" (primarily rifles built on AR and AK platforms, *see* JA2605), making them second in popularity only to semiautomatic handguns. JA2648. Surely the Nation's most popular semiautomatic rifle and other similar firearms are protected by the Second Amendment.

It is undisputed that there are millions of "assault weapons" in the United States. *See* Plaintiffs' Br. 21-22; State Br. 48. The State argues that these millions of firearms amount only to a small percentage of the overall civilian gun stock. But firearms numbering in the millions can hardly be dismissed as atypical or uncommon and, as explained above, today they are among the best-selling firearms in the country. The State also points out that some people own multiple "assault weapons," some are owned by law enforcement, and some are owned by criminals. But these considerations do not help the State's case. The 2010 survey data cited

by the State found that a plurality of respondents—40%—owned a single "modern sporting rifle" such as an AR-15 and a majority—65%—owned one or two, JA164, indicating that the firearms the State bans are not concentrated in a small number of hands. *See also* JA2607 ("More than 4.8 million people in the United States own AR-type or AK-type rifles.") (Curcuruto Declaration). The same survey found that only about 7.5% of owners were active law enforcement officials. JA162. And the percentage of "assault weapons," and particularly "assault rifles," that are used in crime is minuscule. *See, e.g.*, Plaintiffs' Br. 22-23. For example, from 1995 to 2010 a total of 24 murders were committed in Connecticut with *any* type of rifle, versus 829 with the handguns *Heller* held to be constitutionally protected. *See* JA507. Nearly five times more people—118—were punched or kicked to death than were killed with a rifle. *Id*. Over ten times more—288—were killed with a knife. *Id*.

Furthermore, the semiautomatic firearms that the State brands as "assault weapons" and bans are, as the State admits, a "subset" of semiautomatic firearms. State Br. 58. These firearms are not fully automatic machine guns that keep firing as long as the shooter holds down the trigger. Rather, a separate pull of the trigger is required for each round fired. Thus, incidents in which criminals used "illegally converted automatic and semiautomatic weapons" to fire more than a thousand

rounds of ammunition do nothing to support the State's ban. JA1701; *see* State Br. 43-44.

Because they are semiautomatic, the firearms the State bans do *not* allow the user to choose between automatic and semiautomatic fire. This feature distinguishes a "civilian" firearm from a "military" one. *Staples v. United States*, 511 U.S. 600, 603 (1994); JA2591-92 (Rossi Declaration). The Army training manual cited by the State explains that "automatic weapon fire may be necessary" in some combat situations, JA2116, which is why the military insists on having weapons with automatic firing capability. The manual also explains that semiautomatic fire generally "is the most accurate method of engaging targets," while automatic fire is "inaccurate and difficult to control." *Id.* Thus, the Army's practices support the traditional distinction between semiautomatic and automatic firearms.

The State does not argue that it could ban *all* semiautomatic firearms, and for good reason—they are overwhelmingly popular with the law-abiding public. For example, ATF statistics indicate that 82% of the handguns made for the domestic market in 2011 were semiautomatic. *See* JA147 (Overstreet Declaration). The Second Amendment's protection of semiautomatic firearms is fatal to the State's ban, for "semiautomatic assault weapons" are not a type or class of semiautomatic firearms that may be treated differently than other semiautomatic firearms for constitutional purposes. *See* Plaintiffs' Br. 16. Even the 1989 ATF report cited

by the State admits that "it is somewhat of a misnomer to refer to [semiautomatic] weapons as 'assault rifles' " because "[t]rue assault rifles are selective fire weapons *that will fire in a fully automatic mode*." JA1100-01 (emphasis added).

The State's arguments reinforce the fundamental similarity of all semiautomatic firearms. "[W]hile it takes just under two seconds to empty a 30-round magazine on full automatic," the State argues, "it takes just five seconds to empty the same magazine on semiautomatic." State Br. 32. The source of this information is the inaccurate, unsworn legislative testimony of a Brady Center lobbyist (the Army reports the maximum effective rate of semiautomatic fire as around one round per second, *see* Plaintiffs' Br. 17), and it "indicate[s] that semi-automatics actually fire two-and-a-half times slower than automatics," *Heller II*, 670 F.3d at 1289 (Kavanaugh, J., dissenting). But the principal point is that "assault weapons" fire no more rapidly than *other semiautomatic firearms*. The ability to fire rounds "rapidly" cannot distinguish the firearms the State bans from other semiautomatic firearms that remain lawful.

Staples further undermines the State's position. The firearm at issue in *Staples* was "an AR-15 rifle." 511 U.S. at 603. *Staples* recognized that AR-15 rifles are *unlike* firearms such as "machineguns, sawed-off shotguns, and artillery pieces," because they, like other semiautomatic firearms, "traditionally have been widely accepted as lawful possessions." *Id.* at 611-12. Thus, while the State cites

Staples in the course of arguing that "[t]he AR-15 is identical to the [military] M-16 for purposes of the Second Amendment," State Br. 32, the Supreme Court's reasoning actually proves the opposite.

3. The State asserts that it should be allowed to ban certain semiautomatic firearms with features serving "combat-functional ends." *Id.* at 35. But having a feature useful in combat does not cause a firearm to lose constitutional protection. If that were the case, *all* firearms could be banned, for the ability to fire a projectile with stopping power capable of thwarting an enemy's attack plainly has a military application. Furthermore, any such conclusion would be wholly incompatible with the reason why the Second Amendment was included in the Bill of Rights—"to prevent elimination of the militia." *Heller*, 554 U.S. at 599. Militia "men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time," *id*. at 624, and it was understood that those protected arms could serve "combat-functional ends." Indeed, many firearm designs and features that have long been used by civilians originally were designed for military use. *See* JA2590-91 (Rossi Declaration).

The features the State targets do not transform a firearm into a fundamentally different type of weapon. *See* NSSF Amicus Br. 14-17. As Professor Koper, the State's expert, explained in connection with the now-expired federal "assault weapons" ban (the "1994 Federal Ban"):

> The gun ban provision targets a relatively small number of weapons based on outward features or accessories that have **little to do with the weapons' operation**. . . . In other respects (e.g., type of firing mechanism, ammunition fired, and the ability to accept a detachable magazine), **AWs do not differ from other legal semiautomatic weapons**.

JA1572 (emphases added).

Indeed, features such as thumbhole stocks, telescoping stocks, flash suppressors, and pistol grips tend to *improve* a firearm's accuracy and usability. Plaintiffs' Br. 19-20. It is exactly backwards from *Heller*'s reasoning to conclude that firearms with features making them *more effective* for lawful purposes lack constitutional protection because those firearms purportedly are more "dangerous" when used by criminals. *Compare Heller*, 554 U.S. at 629 (discussing "reasons that a citizen may prefer a handgun for home defense"), *with id.* at 711 (Breyer, J., dissenting) (asserting that "the very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous"). Features enhancing a firearm's effectiveness should *enhance* the firearm's constitutional protection, not detract from it.

Furthermore, the State has no empirical evidence that use of firearms with, say, thumbhole stocks leads to worse outcomes in crimes. The State does not even attempt to muster any empirical evidence supporting its ban on a feature-by-feature basis, or to present one iota of evidence that any of the specific banned features played any material role in a single unlawful homicide.

The purpose of the banned features is *not* to allow a shooter to "spray bullets," whether from the hip or otherwise. State Br. 34. Spray-firing is the antithesis of aimed firing, and firing from the hip makes accurate, sight-aligned fire impossible. As Guy Rossi, a nationally recognized law enforcement trainer, explains while discussing pistol grips on rifles:

> Pistol grips assist in achieving sight-aligned accurate fire . . . . Positioning the rear of the stock *into [the] pocket of the shoulder* and maintaining it in that position is aided by the pistol grip, and is *imperative* for accurate sight alignment and thus accurate shooting with rifles of this design, due to the shoulder stock being in a straight line with the barrel. . . . *This sight alignment between the eye and firearm is not conducive to spray or hip fire*.

JA240 (emphases added).

The State's case is not advanced by the 1989 ATF report addressing whether the agency should reverse the position it had taken since 1968 that certain semiautomatic rifles with features the State's ban targets are "generally recognized as particularly suitable for or readily adaptable to sporting purposes." 18 U.S.C. § 925(d)(3). ATF interpreted "sporting purposes" "narrow[ly]" to "refer[] to the traditional sports of target shooting, skeet and trap shooting, and hunting," with "target shooting" not including all types of organized shooting competitions. JA1103-04. Alleged "criminal misuse" was not a "factor [in the report's] analysis." JA1104.

Whether a government agency deems firearms with certain features to be particularly suitable for a subset of lawful uses *excluding* "the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630, provides little guidance for evaluating whether the firearms are constitutionally protected. Indeed, because ATF *acknowledged* that the rifles it was evaluating were "**popular among some gun owners for . . . self-defense**," JA1107 (emphasis added), the 1989 ATF report if anything supports Plaintiffs' position.

4. Given their ergonomic designs and accuracy-enhancing features, it should come as no surprise that the AR-15 rifle and other similar firearms that the State bans are extremely popular with law-abiding citizens. As Plaintiffs' expert Dr. Gary Roberts has explained, "[t]he semi-automatic AR15 carbine is likely the most ergonomic, safe, and effective firearm for . . . civilian self-defense." *See* JA766 (Roberts Declaration). (Dr. Roberts has extensive experience in ballistics. JA753.) *See also, e.g.*, JA2598 ("It is widely accepted that the AR15 chambered in a .223/5.56 mm caliber is the firearm best suited for home defense use.") (Rossi Declaration); FRANK MINITER, THE FUTURE OF THE GUN 35 (2014) (The AR-15 type rifle is "easy to shoot and has little recoil, making it popular with women. . . . [A] group called 'Disabled Americans for Firearms Rights' . . . says the AR-15 makes it possible for people who can't handle a bolt-action or other rifle type to

shoot and protect themselves."); ROB PINCUS, DEFEND YOURSELF: A COMPREHENSIVE SECURITY PLAN FOR THE ARMED HOMEOWNER 158-59 (2014) ("In the civilian rifle classes I run, most people have AR-15-type rifles they train with for defensive use . . . ."). This opinion is consistent with recent surveys of owners of AR-15s and other modern sporting rifles, which found that recreational target shooting and home defense are the top two reasons for owning them and that they are chosen for their accuracy and reliability. JA172, 185; JA2627, 2631.

The State argues that "assault weapons" are "used disproportionately in gun crime." State Br. 39. But analyzing much of the same data, Professor Koper concluded that "**it is *not* clear that AWs are used disproportionately in most crimes**, though AWs still seem to account for a somewhat disproportionate share of guns used in murders and other serious crimes." JA1578 (emphasis added). Professor Koper also found that "assault" *rifles*, like the AR-15, were use in crime much less frequently than "assault" *pistols*: "Among AWs reported by police to ATF during 1992 and 1993, for example, APs outnumbered ARs by a ratio of 3 to 1." JA1577.

At any rate, *Heller* establishes that disproportionate use in crime does not rid a firearm of constitutional protection. Various estimates from 1994 to 2009 found that approximately 30% to 37% of civilian firearms in the United States were handguns. WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL32842, GUN CONTROL

LEGISLATION 8 (2012), http://goo.gl/OmyT3Q. But during those same years, handguns accounted for approximately 71% to 83% of firearms used in murders and 84% to 90% of firearms used in other violent crimes. JA435; *see also Heller*, 554 U.S. at 697-98 (Breyer, J., dissenting) (discussing similar statistics). This disproportionate use of handguns in crime was a centerpiece of the District of Columbia's arguments to the Supreme Court in defense of its ban, but it was not a factor in the Court's analysis. *See, e.g.*, Brief for Petitioners at 51-52, *Heller*, No. 07-290 (S. Ct. Jan. 4, 2008).

5. The magazines the State bans are even more popular with law-abiding citizens than the semiautomatic firearms it bans. *See* Plaintiffs' Br. 23-24; *see also, e.g.*, *Fyock v. City of Sunnyvale*, 2014 WL 984162, at *4 (N.D. Cal. Mar. 5, 2014) ("[W]hatever the actual number of such magazines in United States consumers' hands is, it is in the tens-of-millions, even under the most conservative estimates."). Connecticut nevertheless asserts that these magazines "are particularly designed and most suitable for military and law enforcement applications." State Br. 36. This is a quote from a 2011 ATF report on the importability of certain shotguns, but that report says that magazine capacity restrictions are "justifiable because those engaged in sports shooting events are *not* engaging in potentially hostile or confrontational situations . . . ." JA1283 (emphasis added). Law-abiding

citizens who *are* preparing for potentially hostile or confrontational situations commonly, and legitimately, desire to possess the standard-capacity ammunition magazines that the State bans.

Connecticut also argues that "large-capacity" magazines are disproportionately used in certain types of crime. *See* State Br. 40. But Professor Koper's reports indicate that, overall, criminal misuse of these magazines "is generally consistent with national survey estimates" of their prevalence in the civilian magazine stock. JA531. What is more, estimates indicate that the prevalence of "large-capacity" magazines has increased substantially in recent years, such that "the magazines which [Connecticut] bans account for *almost half* of all magazines possessed by private citizens in the United States." NSSF Amicus Br. 11 (emphasis added). *See also, e.g.*, *Fyock*, 2014 WL 984162, at *4 (acknowledging "statistics showing that magazines having a capacity to accept more than ten rounds make up approximately **47 percent** of all magazines owned" (emphasis added)).

6. Finally, the State attempts to liken its semiautomatic firearm and magazine ban to the "longstanding" restrictions that *Heller* said the Second Amendment allows. *See* State Br. 27, 37-38. But "assault weapons" and "large-capacity" magazine bans like Connecticut's are of recent vintage, and even today they are extraordinarily rare. *See* Fjestad et al. Amicus Br. 17-22. The vast majority of States have determined that the banned semiautomatic firearms and magazines *do*

not pose a threat to public safety sufficient to justify banning them. *See* Plaintiffs' Br. 18, 28-29. And the federal government has now made the same determination, as Congress allowed the 1994 Federal Ban to expire on its own terms after ten years and has not reenacted any similar ban. History and the practices of the other States thus cut sharply against the State's ban.

II. The Notion that a Complete Ban on a Commonly-Used Firearm Does Not Substantially Burden Second Amendment Rights Is Irreconcilable with *Heller*.

The Supreme Court's decisions addressing restrictions on certain types of firearms have turned on whether the firearms in question were constitutionally protected. In *Heller*, the Supreme Court found that the Second Amendment right "applies to handguns" and thus concluded that "citizens must be permitted to use [them] for the core lawful purpose of self-defense." *McDonald*, 130 S. Ct. at 3036 (quotation marks omitted). In *United States v. Miller*, 307 U.S. 174 (1939), by contrast, the Court found that "the type of weapon at issue [a short-barreled shotgun] was not eligible for Second Amendment protection," *Heller*, 554 U.S. at 622 (emphasis omitted), and thus affirmed an indictment for transporting such a weapon in interstate commerce without registering it with the federal government.

Under these binding decisions, Connecticut's argument that its flat ban on protected arms does not substantially burden Second Amendment rights cannot be right—it is difficult to conceive of a more substantial burden on constitutionally

protected behavior than a flat ban. Connecticut insists that its ban does not impose a substantial burden because of the availability "of other lawful alternative firearms and magazines." State Br. 57. But the same was true in *Heller*, as around two-thirds of the firearms in this country are long guns, not handguns. And the Supreme Court expressly rejected the District of Columbia's argument "that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller*, 554 U.S. at 629.

Connecticut's reasoning betrays a fundamental misunderstanding of the right to keep and bear *arms* protected by the Second Amendment. The State essentially argues that its ban is valid because it does not prevent citizens from accomplishing the core purpose of the right, self-defense, through alternative means. *See, e.g.*, State Br. 58. But *Heller*'s discussion of the Second Amendment's "prefatory" clause establishes that the purposes underlying the Second Amendment are not to be used to contract the scope of the right itself. "Logic demands that there be a *link* between the stated purpose and the command," the Court explained, but "[t]he former does not *limit* the latter grammatically . . . ." *Heller*, 554 U.S. at 577 (emphases added). The State's argument thus ignores the *means* through which the Second Amendment advances the purposes it seeks to achieve—the codification of a right to possess protected arms for self-defense and other lawful purposes. That

right is violated by a ban on protected arms, whether or not citizens can still defend themselves through other means.

For these reasons, the State's argument that law-abiding citizens do not really *need* the firearms and magazines it bans is irrelevant. The Second Amendment guarantees to *law-abiding citizens*, not to legislatures or courts, the right to select the protected arms they deem best suited for their self-defense: "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634.

And there are *many* reasons millions of citizens have chosen to arm themselves with the firearms and magazines Connecticut bans, most notably a desire to use accurate firearms with standard ammunition capacity. *See* Plaintiffs' Br. 18-22, 25-27. (Contrary to the State's suggestion, State Br. 59, neither Plaintiffs nor their experts have conceded that the firearm features the State bans are irrelevant for self-defense. *See, e.g.*, JA2601-03 (Kleck Declaration).) Many of these reasons are apparent from testimony recounted in the 1994 House Judiciary Committee report repeatedly cited by the State. One woman who witnessed the murder of her parents strenuously opposed the notion that "so-called assault weapons . . . don't have any defense use. You tell that to the guy that I saw on a videotape of the Los Angeles riots standing on his rooftop protecting his property and his life

from an entire mob with one of these so-called assault weapons." JA1320. Congress also heard from a man who "used his lawfully-possessed Colt AR-15 H-BAR Sporter semiautomatic rifle . . . to capture one of Tucson, Arizona's most wanted criminals who was attempting to burglarize the home of [his] parents." *Id*. A law-enforcement representative testified that "[t]he six-shot .38 caliber service revolver, standard law enforcement issue for years," was no longer an adequate service weapon "as a matter of self-defense and preservation." JA1317-18. Law-enforcement affidavits submitted by Connecticut in this case indicate that many Connecticut police officers so highly value the defensive use of banned "assault weapons" that they purchase them with their own money when their departments lack funds for them. *See* JA1372; JA1704.

The State argues that it is not "typical, appropriate, or necessary for individuals to fire more than 10 rounds in lawful self defense," State Br. 59, but the Second Amendment is designed precisely for those relatively rare circumstances when citizens are compelled to use deadly force to protect themselves and their families. It is meant, in other words, for the worst-case scenario, whether it be one involving criminal attack, civil unrest, or a tyrannical government. *See, e.g.*, *Heller*, 554 U.S. at 594 (The right to arms "was by the time of the founding understood to be an individual right protecting against both public and private violence."); 1 WILLIAM

BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *140 (1765) ("[T]o vindicate these rights [to the free enjoyment of personal security, of personal liberty, and of personal property], when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using arms for self-preservation and defence."). The fact that the police often fire more than ten rounds to defend themselves shows that a law-abiding citizen may reasonably expect to do so as well, particularly in a worst-case type scenario. *See* Plaintiffs' Br. 25; *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) (holding that police officers acted reasonably "in firing a total of 15 shots" because threat persisted during the time in which the shots were fired); ILEETA et al. Amicus Br. 12-13. And it makes perfect sense that a citizen preparing for such a scenario is entitled to possess the arms commonly possessed in society at large, *because those are the arms the citizen may potentially expect to face*.

The State turns for support to this Court's decisions in *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012), and *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013), but those cases do not advance its argument. *Decastro* held that the federal statute restricting the transportation of a firearm into a person's state of residence does not substantially burden Second Amendment rights. But that statute

does not amount to a prohibition on the acquisition of protected firearms, because an individual can purchase a firearm of the same make and model in-state. Indeed, it does not even amount to a ban on acquiring any particular firearm because the statute "does not bar purchases from an out-of-state supplier if the gun is first transferred to a licensed gun dealer in the purchaser's home state." *Decastro*, 682 F.3d at 168; *see also id*. at 170 (Hall, J., concurring). *Kwong* suggested, but did not hold, that New York City's handgun licensing fee did not substantially burden the Second Amendment rights of the plaintiffs, who "put forth *no evidence* to support their position that the fee is prohibitively expensive," and who were "able to, and did, obtain a residential handgun license." 723 F.3d at 167 & n.14. The fee thus did nothing to prohibit the plaintiffs before the Court from possessing any particular firearm, and this Court emphasized that the case did "not present [it] with the hypothetical situation where a plaintiff was unable to obtain a residential handgun license on account of an inability to pay the . . . fee." *Id*. at 167 n.12. Neither *Kwong* nor *Decastro* held that barring ownership of protected arms may be excused when other protected arms are not barred, and *Heller* forecloses any such conclusion.

III. Connecticut's Ban Cannot Survive Any Level of Scrutiny that Might Apply.

1. Because the Second Amendment takes bans of protected arms "off the table," *Heller*, 554 U.S. at 636, Connecticut's ban of protected semiautomatic firearms and ammunition magazines is flatly unconstitutional. There is no need, and no warrant, for this Court to engage in a levels-of-scrutiny analysis. *See id.* at 628-29.

If a levels-of-scrutiny analysis were to apply, it would mandate application of strict scrutiny because Connecticut's ban prohibits law-abiding citizens from possessing protected arms in the home. "Second Amendment guarantees are at their zenith within the home." *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012). Because "the home [is] special and subject to limited state regulation, . . . the state's ability to regulate firearms is circumscribed in the home . . . ." *Id*. at 94. Thus, a *flat ban* on law-abiding citizens possessing protected arms in the home merits at least strict scrutiny.

The State's arguments for applying intermediate scrutiny are meritless. First, the State argues that its ban does not implicate the Second Amendment's "core" because the firearms it bans "are akin to the M-16 and other military weapons." State Br. 62. But, as explained above, the arms the State bans are common civilian firearms entitled to full Second Amendment protection. Second, the State

argues that the firearms it bans are unlike "the types of weapons that were in common use at the time . . . the Second Amendment was enacted." *Id.* at 63 (quotation marks and emphasis omitted). But *Heller* rejected as "bordering on the frivolous" the argument "that only those arms in existence in the 18th century are protected by the Second Amendment," and held that "the 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." 554 U.S. at 582 (emphasis added). Third, the State asserts that citizens of Connecticut can defend themselves with "alternative firearms and magazines." State Br. 64. But, again, *Heller* rejected the notion that the availability of unbanned alternatives has any significance when evaluating the constitutionality of a ban on protected arms.

The State also relies on federal Court of Appeals decisions that have applied intermediate scrutiny to Second Amendment claims. Most of those cases, however, concerned limitations on criminals or limitations on bearing arms in public, not limitations on law-abiding citizens in their homes. *See Kachalsky*, 701 F.3d 81; *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013).

Three of the State's cases did concern laws that potentially implicate possession of firearms in the home by law-abiding citizens. But two of them—*Kwong*

and *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010)—plainly do not support application of intermediate scrutiny here. *Kwong* did not involve a ban of any kind, but rather a fee for a license to possess a handgun. *Marzzarella* addressed a Second Amendment challenge to a conviction "for possession of a handgun with an obliterated serial number." 614 F.3d at 87. Like restrictions on sawed-off shotguns, bans on obliterating serial numbers prohibit individuals from adulterating firearms in ways that "have value primarily for persons seeking to use them for illicit purposes." *Id.* at 95. They leave law-abiding citizens free to possess *unadulterated* firearms of any make and model. Thus, application of intermediate scrutiny in *Marzzarella* in no way supports application of intermediate scrutiny here. Indeed, the Third Circuit's acknowledgment that its application of intermediate rather than strict scrutiny was "not free from doubt," *id.* at 97, fairly compels the conclusion that strict scrutiny should apply here.

Finally, the State cites *Heller II*, which likened the District of Columbia's ban on "assault weapons" and "large-capacity" magazines to a time, place, and manner restriction under the First Amendment. *See* 670 F.3d at 1262. But bans like the District of Columbia's and Connecticut's prohibit the possession of protected arms at *any* time, in *any* place, and in *any* manner. Under the First Amend-

ment, "restrictions *such as an absolute prohibition on a particular type of expression*" trigger strict scrutiny. *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added).

The State also cites First Amendment voting-rights cases such as *Burdick v. Takushi*, 504 U.S. 428 (1992). *See* State Br. 60, 83-84. But the Constitution grants States the authority to establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I § 4, cl.1. Thus, "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls" do not trigger strict scrutiny. *Burdick*, 504 U.S. at 438. The Second Amendment, by contrast, provides that "the right of the people to keep and bear Arms, *shall not be infringed*." (Emphasis added.) A flat ban on the right of law-abiding citizens to keep protected arms in their homes strikes at the very core of this right, and it is nothing like a reasonable and neutral regulation setting the times, places, and manner of voting. Tellingly, *Burdick* was one of the cases Justice Breyer cited in his *Heller dissent* as exemplifying his proposed (and expressly rejected) "interest-balancing inquiry." 554 U.S. at 689-90 (Breyer, J., dissenting).

2. Ultimately, this Court need not decide whether strict or intermediate scrutiny applies because Connecticut's ban fails even intermediate scrutiny. (The State does not even argue that it could satisfy strict scrutiny.) Under intermediate scrutiny, the State bears the burden to demonstrate that its ban was "designed to

address a real harm" and that it "will alleviate [that harm] in a material way." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997). In determining whether the State has carried this burden, the Court is to "accord substantial deference to the predictive judgments" of the legislature. *Id*. But judicial deference does not mean judicial abdication. The Court must ensure that the legislature "grounded" its judgment on "reasonable factual findings supported by evidence that is substantial for a legislative determination." *Id*. at 224. Connecticut cannot meet this burden, whether the evidence is limited to that purportedly before its legislature (the ban passed was signed into law the day after being introduced in the legislature, *see* ILEETA et al. Amicus Br. 9-10), or extended to include materials prepared for this litigation.

Professor Koper, the State's expert, has conceded that the 1994 Federal Ban "*did not* appear to affect gun crime during the time it was in effect . . . ." JA1675 (emphasis added). Professor Koper prepared two reports for the Department of Justice regarding the effects of the 1994 Federal Ban. The first was published in 1997. JA1437. The second was published just before the ban was set to expire in 2004, and it updated the findings of the first. JA1555. Professor Koper highlighted some of the results from these studies in a piece published in 2013. JA1670. According to Professor Koper, "the reports [he] authored are the only

published academic studies to have examined the impacts of the" 1994 Federal Ban. JA1395.

Professor Koper failed to find that the 1994 Federal Ban improved public safety. He did find evidence that criminal use of the banned semiautomatic firearms relative to non-banned guns declined after the ban, although the same could not be said for criminal use of the banned magazines. JA1563. (A later Washington Post study of data from Virginia "suggest[s] that the federal ban may have been reducing the use of LCMs in gun crime by the time it expired in 2004," but Professor Koper has admitted that "it is difficult to extrapolate the Virginia data to the nation as a whole . . . ." JA1406.) But despite the apparent relative decline in the use of "assault weapons," Professor Koper found "no discernible reduction in the lethality and injuriousness of gun violence, based on indicators like the percentage of gun crimes resulting in death or the share of gunfire incidents resulting in injury . . . ." JA1657. Indeed, the data showed that, "[i]f anything, . . . gun attacks appear to have been more lethal and injurious since the ban." *Id*. Professor Koper therefore could not "clearly credit the ban with any of the nation's recent drop in gun violence." *Id*. Professor Koper concluded that, "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement." JA1564.

Connecticut insists that its ban is "more robust" than the 1994 Federal Ban because it replaces the "two-feature" test for banned semiautomatic firearms with a "one-feature" test and it prohibits grandfathered magazines from being sold or transferred, or imported into the State. *See* State Br. 74-75. But there is no substantial basis for concluding that these features of Connecticut's ban will advance public safety in a material way. Professor Koper effectively has said so himself with respect to the "one-feature" test: "It is *unknown* whether further restrictions on the outward features of semi-automatic weapons, such as banning weapons having any military-style features, will produce measurable benefits beyond those of restricting magazine capacity." JA1685 (emphasis added); *see also* JA1662 (similar). Professor Koper similarly appears to deny any independent significance to Connecticut's "assault weapons" ban, as he opines that "Connecticut's bans on assault weapons and large-capacity magazines, *and particularly its ban on LCMs*, have the potential to prevent and limit shootings in the state . . . ." JA1410 (emphasis added); *see also* JA1395-96 (similar).

While the State asserts that the firearms it bans can shoot "armor-piercing" bullets, State Br. 43, none of the firearm features the State bans have anything to do with the ability to fire rounds that will penetrate body armor. As Professor Koper has explained in discussing the 1994 Federal Ban, the banned "AWs do not differ from other legal semi-automatic weapons" in respects such as "type of firing

mechanism" and "ammunition fired." JA1572. The same is true here. Indeed, individuals may substitute *more powerful* firearms for the firearms the State bans. *See* JA760 ("AR15's firing relatively weak .223/5.56 mm ammunition are quite anemic in penetration capability and pale in destructive capacity when compared to common civilian hunting rifles . . . .") (Roberts Declaration); MINITER, THE FUTURE OF THE GUN 35 (The AR-15's ".223 caliber makes it safer to use as a home-defense gun because this lighter caliber is less likely to travel through walls.").

At a minimum, then, the State's ban is overbroad to the extent it applies firearm features other than magazine capacity. *See Turner*, 520 U.S. at 189 (law cannot "burden substantially more [protected activity] than necessary to further" important interests).

That leaves the State's magazine ban. The theory is that by restricting the importation, transfer, and sale of banned magazines (and by making the ban permanent), the State's ban will be "more effective more quickly" than the 1994 Federal Ban. *See* State Br. 74-75. But this ignores one significant way in which the State's ban will be *less* effective in reducing the supply of banned magazines: it does not apply in the 44 states that do not limit magazine capacity to ten rounds. Professor Koper highlighted this issue in his 2004 report, explaining:

> [T]here is little evidence on how state AW bans affect the availability and use of AWs (the impact of these laws is likely undermined to some

> degree by the influx of AWs from other states, a problem that was probably more pronounced prior to the federal ban when the state laws were most relevant).

JA1642 n.95. This problem has again become "more pronounced" because the 1994 Federal Ban has expired. In a report prepared for this case Professor Koper reiterates that "there is little evidence on how state assault weapon bans affect the availability and use of assault weapons . . . ." JA1412. Given this state of the evidence, it is sheer speculation whether Connecticut's ban will reduce criminal use of the banned magazines (or firearms).

But even if one were to assume that the ban will result in Connecticut's criminals using smaller magazines, there *still* would not be substantial evidence that the ban will advance public safety in a material way. Relatively few crimes involve the firing of more than ten rounds. As Professor Koper explained in his 2004 report, the available evidence "on shots fired show[s] that assailants fire less than four shots on average" and "suggest[s] that relatively few attacks involve more than 10 shots fired." JA1651. And he expressly recognized the need for "further research validating the dangers of . . . LCMs." JA1661. No such further research has materialized. Just last year Professor Koper wrote that "**available evidence is too limited to make firm projections**" that shootings would have been reduced even "***slightly***" had the 1994 Federal Ban "remained in place long enough

to *substantially* reduce crimes with both LCMs and AWs." JA1683 (emphases added).

The State insists that when the banned "weapons and magazines are used they result in more shots fired, more victims wounded, and more wounds per victim than do gun crimes committed with more conventional firearms." State Br. 75-76. The State cites Professor Koper for this assertion, but Professor Koper's opinion is much more equivocal, as the following example shows: "*while tentative*, the available evidence *suggests* that, *more often than not*, attacks with semiautomatics—particularly those equipped with LCMs—result in more shots fired, more victims, and more wounds per victim." JA1402 (emphases added). And there is good reason for Professor Koper's caution. He relies on many of the same studies he cited in his 2004 report for the Department of Justice. There, he made clear that those studies' findings "are subject to numerous caveats" because "[t]here were few if any attempts to control for characteristics of the actors or situations that might have influenced weapon choices and/or attack outcomes. Weapons data were typically missing for substantial percentages of cases. Further, many of the comparisons in the tables were not tested for statistical significance." JA602 (footnote omitted). Furthermore, it is not clear that Professor Koper's opinion distinguishes the firearms the State bans from other semiautomatic firearms it does not ban. As Professor Koper wrote in 2013, "[a] small number of studies suggest that

gun attacks with semi-automatics—*including* AWs and other guns equipped with LCMs—tend to result in more shots fired, more persons wounded, and more wounds inflicted per victim than do attacks with other firearms." JA1683-84 (emphasis added). Indeed, the basis for Professor Koper's conclusion that "had the federal ban been allowed to operate long enough to meaningfully reduce the number of large capacity magazines in circulation, it could have reduced the number and lethality of gunshot victimizations by up to 5%," State Br. 76, *is a study that compared crimes committed with semiautomatic handguns with those committed with revolvers*. *See* JA1684.

Professor Koper buttresses his opinion in this case with the results of a study by one of his graduate students on the outcomes of mass shootings. But as Professor Koper has explained, there are significant limitations in the data available for studying mass shootings:

> There is no national data source that provides detailed information on the types of guns and magazines used in shooting incidents or that provides full counts of victims killed and wounded in these attacks. Studying mass shootings in particular poses a number of challenges with regard to defining these events, establishing the validity and reliability of methods for measuring their frequency and characteristics (particularly if done through media searches, as is often necessary), and modeling their trends, as they are particularly rare events.

JA1683.

These limitations infect the study by Professor Koper's graduate student. (And the follow-up study conducted by Professor Koper. *See* JA2694-95.) The

study relies on data compiled by a media outlet, Mother Jones. *See* JA1399. Researchers have criticized Mother Jones's criteria for determining whether an incident is considered a "mass shooting." *See* JAMES ALAN FOX & MONICA J. DELATEUR, MASS SHOOTINGS IN AMERICA: MOVING BEYOND NEWTOWN 4-6, HOMICIDE STUDIES (2013). For example, based on the incidents included in its data set, Mother Jones concluded that from 1982 to 2012 more than half of mass shooters possessed "assault weapons," "high-capacity" magazines, or both. *See* JA1932. Another group, Mayors Against Illegal Guns, used a more inclusive definition of mass shootings and found that only 23% of mass shooters possessed an "assault weapon" or "large-capacity" magazine in incidents from January 2009 to January 2013. JA1984. (The Mayors Against Illegal Guns analysis has been extended through July 2014, and the percentage of "mass shootings" involving "assault weapons" or "high-capacity" magazines has fallen to 13%. EVERYTOWN FOR GUN SAFETY, ANALYSIS OF RECENT MASS SHOOTINGS 4 (2014), http://goo.gl/FuhMXE.)

Definitional issues aside, comparing "mass shootings" involving different types of firearms is further complicated by the unavailability of reliable information about the weapons used in every incident. The Mother Jones dataset, for example, includes information about firearms and magazines shooters *possessed*, not necessarily *used*, and even this information is not complete for all of the incidents. Thus, Professor Koper's graduate student "compared cases where an LCM

was known to have been used (*or at least possessed by the shooter*) against cases where either an LCM was not used *or known to have been used*." JA1401 (emphases added). This means that the first category could include incidents in which a "large-capacity" magazine was *not* used, while the second could include incidents in which one *was* used. The Mayors Against Illegal Guns report has similar limitations. For example, the group effectively treated incidents in which the type of magazine used was unknown as not involving a "large-capacity" magazine. *See* JA1984.

In all events, the evidence does not "point[] to an intensifying problem of mass shootings involving assault weapons and large capacity magazines." State Br. 41. To the contrary, "[m]ass shootings have not increased in number or in overall death toll . . . over the past several decades." FOX & DELATEUR, MASS SHOOTINGS IN AMERICA 4. "[A] comparison of the incidence of mass shootings during the 10-year window when the assault weapon ban was in force against the time periods before implementation and after expiration shows that the legislation had virtually no effect, at least in terms of murder in an extreme form." *Id.* at 12.

Even if there were substantial evidence that use of a "large-capacity" magazine is *correlated* with more casualties in mass shooting incidents, that fact would not amount to substantial evidence that banning "large-capacity" magazines would *advance public safety* in a material way. Correlation, of course, does not equal

causation, and confounding factors such as the deadly intentions of criminals play a significant role in their selection of firearms and the outcomes of their crimes. *See, e.g.*, JA1548 (Professor Koper hypothesizing "that certain deranged killers might tend to select assault weapons to act out 'commando' fantasies"). Furthermore, as Professor Koper has explained, even if crimes with "large-capacity" magazines do result in more injuries, "this still begs the question of whether a 10-round limit on magazine capacity will affect the outcomes of enough gun attacks to measurably reduce gun injuries and deaths." JA602. There is no empirical evidence showing that forcing criminals to use multiple firearms or multiple ten-round magazines would make a material difference in the outcomes of crimes. *See* Plaintiffs' Br. 49-51; Pink Pistols' Amicus Br. 22-27.

The State identifies incidents in which a shooter may have been subdued when attempting to reload a firearm, but the evidence submitted by the State indicates that this may happen around two or three times a decade. *See, e.g.*, JA2214-15 (Zimring Declaration); *see also* JA2603 (Kleck Declaration). And there is no substantial evidence indicating that lives saved from requiring criminals to stop to reload will outweigh lives *lost* by requiring law-abiding citizens to stop to reload when defending themselves. The State suggests that a law-abiding citizen needing to fire more than 10 rounds can "possess[] multiple magazines" or "make use of a second or third loaded firearm." State Br. 59. But a criminal, of course, can do the

same thing. And the effect of the ban likely will be much greater on law-abiding citizens because (a) they, unlike criminals, will obey the law and limit themselves to legal firearms, and (b) they, unlike criminals, will not have planned in advance the time and location of the encounter, making it less likely that they will have multiple ammunition magazines or firearms readily available when needed. *See, e.g.*, JA286-87 (Kleck Declaration).

The assertion that the State's ban will materially advance public safety rests on three essential propositions: (a) the ban will reduce the use of the banned firearms and magazines in crime, (b) the substitution of other firearms and magazines for the banned items will make crime less lethal, and (c) any reduction in the lethality of crime will not be outweighed by a reduction in the effectiveness of self-defense by law-abiding citizens. The State does not have substantial evidence for *any* of these propositions, much less all of them.

IV. Provisions of Connecticut's Ban Are Unconstitutionally Vague.

A. Facial Vagueness Challenges Are Permitted Outside the First Amendment Context.

City of Chicago v. Morales, 527 U.S. 41 (1999), forecloses the State's argument that facial vagueness challenges are limited to the First Amendment context. *Morales* involved a vague law that burdened "the freedom to loiter for innocent purposes." *Id.* at 53 (plurality). "[E]ven though First Amendment rights were not

implicated, the Court struck down [the] anti-loitering statute as facially unconstitutional . . . ." *United States v. Rybicki*, 354 F.3d 124, 131 (2d Cir. 2003) (en banc). Despite the lack of a majority opinion, "a majority of the Court concurred in the result, and no concurring justice suggested that First Amendment rights were implicated." *Farrell v. Burke*, 449 F.3d 470, 495 n.12 (2d Cir. 2006) (Sotomayor, J.).

In light of *Morales*, this Court repeatedly has indicated that it is an open question whether facial vagueness challenges may be considered outside the First Amendment context. *See, e.g., Arriaga v. Mukasey*, 521 F.3d 219, 223 (2d Cir. 2008) ("[W]e have suggested that some facial vagueness challenges may be brought where fundamental rights are implicated outside the First Amendment context . . . ."); *Dickerson v. Napolitano*, 604 F.3d 732, 743 (2d Cir. 2010) ("Whether a facial void-for-vagueness challenge can be maintained when, as here, a challenge is *not* properly based on the First Amendment is unsettled."). Indeed, "[b]ecause the *Rybicki* Court assessed the facial validity of the statute [at issue] even though no First Amendment rights were implicated, *Rybicki* itself arguably suggests that at least some facial vagueness challenges may be brought outside the First Amendment context," even though the Court insisted it was leaving the issue open. *Farrell*, 449 F.3d at 495 n.11. At a minimum, "[t]he *Rybicki* Court expressed doubt about whether Supreme Court precedent eliminated facial challenges outside the First Amendment, and therefore declined to endorse the holding of

[the] line of cases" suggesting that facial vagueness challenges are limited to the First Amendment context, *Dickerson*, 604 F.3d at 744 n.12, leaving the question an open one.

B. This Court Should Apply *Morales*'s "Permeated with Vagueness" Standard.

In *United States v. Salerno*, 481 U.S. 739 (1987), the Supreme Court "not[ed] in dicta" that "the test for facial unconstitutionality" outside the First Amendment context is "whether any set of circumstances exists under which the statute in question would be valid." *Rybicki*, 354 F.3d at 130 (quotation marks and brackets omitted). In *Morales*, however, a three-justice plurality held that "[w]hen vagueness *permeates the text* of . . . a law" that "contains no *mens rea* requirement and infringes on constitutionally protected rights, . . . it is subject to facial attack," 527 U.S. at 55 (emphasis added) (citation omitted), and noted that "the *Salerno* formulation . . . has never been the decisive factor in any decision of the Court," *id.* at 55 n.22. In *Rybicki*, this Court noted the competing approaches of the *Salerno* dicta and the *Morales* plurality, but declined to mandate or foreclose the application of either. 354 F.3d at 132 n.3. This Court should take the path that *Rybicki* left open and apply *Morales*'s standard here. *See* Plaintiffs' Br. 52-56.

The State argues that the Court should not depart from its precedent on the basis of an opinion that "garnered the votes of only three justices . . . ." State Br. 91-92. But because it is an open question in this Circuit whether *Morales* should

apply to a case like this one, applying it here would not amount to a departure from precedent. Indeed, the case the State cites for the proposition that this Court has established that *Salerno* would apply to a facial vagueness challenge outside the First Amendment context distinguished *Morales* rather than holding that it could not apply in an appropriate case. *See United States v. Farhane*, 634 F.3d 127, 139 n.10 (2d Cir. 2011). And *Rybicki* left the door open for future panels to follow *Morales*, noting that it did not mean to "adopt" or even to "suggest [a] preference for" either *Morales* or *Salerno*. 354 F.3d at 132 n.3.

Further, the State's attempt to downplay the import of the *Morales* plurality shortchanges the respect owing to that case. As noted above, "*Morales* was a plurality opinion, but a majority of the Court concurred in the result, and no concurring justice suggested that First Amendment rights were implicated." *Farrell*, 449 F.3d at 495 n.12. "Thus, it appears that the Supreme Court might decline to apply the 'impermissibly vague in all applications' standard for facial challenges *wherever* fundamental rights are at stake," as they are in this case, and not "merely in those cases where First Amendment rights are at stake." *Id*. (emphasis added).

C. Certain Provisions of the Ban Are Unconstitutionally Vague.

To hold a statute void for vagueness under *Morales*, "a court [must] 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.

As explained above, Connecticut's ban substantially burdens the fundamental right to keep and bear arms. It also lacks a mens rea requirement. Since Connecticut's highest court has not resolved the issue, this Court should look "to the words of the [statute] itself, [and] to the interpretations the [state courts have] given to analogous statutes . . . ." *Greyned v. City of Rockford*, 408 U.S. 104, 110 (1972) (quotation marks and footnotes omitted). The text of the statute does not include a mens rea requirement. And the most analogous statute—the State's prior "assault weapons" ban—has been interpreted by at least one state court as not requiring proof of mens rea. *State v. Egan*, 2000 WL 1196364, at *4 (Conn. Super. Ct. July 28, 2000).

The State faults *Egan* for "not engag[ing] in any meaningful analysis of the legislative intent." State Br. 95. But *Egan*'s refusal to read a scienter requirement into the State's prior ban is consonant with prevailing principles of statutory interpretation under Connecticut law, because "[g]enerally, the absence of [a mental state] requirement demonstrates that the legislature did not intend to make it an element of the crime." *State v. TRD*, 942 A.2d 1000, 1019 (Conn. 2008). The State has pointed to nothing that would upset this general principle here.

1. "Copies or Duplicates"

Connecticut's ban generally defines an "assault weapon" to include "copies or duplicates . . . with the capability of any" of the 116 enumerated firearms "that

were in production prior to or on April 4, 2013." CONN. GEN. STAT. § 53-202a(1)(B)-(D). Because this language "provides no criteria to inform th[e] determination" of how similar any given firearm must be to an enumerated, banned firearm to be banned, *New York State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp.2d 349, 377 (W.D.N.Y. 2013), it is unconstitutionally vague.

The State argues that most "copies or duplicates" of banned weapons would themselves be banned under the features test, such that a citizen "need only consult the features-test . . . to determine whether the firearm is prohibited." State Br. 98. But the features test exacerbates this language's vagueness. Because the familiar presumption against superfluity applies in Connecticut, the "copies or duplicates" language presumably has *some* independent significance. *See Peck v. Jacquemin*, 491 A.2d 1043, 1050 (Conn. 1985). And if it does, law-abiding citizens are given no direction regarding what firearms that would be *lawful* under the features test nevertheless are an *unlawful* "copy or duplicate" of a banned firearm.

To suggest that there may be "commonly understood meanings" of words like "copies or duplicates," State Br. 99, disregards the context of those words here. The State provides no suggestion of how an ordinary person or police officer would know the features of the 116 named firearms (which are banned and hence unavailable for examination), and what features are relevant for purposes of being "copies or duplicates" and of having the same "capability," so those features might

be compared to a firearm in question. Such knowledge, together with information on which firearms "were in production prior to or on April 4, 2013," is beyond the comprehension of ordinary mortals.

2. "Can Be Readily Restored or Converted To Accept"

Connecticut bars possession of magazines that "can be readily restored or converted to accept, more than ten rounds of ammunition." CONN. GEN. STAT. § 53-202w(a)(1). In *Peoples Rights Organization, Inc. v. City of Columbus*, the Sixth Circuit held that an ordinance similarly outlawing "any firearm which may be restored to an operable assault weapon" was unconstitutionally vague, since it "provides absolutely no guidance for interpreting the phrase '[may] be restored," leaving individuals to guess at whether that critical phrase meant, for example, "may be restored by the person in possession, or may be restored by a master gun-smith." 152 F.3d 522, 537 (6th Cir. 1998). The same lack of clarity is present here.

The State argues that the phrase at issue here is narrower because it prohibits only those magazines that can *readily* be converted to accept more than ten rounds. It may be narrower, but not in a way that sufficiently addresses the *reason* the Sixth Circuit found the provision unconstitutionally vague. The critical vagueness in both phrases has to do with the level of skill required for the conversion, not with the amount of time it would take a person of any given skill level to make the

change. Until the former is known, even specifying the latter down to the hour, minute, and second would do nothing to cabin the overall vagueness of the provision.

The State also cites cases in which similar language has been sustained in the face of a vagueness challenge, *see* State Br. 103, but those cases were decided before the Supreme Court recognized a fundamental, individual right to possess a firearm in *Heller*. This distinction makes a critical difference, given this Court's longstanding recognition that "[t]he degree of statutory imprecision that due process will tolerate varies with the nature of the enactment and the correlative needs for notice and protection from unequal enforcement." *Advance Pharms., Inc. v. United States*, 391 F.3d 377, 396 (2d Cir. 2004) (quotation marks omitted).

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the 9,500-word type-volume limitation established by this Court's order of August 19, 2014 because this brief contains 9,495 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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