Nos. 23-1633, 23-1634 and 23-1641

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

DELAWARE STATE SPORTSMEN'S ASSOCIATION INC., ET AL. V. DELAWARE DEPARTMENT OF SAFETY AND HOMELAND SECURITY, ET AL.

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

Consolidated Case No. 1:22-cv-00951-RGA
The Honorable Richard G. Andrews, United States District Court Judge

DEFENDANTS-APPELLEES' SUPPLEMENTAL APPENDIX VOL. III: SA844 – SA1101

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Executive Summary

The purpose of this study is to establish criteria that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) will use to determine the importability of certain shotguns under the provisions of the Gun Control Act of 1968 (GCA).

The Gun Control Act of 1968 (GCA) generally prohibits the importation of firearms into the United States. [1] However, pursuant to 18 U.S.C. § 925(d), the GCA creates four narrow categories of firearms that the Attorney General must authorize for importation. Under one such category, subsection 925(d)(3), the Attorney General shall approve applications for importation when the firearms are generally recognized as particularly suitable for or readily adaptable to sporting purposes (the "sporting purposes test").

After passage of the GCA in 1968, a panel was convened to provide input on the sporting suitability standards which resulted in factoring criteria for handgun importations. Then in 1989, and again in 1998, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) conducted studies to determine the sporting suitability and importability of certain firearms under section 925(d)(3). However, these studies focused mainly on a type of firearm described as "semiautomatic assault weapons." The 1989 study determined that assault rifles contained a variety of physical features that distinguished them from traditional sporting rifles. The study concluded that there were three characteristics that defined semiautomatic assault rifles.[2]

The 1998 study concurred with the conclusions of the 1989 study, but included a finding that "the ability to accept a detachable large capacity magazine originally designed and produced for a military assault weapon should be added to the list of disqualifying military configuration features identified in 1989."[3] Further, both studies concluded that the scope of "sporting purposes" did not include all lawful activity, but was limited to traditional sports such as hunting, skeet shooting, and trap shooting. This effectively narrowed the universe of firearms considered by each study because a larger number of firearms are "particularly suitable for or readily adaptable to a sporting purpose" if plinking[4] and police or military-style practical shooting competitions are also included as a "sporting purpose."[5]

Although these studies provided effective guidelines for determining the sporting purposes of rifles, ATF recognized that no similar studies had been completed to determine the sporting

[1] Chapter 44, Title 18, United States Code (U.S.C.), at 18 U.S.C. § 922(l).
[2] These characteristics were: (a) a military configuration (ability to accept a detachable magazine, folding/telescoping stocks, pistol grips, ability to accept a bayonet, flash suppressors, bipods, grenade launchers, and night sights); (b) a semiautomatic version of a machinegun; and (c) chambered to accept a centerfire cartridge case having a length of 2.25 inches or less. *1989 Report and Recommendation on the Importability of Certain Semiautomatic Rifles (1989 Study)* at 6-9.
[3] *1998 Department of the Treasury Study on the Sporting Suitability of Modified Semiautomatic Rifles (1998 Study)* at 2.
[4] "Plinking" is shooting at random targets such as bottles and cans. 1989 Report at 10.
[5] *1989 Report* at 8-9; *1998 Study* at 18-19.

suitability of shotguns. A shotgun study working group (working group) was assigned to perform a shotgun study under the § 925(d)(3) sporting purposes test. The working group considered the 1989 and 1998 studies, but neither adopted nor entirely accepted findings from those studies as conclusive as to shotguns.

Sporting Purpose

Determination of whether a firearm is generally accepted for use in sporting purposes is the responsibility of the Attorney General (formerly the Secretary of the Treasury). As in the previous studies, the working group considered the historical context of "sporting purpose" and that Congress originally intended a narrow interpretation of sporting purpose under § 925(d)(3).

While the 1989 and 1998 studies considered all rifles in making their recommendations, these studies first identified firearm features and subsequently identified those activities believed to constitute a legitimate "sporting purpose." However, in reviewing the previous studies, the working group believes that it is appropriate to first consider the current meaning of "sporting purpose" as this may impact the "sporting" classification of any shotgun or shotgun features. For example, military shotguns, or shotguns with common military features that are unsuitable for traditional shooting sports, may be considered "particularly suitable for or readily adaptable to sporting purposes" if military shooting competitions are considered a generally recognized sporting purpose. Therefore, in determining the contemporary meaning of sporting purposes, the working group examined not only the traditional sports of hunting and organized competitive target shooting, but also made an effort to consider other shooting activities.

In particular, the working group examined participation in and popularity of practical shooting events as governed by formal rules, such as those of the United States Practical Shooting Association (USPSA) and International Practical Shooting Confederation (IPSC), to determine whether it was appropriate to consider these events a "sporting purpose" under § 925(d)(3). While the number of members reported for USPSA is similar to the membership for other shotgun shooting organizations,[6] the working group ultimately determined that it was not appropriate to use this shotgun study to determine whether practical shooting is "sporting" under § 925(d)(3). A change in ATF's position on practical shooting has potential implications for rifle and handgun classifications as well. Therefore, the working group believes that a more thorough and complete assessment is necessary before ATF can consider practical shooting as a generally recognized sporting purpose.

The working group agreed with the previous studies in that the activity known as "plinking" is "primarily a pastime" and could not be considered a recognized sport for the purposes of

[6] Organization websites report these membership numbers: for the United States Practical Shooting Association, approx. 19,000; Amateur Trapshooting Association, over 35,000 active members; National Skeet Shooting Association, nearly 20,000 members; National Sporting Clays Association, over 22,000 members; Single Action Shooting Society, over 75,000 members.

importation.[7] Because almost any firearm can be used in that activity, such a broad reading of "sporting purpose" would be contrary to the congressional intent in enacting section 925(d)(3). For these reasons, the working group recommends that plinking not be considered a sporting purpose. However, consistent with past court decisions and Congressional intent, the working group recognized hunting and other more generally recognized or formalized competitive events similar to the traditional shooting sports of trap, skeet, and clays.

Firearm Features

In reviewing the shotguns used for those activities classified as sporting purposes, the working group examined State hunting laws, rules, and guidelines for shooting competitions and shooting organizations; industry advertisements and literature; scholarly and historical publications; and statistics on participation in the respective shooting sports. Following this review, the working group determined that certain shotgun features are not particularly suitable or readily adaptable for sporting purposes. These features include:

(1) Folding, telescoping, or collapsible stocks;
(2) bayonet lugs;
(3) flash suppressors;
(4) magazines over 5 rounds, or a drum magazine;
(5) grenade-launcher mounts;
(6) integrated rail systems (other than on top of the receiver or barrel);
(7) light enhancing devices;
(8) excessive weight (greater than 10 pounds for 12 gauge or smaller);
(9) excessive bulk (greater than 3 inches in width and/or greater than 4 inches in depth);
(10) forward pistol grips or other protruding parts designed or used for gripping the shotgun with the shooter's extended hand.

Although the features listed above do not represent an exhaustive list of possible shotgun features, designs or characteristics, the working group determined that shotguns with any one of these features are most appropriate for military or law enforcement use. Therefore, shotguns containing any of these features are not particularly suitable for nor readily adaptable to generally recognized sporting purposes such as hunting, trap, sporting clay, and skeet shooting. Each of these features and an analysis of each of the determinations are included within the main body of the report.

[7] 1989 Study at 10; 1998 Study at 17.

Study on the Importability of Certain Shotguns

The purpose of this study is to establish criteria that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) will use to determine the importability of certain shotguns under the provisions of the Gun Control Act of 1968 (GCA).

Background on Shotguns

A shotgun is defined by the GCA as "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger."[8]

Shotguns are traditional hunting firearms and, in the past, have been referred to as bird guns or "fowling" pieces. They were designed to propel multiple pellets of shot in a particular pattern that is capable of killing the game that is being hunted. This design and type of ammunition limits the maximum effective long distance range of shotguns, but increases their effectiveness for small moving targets such as birds in flight at a close range. Additionally, shotguns have been used to fire slugs. A shotgun slug is a single metal projectile that is fired from the barrel. Slugs have been utilized extensively in areas where State laws have restricted the use of rifles for hunting. Additionally, many States have specific shotgun seasons for deer hunting and, with the reintroduction of wild turkey in many States, shotguns and slugs have found additional sporting application.

Shotguns are measured by *gauge* in the United States. The gauge number refers to the "number of equal-size balls cast from one pound of lead that would pass through the bore of a specific diameter."[9] The largest commonly available gauge is 10 gauge (.0775 in. bore diameter). Therefore, a 10 gauge shotgun will have an inside diameter equal to that of a sphere made from one-tenth of a pound of lead. By far, the most common gauges are 12 (0.729 in. diameter) and 20 (0.614 in. diameter). The smallest shotgun that is readily available is known as a ".410," which is the diameter of its bore measured in inches. Technically, a .410 is a 67 gauge shotgun.

Background on Sporting Suitability

The GCA generally prohibits the importation of firearms into the United States.[10] However, the statute exempts four narrow categories of firearms that the Attorney General shall authorize for importation. Originally enacted by Title IV of the Omnibus Crime Control and Safe Streets Act of 1968,[11] and amended by Title I of the GCA[12] enacted that same year, this section provides, in pertinent part:

[8] 18 U.S.C. § 921(a)(5).
[9] The Shotgun Encyclopedia at 106.
[10] 18 U.S.C. § 922(l).
[11] Pub. Law 90-351 (June 19, 1968).
[12] Pub. Law 90-618 (October 22, 1968).

> the Attorney General shall authorize a firearm . . . to be imported or brought into the United States . . . if the firearm . . . (3) is of a **type** that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and **is generally recognized as particularly suitable for or readily adaptable to sporting purposes**, excluding surplus military firearms, except in any case where the Secretary has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of such firearm which would be prohibited if assembled.[13] (Emphasis added)

This section addresses Congress' concern that the United States had become a "dumping ground of the castoff surplus military weapons of other nations,"[14] in that it exempted only firearms with a generally recognized sporting purpose. In recognizing the difficulty in implementing this section, Congress gave the Secretary of the Treasury (now the Attorney General) the discretion to determine a weapon's suitability for sporting purposes. This authority was ultimately delegated to what is now ATF. Immediately after discussing the large role cheap imported .22 caliber revolvers were playing in crime, the Senate Report stated:

> [t]he difficulty of defining weapons characteristics to meet this target without discriminating against sporting quality firearms, was a major reason why the Secretary of the Treasury has been given fairly broad discretion in defining and administering the import prohibition.[15]

Indeed, Congress granted this discretion to the Secretary even though some expressed concern with its breadth:

> [t]he proposed import restrictions of Title IV would give the Secretary of the Treasury unusually broad discretion to decide whether a particular type of firearm is generally recognized as particularly suitable for, or readily adaptable to, sporting purposes. If this authority means anything, it permits Federal officials to differ with the judgment of sportsmen expressed through consumer preference in the marketplace….[16]

Since that time, ATF has been responsible for determining whether firearms are generally recognized as particularly suitable for or readily adaptable to sporting purposes under the statute.

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[13] 18 U.S.C. § 925(d)(3). In pertinent part, 26 U.S.C. § 5845(a) includes "a shotgun having a barrel or barrels of less than 18 inches in length."
[14] 90 P.L. 351 (1968).
[15] S. Rep. No. 1501, 90th Cong. 2d Sess. 38 (1968).
[16] S. Rep. No. 1097, 90th Cong. 2d. Sess. 2155 (1968) (views of Senators Dirksen, Hruska, Thurmond, and Burdick). In Gun South, Inc. v. Brady, 877 F.2d 858, 863 (11th Cir. 1989), the court, based on legislative history, found that the GCA gives the Secretary "unusually broad discretion in applying section 925(d)(3)."

On December 10, 1968, the Alcohol and Tobacco Tax Division of the Internal Revenue Service (predecessor to ATF) convened a "Firearm Advisory Panel" to assist with defining "sporting purposes" as utilized in the GCA. This panel was composed of representatives from the military, law enforcement, and the firearms industry. The panel generally agreed that firearms designed and intended for hunting and organized competitive target shooting would fall into the sporting purpose criteria. It was also the consensus that the activity of "plinking" was primarily a pastime and therefore would not qualify. Additionally, the panel looked at criteria for handguns and briefly discussed rifles. However, no discussion took place on shotguns given that, at the time, all shotguns were considered inherently sporting because they were utilized for hunting or organized competitive target competitions.

Then, in 1984, ATF organized the first large scale study aimed at analyzing the sporting suitability of certain firearms. Specifically, ATF addressed the sporting purposes of the Striker-12 and Streetsweeper shotguns. These particular shotguns were developed in South Africa as law enforcement, security and anti-terrorist weapons. These firearms are nearly identical 12-gauge shotguns, each with 12-round capacity and spring-driven revolving magazines. All 12 rounds can be fired from the shotguns within 3 seconds.

In the 1984 study, ATF ruled that the Striker-12 and the Streetsweeper were not eligible for importation under 925(d)(3) because they were not "particularly suitable for sporting purposes." In doing this, ATF reversed an earlier opinion and specifically rejected the proposition that police or combat competitive shooting events were a generally accepted "sporting purpose." This 1984 study adopted a narrow interpretation of organized competitive target shooting competitions to include the traditional target events such as trap and skeet. ATF ultimately concluded that the size, weight and bulk of the shotguns made them difficult to maneuver in traditional shooting sports and, therefore, these shotguns were not particularly suitable for or readily adaptable to these sporting purposes. At the same time, however, ATF allowed importation of a SPAS-12 variant shotgun because its size, weight, bulk and *modified* configuration were such that it was particularly suitable for traditional shooting sports.[17] The Striker-12 and Streetsweeper were later classified as "destructive devices" pursuant to the National Firearms Act.[18]

In 1989, and again in 1998, ATF conducted studies to determine whether certain rifles could be imported under section 925(d)(3). The respective studies focused primarily on the application of the sporting purposes test to a type of firearm described as a "semiautomatic assault weapon." In both 1989 and 1998, ATF was concerned that certain semiautomatic assault weapons had been approved for importation even though they did not satisfy the sporting purposes test.

[17] Private letter Ruling of August 9, 1989 from Bruce L. Weininger, Chief, Firearms and Explosives Division.
[18] *See* ATF Rulings 94-1 *and* 94-2.

1989 Study

In 1989, ATF announced that it was suspending the importation of several semiautomatic assault rifles pending a decision on whether they satisfied the sporting criteria under section 925(d)(3). The 1989 study determined that assault rifles were a "type" of rifle that contained a variety of physical features that distinguished them from traditional sporting rifles. The study concluded that there were three characteristics that defined semiautomatic assault rifles:

(1) a military configuration (ability to accept a detachable magazine, folding/telescoping stocks, pistol grips, ability to accept a bayonet, flash suppressors, bipods, grenade launchers, and night sights);
(2) semiautomatic version of a machinegun;
(3) chambered to accept a centerfire cartridge case having a length of 2.25 inches or less.[19]

The 1989 study then examined the scope of "sporting purposes" as used in the statute.[20] The study noted that "[t]he broadest interpretation could take in virtually any lawful activity or competition which any person or groups of persons might undertake. Under this interpretation, any rifle could meet the "sporting purposes" test.[21] The 1989 study concluded that a broad interpretation would render the statute useless. The study therefore concluded that neither plinking nor "police/combat-type" competitions would be considered sporting activities under the statute.[22]

The 1989 study concluded that semiautomatic assault rifles were "designed and intended to be particularly suitable for combat rather than sporting applications."[23] With this, the study determined that they were not suitable for sporting purposes and should not be authorized for importation under section 925(d)(3).

1998 Study

The 1998 study was conducted after "members of Congress and others expressed concern that rifles being imported were essentially the same as semiautomatic assault rifles previously determined to be nonimportable" under the 1989 study.[24] Specifically, many firearms found to be nonimportable under the 1989 study were later modified to meet the standards outlined in the study. These firearms were then legally imported into the country under section 925(d)(3). ATF commissioned the 1998 study on the sporting suitability of semiautomatic rifles to address concerns regarding these modified firearms.

[19] 1989 Report and Recommendation on the ATF Working Group on the Importability of Certain Semiautomatic Rifles (1989 Study).
[20] Id. at 8.
[21] Id.
[22] *Id.* At 9.
[23] *Id.* At 12.
[24] 1998 Study at 1.

The 1998 study identified the firearms in question and determined that the rifles shared an important feature—the ability to accept a large capacity magazine that was originally designed for military firearms. The report then referred to such rifles as Large Capacity Military Magazine rifles or "LCMM rifles."[25]

The study noted that after 1989, ATF refused to allow importation of firearms that had any of the identified non-sporting features, but made an exception for firearms that possessed only a detachable magazine. Relying on the 1994 Assault Weapons Ban, the 1998 study noted that Congress "sent a strong signal that firearms with the ability to expel large amounts of ammunition quickly are not sporting."[26] The study concluded by adopting the standards set forth in the 1989 study and by reiterating the previous determination that large capacity magazines are a military feature that bar firearms from importation under section 925(d)(3).[27]

Present Study

While ATF conducted the above mentioned studies on the sporting suitability of rifles, to date, no study has been conducted to address the sporting purposes and importability of shotguns. This study was commissioned for that purpose and to ensure that ATF complies with it statutory mandate under section 925(d)(3).

Methodology

To conduct this study, the working group reviewed current shooting sports and the sporting suitability of common shotguns and shotgun features. At the outset, the working group recognized the importance of acknowledging the inherent differences between rifles, handguns and shotguns. These firearms have distinct characteristics that result in specific applications of each weapon. Therefore, in conducting the study, the working group generally considered shotguns without regard to technical similarities or differences that exist in rifles or handguns.

The 1989 and 1998 studies examined particular features and made sporting suitability determinations based on the generally accepted sporting purposes of ***rifles***. These studies served as useful references because, in recent years, manufacturers have produced shotguns with features traditionally found only on rifles. These features are typically used by military or law enforcement personnel and provide little or no advantage to sportsmen.

Following a review of the 1989 and 1998 studies, the working group believed that it was necessary to first identify those activities that are considered legitimate "sporting purposes" in the modern era. While the previous studies determined that only "the traditional sports of hunting and organized competitive target shooting" would be considered "sporting,"[28] the working group recognized that sporting purposes may evolve over time. The working group felt

[25] 1998 Study at 16.
[26] 1998 Study at 3.
[27] The 1994 Assault Weapons Ban expired Sept. 13, 2004, as part of the law's sunset provision.
[28] 1998 Study at 16

that the statutory language supported this because the term “generally recognized” modifies, not only firearms used for shooting activities, but also the shooting activities themselves. This is to say that an activity is considered “sporting” under section 925(d)(3) if it is generally recognized as such.[29] Therefore, activities that were “generally recognized” as legitimate “sporting purposes” in previous studies are not necessarily the same as those activities that are “generally recognized” as sporting purposes in the modern era. As stated above, Congress recognized the difficulty in legislating a fixed meaning and therefore gave the Attorney General the responsibility to make such determinations. As a result, the working group did not simply accept the proposition that sporting events were limited to hunting and traditional trap and skeet target shooting. In determining whether an activity is now generally accepted as a sporting purpose, the working group considered a broad range of shooting activities.

Once the working group determined those activities that are generally recognized as a “sporting purpose” under section 925(d)(3), it examined numerous shotguns with diverse features in an effort to determine whether any particular firearm was particularly suitable for or readily adaptable to those sports. In coming to a determination, the working group recognized that a shotgun cannot be classified as sporting merely because it may be used for a sporting purpose. During debate on the original bill, there was discussion about the meaning of the term "sporting purposes." Senator Dodd stated:

> Here again I would have to say that if a military weapon is used in a special sporting event, it does not become a sporting weapon. It is a military weapon used in a special sporting event . . . . As I said previously the language says no firearms will be admitted into this country unless they are genuine sporting weapons.[30]

In making a determination on any particular feature, the working group considered State hunting laws, currently available products, scholarly and historical publications, industry marketing, and rules and regulations of organization such as the National Skeet Shooting Association, Amateur Trapshooting Association, National Sporting Clays Association, Single Action Shooting Society, International Practical Shooting Confederation (IPSC), and the United States Practical Shooting Association (USPSA). Analysis of these sources as well as a variety of shotguns led the working group to conclude that certain shotguns were of a type that did not meet the requirements of section 925(d)(3), and therefore, could not lawfully be imported.

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[29] ATF previously argued this very point in Gilbert Equipment Company , Inc. v. Higgins, 709 F.Supp. 1071, 1075 (S.D. Ala. 1989). The court agreed, noting, “according to Mr. Drake, the bureau takes the position…that an event has attained general recognition as being a sport before those uses and/or events can be ‘sporting purposes’ or ‘sports’ under section 925(d)(3). *See also* Declaration of William T. Drake, Deputy Director, Bureau of Alcohol, Tobacco and Firearms.

[30] 114 Cong. Rec. 27461-462 (1968).

Analysis

A. Scope of Sporting Purposes

In conducting the sporting purposes test on behalf of the Attorney General, ATF examines the physical and technical characteristics of a shotgun and determines whether those characteristics meet this statutory requirement. A shotgun's suitability for a particular sport depends upon the nature and requirements inherent to that sport. Therefore, determining a "sporting purpose" was the first step in this analysis under section 925(d)(3) and is a critical step of the process.

A broad interpretation of "sporting purposes" may include any lawful activity in which a shooter might participate and could include any organized or individual shooting event or pastime. A narrow interpretation of "sporting purposes" would clearly result in a more selective standard governing the importation of shotguns.

Consistent with previous ATF decisions and case law, the working group recognized that a sport or event must "have attained general recognition as being a 'sport,' before those uses and/or events can be 'sporting purposes' or 'sports' under Section 925(d)(3)."[31] The statutory language limits ATF's authority to recognize a particular shooting activity as a "sporting purpose," and therefore requires a narrow interpretation of this term. As stated however, the working group recognized that sporting purposes may change over time, and that certain shooting activities may become "generally recognized" as such.

At the present time, the working group continues to believe that the activity known as "plinking" is not a generally recognized sporting purpose. There is nothing in the legislative history of the GCA to indicate that section 925(d)(3) was meant to recognize every conceivable type of activity or competition that might employ a firearm. Recognition of plinking as a sporting purpose would effectively nullify section 925(d)(3) because it may be argued that ***any*** shotgun is particularly suitable for or readily adaptable to this activity.

The working group also considered "practical shooting" competitions. Practical shooting events generally measure a shooter's accuracy and speed in identifying and hitting targets while negotiating obstacle-laden shooting courses. In these competitions, the targets are generally stationary and the shooter is mobile, as opposed to clay target shooting where the targets are moving at high speeds mimicking birds in flight. Practical shooting consist of rifle, shotgun and handgun competitions, as well as "3-Gun" competitions utilizing all three types of firearm on one course. The events are often organized by local or national shooting organizations and attempt to categorize shooters by skill level in order to ensure competitiveness within the respective divisions. The working group examined participation in and popularity of practical shooting events as governed under formal rules such as those of the United States Practical Shooting Association (USPSA) and International Practical Shooting Confederation (IPSC) to see

[31] Gilbert *at 1085.*

if it is appropriate to consider these events a legitimate "sporting purpose" under section 925(d)(3).

The USPSA currently reports approximately 19,000 members that participate in shooting events throughout the United States.[32] While USPSA's reported membership is within the range of members for some other shotgun shooting organizations,[33] organizations involved in shotgun hunting of particular game such as ducks, pheasants and quail indicate significantly more members than any of the target shooting organizations.[34] Because a determination on the sporting purpose of practical shooting events should be made only after an in-depth study of those events, the working group determined that it was not appropriate to use this shotgun study to make a definitive conclusion as to whether practical shooting events are "sporting" for purposes of section 925(d)(3). Any such study must include rifles, shotguns and handguns because practical shooting events use all of these firearms, and a change in position by ATF on practical shooting or "police/combat-type" competitions may have an impact on the sporting suitability of rifles and handguns. Further, while it is clear that shotguns are used at certain practical shooting events, it is unclear whether shotgun use is so prevalent that it is "generally recognized" as a sporting purpose. If shotgun use is not sufficiently popular at such events, practical shooting would have no effect on any sporting suitability determination of shotguns. Therefore, it would be impractical to make a determination based upon one component or aspect of the practical shooting competitions.

As a result, the working group based the following sporting suitability criteria on the traditional sports of hunting, trap and skeet target shooting.

B. Suitability for Sporting Purposes

The final step in our review involved an evaluation of shotguns to determine a "type" of firearm that is "generally recognized as particularly suitable or readily adaptable to sporting purposes." Whereas the 1989 and 1998 studies were conducted in response to Congressional interest pertaining to a certain "type" of firearm, the current study did not benefit from a mandate to focus upon and review a particular type of firearm. Therefore, the current working group determined that it was necessary to consider a broad sampling of shotguns and shotgun features that may constitute a "type."

Whereas rifles vary greatly in size, function, caliber and design, historically, there is less variation in shotgun design. However, in the past several years, ATF has witnessed increasingly diverse shotgun design. Much of this is due to the fact that some manufacturers are now applying rifle designs and features to shotguns. This has resulted in a type of shotgun that has

[32] *See* www.uspsa.org.

[33] Organization websites report these membership numbers: for the United States Practical Shooting Association, approx. 19,000; Amateur Trapshooting Association, over 35,000 active members; National Skeet Shooting Association, nearly 20,000 members; National Sporting Clays Association, over 22,000 members; Single Action Shooting Society, over 75,000 members.

[34] Organization websites report these membership numbers: Ducks Unlimited, U.S adult 604,902 (Jan. 1, 2010); Pheasants/Quail Forever, over 130,000 North American members (2010) http://www.pheasantfest.org/page/1/PressReleaseViewer.jsp?pressReleaseId=12406.

features or characteristics that are based on tactical and military firearms. Following a review of numerous shotguns, literature, and industry advertisements, the working group determined that the following shotgun features and design characteristics are particularly suitable for the military or law enforcement, and therefore, offer little or no advantage to the sportsman. Therefore, we recognized that any shotgun with one or more of these features represent a "type" of firearm that is not "generally recognized as particularly suitable or readily adaptable to sporting purposes" and may not be imported under section 925(d)(3).

(1) Folding, telescoping or collapsible stock.

Shotgun stocks vary in style, but sporting stocks have largely resembled the traditional design.[35] Many military firearms incorporate folding or telescoping stocks. The main advantage of this feature is portability, especially for airborne troops. These stocks allow the firearm to be fired from the folded or retracted position, yet it is difficult to fire as accurately as can be done with an open or fully extended stock. While a folding stock or telescoping stock makes it easier to carry the firearm, its predominant advantage is for military and tactical purposes. A folding or telescoping stock is therefore not found on the traditional sporting shotgun. Note that certain shotguns may utilize adjustable butt plates, adjustable combs, or other designs intended only to allow a shooter to make small custom modifications to a shotgun. These are not intended to make a shotgun more portable, but are instead meant to improve the overall "fit" of the shotgun to a particular shooter. These types of adjustable stocks are sporting and are, therefore, acceptable for importation.

(2) Bayonet Lug.

A bayonet lug is generally a metal mount that allows the installation of a bayonet onto the end of a firearm. While commonly found on rifles, bayonets have a distinct military purpose. Publications have indicated that this may be a feature on military shotguns as well.[36] It enables soldiers to fight in close quarters with a knife attached to their firearm. The working group discovered no generally recognized sporting application for a bayonet on a shotgun.

(3) Flash Suppressor.

Flash suppressors are generally used on military firearms to disperse the muzzle flash in order to help conceal the shooter's position, especially at night. Compensators are used on military and commercial firearms to assist in controlling recoil and the "muzzle climb" of the shotgun. Traditional sporting shotguns do not have flash suppressors or compensators. However, while compensators have a limited benefit for shooting sports because they allow the shooter to quickly reacquire the target for a second shot, there is no particular benefit in suppressing muzzle flash in

[35] Exhibit 1.
[36] *A Collector's Guide to United States Combat Shotguns* at 156.

sporting shotguns. Therefore, the working group finds that flash suppressors are not a sporting characteristic, while compensators are a sporting feature. However, compensators that, in the opinion of ATF, actually function as flash suppressors are neither particularly suitable nor readily adaptable to sporting purposes.

(4) Magazine over 5 rounds, or a Drum Magazine.

A magazine is an ammunition storage and feeding device that delivers a round into the chamber of the firearm during automatic or semiautomatic firing.[37] A magazine is either integral (tube magazine) to the firearm or is removable (box magazine). A drum magazine is a large circular magazine that is generally detachable and is designed to hold a large amount of ammunition.

The 1989 Study recognized that virtually all modern military firearms are designed to accept large, detachable magazines. The 1989 Study noted that this feature provides soldiers with a large ammunition supply and the ability to reload rapidly. The 1998 Study concurred with this and found that, for rifles, the ability to accept a detachable large capacity magazine was not a sporting feature. The majority of shotguns on the market today contain an integral "tube" magazine. However, certain shotguns utilize removable box magazine like those commonly used for rifles.[38]

In regard to sporting purposes, the working group found no appreciable difference between integral tube magazines and removable box magazines. Each type allowed for rapid loading, reloading, and firing of ammunition. For example, "speed loaders" are available for shotguns with tube-type magazines. These speed loaders are designed to be preloaded with shotgun shells and can reload a shotgun with a tube-type magazine in less time than it takes to change a detachable magazine.

However, the working group determined that magazines capable of holding large amounts of ammunition, regardless of type, are particularly designed and most suitable for military and law enforcement applications. The majority of state hunting laws restrict shotguns to no more than 5 rounds.[39] This is justifiable because those engaged in sports shooting events are not engaging in potentially hostile or confrontational situations, and therefore do not require the large amount of immediately available ammunition, as do military service members and police officers.

Finally, drum magazines are substantially wider and have considerably more bulk than standard clip-type magazines. They are cumbersome and, when attached to the shotgun, make it more difficult for a hunter to engage multiple small moving targets. Further, drum magazines are generally designed to contain more than 5 rounds. Some contain as many as 20 or more

[37] Steindler's New Firearms Dictionary at 164.
[38] See Collector's Guide to United States Combat Shotguns at 156-7, noting that early combat shotguns were criticized because of their limited magazine capacity and time consuming loading methods.
[39] Exhibit 2.

rounds.[40] While such magazines may have a military or law enforcement application, the working group determined that they are not useful for any generally recognized sporting purpose. These types of magazines are unlawful to use for hunting in most states, and their possession and manufacture are even prohibited or restricted in some states.[41]

(5) Grenade Launcher Mount.

Grenade launchers are incorporated into military firearms to facilitate the launching of explosive grenades. Such launchers are generally of two types. The first type is a flash suppressor designed to function as a grenade launcher. The second type attaches to the barrel of the firearm either by screws or clamps. Grenade launchers have a particular military application and are not currently used for sporting purposes.

(6) Integrated Rail Systems.[42]

This refers to a mounting rail system for small arms upon which firearm accessories and features may be attached. This includes scopes, sights, and other features, but may also include accessories or features with no sporting purpose, including flashlights, foregrips, and bipods. Rails on the sides and underside of shotguns—including any accessory mount—facilitate installation of certain features lacking any sporting purpose. However, receiver rails that are installed on the top of the receiver and barrel are readily adaptable to sporting purposes because this facilitates installation of optical or other sights.

(7) Light Enhancing Devices.

Shotguns are generally configured with either bead sights, iron sights or optical sights, depending on whether a particular sporting purpose requires the shotgun to be pointed or aimed.[43] Bead sights allow a shooter to "point" at and engage moving targets at a short distance with numerous small projectiles, including birds, trap, skeet and sporting clays. Iron and optical sights are used when a shooter, firing a slug, must "aim" a shotgun at a target, including deer, bear and turkeys.[44] Conversely, many military firearms are equipped with sighting devices that utilize available light to facilitate night vision capabilities. Devices or optics that allow illumination of a target in low-light conditions are generally for military and law enforcement purposes and are not typically found on sporting shotguns because it is generally illegal to hunt at night.

[40] Exhibit 3.
[41] *See, e.g.,* Cal Pen Code § 12020**;** N.J. Stat. § 2C:39-9.
[42] Exhibit 4.
[43] NRA Firearms Sourcebook at 178.
[44] Id.

(8) Excessive Weight.[45]

Sporting shotguns, 12 gauge and smaller, are lightweight (generally less than 10 pounds fully assembled),[46] and are balanced and maneuverable. This aids sportsmen by allowing them to carry the firearm over long distances and rapidly engage a target. Unlike sporting shotguns, military firearms are larger, heavier, and generally more rugged. This design allows the shotguns to withstand more abuse in combat situations.

(9) Excessive Bulk.[47]

Sporting shotguns are generally no more than 3 inches in width or more than 4 inches in depth. This size allows sporting shotguns to be sufficiently maneuverable in allowing hunters to rapidly engage targets. Certain combat shotguns may be larger for increased durability or to withstand the stress of automatic fire. The bulk refers to the fully assembled shotgun, but does not include magazines or accessories such as scopes or sights that are used on the shotgun. For both width and depth, shotguns are measured at the widest points of the action or housing on a line that is perpendicular to the center line of the bore. Depth refers to the distance from the top plane of the shotgun to the bottom plane of the shotgun. Width refers to the length of the top or bottom plane of the firearm and measures the distance between the sides of the shotgun. Neither measurement includes the shoulder stock on traditional sporting shotgun designs.

(10) Forward Pistol Grip or Other Protruding Part Designed or Used for Gripping the Shotgun with the Shooter's Extended Hand.[48]

While sporting shotguns differ in the style of shoulder stock, they are remarkably similar in fore-end design.[49] Generally, sporting shotguns have a foregrip with which the shooter's forward hand steadies and aims the shotgun. Recently, however, some shooters have started attaching forward pistol grips to shotguns. These forward pistol grips are often used on tactical firearms and are attached to those firearms using the integrated rail system. The ergonomic design allows for continued accuracy during sustained shooting over long periods of time. This feature offers little advantage to the sportsman. Note, however, that the working group believes that pistol grips for the trigger hand are prevalent on shotguns and are therefore generally recognized as particularly suitable for sporting purposes.[50]

While the features listed above are the most common non-sporting shotgun features, the working group recognizes that other features, designs, or characteristics may exist. Prior to importation, ATF will classify these shotguns based upon the requirements of section 925(d)(3). The working

[45] *See generally* Gilbert.
[46] Shotgun Encyclopedia 2001 at 264.
[47] Exhibit 5.
[48] Exhibit 6.
[49] *See* Exhibit 1. *See generally* NRA Firearms Sourcebook at 121-2.
[50] See Exhibit 1.

group expects the continued application of unique features and designs to shotguns that may include features or designs based upon traditional police or military tactical rifles. However, even if a shotgun does not have one of the features listed above, it may be considered "sporting" only if it meets the statutory requirements under section 925(d)(3). Further, the simple fact that a military firearm or feature ***may*** be used for a generally recognized sporting purposes is not sufficient to support a determination that it is sporting under 925(d)(3). Therefore, as required by section 925(d)(3), in future sporting classifications for shotguns, ATF will classify the shotgun as sporting only if there is evidence that its features or design characteristics are generally recognized as particularly suitable for or readily adaptable to generally recognized sporting purposes.

The fact that a firearm or feature was initially designed for military or tactical applications, including offensive or defensive combat, may indicate that it is not a sporting firearm. This may be overcome by evidence that the particular shotgun or feature has been so regularly used by sportsmen that it is generally recognized as particularly suitable for or readily adaptable to sporting purposes. Such evidence may include marketing, industry literature and consumer articles, scholarly and historical publications, military publications, the existence of State and local statutes and regulations limiting use of the shotgun or features for sporting purposes, and the overall use and the popularity of such features or designs for sporting purposes according to hunting guides, shooting magazines, State game commissioners, organized competitive hunting and shooting groups, law enforcement agencies or organizations, industry members and trade associations, and interest and information groups. Conversely, a determination that the shotgun or feature was originally designed as an improvement or innovation to an existing sporting shotgun design or feature will serve as evidence that the shotgun is sporting under section 925(d)(3). However, any new design or feature must still satisfy the sporting suitability test under section 925(d)(3) as outlined above.

The Attorney General and ATF are not limited to these factors and therefore may consider any other factor determined to be relevant in making this determination. The working group recognizes the difficulty in applying this standard but acknowledges that Congress specifically intended that the Attorney General perform this function. Therefore, the working group recommends that sporting determinations for shotguns not specifically addressed by this study be reviewed by a panel pursuant to ATF orders, policies and procedures, as appropriate.

Conclusion

The purpose of section 925(d)(3) is to provide a limited exception to the general prohibition on the importation of firearms without placing "any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms…."[51] Our determinations will in no way preclude the importation of true sporting shotguns. While it will certainly prevent the importation of certain shotguns, we believe that

[51] 90 P.L. 351 (1968).

those shotguns containing the enumerated features cannot be fairly characterized as "sporting" shotguns under the statute. Therefore, it is the recommendation of the working group that shotguns with any of the characteristics or features listed above not be authorized for importation.

Shotgun Stock Style Comparison

Exhibit 1

"Straight" or "English" style stock (Ruger Red Label):

"Pistol grip" style stock (Browning Citori):

"Pistol grip" style stock (Mossberg 935 Magnum Turkey):

"Thumbhole" style stock (Remington SP-10):

Stock with Separate Pistol Grip

Hunting Statutes by State

Exhibit 2

State	Gauge	Mag Restriction / plugged with one piece filler requiring disassembly of gun for removal	Attachments	Semi-Auto	Other
Alabama	10 gauge or smaller;	(Species specific) 3 shells			1
Alaska	10 gauge or smaller				
Arizona	10 gauge or smaller	5 shells			
Arkansas	≤ 10 gauge; some zones ≥ .410; ≥ 20 gauge for bear	(Species specific) 3 shells			
California	≤ 10 gauge; Up to 12 gauge in some areas	(Species specific) 3 shells			
Colorado	≥ 20 gauge; Game Mammals ≤ 10 gauge	3 shells			
Connecticut	≤ 10-gauge	(Species specific) 3 shells	telescopic sights		
Delaware	20, 16, 12, 10 gauge	3 shells	Muzzleloaders may be equipped with scopes		2
Florida	Muzzleloading firing ≥ 2 balls ≥ 20-gauge; Migratory birds ≤ 10-gauge; opossums - single-shot .41 -gauge shotguns	(Species specific) 3 shells			
Georgia	≥ 20-gauge; Waterfowl ≤ 10-gauge	5 shells	Scopes are legal		
Hawaii	≤ 10 gauge	(Species specific) 3 shells			
Idaho			some scopes allowed		3
Illinois	20 - 10 gauge; no .410 or 28 gauge allowed	3 shells			
Indiana		(Species specific) 3 shells	Laser sights are legal		

Hunting Statutes by State

Exhibit 2

Iowa	10-, 12-, 16-, and 20-gauge			
Kansas	≥ 20 gauge; ≤ 10 gauge,	(Species specific) 3 shells		
Kentucky	up to and including 10-gauge, includes .410-	(Species specific) 3 shells	Telescopic sights (scopes)	
Louisiana	≤ 10 gauge	3 shells	Nuisance Animals; infrared, laser sighting devices, or night vision devices	
Maine	10 - 20 gauge	(Species specific) 3 shells	may have any type of sights, including scopes	Auto-loading illegal if hold more than 6 cartridges
Maryland	Muzzle loading ≥ 10 gauge ; Shotgun ≤ 10-gauge	(Species specific) 3 shells	may use a telescopic sight on muzzle loading firearm	
Massachusetts	≤ 10 gauge	(Species specific) 3 shells		
Michigan	any gauge	(Species specific) 3 shells		Illegal: semi-automatic holding > 6 shells in barrel and magazine combined
Minnesota	≤ 10 gauge	(Species specific) 3 shells		
Mississippi	any gauge	(Species specific) 3 shells	Scopes allowed on primitive weapons	
Missouri	≤ 10 gauge	(Species specific) 3 shells		
Montana	≤ 10 gauge	(Species specific) 3 shells		
Nebraska	≥ 20 gauge	(Species specific) 3 shells		Illegal: semi-automatic holding > 6 shells in barrel and magazine combined
Nevada	≤ 10 gauge; ≥ 20 gauge	(Species specific) 3 shells		
New Hampshire	10 - 20 gauge	(Species specific) 3 shells		
New Jersey	≤ 10 gauge; ≥ 20 gauge; or .410 caliber	(Species specific) 3 shells	Require adjustable open iron, peep sight or scope affixed if hunting with slugs. Telescopic sights Permitted	
New Mexico	≥ 28 gauge, ≤ 10 gauge	(Species specific) 3 shells		
New York	Big game ≥ 20 gauge		scopes allowed	No semi-automatic firearm with a capacity to hold more than 6 rounds

Hunting Statutes by State

Exhibit 2

North Carolina	≤ 10 gauge	(Species specific) 3 shells			
North Dakota	≥ 410 gauge; no ≤ 10 gauge	3 shells (repealed for migratory birds)			
Ohio	≤ 10 gauge	(Species specific) 3 shells			
Oklahoma	≤ 10 gauge	(Species specific) 3 shells			
Oregon	≤ 10 gauge; ≥ 20 gauge	(Species specific) 3 shells	Scopes (permanent and detachable), and sights allowed for visually impaired		
Pennsylvania	≤ 10 gauge; ≥ 12 gauge	(Species specific) 3 shells			
Rhode Island	10, 12, 16, or 20-gauge	5 shells			
South Carolina		(Species specific) 3 shells			
South Dakota	(Species specific) ≤ 10 gauge	5 shells		No auto-loading firearm holding > 6 cartridges	
Tennessee	Turkey: ≥ 28 gauge	(Species specific) 3 shells	May be equipped with sighting devices		
Texas	≤ 10 gauge	(Species specific) 3 shells	scoping or laser sighting devices used by disabled hunters		
Utah	≤ 10 gauge; ≥ 20 gauge	(Species specific) 3 shells			
Vermont	≥ 12 gauge	(Species specific) 3 shells			
Virginia	≤ 10 gauge	(Species specific) 3 shells			
Washington	≤ 10 gauge	(Species specific) 3 shells			
West Virginia					
Wisconsin	10, 12, 16, 20 and 28 gauge; no .410 shotgun for deer/bear	(Species specific) 3 shells			
Wyoming					4

1 Shotgun/rifle combinations (drilling) permitted

2 large game training course - Students in optional proficiency qualification bring their own pre-zeroed, ≥ .243 , scoped shotgun

3 no firearm that, in combination with a scope, sling and/or any attachments, weighs more than 16 pounds

4 no relevant restrictive laws concerning shotguns

General Firearm Statutes by State

Exhibit 2

State	Source	Semi-Auto Restrictions	Attachments	Prohibited* (in addition to possession of short-barrel or sawed-off shotguns by non-authorized persons, e.g., law enforcment officers for official duty purposes)
Alabama	Alabama Code, title 13:			
Alaska	Alaska Statutes 11.61.200.(h)			
Arizona	Arizona Rev. Statutes 13-3101.8.	single shot	silencer prohibited	
Arkansas	Arkansas Code Title 5, Chapter 73.			
California	California Penal Code, Part 4.12276. and San Diego Municipal Code 53.31.	San Diego includes under "assault weapon," any shotgun with a magazine capacity of more than 6 rounds		"Assault weapons": Franchi SPAS 12 and LAW 12; Striker 12; Streetsweeper type S/S Inc. ; semiautomatic shotguns having both a folding or telescoping stock and a pistol grip protruding conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip; semiautomatic shotguns capable of accepting a detachable magazine; or shotguns with a revolving cylinder.
Colorado	2 CCR 406-203			
Connecticut	Connecticut Gen. Statutes 53-202a.			"Assault weapons": Steyr AUG; Street Sweeper and Striker 12 revolving cylinder shotguns
D.C	7-2501.01.			

General Firearm Statutes by State

Exhibit 2

Delaware	7.I.§ 711.			7.I.§ 711. Hunting with automatic-loading gun prohibited; penalty (a) No person shall hunt for game birds or game animals in this State, except as authorized by state-sanctioned federal depredation/conservation orders for selected waterfowl species, with or by means of any automatic-loading or hand-operated repeating shotgun capable of holding more than 3 shells, the magazine of which has not been cut off or plugged with a filler incapable of removal through the loading end thereof, so as to reduce the capacity of said gun to not more than 3 shells at 1 time, in the magazine and chamber combined. (b) Whoever violates this section shall be guilty of a class C environmental misdemeanor. (c) Having in one's possession, while in the act of hunting game birds or game animals, a gun that will hold more than 3 shells at one time in the magazine and chamber combined, except as authorized in subsection (a) of this section, shall be prima facie evidence of violation of this section.
Florida	Florida statutes, Title XLVI.790.001.			
Georgia				
Hawaii	Hawaii Rev. Statutes, Title 10., 134-8.		silencer prohibited	
Idaho	Idaho Code, 18-3318.			
Illinois	Code of Ordinances, City of Aurora 29-43.	Aurora includes under "assault weapon," any shotgun with a magazine capacity of more than 5 rounds		"Assault weapons": Street Sweeper and Striker 12 revolving cylinder shotguns or semiautomatic shotguns with either a fixed magazine with a capacity over 5 rounds or an ability to accept a detachable magazine and has at least a folding / telescoping stock or a pistol grip that protrudes beneath the action of firearm and which is separate and apart from stock

General Firearm Statutes by State

Exhibit 2

Indiana	Indiana Code 35-47-1-10. and Municipal Code of the City of South Bend 13-95.	South Bend under "assault weapon" firearms which have threads, lugs, or other characteristics designed for direct attachment of a silencer, bayonet, flash suppressor, or folding stock; as well as any detachable magazine, drum, belt, feed strip, or similar device which can be readily made to accept more than 15. rounds	South Bend includes under "assault weapon," any shotgun with a magazine capacity of more than 9 rounds
Iowa	Iowa Code, Title XVI. 724.1.		Includes as an offensive weapon, "a firearm which shoots or is designed to shoot more than one shot, without manual reloading, by a single function of the trigger"
Kansas			
Kentucky	Kentucky Revised Statutes- 150.360		
Louisiana	Louisiana RS 56:116.1		
Maine	Maine Revised Statutes 12.13.4.915.4.§11214. F.		
Maryland	Maryland Code 5-101.		"Assault weapons": F.I.E./Franchi LAW 12 and SPAS 12 assault shotgun; Steyr-AUG-SA semi-auto; Holmes model 88 shotgun; Mossberg model 500 Bullpup assault shotgun; Street sweeper assault type shotgun; Striker 12 assault shotgun in all formats; Daewoo USAS 12 semi-auto shotgun

General Firearm Statutes by State

Exhibit 2

Massachusetts	Massachusetts Gen L. 140.121.	under "assault weapon": any shotgun with (fixed or detachable) magazine capacity of more than 5 rounds		"Assault weapons": revolving cylinder shotguns, e.g., Street Sweeper and Striker 12; also "Large capacity weapon" includes any semiautomatic shotgun fixed with large capacity feeding device (or capable of accepting such), that uses a rotating cylinder capable of accepting more than 5 shells
Michigan	II.2.1. (2)			
Minnesota	Minnesota Statutes 624.711			"Assault weapons": Street Sweeper and Striker-12 revolving cylinder shotgun types as well as USAS-12 semiautomatic shotgun type
Mississippi	Mississippi Code 97-37-1.		silencer prohibited	
Missouri	Code of State Regulations 10-7.410(1)(G)			
Montana				
Nebraska	Nebraska Administrative Code Title 163 Chapter 4 001.			
Nevada	Nevada Revised Statutes 503.150 1.			
New Hampshire				
New Jersey	New Jersey Statutes 23:4-13. and 23:4-44. and New Jersey Rev. Statutes 2C39-1.w.	magazine capacity of no more than 5 rounds		"Assault weapons": any shotgun with a revolving cylinder, e.g. "Street Sweeper" or "Striker 12" Franchi SPAS 12 and LAW 12 shotguns or USAS 12 semi-automatic type shotgun; also any semi-automatic shotgun with either a magazine capacity exceeding 6 rounds, a pistol grip, or a folding stock
New Mexico	New Mexico Administrative Code 19.31.6.7H., 19.31.11.10N. , 19.31.13.10M. and 19.31.17.10N.			

General Firearm Statutes by State

Exhibit 2

New York	New York Consolidated Laws 265.00. 22. and Code of the City of Buffalo 1801B.	magazine capacity of no more than 5 rounds	sighting device making a target visible at night may classify a shotgun as an assault weapon	"Assault weapons": Any semiautomatic shotgun with at least two of the following:folding or telescoping stock;pistol grip that protrudes conspicuously beneath the action of the weapon;fixed magazine capacity in excess of five rounds;an ability to accept a detachable magazine; or any revolving cylinder shotguns, e.g., Street Sweeper and Striker 12; Buffalo 1801B. Assault Weapon:(2) A center-fire rifle or shotgun which employs the force of expanding gases from a discharging cartridge to chamber a fresh round after each single pull of the trigger, and which has:(a) A flash suppressor attached to the weapon reducing muzzle flash;(c) A sighting device making a target visible at night;(d) A barrel jacket surrounding all or a portion of the barrel, to dissipate heat therefrom; or(e) A multi-burst trigger activator.(3) Any stockless pistol grip shotgun.
North Carolina	North Carolina Gen. Statutes 14-288.8		silencer prohibited	
North Dakota	North Dakota Century Code 20.1-01-09. Section 20.1-04-10, SHOTGUN SHELL-HOLDING CAPACITY RESTRICTION, repealed/eliminated			
Ohio	Ohio Rev. Code 2923.11. and Columbus City Codes 2323.11.	magazine capacity of no more than 5 rounds		semiautomatic shotgun that was originally designed with or has a fixed magazine or detachable magazine with a capacity of more than five rounds. Columbus includes under "Assault weapon" any semi-automatic shotgun with two or more of the following: pistol grip that protrudes conspicuously beneath the receiver of the weapon; folding, telescoping or thumbhole stock; fixed magazine capacity in excess of 5 standard 2-3/4, or longer, rounds; or ability to accept a detachable magazine; also any shotgun with revolving cylinder
Oklahoma				
Oregon	Oregon Rev. Statutes 166.272.		silencer prohibited	
Pennsylvania	Title 34 Sec. 2308. (a)(4) and (b)(1)			
Rhode Island	Rule 7, Part III, 3.3 and 3.4			
South Carolina	SECTION 50-11-310. (E) and ARTICLE 3. SUBARTICLE 1. 123 40			

General Firearm Statutes by State

Exhibit 2

South Dakota	South Dakota Codified Laws 22,1,2, (8)		silencer prohibited	
Tennessee				
Texas				
Utah	Utah Administrative Code R657-5-9. (1), R657-6-6. (1) and R657-9-7.			
Vermont				
Virginia	Virginia Code 18.2-308.	magazine capacity no more than 7 rounds (not applicable for hunting or sport shooting)		"Assault weapons": Striker 12's commonly called a "streetsweeper," or any semi-automatic folding stock shotgun of like kind with a spring tension drum magazine capable of holding twelve shotgun shells prohibited
Washington	Washington Administrative Code 232-12-047			
West Virginia	West Virginia statute 8-12-5a.			
Wisconsin	Wisconsin Administrative Code – NR 10.11 and NR 10.12			
Wyoming	Wyoming Statutes, Article 3. Rifles and Shotguns [Repealed] and 23-3-112.		silencer prohibited	

Drum Magazine

Exhibit 3

Integrated Rail System Exhibit 4

Sporting

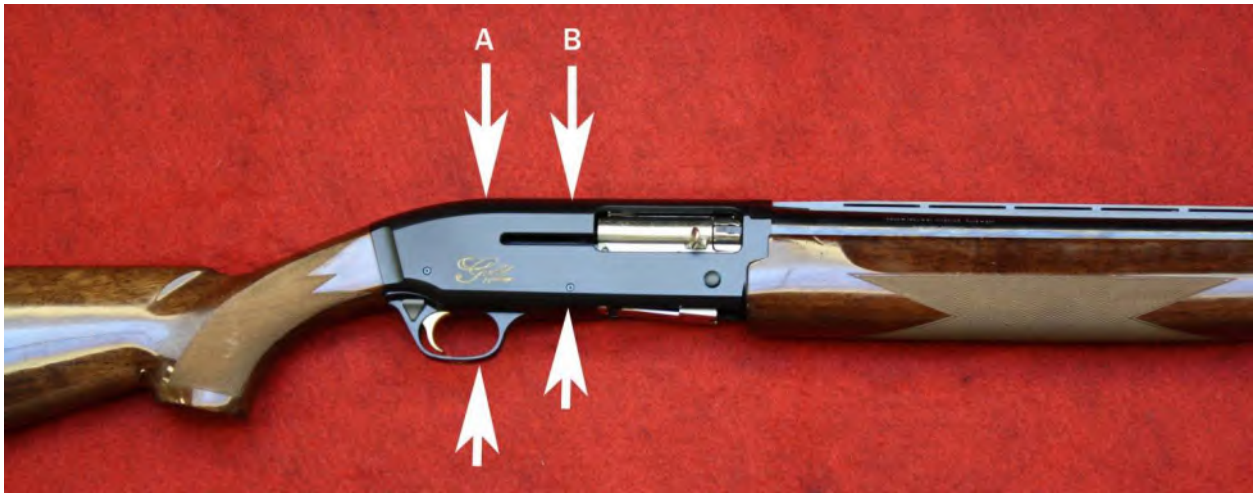
Sporting

Non-Sporting

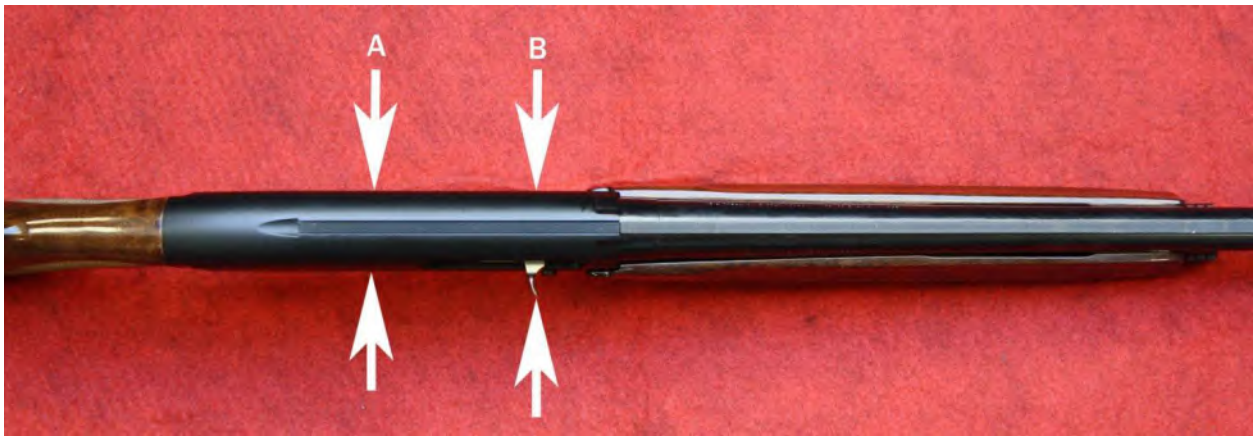
Non-Sporting

Bulk Measurements Exhibit 5

Depth refers to the distance from the top plane of the shotgun to the bottom plane of the shotgun. Depth measurement “A” below is INCORRECT; it includes the trigger guard which is not part of the frame or receiver. Depth measurement “B” below is CORRECT; it measures only the depth of the frame or receiver:



Width refers to the length of the top or bottom pane of the firearm and measures the distance between the sides of the shotgun. Width measurement “A” below is CORRECT; it measures only the width of the frame or receiver. Width measurement “B” below is INCORRECT; it includes the charging handle which is not part of the frame or receiver:



Forward Pistol Grip Exhibit 6

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Exhibit T

FM 3-22.9(FM23-9)

RIFLE MARKSMANSHIP M16A1, M16A2/3, M16A4, AND M4 CARBINE

APRIL 2003

HEADQUARTERS
DEPARTMENT OF THE ARMY

This publication is available at Army Knowledge Online (www.us.army.mil) and General Dennis J. Reimer Training and Doctrine Digital Library at (http://www.train.army.mil)

Figure 7-8. Firing from windows.

c. With minor modifications, the dry-fire exercises taught during preliminary marksmanship instruction can effectively train and evaluate a soldier's ability to apply the fundamentals while in advanced firing positions. Repetitive training (muscle memory) will make the soldier knowledgeable in the types of corrections needed to keep the same point of aim consistently in all of the different firing positions. This increases first time target hits and soldier survivability.

7-7. MODIFIED AUTOMATIC AND BURST FIRE POSITION

Maximum use of available artificial support is necessary during automatic or burst fire. The rifle should be gripped more firmly and pulled into the shoulder more securely than when firing in the semiautomatic mode. This support and increased grip help offset the progressive displacement of weapon-target alignment caused by recoil. To provide maximum stability, prone and supported positions are best when firing the M16-/M4-series weapon in the automatic or burst fire mode. (If the weapon is equipped with the RAS, the use of the vertical pistol grip can further increase the control the soldier has over the weapon.) Figure 7-9 demonstrates three variations that can be used when firing in automatic or burst fire. The first modification shown involves forming a 5-inch loop with the sling at the upper sling swivel, grasping this loop with the nonfiring hand, and pulling down and to the rear while firing. The second modification involves grasping the small of the stock with the nonfiring hand and applying pressure down and to the rear while firing. The third modification shown is the modified machinegun position when a bipod is not available. Sandbags may be used to support the rifle. The nonfiring hand

may be positioned on the rifle wherever it provides the most stability and flexibility. The goal is to maintain weapon stability and minimize recoil.

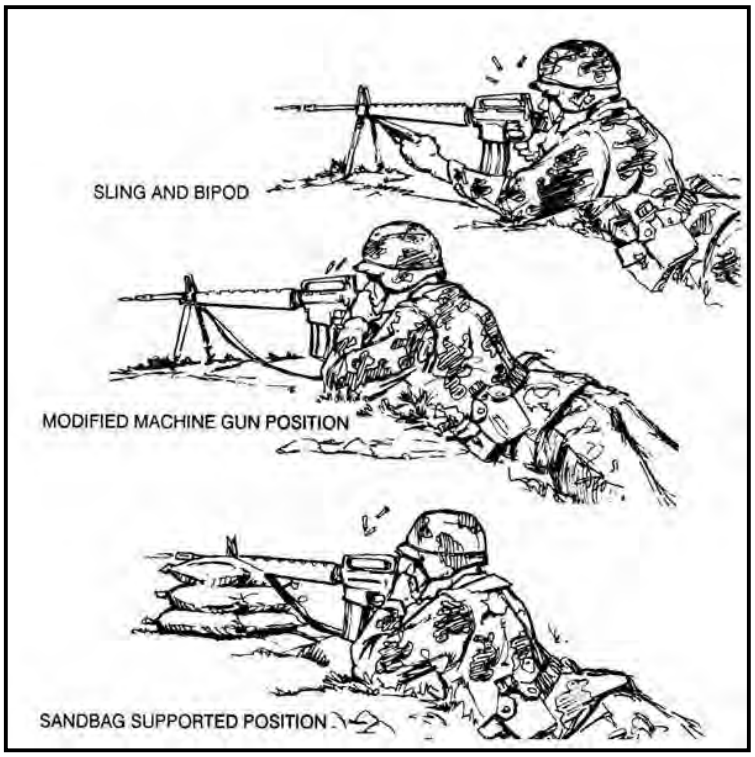

Figure 7-9. Modified automatic and burst fire positions.

Section II. COMBAT FIRE TECHNIQUES

The test of a soldier's training is applying the fundamentals of marksmanship and firing skills in combat. The marksmanship skills mastered during training, practice, and record fire exercises must be applied to many combat situations (attack, assault, ambush, UO). Although these situations present problems, only two modifications of the basic techniques and fundamentals are necessary: changes to the rate of fire and alterations in weapon-target alignment. The necessary changes are significant and must be thoroughly taught and practiced before discussing live-fire exercises.

7-8. RAPID SEMIAUTOMATIC FIRE

The most important firing technique during modern, fast moving combat is rapid semiautomatic fire. Rapid-fire techniques are the key to hitting the short exposure, multiple, or moving targets described previously. If properly applied, rapid semiautomatic fire delivers a large volume of effective fire into a target area. The soldier intentionally fires a quick series of shots into the target area to assure a high probability of a hit. (Figure 7-10, page 7-8 shows the current training program for rapid semiautomatic fire.)

Instructional Intent:
Soldiers learn to engage targets using rapid semiautomatic fire and practice rapid magazine changes.
Special Instructions:
Ensure M16A1 rear sight is set on the unmarked aperture.
Ensure M16A2/A3/A4 and M4 series weapon's rear sight is set on the 0-2 aperture.
Use a 25-meter alternate course C qualification target.
Ensure soldier is in a proper supported firing position.
Soldier is given four 5-round magazines of 5.56ammunition.
Soldier fires one round at each of the 10 silhouettes on the alternate course C qualification target.
Soldier does a rapid magazine change after each magazine is fired.
Soldier uses rapid semiautomatic fire to engage targets.
The first iteration of 10 rounds is fired in a time limit of 40 seconds.
The second iteration of 10 rounds is fired in a time limit of 30 seconds.
Each target is inspected and posted after each iteration.
Observables:
Coaches are analyzing the firer's fundamentals continuously.
Each soldier must obtain 14 silhouette target hits.

Figure 7-10. Rapid semiautomatic fire training program.

a. **Effectiveness of Rapid Fire.** When a soldier uses rapid semiautomatic fire properly, he sacrifices some accuracy to deliver a greater volume of effective fire to hit more targets. It is surprising how devastatingly accurate rapid fire can be. At ranges beyond 25 meters, rapid semiautomatic fire is superior to automatic fire in all measures (shots per target, trigger pulls per hit, and even time to hit). The decrease in accuracy when firing faster is reduced with proper training and repeated practice.

b. **Control of Rapid Semiautomatic Fire.** With proper training, the soldier can properly select the appropriate mode of fire; semiautomatic fire, rapid semiautomatic fire, or automatic/burst. Leaders must assure proper fire discipline at all times. Even in training, unaimed fire must never be tolerated, especially unaimed automatic fire.

c. **Modifications for Rapid Fire.** Increases in speed and volume should be sought only after the soldier has demonstrated expertise and accuracy during slow semiautomatic fire. The rapid application of the four fundamentals will result in a well-aimed shot every one or two seconds. This technique of fire allows a unit to place the most effective volume of fire in a target area while conserving ammunition. It is the most accurate means of delivering suppressive fire. Trainers must consider the impact of the increased rate of fire on the soldier's ability to properly apply the fundamentals of marksmanship and other combat firing skills. These fundamentals and skills include:

(1) ***Marksmanship Fundamentals.*** The four fundamentals are used when firing in the rapid semiautomatic mode. The following differences apply:

(a) *Steady Position.* Good support improves accuracy and reduces recovery time between shots. A somewhat tighter grip on the hand guard assists in recovery time and in rapidly shifting or distributing fire to subsequent targets. When possible, the rifle should pivot at the point where the non-firing hand meets the support. The soldier should avoid changing the position of the non-firing hand on the support, because it is awkward and time consuming when rapidly firing a series of shots.

(b) *Aiming.* Sighting and stock weld do not change during rapid semiautomatic fire. The firer's head remains on the stock for every shot, his firing eye is aligned with the rear aperture, and his focus is on the front sight post. In slow fire, the soldier seeks a stable sight picture. In the fast moving situations requiring rapid semiautomatic fire, the soldier must accept target movement, and unsteady sight picture, and keep firing into the target area until the target is down or there is no chance of a hit. Every shot must be aimed.

(c) *Breath Control.* Breath control must be modified because the soldier does not have time to take a complete breath between shots. He must hold his breath at some point in the firing process and take shallow breaths between shots.

(d) *Trigger Squeeze.* To maintain the desired rate of fire, the soldier has only a short period to squeeze the trigger (one well-aimed shot every one or two seconds). The firer must cause the rifle to fire in a period of about one-half of a second or less and still not anticipate the precise instant of firing. It is important that initial trigger pressure be applied as soon as a target is identified and while the front sight post is being brought to the desired point of aim. When the front sight post reaches the point of aim, final pressure must be applied to cause the rifle to fire almost at once. This added pressure, or final trigger squeeze, must be applied without disturbing the lay of the rifle. Repeated dry-fire training, using the Weaponeer device, and live-fire practice ensure the soldier can squeeze the trigger and maintain a rapid rate of fire consistently and accurately.

NOTE: The soldier can increase the firing rate by firing, then releasing just enough pressure on the trigger to reset the sear, then immediately fire the next shot. This technique eliminates some of the time used in fully releasing the pressure on the trigger. It allows the firer to rapidly deliver subsequent rounds. Training and practice sessions are required for soldiers to become proficient in the technique of rapid trigger squeeze.

(2) ***Immediate Action.*** To maintain an increased rate of suppressive fire, immediate action must be applied quickly. The firer must identify the problem and correct the stoppage immediately. Repeated dry-fire practice, using blanks or dummy rounds, followed by live-fire training and evaluation ensures that soldiers can rapidly apply immediate action while other soldiers initiate fire.

d. **Rapid-Fire Training.** Soldiers should be well trained in all aspects of slow semiautomatic firing before attempting any rapid-fire training. Those who display a lack of knowledge of the fundamental skills of marksmanship should not advance to rapid semiautomatic training until these skills are learned and mastered. Initial training should focus on the modifications to the fundamentals and other basic combat skills necessary during rapid semiautomatic firing.

(1) ***Dry-Fire Exercises.*** Repeated dry-fire exercises are the most efficient means available to ensure soldiers can apply modifications to the fundamentals. Multiple dry-fire exercises are needed, emphasizing a rapid shift in position and point of aim, followed by breath control and fast trigger squeeze. Blanks or dummy rounds may be used to train rapid magazine changes and the application of immediate action. The soldier should display knowledge and skill during these dry-fire exercises before attempting live fire.

Exhibit U

TC 3-22.9

Rifle and Carbine

MAY 2016

Distribution Restriction: Approved for public release; distribution is unlimited.

*This publication supersedes FM 3-22.9, 12 August 2008.

Headquarters, Department of the Army

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Chapter 8

Control

The control element of employment considers all the conscious actions of the Soldier before, during, and after the shot process that the Soldier's specifically in control of. It incorporates the Soldier as a function of safety, as well as the ultimate responsibility of firing the weapon.

Proper trigger control, without disturbing the sights, is the most important aspect of control and the most difficult to master.

Combat is the ultimate test of a Soldier's ability to apply the functional elements of the shot process and firing skills. Soldiers must apply the employment skills mastered during training to all combat situations (for example, attack, assault, ambush, or urban operations). Although these tactical situations present problems, the application of the functional elements of the shot process require two additions: changes to the rate of fire and alterations in weapon/target alignment. This chapter discusses the engagement techniques Soldiers must adapt to the continuously changing combat engagements.

8-1. When firing individual weapons, the Soldier is the weapon's fire control system, ballistic computer, stabilization system, and means of mobility. Control refers to the Soldier's ability to regulate these functions and maintain the discipline to execute the shot process at the appropriate time.

8-2. Regardless of how well trained or physically strong a Soldier is, a wobble area (or arc of movement) is present, even when sufficient physical support of the weapon is provided. The arc of movement (AM) may be observed as the sights moving in a W shape, vertical (up and down) pulses, circular, or horizontal arcs depending on the individual Soldier, regardless of their proficiency in applying the functional elements. The wobble area or arc of movement is the extent of lateral horizontal and front-to-back variance in the movement that occurs in the sight picture (see figure 8-1).

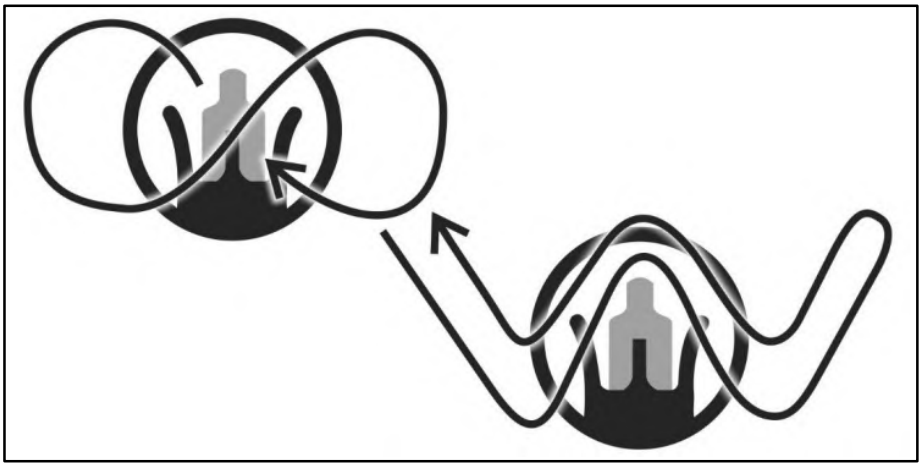

Figure 8-1. Arc of movement example

8-3. The control element consists of several supporting Soldier functions, and include all the actions to minimize the Soldier's induced arc of movement. Executed correctly, it provides for the best engagement window of opportunity to the firer. The Soldier physically maintains positive control of the shot process by managing—

- Trigger control.
- Breathing control.
- Workspace.
- Calling the shot (firing or shot execution).
- Follow-through.

TRIGGER CONTROL

8-4. Trigger control is the act of firing the weapon while maintaining proper aim and adequate stabilization until the bullet leaves the muzzle. Trigger control and the shooter's position work together to allow the sights to stay on the target long enough for the shooter to fire the weapon and bullet to exit the barrel.

8-5. Stability and trigger control complement each other and are integrated during the shot process. A stable position assists in aiming and reduces unwanted movements during trigger squeeze without inducing unnecessary movement or disturbing the sight picture. A smooth, consistent trigger squeeze, regardless of speed, allows the shot to fire at the Soldier's moment of choosing. When both a solid position and a good trigger squeeze are achieved, any induced shooting errors can be attributed to the aiming process for refinement.

8-6. Smooth trigger control is facilitated by placing the finger where it naturally lays on the trigger. Natural placement of the finger on the trigger will allow for the best mechanical advantage when applying rearward pressure to the trigger.

- **Trigger finger placement** – the trigger finger will lay naturally across the trigger after achieving proper grip (see figure 8-2). There is no specified point on the trigger finger that must be used. It will not be the same for all Soldiers due to different size hands. This allows the Soldier to engage the trigger in the most effective manner
- **Trigger squeeze** – The Soldier pulls the trigger in a smooth consistent manner adding pressure until the weapon fires. Regardless of the speed at which the Soldier is firing the trigger control will always be smooth.
- **Trigger reset** – It is important the Soldier retains focus on the sights while resetting the trigger.

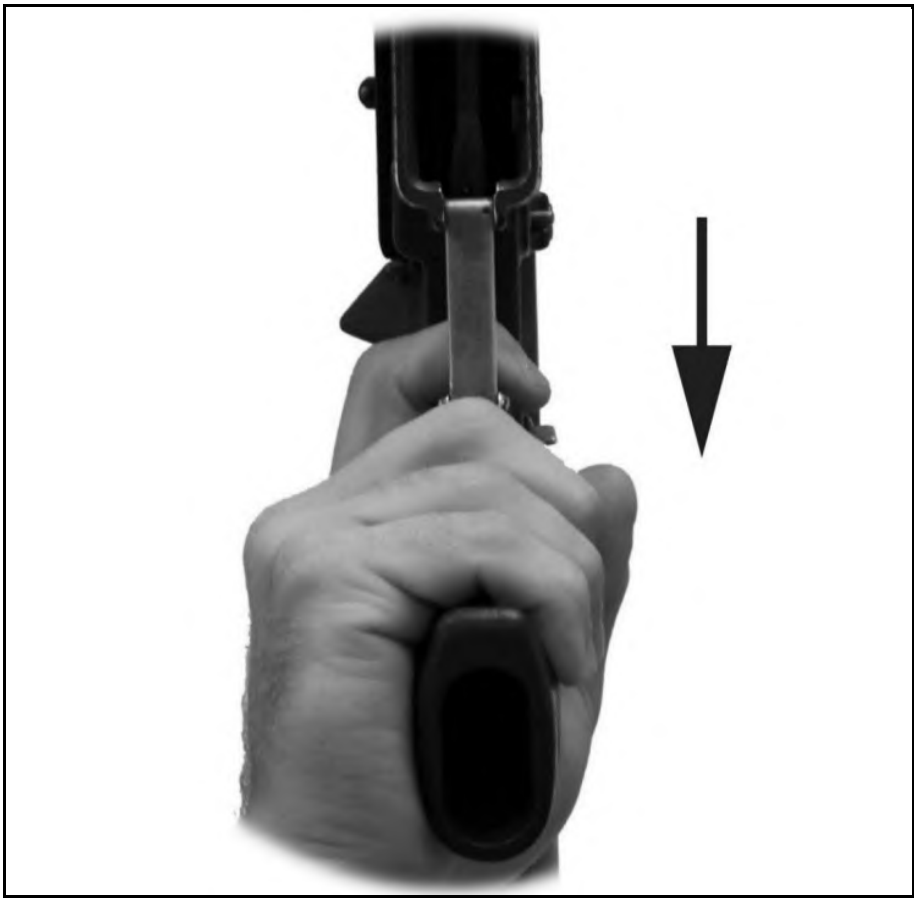

Figure 8-2. Natural trigger finger placement

BREATHING CONTROL

8-7. During the shot process, the shooter controls their breathing to reduce the amount of movement of the weapon. During training, the Soldier will learn a method of breathing control that best suits their shooting style and preference. Breathing control is the relationship of the respiratory process (free or under stress) and the decision to execute the shot with trigger squeeze.

8-8. Breathing induces unavoidable body movement that contribute to wobble or the arc of movement (AM) during the shot process. Soldiers cannot completely eliminate all motion during the shot process, but they can significantly reduce its effects through practice and technique. Firing on the natural pause is a common technique used during grouping and zeroing.

8-9. Vertical dispersion during grouping is most likely not caused by breathing but by failure to maintain proper aiming and trigger control. Refer to appendix E of this publication for proper target analysis techniques.

WORKSPACE MANAGEMENT

8-10. The workspace is a spherical area, 12 to 18 inches in diameter centered on the Soldier's chin and approximately 12 inches in front of their chin. The workspace is where the majority of weapons manipulations take place. (See figure 8-3 on page 8-5.)

8-11. Conducting manipulations in the workspace allows the Soldier to keep his eyes oriented towards a threat or his individual sector of fire while conducting critical weapons tasks that require hand and eye coordination. Use of the workspace creates efficiency of motion by minimizing the distance the weapon has to move between the firing position to the workspace and return to the firing position.

8-12. Location of the workspace will change slightly in different firing positions. There are various techniques to use the workspace. Some examples are leaving the butt stock in the shoulder, tucking the butt stock under the armpit for added control of the weapon, or placing the butt stock in the crook of the elbow.

8-13. Workspace management includes the Soldier's ability to perform the following functions:

- **Selector lever** – to change the weapon's status from safe to semiautomatic, to burst/automatic from any position.

Note. Some models will have ambidextrous selectors.

- **Charging handle** – to smoothly use the charging handle during operation. This includes any corrective actions to overcome malfunctions, loading, unloading, or clearing procedures.
- **Bolt catch** – to operate the bolt catch mechanism on the weapon during operations.
- **Ejection port** – closing the ejection port cover to protect the bolt carrier assembly, ammunition, and chamber from external debris upon completion

of an engagement. This includes observation of the ejection port area during malfunctions and clearing procedures.

- **Magazine catch** – the smooth functioning of the magazine catch during reloading procedures, clearing procedures, or malfunction corrective actions.
- **Chamber check** – the sequence used to verify the status of the weapon's chamber.
- **Forward assist** – the routine use of the forward assist assembly of the weapon during loading procedures or when correcting malfunctions.

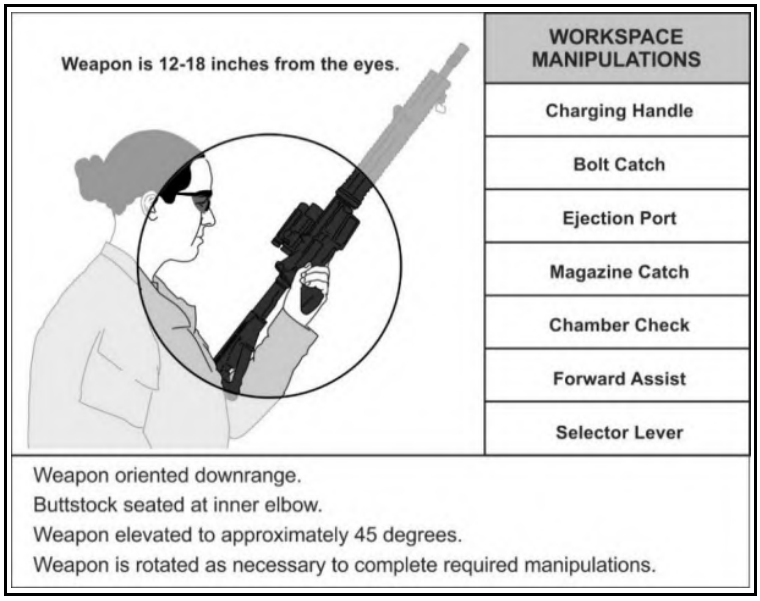

Figure 8-3. Workspace example

CALLING THE SHOT

8-14. Knowing precisely where the sights are when the weapon discharges is critical for shot analysis. Errors such as flinching or jerking of the trigger can be seen in the sights before discharge.

8-15. Calling a shot refers to a firer stating exactly where he thinks a single shot strikes by recalling the sights relationship to the target when the weapon fired. This is normally expressed in clock direction and inches from the desired point of aim.

8-16. The shooter is responsible for the point of impact of every round fired from their weapon. This requires the Soldier to ensure the target area is clear of friendly and neutral actors, in front of and behind the target. Soldiers must also be aware of the environment the target is positioned in, particularly in urban settings—friendly or neutral actors may be present in other areas of a structure that the projectile can pass through.

RATE OF FIRE

8-17. The shooter must determine ***how*** to engage the threat with the weapon, on the current shot as well as subsequent shots. Following the direction of the team leader, the Soldier controls the rate of fire to deliver consistent, lethal, and precise fires against the threat.

SLOW SEMIAUTOMATIC FIRE

8-18. Slow semiautomatic fire is moderately paced at the discretion of the Soldier, typically used in a training environment or a secure defensive position at approximately 12 to 15 rounds per minute. All Soldiers learn the techniques of slow semiautomatic fire during their introduction to the service rifle during initial entry training. This type of firing provides the Soldier the most time to focus on the functional elements in the shot process and reinforces all previous training.

RAPID SEMIAUTOMATIC FIRE

8-19. Rapid semiautomatic fire is approximately 45 rounds per minute and is typically used for multiple targets or combat scenarios where the Soldier does not have overmatch of the threat. Soldiers should be well-trained in all aspects of slow semiautomatic firing before attempting any rapid semiautomatic fire training.

8-20. Those who display a lack of knowledge of employment skills should not advance to rapid semiautomatic fire training until these skills are learned and mastered.

AUTOMATIC OR BURST FIRE

8-21. Automatic or burst fire is when the Soldier is required to provide suppressive fires with accuracy, and the need for precise fires, although desired, is not as important. Automatic or burst fires drastically decrease the probability of hit due to the rapid succession of recoil impulses and the inability of the Soldier to maintain proper sight alignment and sight picture on the target.

8-22. Soldiers should be well-trained in all aspects of slow semiautomatic firing before attempting any automatic training.

FOLLOW-THROUGH

8-23. Follow-through is the continued mental and physical application of the functional elements of the shot process after the shot has been fired. The firer's head stays in contact with the stock, the firing eye remains open, the trigger finger holds the trigger back through recoil and then lets off enough to reset the trigger, and the body position and breathing remain steady.

8-24. Follow-through consists of all actions controlled by the shooter after the bullet leaves the muzzle. It is required to complete the shot process. These actions are executed in a general sequence:

- **Recoil management.** This includes the bolt carrier group recoiling completely and returning to battery.
- **Recoil recovery.** Returning to the same pre-shot position and reacquiring the sight picture. The shooter should have a good sight picture before and after the shot.
- **Trigger/Sear reset.** Once the ejection phase of the cycle of function is complete, the weapon initiates and completes the cocking phase. As part of the cocking phase, all mechanical components associated with the trigger, disconnect, and sear are reset. Any failures in the cocking phase indicate a weapon malfunction and require the shooter to take the appropriate action. The shooter maintains trigger finger placement and releases pressure on the trigger until the sear is reset, demonstrated by a metallic click. At this point the sear is reset and the trigger pre-staged for a subsequent or supplemental engagement if needed.
- **Sight picture adjustment.** Counteracting the physical changes in the sight picture caused by recoil impulses and returning the sight picture onto the target aiming point.
- **Engagement assessment.** Once the sight picture returns to the original point of aim, the firer confirms the strike of the round, assesses the target's state, and immediately selects one of the following courses of action:
  - **Subsequent engagement.** The target requires additional (subsequent) rounds to achieve the desired target effect. The shooter starts the pre-shot process.
  - **Supplemental engagement.** The shooter determines the desired target effect is achieved and another target may require servicing. The shooter starts the pre-shot process.
  - **Sector check.** All threats have been adequately serviced to the desired effect. The shooter then checks his sector of responsibility for additional threats as the tactical situation dictates. The unit's SOP will dictate any vocal announcements required during the post-shot sequence.
  - **Correct Malfunction.** If the firer determines during the follow-through that the weapon failed during one of the phases of the cycle of function, they make the appropriate announcement to their team and immediately execute corrective action.

MALFUNCTIONS

8-25. When any weapon fails to complete any phase of the cycle of function correctly, a malfunction has occurred. When a malfunction occurs, the Soldier's priority remains to defeat the target as quickly as possible. The malfunction, Soldier capability, and secondary weapon capability determine if, when, and how to transition to a secondary weapon system.

8-26. The Soldier controls which actions must be taken to ensure the target is defeated as quickly as possible based on secondary weapon availability and capability, and the level of threat presented by the range to target and its capability:

- **Secondary weapon can defeat the threat.** Soldier transitions to secondary weapon for the engagement. If no secondary weapon is available, announce their status to the small team, and move to a covered position to correct the malfunction.
- **Secondary weapon cannot defeat the threat**. Soldiers quickly move to a covered position, announce their status to the small team, and execute corrective action.
- **No secondary weapon.** Soldiers quickly move to a covered position, announce their status to the small team, and execute corrective action.

8-27. The end state of any of corrective action is a properly functioning weapon. Typically, the phase where the malfunction occurred within the cycle of function identifies the general problem that must be corrected. From a practical, combat perspective, malfunctions are recognized by their symptoms. Although some symptoms do not specifically identify a single point of failure, they provide the best indication on which corrective action to apply.

8-28. To overcome the malfunction, the Soldier must first avoid over analyzing the issue. The Soldier must train to execute corrective actions immediately without hesitation or investigation during combat conditions.

8-29. There are two general types of corrective action:

- **Immediate action** – simple, rapid actions or motions taken by the Soldier to correct basic disruptions in the cycle of function of the weapon. Immediate action is taken when a malfunction occurs such that the trigger is squeeze and the hammer falls with an audible "click."
- **Remedial action** – a skilled, technique that must be applied to a specific problem or issue with the weapon that will not be corrected by taking immediate action. Remedial action is taken when the cycle of function is interrupted where the trigger is squeezed and either has little resistance during the squeeze ("mush") or the trigger cannot be squeezed.

8-30. No single corrective action solution will resolve ***all*** or ***every*** malfunction. Soldiers need to understand what failed to occur, as well as any specific sounds or actions of the weapon in order to apply the appropriate correction measures.

8-31. Immediate action can correct rudimentary failures during the cycle of function:

- **Failure to fire** – is when a round is locked into the chamber, the weapon is ready to fire, the select switch is placed on SEMI or BURST / AUTO, and the trigger is squeezed, the hammer falls (audible click), and the weapon does not fire.
- **Failure to feed** – is when the bolt carrier assembly is expected to move return back into battery but ***is prevented from moving all the way forward***. A clear gap can be seen between the bolt carrier assembly and the forward edge of the ejection port. This failure may cause a stove pipe or a double feed (see below).
- **Failure to chamber** – when the round is being fed into the chamber, but the bolt carrier assembly does not fully seat forward, failing to chamber the round and lock the bolt locking lugs with the barrel extension's corresponding lugs.
- **Failure to extract** – when either automatically or manually, the extractor loses its grip on the cartridge case or the bolt seizes movement rearward during extraction that leaves the cartridge case partially removed or fully seated.
- **Failure to eject** – occurs when, either automatically or manually, a cartridge case is extracted from the chamber fully, but does not leave the upper receiver through the ejection port.

8-32. Remedial action requires the Soldier to quickly identify one of four issues and apply a specific technique to correct the malfunction. Remedial action is required to correct the following types of malfunctions or symptoms:

- **Immediate action fails to correct symptom** – when a malfunction occurred that initiated the Soldier to execute immediate action and multiple attempts failed to correct the malfunction. A minimum of two cycles of immediate action should have been completed; first, without a magazine change, and the second with a magazine change.
- **Stove pipe** – can occur when either a feeding cartridge or an expended cartridge case is pushed sideways during the cycle of function causing that casing to stop the forward movement of the bolt carrier assembly and lodge itself between the face of the bolt and the ejection port.
- **Double feed** – occurs when a round is chambered and not fired and a subsequent round is being fed without the chamber being clear.
- **Bolt override** – is when the bolt fails to push a new cartridge out of the magazine during feeding or chambering, causing the bolt to ride on top of the cartridge.
- **Charging handle impingement** – when a round becomes stuck between the bolt assembly and the charging handle where the charging handle is not in the forward, locked position.

8-33. Although there are other types of malfunctions or disruptions to the cycle of function, those listed above are the most common. Any other malfunction will require additional time to determine the true point of failure and an appropriate remedy.

Note. When malfunctions occur in combat, the Soldier must announce STOPPAGE or another similar term to their small unit, quickly move to a covered location, and correct the malfunction as rapidly as possible. If the threat is too close to the Soldier or friendly forces, and the Soldier has a secondary weapon, the Soldier should immediately transition to secondary to defeat the target prior to correcting the malfunction.

RULES FOR CORRECTING A MALFUNCTION

8-34. To clear a malfunction, the Soldier must—

- **Apply Rule #1.** Soldiers must remain coherent of their weapon and continue to treat their weapon as if it is loaded when correcting malfunctions.
- **Apply Rule #2.** Soldiers must ensure the weapon's orientation is appropriate for the tactical situation and not flag other friendly forces when correcting malfunctions.
- **Apply Rule #3.** Take the trigger finger off the trigger, keep it straight along the lower receiver placed outside of the trigger guard.
- **Do not attempt to place the weapon on SAFE** (unless otherwise noted). Most stoppages will not allow the weapon to be placed on safe because the sear has been released or the weapon is out of battery. Attempting to place the weapon on SAFE will waste time and potentially damage the weapon.
- **Treat the symptom.** Each problem will have its own specific symptoms. By reacting to what the weapon is "telling" the Soldier, they will be able to quickly correct the malfunction.
- **Maintain focus on the threat.** The Soldier must keep their head and eyes looking downrange at the threat, not at the weapon. If the initial corrective action fails to correct the malfunction, the Soldier must be able to quickly move to the next most probable corrective action.
- **Look last.** Do not look and analyze the weapon to determine the cause of the malfunction. Execute the drill that has the highest probability of correcting the malfunction.
- **Check the weapon.** Once the malfunction is clear and the threat is eliminated, deliberately check the weapon when in a covered location for any potential issues or contributing factors that caused the malfunction and correct them.

Perform Immediate Action

8-35. To perform immediate action, the Soldier instinctively:

- Hears the hammer fall with an audible "click."
- Taps the bottom of the magazine firmly.
- Rapidly pulls the charging handle and releases to extract / eject the previous cartridge and feed, chamber, and lock a new round.
- Reassess by continuing the shot process.

Note. If a malfunction continues to occur with the same symptoms, the Soldier will remove the magazine and insert a new loaded magazine, then repeat the steps above.

Perform Remedial Action

8-36. To perform remedial action, the Soldier must have a clear understanding of where the weapon failed during the cycle of function. Remedial action executed when one of the following conditions exist:

- Immediate action does not work after two attempts.
- The trigger refuses to be squeezed.
- The trigger feels like "mush" when squeezed.

8-37. When one of these three symptoms exist, the Soldier looks into the chamber area through the ejection port to quickly assess the type of malfunction. Once identified, the Soldier executes actions to "reduce" the symptom by removing the magazine and attempting to clear the weapon. Once complete, visually inspect the chamber area, bolt face, and charging handle. Then, complete the actions for the identified symptom:

- **Stove pipe** – Grasp case and attempt to remove, cycle weapon and attempt to fire. If this fails, pull charging handle to the rear while holding case.
- **Double-feed** - the Soldier must remove the magazine, clear the weapon, confirm the chamber area is clear, secure a new loaded magazine into the magazine well, and chamber and lock a round.
- **Bolt override** – Remove magazine. Pull charging handle as far rearward as possible. Strike charging handle forward. If this fails, pull charging handle to the rear a second time, use tool or finger to hold the bolt to the rear, sharply send charging handle forward.

CORRECTING MALFUNCTIONS

8-38. Figure 8-4 below provides a simple mental flow chart to rapidly overcome malfunctions experienced during the shot process.

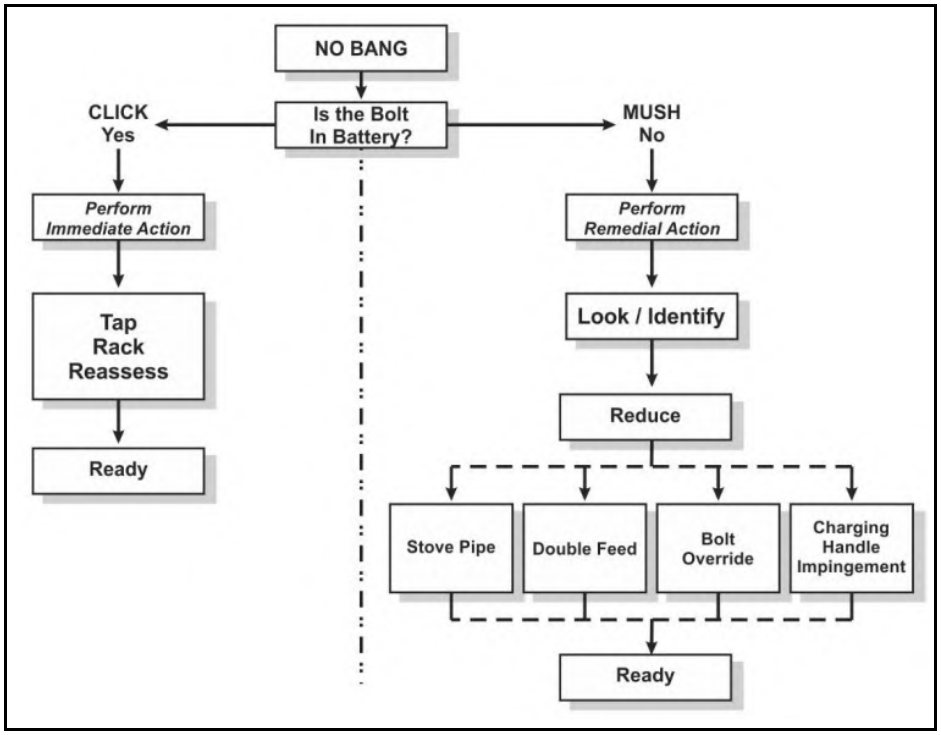

Figure 8-4. Malfunction corrective action flow chart

COOK-OFF

8-39. Rapid and continuous firing of several magazines in sequence without cooling, will severely elevate chamber temperatures. While unlikely this elevated temperature may cause a malfunction known as a "cook-off". A “cook-off” may occur while the round is locked in the chamber, due to excessive heating of the ammunition. Or the rapid exposure to the cooler air outside of the chamber, due in part to the change in pressure.

8-40. If the Soldier determines that he has a potential “cook-off” situation he should leave the weapon directed at the target, or in a known safe direction, and follow proper weapons handling procedures, until the barrel of the weapon has had time to cool. If the chambered round has not been locked in the chamber for 10 seconds, it should be ejected as quickly as possible. If the length of time is questionable or known to be longer than 10 seconds and it is tactically sound, the Soldier should follow the above procedures until the weapon is cooled. If it is necessary to remove the round before the weapon has time to cool, the Soldier should do so with care as the ejected round may detonate due to rapid cooling in open air.

WARNING

Ammunition “cook-off” is not likely in well maintained weapons used within normal training and combat parameters.

Soldiers and unit leadership need to consider the dangers of keeping rounds chambered in weapons that have elevated temperatures due to excessive firing. Or clearing ammunition that has the potential to cook-off when exposed to the cooler air outside of the chamber.

Exposure to the colder air outside of the chamber has the potential to cause the “cook-off” of ammunition. Keeping ammunition chambered in severely elevated temperatures also has the potential to cause the “cook-off” of ammunition.

Note. For more information about troubleshooting malfunctions and replacing components, see organizational and direct support maintenance publications and manuals.

Chapter 8

TRANSITION TO SECONDARY WEAPON

8-41. A secondary weapon, such as a pistol, is the most efficient way to engage a target at close quarters when the primary weapon has malfunctioned. The Soldier controls which actions must be taken to ensure the target is defeated as quickly as possible based on the threat presented.

8-42. The firer transitions by taking the secondary weapon from the HANG or HOLSTERED position to the READY UP position, reacquiring the target, and resuming the shot process as appropriate.

8-43. Refer to the appropriate secondary weapon's training publications for the specific procedures to complete the transition process.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE STATE SPORTSMEN'S ASSOCIATION, INC; BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; DELAWARE RIFLE AND PISTOL CLUB; DELAWARE ASSOCIATION OF FEDERAL FIREARMS LICENSEES; MADONNA M. NEDZA; CECIL CURTIS CLEMENTS; JAMES E. HOSFELT, JR; BRUCE C. SMITH; VICKIE LYNN PRICKETT; and FRANK M. NEDZA,

Plaintiffs,

v.

DELAWARE DEPARTMENT OF SAFETY AND HOMELAND SECURITY; NATHANIAL MCQUEEN JR. in his official capacity as Cabinet Secretary, Delaware Department of Safety and Homeland Security; and COL. MELISSA ZEBLEY in her official capacity as superintendent of the Delaware State Police,

Defendants.

C.A. No. 1:22-cv-00951-RGA
(Consolidated)

GABRIEL GRAY; WILLIAM TAYLOR; DJJAMS LLC; FIREARMS POLICY COALITION, INC. and SECOND AMENDMENT FOUNDATION,

Plaintiffs,

v.

KATHY JENNINGS, Attorney General of Delaware,

Defendant.

PLAINTIFFS' JOINT REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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Dated: February 13, 2023

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INTRODUCTION

Following the Supreme Court's seminal decision in *New York State Rifle & Pistol Association, Inc. v. Bruen,* 142 S. Ct. 2111 (2022), this Court must determine whether the arms and their components banned by Delaware are "in common use" for lawful purposes and, therefore, protected by the Second Amendment's "unqualified command."[1] 142 S. Ct. at 2126, 2128. The State cannot meet its heavy burden to prove otherwise. Indeed, likely realizing that it cannot prevail in defiance of controlling law clarified in *Bruen*, it attempts to complicate this case and muddy the waters with irrelevant evidence and by playing semantic games with pre-*Bruen* precedent. "[T]he Second Amendment protects the possession and use of weapons that are 'in common use….' " 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 627). The arms and components thereof banned by Delaware are indisputably covered by this command. Plaintiffs are entitled to an injunction preventing the enforcement of unconstitutional restrictions imposed by HB 450 and SS 1 for SB 6.

[1] The complete standard mandated by the Supreme Court requires: (1) determining, through textual analysis, that the Second Amendment protected an individual right to armed self-defense; and (2) relying on the historical understanding of the Amendment to demark the limits on the exercise of that right. See *Heller*, 554 U.S. 570. Once the first test is met, it becomes the burden of the State to demonstrate that the burdensome restrictions upon the right to own common arms are consistent with "this Nation's historical tradition" so as to fall outside of the Second Amendment's "unqualified command." *Bruen*, 142 S. Ct. at 2126 (*citing Konigsberg v. State Bar of Cal.,* 366 U.S. 36, 50 n.10 (1961)). The *Bruen* Court further held that "[t] he Second Amendment protects the possession and use of weapons that are "'in common use at the time.'" *Id*. at 2128. Therefore, such weapons cannot and do not fall outside of the Second Amendment's "unqualified command." In the context of bans on entire categories of arms, the Supreme Court has already done the relevant historical analysis and has held that despite "the historical tradition of prohibiting the carrying of dangerous and unusual weapons," firearms cannot be banned if they are "in common use" today. *Id*. (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

ARGUMENT

I. So-Called "Assault Weapons" Are Protected by the Second Amendment

Plaintiffs only have to show that the restricted arms are "bearable arms" and that they are in common use today for lawful purposes. Once they make that showing, the arms are presumptively protected under the Second Amendment. Semiautomatic arms such as those proscribed under Delaware's Ban "traditionally have been widely accepted as lawful possessions." *See Staples v. United States*, 511 U.S. 600, 612 (1994) (so categorizing an AR-15 semiautomatic rifle); *see also Heller v. Dist. of Columbia,* 670 F.3d 1244, 1269-70 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles."). It is beyond dispute that the firearms banned by Delaware are bearable arms that are in common use today for lawful purposes by law-abiding persons, and that they are therefore plainly protected by the Second Amendment. In an effort to avoid that inescapable conclusion, the State engages in some sleight-of-hand with Supreme Court precedent.

A. The Arms at Issue Are in Common Use for Lawful Purposes

First, the State attempts to steer the Court toward the incorrect conclusion that arms are only protected by the Second Amendment if they are in "common use for self-defense" and that, because the State and its declarants contend that, in their view, an AR-15 is not ideal for self-defense, the AR-15 and its ilk are not protected. But that materially misstates the relevant inquiry.[2] The U.S. Supreme Court has never set forth such a requirement, although the State's brief nonetheless includes carefully selected quotations to suggest that conclusion. Rather, in order to

[2] Of course, this argument also ignores the much broader right to use firearms beyond self-defense recognized in the Delaware Constitution.

be presumptively protected by the Second Amendment, arms need only to be in common use for "lawful purposes," of which self-defense is but one of many.

As the Supreme Court has said, "We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for *lawful purposes*, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right…." *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (emphasis added). "Miller said, as we have explained, that 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." *Id*. at 627 (emphasis added) (internal citation and quotations omitted). Moreover, following the *Heller* decision in 2008, the D.C. Circuit, mistakenly applying intermediate scrutiny under the since-rejected two-step approach, nonetheless stated: "We are not aware of evidence that prohibitions on either semi-automatic rifles or large-capacity magazines are longstanding and thereby deserving of a presumption of validity.… Of course, the [U.S. Supreme] Court also said the *Second Amendment protects the right to keep and bear arms for other lawful purposes, such as hunting*, but self-defense is the core lawful purpose protected." *Heller v. District of Columbia*, 670 F.3d 1244, 1260 (D.C. Cir. 2011) (emphasis added) (*citing Heller*, 554 U.S. at 630). "As to bans on categories of guns, the Heller Court stated that the government may ban classes of guns that have been banned in our historical tradition — namely, guns that are dangerous and unusual and thus are not the sorts of lawful weapons that citizens typically possess at home." *Id*. at 1271-1272 (Kavanaugh, J., dissenting). Naturally, the *Heller* and *Bruen* decisions repeatedly referenced self-defense, both because that is the "core" of the Second Amendment right and because carrying handguns for that purpose was at issue in those cases (and, of course, a concealed handgun is not generally carried for purposes of

hunting or recreation), but the Supreme Court has certainly never suggested that self-defense is the *only* lawful purpose protected by the Second Amendment.[3] In fact, as demonstrated above, it has clearly recognized exactly the opposite.

Further, the State's novel position concerning self-defense as the only lawful purpose protected by the Second Amendment immediately falls to pieces when applied to the broader universe of lawfully owned firearms. There are many collectible antique firearms, certain hunting or competition target shooting rifles, and even some handguns that are virtually useless or at least relatively impractical for use as self-defense weapons, yet their protection under the Second Amendment is not at all in question. The Supreme Court plainly did not envision that lower courts in the wake of *Heller* and *Bruen* would decide on a case-by-case basis whether individual firearms, in those lower courts' views, were "legitimate" or "ideal" self-defense weapons or not. Instead, bearable arms are presumptively protected so long as they are in common use for any lawful purpose.[4]

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[3] Notably, the Delaware Constitution at Article 1, § 20, expressly protects the right to bear arms for hunting and recreation, as well as defense of one's family—far beyond simple self-defense.

[4] *Heller* left no doubt that the people choose what is useful for self-defense and whatever reason they have for it is good enough:

> "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629.

B. Bearable Arms May Not be Banned Unless They Are Both Dangerous and Unusual

In another effort to rewrite applicable Second Amendment precedent, the State takes another curious and novel position. Rather than accepting the plain language of the Supreme Court's (and other courts') repeated references over the years to "dangerous *and* unusual" weapons, the State urges this Court to instead view that language as some sort of obscure semantic anomaly which results in the "unusual" part of the test having no meaning at all. In doing so, the State ignores the great weight of authority to the contrary while citing no case law supporting its newly invented, subjective, and completely unworkable "unusually dangerous" interpretation.

There is no tradition of banning dangerous arms – just a tradition of banning "*dangerous and unusual*" arms. *See Bruen*, 142 S. Ct. at 2128 (emphasis added). Indeed, all arms are dangerous or else they would not be arms; a weapon that poses no danger is useless. Further, "that an item is 'dangerous,' in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent." *Staples*, 511 U.S. at 611. In 2016, Justice Alito wrote, concurring with the majority: "As the per *curiam* opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is both dangerous and unusual. Because the Court rejects the lower court's conclusion that stun guns are unusual, it does not need to consider the lower court's conclusion that they are also dangerous." *Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring) (emphasis in original). If the Supreme Court had intended lower courts to consider whether various arms were dangerous or unusual and uphold bans based solely on one or the other, it would have said so. It did not.

Undeterred, the State asserts that the banned arms in this case are "unusually dangerous" and may be banned on that basis, boldly pronouncing that the banned arms are not subject to Second Amendment protection simply because they allegedly pose a special threat to law

enforcement[5] and the general public. First, this assertion seeks subtly to prod the Court back into the forbidden territory of interest-balancing. The fact that the legislature may be particularly concerned with the potential dangerousness of the banned arms is immaterial and entitled to no deference from this Court under *Bruen*, and the State continues to ignore the "and unusual" part of the conjunctive test. Second, what do they mean by "unusually dangerous"--compared to what? The only reasonable comparison is with arms in common use for lawful purposes, but these arms are in common use for lawful purposes and cannot be relatively dangerous in comparison with themselves. Further, while it is beside the point, the State and its declarants casually ignore the numerous non-banned firearms that are just as or even more "dangerous" in the sense that they fire projectiles with greater kinetic energy and are capable of causing relatively more devastating wounds. The notion that the banned arms are "unusually dangerous," even if that were the test (it is not), is fiction. Notably, substantially more people are killed each year in the U.S. with bare hands, knives, or blunt objects (individually, not collectively) than are killed by rifles of *any* kind. See Federal Bureau of Investigation (2019), *Expanded Homicide Data Table 8, Murder Victims by Weapon, 2015-2019*, available at https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8.xls (last accessed February 7, 2023).

Moreover, as Justice Alito has explained: "[T]he court below held that a weapon is 'dangerous per se' if it is 'designed and constructed to produce death or great bodily harm' and 'for the purpose of bodily assault or defense.' That test…cannot be used to identify arms that fall outside the Second Amendment. …[T]he relative dangerousness of a weapon is irrelevant when

[5] The Supreme Court rejected this argument in the Fourth Amendment context. *See*, *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) ("The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.")

the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano*, 577 U.S. at 418 (Alito, J. concurring); *see also Bruen*, 142 S. Ct. at 2143 ("the Second Amendment protects only the carrying of weapons that are those 'in common use at the time,'[6] as opposed to those that 'are highly unusual in society at large.' "); *Jones v. Bonta,* 34 F.4th 704, 716 (9th Cir. 2022) *vacated on other grounds,* 47 F.4th 1124 (9th Cir. 2022) ("Here, the district court held that both long-guns and semi-automatic centerfire rifles are commonly used by law abiding citizens for lawful purposes such as hunting, target practice, and self-defense, and thus that they are not dangerous and unusual weapons under *Helle*r, 554 U.S. at 627…. We agree: long guns and semiautomatic rifles are not dangerous and unusual weapons.") (internal quotations and citations omitted); *Friedman v. City of Highland Park*, 784 F.3d 406, 415 n.2 (7th Cir. 2015) ("All weapons are presumably dangerous. To say that a weapon is unusual is to say that it is not commonly used for lawful purposes."). *Heller's* distinction, reiterated by *Bruen*, between protected weapons "in common use at the time" and those that are "dangerous and unusual" loses all meaning if a state can ban a weapon in common use merely because the legislature concludes that the weapon is potentially more dangerous relative to some other weapon.

The State briefly points to a purported tradition of banning "dangerous weapons," identifying laws targeting clubs, Bowie knives, sword canes, daggers, Tommy guns, etc., which were perceived to be weapons of criminals and gangsters, as historical restrictions analogous to its "assault weapons" ban. Notably, the State has not identified a single law that would permit a State to outlaw possession of a "dangerous" weapon that was among the most popular contemporary

[6] By this, the Supreme Court means the Second Amendment protects the right to own weapons that are in common use for lawful purposes today. *See id*. ("Thus, even if these colonial laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.").

choices of citizens lawfully seeking to exercise their fundamental Second Amendment rights. None of the laws cited by the State are "relevantly similar" under *Bruen. See Bruen*, 142 S. Ct. at 2132 ("…determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.' "). Further, while the State appeals to emotion concerning the issues "the Statutes seek to address" – including declarations needlessly recounting tales of gore and of the exceedingly rare instances in which "assault weapons" are used to perpetrate mass shootings – these considerations implicate the sort of interest-balancing, means-end analysis that the Supreme Court has directed this Court not to undertake. [7]

C. "Common Use" Does Not Require the Arms to be Actually Fired or Actively Employed in Self-Defense

The State contends, without citing any authority on point, that "the fact that a weapon is commonly owned, used, or sold, by itself, is insufficient to prevent its regulation." This is an unusual assertion given that the Supreme Court has repeatedly and unequivocally stated that weapons in common use for lawful purposes are protected. *See*, *e.g., Bruen*, 142 S. Ct. at 2128 ("the Second Amendment protects the possession and use of weapons that are 'in common use at the time.' " (quoting *Heller*, 554 U.S. at 627)). The Second Amendment protects the rights of Americans to "keep and bear Arms." By its plain terms then, it contemplates ways of "using" firearms other than just shooting them. In construing the word "bear," *Heller* explained the term meant "being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998)

[7] Pages 17-23 of the State's Answering Brief consist of nothing but fodder for improper interest-balancing, citing in numerous instances to news articles, and could safely be ignored entirely by the Court. They also rely on the faulty logic of appealing to emotion instead of legal reasoning based on case law.

(Ginsburg, J., dissenting)) (emphasis added). Similarly, in *Bruen* the Court explained that "[a]lthough individuals often 'keep' firearms in their home, a*t the ready for self-defense*, most do not 'bear' (i.e., carry) them in the home beyond moments of actual confrontation. To confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative protections." *Bruen*, 142 S. Ct. at 2134–35 (emphasis added). Importantly, the Court in *Heller* recognized that the Second Amendment protects those firearms "typically *possessed* by law-abiding citizens for lawful purposes…." 554 U.S. at 625 (emphasis added). The Supreme Court has repeatedly construed "common use" broadly to include possession (i.e., to "keep").

Other notable opinions also make clear that possession is indeed sufficient. In *Caetano*, Justice Alito did not ask how often stun guns were actually discharged to prevent an attack. Instead, he explained that the "relevant statistic is that hundreds of thousands of Tasers and stun guns have been *sold* to private citizens, who it appears may lawfully possess them in 45 states." 577 U.S. at 420 (Alito, J., concurring) (emphasis added). And when analyzing an "assault weapons" ban, Justice Thomas said the "ban is thus highly suspect because it broadly prohibits common semiautomatic firearms used for lawful purposes. Roughly five million Americans own AR-style semiautomatic rifles. The vast majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting." *Friedman v. City of Highland Park*, 577 U.S. 1039, 1042 (2015) (Thomas, J., dissenting from the denial of certiorari) (emphasis added). In both cases the touchstone for "common use" was ownership, and the sale of approximately 200,000 stun guns was enough for them to be considered in common use by Justice Alito in *Caetano*. Tens of millions of so-called "assault weapons" are presently owned by millions of Americans. *See, e.g.,* WILLIAM ENGLISH, 2021 National Firearms Survey: *Updated Analysis Including Types of Firearms Owned* at 1 (May 13, 2022), https://bit.ly/3yPfoHw (finding in a

recent survey of gun owners that approximately 24.6 million Americans have owned up to 44 million AR-15 or similar rifles); NAT'L SHOOTING SPORTS FOUND., INC., *Firearms Retailer Survey Report* (2013) at 11 (even ten years ago, one out of every five firearms sold in the US was a rifle of the type banned by Delaware).

Additionally, when confronted with a similar question in the pre-*Bruen* context during his tenure on the D.C. Circuit Court of Appeals, now-Justice Kavanaugh stated: "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, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market." *Heller*, 670 F.3d at 1261 (emphasis added); see *also Kolbe v. Hogan*, 849 F.3d 114, 153 (4th Cir. 2017) (Traxler, J., dissenting) ("Between 1990 and 2012, more than 8 million AR- and AK- platform semiautomatic rifles alone were manufactured in or imported into the United States. In 2012, semiautomatic sporting rifles accounted for twenty percent of all retail firearms sales. In fact, in 2012, the number of AR- and AK- style weapons manufactured and imported into the United States was more than double the number of the most commonly sold vehicle in the U.S., the Ford F-150.");[8] *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015) ("This much is clear: Americans own millions of the firearms that the challenged legislation prohibits. . . . Even accepting the most conservative estimates cited by the parties and by amici, the assault weapons and large-capacity magazines at issue are 'in common use' as that term was used in *Heller*."); *Colorado Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo.

[8] These firearms, now banned by Delaware, are no more a "niche product," as the State suggests, than the most popular vehicle sold in the United States over the past few decades is a niche vehicle.

2014) (concluding that statute "affects the use of firearms that are both widespread and commonly used for self-defense," in view of the fact that "lawfully owned semiautomatic firearms using a magazine with the capacity of greater than 15 rounds number in the tens of millions"), *vacated in part on other grounds*, 823 F.3d 537 (10th Cir. 2016).

Thus, it remains settled that possession and ownership are indeed sufficient, and the firearms now banned by Delaware are plainly in common use for lawful purposes today. When a substantial number of law-abiding citizens own a type of firearm with the intent to use it for lawful purposes should the need or opportunity arise, then such firearms are in "common use" within the meaning of the Second Amendment and cannot be banned. The Supreme Court has told us in plain terms what the law is, and the majority opinion of the justices of the Court would surely have addressed the possibility of the State's highly improbable doomsday scenario if it were of any real concern.

D. Historical Regulation of Firearms in Common Use for Lawful Purposes Today is Immaterial

As discussed above, *Heller* and *Bruen* make clear that arms in common use for lawful purposes today are protected by the Second Amendment's "unqualified command" and cannot be banned. Although the State has not offered any relevant historical analogues for its ban on so-called "assault weapons," it would not matter if they had. When a category of arms is in common use today, historical regulations are immaterial. *Bruen*, 142 S. Ct. at 2143 ("Thus, even if these colonial laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.").

II. So-Called "Large-Capacity Magazines" Are Protected by the Second Amendment

The State employs virtually the same flawed approach to opposing Plaintiffs' challenge to SS 1 for SB 6's so-called "large-capacity magazine" ban as they do to the challenge to HB 450, often treating SS 1 for SB 6 as an afterthought in their opposition. As noted, the State has introduced five separate voluminous expert declarations that are nothing more than an irrelevant effort to obfuscate the required basic analysis to decide this issue that the United States Supreme Court established first in *Heller* and now in *Bruen*.

The Supreme Court's standard requires: (1) determining, through textual analysis, that the Second Amendment protected an individual right to armed self-defense; and (2) relying on the historical understanding of the Amendment to demark the limits on the exercise of that right. See *Heller*, 554 U.S. 570. Once the first test is met, it becomes the burden of the State to demonstrate that the burdensome restrictions upon the right to own common arms are consistent with "this Nation's historical tradition" so as to fall outside of the Second Amendment's "unqualified command." *Bruen*, 142 S. Ct. at 2126 (*citing Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)). The State has failed to meet its burden. Regardless of the immaterial and numerous declarations they provide, the State cannot and has not demonstrated that common ammunition magazines are not protected by the Second Amendment, and they cannot and have not demonstrated that the burdens of SS 1 for SB 6 are consistent with this Nation's historical tradition of regulation of magazines.

A. Ammunition Magazines are Common Arms Protected by the Second Amendment

Perhaps the only manner in which the State's opposition to the challenge to SS 1 for SB 6 differs from its opposition to the challenge of HB 450 is via its preposterous and unfounded argument that ammunition magazines, and even ammunition itself, are not included within the

constitutional concept of "arms" and are thus not protected by the Second Amendment. This distorted argument defies textual analysis of the Second Amendment, precedent, and basic logic. The concept that ammunition or ammunition magazines, as components of arms, are not included within the constitutional protection of arms is nonsensical at best and disingenuous at worst.

Judicial support for the State's position is found only in a single, unexplainable, outlier decision from the District of Rhode Island, *Ocean State Tactical, LLC v. State of Rhode Island*, 2022 WL 17721175 (D.R.I. Dec. 14, 2022). The State conveniently ignores all other precedent, including Supreme Court precedent that contradicts their position. Constitutional rights "implicitly protect those closely related acts necessary to their exercise." *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring in the judgment).

Importantly, the Third Circuit has already held, before *Bruen*, that ammunition magazines are arms, "[b]ecause ammunition magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018) ("ANJRPC").[9] The Ninth Circuit has also previously recognized that "caselaw supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable." *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015). Despite citation to a single outlier, trial court ruling, federal appellate courts have often recognized the basic, logical fact that the Second Amendment's right

[9] The Third Circuit's ruling that ammunition magazines are arms in common use survived remand in *ANJRPC*, as that matter was remanded so that the state could establish its historical record in the district court. This remand does not affect the finding that ammunition magazines were arms. *See, e.g., Cowgill v. Raymark Indus., Inc.*, 832 F.2d 798, 802 (3d Cir. 1987).

to bear arms protects the components of those arms that are required to render them operable. Therefore, ammunition magazines are protected under the Second Amendment.

At the textual level, this semantic smokescreen attempts to isolate a certain definition of "arms" and divorce it completely from the remainder of the text of the Second Amendment and the full scope of the right it protects. The Second Amendment prescribes that the right of the people to keep and bear arms shall not be infringed. The dictionary publisher, Noah Webster, who the State and its expert Dennis Barron largely eschew despite its Founders' Era origins, included within the definition of "keep" "[t]o have in custody for security or preservation…" *Webster, An American Dictionary of the English Language* (1828). In turn, Webster defines "security" as "protection; effectual defense or safety from danger of any kind…" *Id*. (emphasis added).[10] Exactly what "effectual defense" do Defendants suggest Delawareans will be afforded by way of common arms stripped of ammunition, magazines, and other essential component parts? Webster's definition of infringe is perhaps even more essential as it includes "[t]o destroy or hinder; as, to infringe efficacy." *Id.* Rendering a common arm incapable of firing is a quintessential example of hindrance and/or infringement of efficacy of such an arm.[11]

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[10] When the Constitution was being debated, Noah Webster himself asserted that the people were sufficiently armed to defeat any standing army that could be raised, implying that they had similar arms including ammunition. Noah Webster, *An Examination of the Leading Principles of the Federal Constitution* (Philadelphia: Prichard & Hall, 1787), 43.

[11] There are, no doubt, countless Founding Era primary sources that can illustrate the folly of isolating a single definition of "arm" out of context in the manner the State has here. One such example comes from founder George Mason, author of the Virginia Declaration of Rights, the first to be adopted by a colony in convention on June 12, 1776. Virginia's Declaration stated that "a well regulated Militia, composed of the Body of the People, trained to Arms, is the proper, natural and safe Defense of a free State…" Va. Declaration of Rights, Art. I (1776). A year earlier, Mason had helped George Washington organize the Fairfax Independent Militia Company to counter the Royal Militia. Its members pledged to "constantly keep by us" a firelock, **six pounds of gunpowder, and twenty pounds of lead.** 1 *George Mason, The Papers of George Mason, Robert Rutland ed*., 210-211 (Chapel Hill, N.C.: University of North Carolina Press, 1970) (emphasis added)

The State's argument is contrary to the plain text of the Second Amendment because they suggest that the Second Amendment is only required to protect the right to bear an inoperable arm. Just as the government would be prevented from banning the ink used to print newspapers to avoid a First Amendment challenge, banning triggers, barrels, magazines, ammunition, or any other component integral to an operable firearm cannot be allowed to infringe upon Second Amendment rights. The State likens a magazine to a "frying pan" absent its connection to what they consider to be an arm, but an arm itself could just as easily be likened to a frying pan without the ammunition and magazines necessary to make that arm operable.

B. Ammunition Magazines Capable of Holding Seventeen or More Rounds of Ammunition are in Common Use for Lawful Purposes

The State's opposition gives remarkably little attention to the critical issue of the common use of so-called "large-capacity" magazines capable of holding seventeen rounds or more. What little time it does spend on common use is devoted to addressing so-called "assault weapons" under a standard invented from whole cloth, addressed previously herein, and contrary to numerous precedents and plain facts outlined in cases such as *Heller*, 670 F.3d at 1261; *Kolbe*, 849 F.3d 114 (Traxler, J., dissenting), and *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255.

The State's silence on this issue as to ammunition magazines is fatal to carrying its ample burden of proof. It is fatal, first, because "common use" is the critical component of the analysis under *Heller* and *Bruen*. Drawing from historical tradition, the Supreme Court has made explicit that the Second Amendment protects the carrying of weapons "in common use at the time." *Bruen*, 142 S. Ct. at 2143; *see also Heller*, 554 U.S. at 573. As previously stated, by this, the Supreme Court means the Second Amendment protects the right to own weapons that are in common use *for lawful purposes today*. *See id.* ("Thus, even if these colonial laws prohibited the carrying of

handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today."). This silence is also fatal because when the Government restricts constitutionally protected conduct, "the Government bears the burden of proving the constitutionality of its actions." *Id*. at 2130 (citations omitted). The State has abdicated its core responsibility to meet its burden in response to Plaintiffs' challenge.

Despite this outcome-determinative failure, Plaintiffs still cite to public sources that confirm that the magazines at issue are undoubtedly in common use for lawful purposes today. There are currently tens of millions of rifle magazines that are lawfully possessed in the United States with capacities of more than seventeen rounds. The most popular rifle in American history, and to this day, is the AR-15 platform, a semiautomatic rifle with standard magazines of 20 or 30 rounds. Springfield Armory also introduced the M1A semi-automatic rifle in 1974, with a 20-round detachable box magazine. The next year, the Ruger Mini-14 was introduced, with manufacturer-supplied standard 5-, 10-, or 20-round detachable magazines. 2014 Standard Catalog of Firearms, 1102 (2014). Both the M1A and the Mini-14 are very popular to this day. Further, data from the firearm industry trade association indicates that 52% of modern sporting rifle magazines in the country have a capacity of 30 rounds. *See NSSF, Modern Sporting Rifle Comprehensive Consumer Report,* available at https://bit.ly/3GLmErS (last accessed Dec. 21, 2022). This data also does not even account for the fact that many popular magazines have variable capacities and that the existence of this variability means that common arms that come equipped with standard-capacity magazines of 17 rounds of ammunition or fewer may still be banned under SS 1 for SB 6. It bears repeating that all of the data provided above stands in the absence of any

countervailing data to the contrary, despite the State's burden to establish the constitutionality of its actions.[12]

In the absence of any true "common use" analysis, the State does contend, without citing any authority on point, that "the fact that a weapon is commonly owned, used, or sold, by itself, is insufficient to prevent its regulation." The core of this faulty argument is their unsupported assertion that "common use" does not refer to possession, and instead refers to the frequency and necessity with which an arm is fired in self-defense. In other words, the State believes that the standard for "common use" should be how necessary the State deems such firing. As previously discussed, this position has been directly and repeatedly rejected by the Supreme Court in *Heller*, *Caetano*, and *Bruen*. It is the People's business and right to determine what common arms they require, not the *Government's. See, e.g., Heller*, 554 U.S. at 629 (emphasis added) ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid;") *see also Caetano*, 577 U.S. at 420 (Alito, J., concurring) (emphasis added) (the "*relevant statistic* is that hundreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 states.").

C. The State Provides No Historic Analogue for SS 1 for SB 6

As explained above, the "common use" test is the historical analysis called for in this case. Therefore, it is unnecessary to even consider the State's proffered historical analogues. With that

[12] As with HB 450, Defendants also attempt to defend SS 1 for SB 6 on the grounds of the purported dangerousness of so-called "large-capacity magazines." Here again, that defense is toothless in the absence of evidence that the banned magazines are also "unusual." *See Caetano*, 577 U.S. at 417 (Alito, J., concurring) (emphasis in original) ("As the *per curiam* opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual. Because the Court rejects the lower court's conclusion that stun guns are unusual, it does not need to consider the lower court's conclusion that they are also dangerous.").

said, to the extent they are considered, they are unconvincing. With respect to SS 1 for SB 6, the State provides only a single table of irrelevant early 20th Century regulations regarding magazine capacity. Yet again, the State eschews the plain holding of the Supreme Court in offering this as a purported historical analogue.

In *Bruen*, the Supreme Court declined to entertain either late 19th of 20th Century faux-analogues, commenting, "[a]s we suggested in *Heller*, however, late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 142 S. Ct. at 2154 (citations omitted). The *Bruen* Court further noted, "[w]e will not address any of the 20th-century historical evidence brought to bear by respondents or their amici. As with their late-19th-century evidence, the 20th-century evidence presented by respondents and their amici does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id*. at 2154 n.28. In contrast, Plaintiffs' Complaints and Opening Briefs provide ample examples of the existence of multi-shot ammunition magazines at critical moments in the Nation's *relevant* history, and have highlighted the corresponding absence of regulation of such magazines.[13] Further, in this purported historical analysis, for the first time, the State attempts to engage in true "common use" analysis, arguing that such multi-shot arms were not "in common use" in the 18th and 19th centuries. They miss the mark. The key point is not whether such multi-shot arms were in common use at the time of the Founding; the key point is that they are in common use today. The State's argument on this point is one that *Heller* called borderline frivolous. *Heller*, 554 U.S. at 582 ("Some have made the argument, bordering on the

[13] At around the time that the Second Amendment was being ratified, the state of the art for multi-shot guns was the Girandoni air rifle, with a 20 or 22-shot magazine capacity. For example, Meriwether Lewis carried one on the Lewis & Clark expedition. Jim Garry, *Weapons of the Lewis & Clark Expedition* 91-103 (2012).

frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way."). They are certainly in common use for lawful purposes today, and the State again fails to meet its burden to demonstrate that the restrictions imposed upon the right to own common arms now infringed by SS 1 for SB 6 are consistent with "this Nation's historical tradition" so as to fall outside of the Second Amendment's "unqualified command." *Bruen*, 142 S. Ct. at 2126 (*citing Konigsberg*, 366 U.S. at 50 n.10).

III. HB 450 and SS 1 for SB 6 Violate Article I, § 20 of the Delaware Constitution

The State advances the shocking, untenable position that somehow the Delaware Constitution, contrary to recent interpretations by the Delaware Supreme Court, affords fewer fundamental rights than the United States Constitution--and that this Court should therefore ignore *Heller* and *Bruen*. The State's argument that the intermediate scrutiny test or a strict scrutiny test should continue to apply in this case is both uninformed, contrary to controlling authority, and demonstrates a lack of familiarity with Delaware Supreme Court decisions on this topic.

First, the *Bruen* Court held that intermediate scrutiny is one step too many and expressly rejected the use of that test in Second Amendment cases that had been applied by the Court of Appeals for many circuits. 142 S. Ct. at 2127. Next, the State ignores that Article I, Section 20 of the Delaware Constitution expressly articulates much broader rights than the more limited scope of the right to bear arms contained in the Second Amendment. *See Doe v. Wilmington Housing Authority*, 88 A.3d 654, 665 (Del. 2014); *see also Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 644 (Del. 2017) ("…Section 20 protects the right to bear arms outside the home. Importantly, just as we found in *Doe* that the specific enumeration of 'self and family' in addition to the home provides an independent right to bear arms outside the home (and not just in it), the separation of 'defense of self and family' in the text of Section 20 creates a different right from

the right to bear arms 'for hunting and recreational use,' which is a separate clause of the provision and permitted under the Regulations in limited circumstances.").

In addition, and unabashedly, the State ignores the plain holding of the Delaware Supreme Court that "the Delaware Constitution may provide 'broader or additional rights' than the federal constitution, which provides a 'floor' or baseline rights." 88 A.3d at 642.[14]

Bruen announced a test that does not permit any levels of scrutiny—and specifically rejected intermediate scrutiny as a test in Second Amendment cases. It makes no sense, therefore, to suggest that the Delaware Constitution, which provides more rights than the Second Amendment, should be interpreted under a more restrictive standard of review that provides fewer rights than the Second Amendment—based on a test that the U.S. Supreme Court expressly rejected because it would provide fewer rights than even the Second Amendment affords.

The State also ignores that even prior to *Bruen*, the Delaware Supreme Court foresaw the forthcoming *Bruen* clarification of *Heller* when it stated that " 'complete prohibition[s]' of Second Amendment rights are automatically invalid and need not be subjected to any tier of scrutiny." 176 A.3d at 653. The State also conveniently ignores that *Bridgeville* endorsed the Seventh Circuit's ruling in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), that "[b]oth *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right . . . are categorically unconstitutional." *Id.* at 654. (quoting *Ezell*, 651 F.3d at 703). The State fails to meet its burden of demonstrating that the magazine ban passes muster under either Federal or Delaware law.

[14] In its holding, *Bridgeville* cited former Justice Holland's book, *The Delaware State Constitution* 36 (2d ed. 2017), which states, "[t]he provisions in the federal Bill of Rights set only a minimum level of protection." That is, Delaware cannot provide fewer rights than what the federal constitution provides, but can--and does--provide greater rights.

IV. Plaintiffs Will Suffer Irreparable Harm in the Absence of a Preliminary Injunction

The State argues that (1) a four-month delay between enactment of HB 450 and SS 1 for SB 6 should weigh heavily against granting an injunction; and (2) that deprivation of a fundamental constitutional right, as exists here, is not itself sufficient to demonstrate irreparable harm so as to favor an injunction. It is wrong on both counts. The argument for delay is supported only by citation to a patent dispute in which the party seeking the injunction delayed for over three years from the date of alleged injury before moving for an injunction and in which additional factors weighed against the existence of irreparable harm. *See Chestnut Hill Sound, Inc. v. Apple Inc.*, 2015 U.S. Dist. LEXIS 150715, at *12 (D. Del. Nov. 6, 2015). The decision which *Chestnut Hill Sound, Inc.* relied on, *High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.,* 49 F.3d 1551, 1557 (Fed. Cir. 1995), also a patent case, involved both a 17-month delay and a determination from the Court that significant additional factors weighed against an injunction, such as evidence of the injunction seeker's inactivity in the market, its willingness to grant a license under its patent to the defendant in the matter, the absence of any indication that money damages would be unavailable to remedy any loss suffered, and the absence of any suggestion as to why relief pendente lite was needed. 49 F.3d at 1557.

The cases relied upon by the State bear no similarity to this matter. The State provides no authority for the proposition that a four-month "delay" between enactment of the comprehensive legislation and filing qualifies as a delay that weighs at all against irreparable harm and granting an injunction.

The State also entirely ignores that Plaintiffs promptly sought injunctive relief prior to the announced effective date--made public several months after the challenged legislation was passed--of the State's first ammunition magazine "buy-back" event. Even after enactment of HB 450 and SS 1 for SB 6 the "buy-back" program, scheduled dates of "buy-back" events, and the terms and

procedures of the "buy-back" program were not immediately disclosed by the State. While the mere enactment of HB 450 and SS 1 for SB 6 represented a deprivation of the fundamental rights of Delawareans on their own, the "buy-back" program--announced months after the enactment of the challenged statutes--and the terms and procedures under which they were enforced represented the first tangible representation of the State's intent to coerce Plaintiffs and other law-abiding Delawareans into surrendering their commonly used arms under threat of prosecution.

In consideration of the State's own delay and often veiled roll-out of enforcement of HB 450 and SS 1 for SB 6, the Plaintiffs moved swiftly to protect their fundamental Second Amendment and Article I § 20 rights.

Next, the State cherry-picks fragmented quotations from inapposite decisions to argue that HB 450 and SS 1 for SB 6's deprivation of the fundamental Second Amendment rights of Plaintiffs and other law-abiding Delawareans do not cause irreparable harm. This is incorrect, as stated in Plaintiffs' respective motions. *See, e.g., K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013); *Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971; 11A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d ed. 2022).

The stark differences between the authority cited by the State and the instant matter demonstrate that its position is unsupportable. *Hohe v. Casey,* 868 F.2d 69 (3d Cir. 1989), the cornerstone of the State's argument, could not be more different than this matter. In *Hohe*, the Third Circuit held that the collection of "fair share fees" from non-Union members did not constitute irreparable harm in a matter that incidentally touched upon First Amendment rights. In its holding, the Court found that the irreparable harm standard was not met where the harm at issue

was incidental to the First Amendment and where monetary damages or restitution could remedy that ill. *Id*. at 73.

In contrast, HB 450 and SS 1 for SB 6 involve real, immediate, irreparable danger to Plaintiffs' and other law-abiding Delawareans' Second Amendment rights that cannot be remedied by monetary damages or restitution. *See, e.g.*, *Ezell*, 651 F.3d at 699 ("Infringements of this [Second Amendment] right cannot be compensated by damages."); *see also McCahon v. Pa. Tpk. Comm'n,* 491 F. Supp. 2d 522, 528 (M.D. Pa. 2007) (distinguishing *Hohe*, finding irreparable harm and granting injunction where harm involved loss of full union dues and plaintiffs' continued association with the union, including susceptibility to union discipline, therefore demonstrating a "real or immediate danger" to their First Amendment right not to associate); *Bella Vista United v. City of Phila*., 2004 U.S. Dist. LEXIS 6771, at *31 n.10 (E.D. Pa. Apr. 15, 2004) (distinguishing *Hohe* and finding irreparable harm where there was direct penalization of First Amendment rights rather than the incidental inhibition found in *Hohe*.).

The State also cites *Walters v. Kemp*, 2020 WL 9073550, at *11 (N.D. Ga. May 5, 2020), a case decided pre-*Bruen* under intermediate scrutiny, that aimed to make a distinction between the treatment afforded the First Amendment and the Second Amendment in assessing which direct constitutional violations trigger irreparable harm. But any suggestion that the First Amendment gets preferential treatment over the Second Amendment was put to rest with *Bruen*. *See Bruen,* 142 S. Ct. at 2130 ("This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which Heller repeatedly compared the right to keep and bear arms.").

The State closes its advocacy on this point by invoking the same feckless argument it employed earlier in its brief on the issue of "common use." Here, they claim that there cannot be

irreparable harm because it is the State, not the People who, in their omniscient view, know best as to how Plaintiffs and other law-abiding Delawareans should arm and defend themselves. The fact that Plaintiffs may already own common arms banned under HB 450 and SS 1 for SB 6, or the State's contention that so-called "assault weapons" are ill-suited for self-defense, has no bearing on Plaintiffs' fundamental Second Amendment rights. Plaintiffs have demonstrated per se irreparable harm by showing that HB 450 and SS 1 for SB 6 directly deprive them of their fundamental Second Amendment rights.

V. Public Interest and Balance of Hardships Strongly Favor Plaintiffs

The State claims that the public interest weighs against entry of a preliminary injunction because it will be enjoined from effectuating a statute it has enacted. That is a tautology or circular reasoning. The State never had the right to enact these statutes in the first place, and the "enforcement of an unconstitutional law vindicates no public interest." *K.A. ex rel. Ayers*, 710 F.3d at 114 (*citing ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003) ("[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.")). The State further argues, without statistical support, that an injunction will undermine public safety through the greater proliferation of dangerous arms and accessories. First, there has been no support presented either by statistics or otherwise for the position that HB 450 or SS 1 for SB 6 ensure or even contribute to public safety—which the State has the burden to establish. *See* Gary Kleck, Targeting Guns: Firearms and Their Control 112 (1997) (evidence indicates that "well under 1% of [crime guns] are 'assault rifles.' "). In any event, those statistics--even if they existed, and they do not--would suggest that the Court should conduct a prohibited "balancing test." Second, the State's position disregards the benefit to Plaintiffs and other law-abiding Delawareans of lawfully exercising their fundamental right to bear arms and defend themselves. *See Bruen*, 142 S. Ct. at 2161 (Alito, J. concurring) ("Today, unfortunately, many Americans have good reason to

fear that they will be victimized if they are unable to protect themselves. And today, no less than in 1791, the Second Amendment guarantees their right to do so.").

CONCLUSION

In sum, the State has not carried its considerable burden, as articulated in *Bruen*--which does not require an evidentiary hearing—to demonstrate that outlawing the categories of firearms and magazines banned by the challenged statutes, both of which are commonly used for lawful purposes by law-abiding persons, is consistent with "this Nation's historical tradition" so as to fall outside of the Second Amendment's "unqualified command." As observed in *Bruen*, a review of historical, analogous regulations of firearms (if they were to exist) is the type of routine analytical exercise conducted by courts on a regular basis, as a matter of law, without the need for testimony or factual presentations.

For the reasons addressed in this Reply Brief, and those in Plaintiffs' respective Motions for Preliminary Injunction and Opening Briefs in support thereof, this Court should grant Plaintiffs' consolidated motions in their entirety and enter an order enjoining Defendants' enforcement of HB 450 and SS 1 for SB.

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Dated: February 13, 2023

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DELAWARE STATE SPORTSMEN'S ASSOCIATION, INC., BRIDGEVILLE RIFLE & PISTOL CLUB, LTD, DELAWARE RIFLE AND PISTOL CLUB, DELAWARE ASSOCIATION OF FEDERAL FIREARMS LICENSEES, MADONNA M. NEDZA, CECIL CURTIS CLEMENTS, JAMES E. HOSFELT, JR., BRUCE C. SMITH, VICKIE LYNN PRICKETT AND FRANK M. NEDZA,	:	
Plaintiffs,	:	
v.	:	C.A. No. 22-951-RGA
DELAWARE DEPARTMENT OF SAFETY AND HOMELAND SECURITY, NATHANIEL McQUEEN, JR. in his Official capacity as Cabinet Secretary, Delaware Department Of Safety and Homeland Security; and COL. MELISSA ZEBLEY in her Official capacity as Superintendent of the Delaware State Police,	:	
Defendants.	:	
GABRIEL GRAY, WILLIAM TAYLOR, DJJAMS LLC, FIREARMS POLICY COALITION, INC., and SECOND AMENDMENT FOUNDATION,	)	
Plaintiffs,	)	
v.	)	C.A. No. 22-1500-MN
KATHY JENNINGS, Attorney General of Delaware,	)	
Defendants.	)	

J. Caleb Boggs Courthouse
844 North King Street
Wilmington, Delaware

Friday, February 24, 2023
9:00 a.m.
Oral Argument

BEFORE: THE HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

APPEARANCES:

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-and-

GELLERT SCALI BUSENKELL & BROWN, LLC
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BY: GARRETT MORITZ, ESQUIRE

-and-

DELAWARE DEPARTMENT OF JUSTICE
BY: CANEEL RADINSON-BLASUCCI, ESQUIRE
BY: KENNETH WAN, ESQUIRE

For the Defendants

08:56:48
08:56:48
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08:59:46

*** PROCEEDINGS ***

08:59:48 DEPUTY CLERK: All rise. Court is now in session. The Honorable Richard G. Andrews presiding.

09:01:51 THE COURT: All right. Good morning, everyone.

09:01:54 Please be seated.

All right. So, we have argument at least on the motion for preliminary injunction filed by the Plaintiff in this case, which is *Delaware State Sportsmen's Association vs. Delaware Department of Safety and Homeland Security*, Number 22-951.

And you are Mr. Lehman or Lehman?

MR. LEHMAN: Lehman, Your Honor.

THE COURT: All right. And Mr. Pileggi.

MR. PILEGGI: Yes, Your Honor.

MR. LEHMAN: Yes, Your Honor.

THE COURT: And Mr. Moritz, and Mr. Wan and Mr. Ross. And you are, Mr. Ross?

MR. ROSS: Yes, Your Honor.

THE COURT: And so, who's making argument here, is it Mr. Lehman and Mr. Ross?

MR. LEHMAN: Your Honor, if it's all right with the Court, I'm going to handle the assault weapons portion of our argument, along with the injunctive relief factors general, and then Mr. Pileggi was going to handle the magazine issue and the Delaware Constitution issue, if that meets with the Court's approval.

THE COURT: Okay. Mr. Ross.

MR. ROSS: Your Honor, with the Court's permission, we also plan to split the argument. I was going to discuss some of the factual background as well as the

argument as to why large-capacity magazines are not arms. Mr. Moritz will discuss the Second Amendment, and I'll take the remainder of the issues.

THE COURT: All right. So, fine.

So, I do have maybe just a couple questions that it might be easier for me to just ask before you actually get going. And I guess the first question is for the Plaintiffs.

I understand you don't think it's relevant, but for present purposes, I should take every factual assertion that's in the five Defendant declarations as being true; right?

MR. LEHMAN: We think if you do, Your Honor, it's not going to make a difference, but --

THE COURT: Well, so that's why I said if it's relevant. But if it appears to be relevant, I can take it as true for purposes of the preliminary injunction; right?

MR. LEHMAN: Yes.

THE COURT: Okay. Thank you.

I think this is probably obvious, but when the parties talk about assault rifles and sporting rifles, you're talking about the same thing; right?

MR. LEHMAN: From our perspective, Yes, Your Honor. They're the same thing.

MR. ROSS: Yes. Yes, Your Honor.

09:04:21 THE COURT: Okay. So, are the parties keeping
09:04:25 track of similar litigation filed in other states?
09:04:30 MR. LEHMAN: Yes, generally, Your Honor. I
09:04:33 actually have litigation myself in other states on similar
09:04:36 issues.
09:04:36 THE COURT: Well, and the reason I ask is
09:04:39 because my law clerk provided me with a decision from
09:04:44 Illinois about a week ago, and I would imagine you all are
09:04:53 familiar with it. And, you know, that seems like the kind
09:04:59 of thing that would be useful for me to know about.
09:05:02 And so, the only point or the only point is,
09:05:04 because I don't actually expect to rule on this motion
09:05:07 today, is I would ask that if similar decisions that you
09:05:13 think are relevant come down between now and whenever I get
09:05:17 a decision out, which hopefully won't be very long, you
09:05:22 know, if you could send it to me with a cover letter that is
09:05:26 no more than one page, but you know, you can put why it's
09:05:31 relevant on the cover page.
09:05:35 Can you do that for me?
09:05:37 MR. PILEGGI: Yes, Your Honor.
09:05:39 MR. ROSS: Yes, Your Honor.
09:05:39 THE COURT: Okay. Thank you.
09:05:40 All right. And Mr. Ross or Mr. Moritz, if the
09:05:52 laws that we're talking about here are constitutional, and
09:05:56 particularly the assault weapons one, or HB 450, which is

pretty much only prospective, would there be any reason why, if there was the political will for it, Delaware couldn't pass a law basically saying possession of these weapons are criminal and start enforcing that law, you know, maybe with a grace period or something? But is there any reason why the prospective aspect of this makes a difference constitutionally?

MR. ROSS: Not from a Second Amendment perspective as we see it, Your Honor.

THE COURT: Okay. Thank you.

And I guess the other question I had was, you know, you're in federal court, and part of this is arguing about Delaware Constitution and the Delaware Supreme Court, and the Delaware analog to the Second Amendment, which is different for sure or different, I think, than the Second Amendment.

And I'm just kind of wondering: Have either of you, either side, thought about certifying a question, you know, maybe whether or not these statutes are facially unconstitutional under the Delaware Constitution to the Delaware Supreme Court or something like that?

MR. PILEGGI: Your Honor, can I address that?

THE COURT: Yes.

MR. PILEGGI: Your Honor, that's something that we did think about and might ultimately do, but based on

Bruen, we didn't think that was necessary based on the two Delaware Supreme Court decisions that have interpreted Article I Section 20. We didn't think it was necessary. But you may know the history of one of those Delaware Supreme Court's decisions in *Doe vs. Wilmington Housing Authority*, we actually start out in this court. We went to the Third Circuit. And then when we were in the Third Circuit, we asked the Third Circuit to certify a question to the Delaware Supreme Court on that Delaware Constitutional issue, which they did. And that's how we got the *Doe vs. Wilmington Housing Authority* decision.

So, the short answer to your question, Your Honor -- I'm happy to give a longer answer. The short answer is we don't think there's enough ambiguity for that to be necessary. But if the Court thinks it's helpful, we're certainly open to it.

THE COURT: All right. Thank you, Mr. Pileggi. That's very helpful.

Any comment on your side?

MR. ROSS: We basically wound up exactly where Mr. Pileggi ended, Your Honor, which is we don't think it's necessary, but obviously, we would defer to the Court.

THE COURT: Okay. So, on that issue, I would like the parties to meet and confer and submit a -- you know, as you all know better than me, there's a procedure

you have to go through to make it the kind of question you can't actually certify. Obviously, Mr. Pileggi has done it before, but I would like you to try to propose to me -- you don't have to say, We want to do it, but assume that I want to do it and propose something hopefully that you could agree upon. But if not, separately as to what I would need to do in order to make such a certification.

You know, I have seen the Third Circuit in a different case of mine certify a question to the Delaware Supreme Court, but, in some ways, it seems to me like if you've got that sort of issue, maybe it's better to do it sooner rather than later. So, maybe if I could ask if you could submit something by a week from Monday.

Okay. Thank you.

And I guess I have two other questions. One of which is: In terms of what the difference is between an assault pistol and a semi-automatic pistol like a Glock 9 millimeter, maybe I read over that part of the declarations too quickly or something.

Is there a real short and simple answer of what the difference is?

MR. LEHMAN: Our answer, Your Honor, would be there's no material difference at all other than cosmetic features. They all function the same.

THE COURT: Okay. No difference.

09:11:36 And you, sir?

09:11:37 MR. ROSS: Your Honor, we believe there are
09:11:39 fundamental differences. I won't get into the details --

09:11:42 THE COURT: No, save me the -- give me the short
09:11:44 answer.

09:11:45 MR. ROSS: So, we believe there are significant
09:11:47 fundamental differences. The assault pistols, among other
09:11:53 things, are derived from weapons of war, some machine guns.
09:11:58 I want to be very clear that the 9 millimeter, like a Glock,
09:12:02 is not covered by the statute, and there's no suggestion
09:12:05 that it is.

09:12:06 THE COURT: No, I understand that, but, or I
09:12:09 wasn't suggesting it was. I was trying to figure out how
09:12:13 much of a difference there was. And just, you know, you
09:12:19 could derive something from a military weapon and get to an
09:12:25 end result. And you could derive something from other some
09:12:29 other source and get to a pretty similar end result, because
09:12:34 it seems like it shouldn't really matter what the -- if you
09:12:41 get to the same result, it shouldn't matter, you know, what
09:12:44 the idea was 70 years ago.

09:12:48 Right?

09:12:48 MR. ROSS: No, that's right, Your Honor. And I
09:12:51 should be more clear that beyond sort of a derivation, it's
09:12:56 they share commonality of features. It's not -- you know,
09:12:57 you could start from two different points and wind up in two

very different places. I take Your Honor's point well, but we believe that banned assault pistols share a number of features that are commonly found.

THE COURT: And so, one of them, if I'm correct, is what's called the shroud which is something that sticks off; is that right or is that wrong?

MR. ROSS: Yes, Your Honor.

THE COURT: And the shroud is a little thing that extends from the end of the barrel, so that, according to the expert, when you bump into something, you don't hurt the gun or, I'm not saying that right, but generally along that gist; right?

MR. ROSS: It's my understanding, Your Honor.

THE COURT: But in terms of the sort of firing function, is it pretty much the same?

MR. ROSS: We'll get into this, Your Honor, but there are actually significant differences with some of these weapons, including velocity at which the bullets are fired, which we will get to, that has a significant impact on the destructive ability of the weapons, Your Honor.

THE COURT: Okay. So, for purposes of today's proceeding, I would have said the briefing was -- maybe that's not a fair characterization. I guess I would say to the Plaintiffs, it seemed to me your position is none of these things really matter in terms of the number of

different guns that are listed for Second Amendment purposes, the number of different guns that are listed, even the definition of copycat, and is that right or am I wrong there?

MR. LEHMAN: If I understand you correctly, Your Honor, I think that's right. What the State has done is taken semi-automatic weapons generally and said basically these have features that we think are scary. And so, this smaller subset of semi-automatic firearms are banned now. The list really doesn't make any difference.

THE COURT: Okay. All right. So, thank you.

So, Mr. Lehman or Mr. Pileggi, whoever was going first, why don't you go ahead.

MR. LEHMAN: Good morning, Your Honor. May it please the Court, Bradley Lehman of Gellert Scali Busenkell and Brown on behalf of the Plaintiffs from the now consolidated Gray matter.

So, Your Honor, I'll just kind of proceed through the injunctive relief elements and hit kind of major points rather than rehashing all of the briefing.

THE COURT: Well, yeah, so rehashing is not very helpful.

MR. LEHMAN: Right.

THE COURT: And, I guess, to some extent, the injunction, the points about irreparable harm, public

interest, burden, you know, relative burden, I wouldn't be spending a lot of time on that. I mean, the thing that's of interest, and it's difficult, to me at least, is the Second Amendment issues.

MR. LEHMAN: Sure. So, I'll certainly focus my time on that, Your Honor.

So, under *Bruen*, Your Honor, the Court has to determine whether the arms at issue are protected by the Second Amendments or what they call the unqualified. And unquestionably in this case, they are. These are bearable arms, first of all. And in addition to being bearable arms, they're in common use for lawful purposes today.

THE COURT: Well, so you say "in common use for lawful purposes." I counted up something like ten times in *Bruen* where they said in common use for self-defense.

MR. LEHMAN: Right. So, the difference, Your Honor, and in *Heller* and in many other cases, they referred to lawful purposes. In *Bruen* in particular, the issue was in New York should people be able to get -- you know, do you need to show some heightened standard of need in order to have a concealed carry handgun.

And so, naturally the Court's discussion in that case was about people's right to arm self-defense outside of their homes because concealed carry handguns don't have a -- you don't carry a concealed handgun for a recreational or

hunting purpose. So, that was the focus there.

But the focus in other cases has been on lawful purposes. And the Court has recognized that there are other lawful purposes like hunting, or like recreational target shooting or competitive target shooting, a variety of things that can also constitute lawful use if you're not using it to commit crimes. Then, whatever else you're doing with it is a lawful use.

And what the State did in that case was sort of changed the test in two ways. One of those ways --

THE COURT: Well, so actually before you get to the test --

MR. LEHMAN: Sure.

THE COURT: -- you said these are bearable arms. And I'm just curious: Knives are bearable arms, too; right?

MR. LEHMAN: Yeah, I think the definition of bearable arms goes back quite a long way to -- I'm not going to be able to -- I'm paraphrasing, but anything that you might pick up and use, you know, in defense of yourself.

THE COURT: So, bearable arms, Bowie knives, switchblades, these are all bearable arms?

MR. LEHMAN: Well, the distinction with those items was that they were perceived at the time --

THE COURT: Well, so are they bearable arms or not?

09:18:43 MR. LEHMAN: Yes. Yes, there's more to the test than just being bearable arms, of course. I mean, machine guns are bearable arms and rocket launchers are bearable arms.

THE COURT: Tasers are bearable arms; right?

MR. LEHMAN: Yes.

THE COURT: Pepper spray?

MR. LEHMAN: Yes.

THE COURT: And you said machine guns?

MR. LEHMAN: Right.

THE COURT: Sawed-off shotguns are bearable arms?

MR. LEHMAN: Right. All those things are bearable arms.

THE COURT: A bazooka would be a bearable arm?

MR. LEHMAN: Absolutely. So, then you move on to whether it's dangerous and unusual.

THE COURT: Do you think a silencer is a bearable arm?

MR. LEHMAN: I don't know whether you would characterize that itself as an arm. Certainly, as part of a firearm, it serves a purpose.

THE COURT: Okay. All right. So, go ahead.

MR. LEHMAN: So, as Your Honor was just sort of keying in on, the next step, obviously, is that not all

bearable arms are protected. They're presumptively protected, but then they move on to determine whether they're dangerous and unusual. You know, the State has some focus about, Well, we need to conduct all this historical analysis. But if you read *Bruen*, the Supreme Court has done the historical analysis when it comes to banning firearms themselves.

Certainly, historical analysis can be useful in analyzing other sorts of firearm regulations. That's such as what's going on right now in New Jersey with the sensitive place restrictions. You know, what sorts of places can you bring your concealed handgun, those sorts of things.

THE COURT: And so, if you refer to what's going on in other states, I have no knowledge of what's going on in other states.

MR. LEHMAN: So, New Jersey, in response to *Bruen* passed a law saying, Okay, we're abandoning our justifiable needs standard, because that's unconstitutional. So, instead, everyone gets a license, but you can't really carry anywhere. So, that's their short-term solution to that, which is being challenged now.

And so, in the context of those sorts of regulations, we might look back through history and say, Okay, well, around the time of the founding and shortly

thereafter, were people carrying guns into churches, and schools and things like that? And so, that sort of analysis would be helpful.

But in the context of banning arms themselves, the Supreme Court has already undertaken that analysis and concluded that if you look back through the relevant history, what's important is bearable arms can only be banned if they're dangerous and unusual. And naturally, as, you know, Your Honor was sort of keying in upon, talking about, you know, other sorts of bearable arms that are not protected. The question is not whether they're dangerous, because any weapon or anything that you might use to defend yourself has to be dangerous or it would be useless for that purpose.

THE COURT: So, the dangerous part of dangerous and unusual or even dangerous or unusual, but the dangerous part, how does that relate because the definition of arms that you've, I think, cited, essentially all arms are dangerous. That's the point.

MR. LEHMAN: Right.

THE COURT: How would you distinguish one arm from another in terms of dangerousness?

MR. LEHMAN: It's not important that we do, because the question and the distinction drawn in *Bruen* is whether or not an arm is highly unusual in society at large.

09:22:00 So --

09:22:01 THE COURT: So, when they talk about dangerous
09:22:02 and unusual, the dangerous is just kind of redundant?
09:22:05 MR. LEHMAN: I think that in the context of the
09:22:09 discussion of weapons, of course the dangerous part goes
09:22:13 without saying because, you know, no one keeps a bag of
09:22:16 marshmallows by their nightstand in case a burglar breaks
09:22:19 in. You want to have something that would conceivably cause
09:22:22 injury to somebody if it was necessary to defend yourself in
09:22:25 that way. So, *Bruen's* true distinction said, Well, if
09:22:28 they're highly unusual in society at large, then they're
09:22:33 outside of that test. They meet the dangerous and unusual
09:22:37 test essentially at that point.
09:22:40 THE COURT: So, the highly unusual, is that a
09:22:45 different way of saying not in common use?
09:22:48 MR. LEHMAN: I think that it's essentially the
09:22:50 same. You know, if something is not in common use, it's
09:22:54 unusual enough that it's not protected.
09:22:58 THE COURT: Well, so does the Supreme Court in
09:23:00 *Bruen* or anywhere else, for that matter, give any kind of
09:23:05 explanation of what is in common use and what is not in
09:23:10 common use? I mean, I think if you said, Are televisions in
09:23:16 common use, everyone would say, Yeah, agree with that.
09:23:20 If you said are Teslas in common use? I don't
09:23:25 know.

MR. LEHMAN: Well, driving around Delaware, I think it's safe to they are. But, no, the Supreme Court doesn't give us an absolute number or a fraction of a total of anything and say, Beyond this threshold, you've hit common use.

THE COURT: And, of course, they didn't have to because I think one could take judicial notice that handguns are in common use. You've got your statistical. There's 400 million, give or take some amount, or at least that's the number that sticks in my head of firearms in the country. And there's 300 million people, and, you know, obviously, some have more than one.

But, you know, and we know that most -- I mean, I don't know how we know, but we know most of the guns that are out there or the large number of the guns that are out there are handguns. Right? So, they -- so, in *Bruen*, it was undisputed that they were in common use; right?

MR. LEHMAN: Right. I don't think anyone questioned that they were. The State didn't press that issue. It would have been a waste of time as --

THE COURT: Right, right. It would have been frivolous.

MR. LEHMAN: Right.

THE COURT: But are the weapons that are banned here, are they in common use in Delaware?

MR. LEHMAN: Yes, absolutely. You know, for example, Your Honor -- well, first of all, it's important to remember that *Heller* has been described as a hardware test. And as we were talking about a little bit kind of more informally before, there's no functional difference in terms of firing rate or anything like that between this subset of banned arms and semi-automatic arms in general.

THE COURT: Well, how about with machine guns?

MR. LEHMAN: Well, machine guns, the difference there was that they were deemed to not be in common use. And as we talked about in the briefing, I mean, they were perceived to be the weapons of gangsters and other criminals. I think overwhelming if you ask --

THE COURT: Well, and I think the gangsters and the criminals, that was also sawed-off shotguns; right?

MR. LEHMAN: Yes, right. I mean, you imagine basically when you ask people to envision what was going on, you know, envision a Tommy gun, they're thinking of Al Capone.

THE COURT: But so, how would a sawed-off shotgun be dangerous and unusual? For that matter, how would a Tommy gun be dangerous and unusual, because the whole problem was there were lots of them?

MR. LEHMAN: I think it was -- the issue was that they were not in common use for lawful purposes. They

were overwhelmingly put to use by criminals and gangsters, you know, that the FBI was in pursuit of. And --

THE COURT: But the --

MR. LEHMAN: -- the difference, I think, Your Honor, is that here we're dealing with arms that are in common use for lawful purposes, very, very rarely used in crimes. And the weapons you're talking about were most often used in crimes and not really associated with something that you would have in your home for your own defense.

THE COURT: Was there in the -- when some machine guns or even sawed-off shotguns, and I remember seeing somewhere, maybe it was in *Heller*, quoting something else, you know, sawed-off shotguns are the weapons of criminals or something like that. Was that based on any facts or was that just kind of common knowledge of the day?

MR. LEHMAN: I'm not aware of specific facts that the Court highlighted. I think it was sort of the common knowledge of the day that there wasn't really a useful purpose for that other than hiding it and creating, you know --

THE COURT: But you would agree that, in fact, a sawed-off shotgun would be a great weapon for self-defense; right?

MR. LEHMAN: I don't think so. I think that

something else would be preferable.

THE COURT: Well, no, but you criticize them for saying something is preferable or not preferable.

MR. LEHMAN: Well, that's true, although you did ask me if it was great.

THE COURT: Wouldn't a sawed-off shotgun, you know, maybe not so much in the street, but in the home, wouldn't that be right up at the top of the list, easy to shoot, takes out whoever is at the door that you don't want? I mean, it's a great self-defense weapon, it would seem to me. But it's just one that was banned or at least heavily restricted, you know, 80 years ago or 90 years ago.

I mean, that's one of the things that's difficult is that the -- really it seems to me the two main Supreme Court cases are talking about handguns used for self-defense. One's in the home, one's outside the home. And so, many of the arguments that are being made here, they're far removed from the factual situations where the Supreme Court was talking about things, and so they had various hints about things.

And so, I think that's -- I mean, there's really -- and I guess in a way, I mean, if in the 1930's sawed-off shotguns were mostly in the hands of criminals, if they were legalized today, would they be mostly in the hands of criminals, or would everybody be getting a sawed-off

shotgun to keep next to their bed?

MR. LEHMAN: They might, Your Honor, but it's -- you know, they were not in common use for lawful purposes then, and they're not now, either.

THE COURT: Well, but, of course, they've been regulated ever since; right?

MR. LEHMAN: That's true. I mean, the arms at issue here have not been, which is a major difference.

THE COURT: Well, but then the -- well, go ahead.

MR. LEHMAN: Well, so, Your Honor, I think, getting back to the common use, I mean, although in *Heller* and *Bruen* the factual circumstances called for discussion of self-defense, the Court, the Supreme Court and the Circuit Courts have been clear that lawful purposes are protected, whether it's for self-defense or not. Although, self-defense is the core of the Second Amendment, right.

THE COURT: Yeah, yeah. The Supreme Court said core multiple times in italics, which I take it is extra core.

MR. LEHMAN: Right. Yeah, and I think they wouldn't say core if they weren't acknowledging that there was something other than core, otherwise it would just be the right. And so, as far as common use is concerned, you know, we had some examples, Your Honor, of where other

courts have taken notice of the fact that these exact arms are in common use, and for that matter, that the magazines at issue are in common use. But by way of one example in the *Caetano* case, the Court, and in particular Justice Alito's concurrence found that the mere fact that 200,000 stun guns have been sold to Americans was enough to find that they were in common use for lawful purposes at the time and could not be banned.

And our position here, Your Honor, is the same. There are millions and millions of these owned by millions and millions of Americans overwhelmingly used for lawful purposes, virtually never used in crimes. Unfortunately, they tend to get a lot of attention when they are, but it's very rare. And so, the State first sort of tries to change the test by saying --

THE COURT: Let me stop you for a second.

MR. LEHMAN: Sure.

THE COURT: You say rarely used in crime. I think the factual assertions of at least one of the State's experts is they are significantly disproportionately used for mass casualty events. You know, your basic one drug dealer shoots another drug dealer. Yeah, the weapons that are best for self-defense are usually best for offense, too, but that there's a specific problem that the State was concerned about or that the law was concerned about.

09:32:31 MR. LEHMAN: Sure. And, I mean, that would be relevant if the Court were undertaking an interest-balancing approach pre-*Bruen*. You know, if the arms at issue are in common use for lawful purposes, generally what criminals rarely use them for, although it's, you know, horrific and unfortunate is not relevant to the analysis of whether the arms are protected by the Second Amendment or not.

And so, you know, the data provided by the parties shows that, I mean, and I don't think the State meaningfully disputes, that there are lots and lots of these in circulation.

THE COURT: Yeah, and I've seen the numbers, though it's not right in the top of my head. What would you say the number is that are in circulation?

MR. LEHMAN: Well, different surveys have come out with different sort of answers. And firearm production numbers provided by the industry over time, I think, suggests that, at the least, perhaps 10 million, possibly quite a lot more. Surveys can sometimes be unreliable because -- well --

THE COURT: And basically --

MR. LEHMAN: -- unreliable in that they would underestimate because some people are not excited about revealing to whoever is on the phone what they have.

THE COURT: But your ball park figure nationally

of the number of weapons that are out there that would fall into the banned categories or banned classes is, you know, 10 million, plus or minus?

MR. LEHMAN: Yes, Your Honor. I think we provided some figures demonstrating that in recent years something like 20 percent of all firearms sold in the United States would fit into the banned category. AR-15 variants, AK variants are extraordinarily popular.

So, where I would go from there, Your Honor, is that the *Bruen* Court laid out a text in history test, and I think we've moved beyond the text part. And what the state and what other states, frankly, have suggested post-*Bruen* is, Well, we need a lot of time now to undertake a lot of discovery to lay out this whole historical backdrop. And as I indicated earlier, that could be relevant in the context of other sorts of regulations where we might look backward. But here, where the Supreme Court has already done that work and said, You know, if weapons are not dangerous and unusual, you can't ban them. And so, that really --

THE COURT: But it seems to me that if that was the case, they spent a lot of time in *Bruen*, that they could have just said: Handguns are ubiquitous. They're not dangerous and unusual. End of story.

MR. LEHMAN: I think they could have done that, although I think that they probably felt it better to lay

09:35:42 out the reasoning and go through the historical analysis to
09:35:44 explain in sort of an unsalable way why, you know, the
09:35:49 dangerous and unusual test is the appropriate one going
09:35:54 forward for determining whether a particular arm, or a
09:35:59 subset of a category or an entire category like handguns
09:36:03 could be banned. And to the extent if an arm is not both
09:36:08 dangerous and unusual, it can't be banned. And that's the
09:36:11 end of the inquiry, regardless -- like the Court has said,
09:36:14 regardless of whether handguns were dangerous and unusual.
09:36:18 THE COURT: Well, just to make sure that I've
09:36:19 got your point in the dangerous and unusual, bazooka --
09:36:24 MR. LEHMAN: Unusual.
09:36:25 THE COURT: Unusual, yes. But dangerous, no.
09:36:28 MR. LEHMAN: Absolutely. Very dangerous.
09:36:30 THE COURT: Or dangerous, yes. Okay. But the
09:36:35 banned guns are not dangerous. The bazooka is dangerous,
09:36:39 and the banned guns are not or --
09:36:40 MR. LEHMAN: No, they're all dangerous.
09:36:42 THE COURT: Right. They're all dangerous.
09:36:43 MR. LEHMAN: Yes. They're all extremely
09:36:44 dangerous.
09:36:44 THE COURT: And, in fact, basically all the
09:36:46 things that we've described as arms or, I don't know, pepper
09:36:53 spray, maybe not, but they're all dangerous; right?
09:36:55 MR. LEHMAN: Right. That's the point of an arm.

If it were not dangerous, it wouldn't be an arm, which is why you have to move on to determine whether it's unusual in society. And if it's in common use for lawful purposes, the Court has said it's not unusual, and so it doesn't meet the dangerous and unusual test and cannot be banned.

And, Your Honor, you sort of cautioned me not to spend a whole lot of time on the other elements. I'm happy to address them very quickly or address any other questions you have in the Second Amendment context, although I think we've covered a lot of the ground.

THE COURT: Let me just check my notes here. Hold on a minute.

So, one of the things *Bruen* said, and I'm, obviously, paraphrasing here, if we get to the question of history, the Court said, "When a challenged regulation addresses a general societal problem that has persisted since the 18th Century, for lack of social similar historical regulations addressing that problem, it is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."

And it goes on to say in a later point, "Other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the

09:39:02 1 founders in 1791 or the reconstruction generation in 1868."
09:39:08 2 What do you think that means in terms of the
09:39:20 3 ability to regulate firearms when there are unprecedented
09:39:28 4 societal concerns? And in particular, I think, though,
09:39:45 5 maybe the State's evidence is short on this, I don't know,
09:39:49 6 but I don't think mass shootings in schools was a societal
09:39:55 7 concern in 1790, or 1868 or really for a long ways going
09:40:02 8 forward towards the present.
09:40:05 9 MR. LEHMAN: Well, Your Honor, I don't think I
09:40:07 10 would draw the distinction that narrowly between gun
09:40:10 11 violence more generally, which has been a societal issue
09:40:14 12 probably since guns were invented. I think Beretta was
09:40:19 13 founded in 15 something, so it's been going on for a while.
09:40:22 14 And certainly it was going on in the, you know, '20's and
09:40:25 15 '30's when, you know, Al Capone and friends were using Tommy
09:40:28 16 guns and --
09:40:30 17 THE COURT: And the result was Tommy guns got
09:40:33 18 regulated and essentially banned; right?
09:40:36 19 MR. LEHMAN: Right. And semi-automatic weapons
09:40:38 20 have never undergone the same sort of regulation, I think,
09:40:43 21 until 1994 in the famously ineffective assault weapons ban
09:40:48 22 that expired. Other than that, it's just been in the past
09:40:51 23 ten years or so that States have decided to take the sort of
09:40:55 24 measures that Delaware has.
09:40:58 25 THE COURT: But isn't it also more or less in

the past 10 or 20 years that the punitive reason for this legislation has surfaced?

MR. LEHMAN: I don't think that mass shootings have surfaced in the past 20 years. But like we talked about earlier and like we said in the briefing, whether the State is hyper-focused on that issue is a little different than whether it -- or I think it rises to the level that it would imbalance that lawful use for a common purposes requirement. And as we noted in the briefing, not just these banned rifles, but any rifles at all kill fewer people in the United States every year than bare hands by themselves do, knives by themselves do, or blunt objects by themselves do. And in most years, less than lightning does.

And so, you know, to the extent that's relevant, we just don't feel that it creates the sort of issue that would upset the requirement that the guns be dangerous and unusual. And because there are so many millions of these that are owned by people who use them for purposely innocent purposes and are very rarely used in crimes, I'm not sure that really rises to the level of an unprecedented societal concern that throws off that balance in a material way in terms of a Second Amendment analysis.

THE COURT: Well, so your position is that unless you can say a weapon is dangerous and unusual, essentially the State can't regulate it?

MR. LEHMAN: Yes, I think that -- I think the Supreme Court has made that pretty clear that in the context of banning arms, the question is whether they're unusual in society at large. And to the extent they're in common use for lawful purposes, the Court has told us they are not unusual. And so, they can't meet that test, and they can't be banned.

THE COURT: So --

MR. LEHMAN: And I think in casting off that interest balancing, the Court made it clear that it's not if they're dangerous, they're not unusual, but you're extremely worried about them, you know, is not the test. It's a purely dangerous and unusual test. If they're in common use for lawful purposes, they don't meet that test.

THE COURT: So, let's assume as a fact that semi-automatic rifles and assault pistols are based on the evidence of Mr. Yurgealitis, not very good weapons for self-defense. I mean, I know your answer basically. You could have a weapon -- well, I haven't asked a question.

If you had a weapon that had no self-defense, really no use for self-defense, let's say a hand grenade, but it was useful for going out and hunting in a kind of different style than most people hunt by blowing up animals, if people had lots of grenades that had been handed down from their grandfathers who fought in World War II, they

09:44:54 couldn't be regulated; is that right?

09:44:59 MR. LEHMAN: I mean, I think that they would
09:45:02 have been dangerous and unusual even at the time of the end
09:45:06 of World War II --

09:45:07 THE COURT: But we're --

09:45:08 MR. LEHMAN: -- in that hypothetical.

09:45:09 THE COURT: But it's not hypothetical, I think,
09:45:10 because I've seen movies. Lots of people kept souvenirs of
09:45:14 the war.

09:45:15 MR. LEHMAN: Mm-hmm.

09:45:16 THE COURT: And I don't know, it's entirely
09:45:22 possible. I mean, so just assume that enough people, let's
09:45:26 say 200,000 had hand grenades from World War II hanging
09:45:33 around their houses as essentially a collector's item, which
09:45:37 I would imagine is what most people would have it for. They
09:45:45 would be, in your view, not dangerous and unusual; right?

09:45:49 MR. LEHMAN: I don't know that they would be in
09:45:52 common use for lawful purposes if they're not serving any --

09:45:56 THE COURT: But so, collection is a lawful
09:45:58 purpose; right?

09:45:58 MR. LEHMAN: It is, yes.

09:46:00 THE COURT: And --

09:46:01 MR. LEHMAN: I think depending on -- certainly,
09:46:03 that would be something that if it came up, I guess the
09:46:05 Court would have to grapple with it. I think it ties in a

little bit with what the State was sort of proposing with sort of a doom's day scenario where the market is flooded with something, and it automatically becomes in common use.

THE COURT: But, I mean, leaving aside the likelihood of that actually happening, if, you know, somebody came up with a new weapon and had -- kind of the way we used to imagine drug dealers did things, give away a few hundred thousand for free and create a demand, and then we'll raise our prices and start selling them for real.

Is there a temporal aspect in common use? Is that the in common use over the last "X" number of years, or is it moment in time when the law is passed, we figure out how many of them are out there?

MR. LEHMAN: Well, what the Supreme Court has told us is that the relevant inquiry is whether something is a common use for lawful purposes today. So, regardless of whether it was in common use at some point in the past, as Your Honor indicated, it's extraordinarily unlikely that that would ever happen. And I suppose if it did, maybe the Court would have something slightly different to say about, you know, an intentional effort to skirt that issue. But it's not what's happening here.

So, it's an interesting hypothetical, but not, I think, relevant to the constitutionality of the bans that are at issue -- the arms that are at issue in this case,

which, you know, indisputably have been very popular for, you know, quite a while and are very popular today.

THE COURT: So, let's assume for the sake of argument that I don't agree with you that for, you know, likelihood of success on the merits here that the fact that, let's say, there's 10 million of these in the United States means they can't be regulated anymore.

What was my thought here? I forgot what my thought is.

So, actually I do have a slightly different question. So, in Delaware, there's a crime called carrying a concealed deadly weapon; right? Does that mean that if I'm, you know, a non-felon, non-illegal alien, non the various other things that cause you to be a prohibited person, and I strap on a holster and put a .45 pistol, a non-banned gun in it, I can just walk around on the streets with my gun; right?

MR. LEHMAN: Yes, in Delaware, you can --

THE COURT: So --

MR. LEHMAN: -- assuming it's not concealed. You need a permit to conceal it.

THE COURT: Right, right. That's the point. And so, I must admit I don't see too many people walking around like that.

MR. LEHMAN: I've only ever seen one or two

myself, Your Honor.

THE COURT: But the point is that, as the Defendant's expert says, if you're going to walk around with a gun or at least a handgun for self-defense, it's useful to be able to carry it concealed. And, you know, that's the reason why we have a permitting process and that's the reason why *Bruen* was in the Supreme Court to begin with.

I don't think I've ever seen anybody walking around, you know, with a banned gun. And I think they'd be pretty hard to actually -- particularly the rifles, they would be pretty hard to actually conceal on your person.

MR. LEHMAN: They are. I've frequently seen people carry, usually at events, you know, sort of rallies that were scheduled for that purpose. I've never attended one, but I --

THE COURT: No, no, but that would be -- but they're not carrying them for self-defense. They're carrying them for some other reason.

MR. LEHMAN: Well, if they needed it for self-defense, they have it. I can't speak to why, in those circumstances, they were. Maybe it was both. You know, maybe they perceived the likelihood of, you know, counter-protestors attacking them or something. I have no idea.

THE COURT: All right. Does it make any

difference -- let's assume there are 10 million of these guns out there. Does it make any difference whether there's evidence about how many of the 10 million carry, or bear or keep, I guess, the weapons for self-defense as to some other purpose?

MR. LEHMAN: No, it doesn't matter. Constitutionally, you know, the Second Amendment gives you the right to keep and to bear arms. And the Court has recognized that there are other lawful purposes besides self-defense. And so, you're perfectly entitled to keep a protected arm in your home for whatever purpose you want.

THE COURT: Is there --

MR. LEHMAN: It's not illegal.

THE COURT: -- any good evidence of the 10 million people or the 10 million firearms, how many of them are kept or carried for self-defense, in part or in whole, as opposed to some of the other purposes like, for example, target shooting?

MR. LEHMAN: There are, Your Honor. And I don't have the citation to that source right in front of me, but there was, I think, either in the Gray Plaintiffs' opening brief, or a Complaint or in the reply, we had citations to surveys where people were asked specifically about the ownership of AR-15 sorts of rifles and why they have them. A substantial number of people said it was for personal

protection. Another substantial percentage of people said it's for recreational target shooting. And I know that, you know, at least one of the State's experts opined that they're not ideal for hunting, although a substantial number of people also indicated that they use them for that purpose as well, partially because these sorts of rifles come in different calibers. And while this sort of most common .223 ammunition is not ideal in most hunting scenarios, there are other calibers that are more suited to that. So, it's the same rifle, just shoots a different caliber of bullet.

THE COURT: Do the assault pistols, do some of the ones that are in the legislation use 9-millimeter ammunition?

MR. LEHMAN: Yes. Yes.

THE COURT: Okay.

MR. LEHMAN: As my colleague indicated earlier, the distinction seems to be, well, they bear a resemblance or ostensibly derived from a military weapon. And that's really the -- seems to be the distinction, not that they operate in a different way than any other semi-automatic.

THE COURT: No. I was just wondering because you mentioned the caliber.

MR. LEHMAN: Right. Yeah. Yeah, it varies.

THE COURT: And my impression was, just an impression, but my impression was that a lot of the weapons

in question were designed to or maybe do shoot a bigger caliber ammunition.

MR. LEHMAN: Some do, but, honestly, the Government, the military uses 9-millimeter ammunition. So, it's not, you know, 9-millimeter ammunition was designed, I think, for use by NATO countries. So, it's not -- you know, these pistols and rifles are not using any extra special, you know, ammunition that's not common generally among firearms.

THE COURT: All right. Mr. Lehman, thank you.

Maybe I'll hear from Mr. Pileggi.

MR. LEHMAN: Sure. I did have one housekeeping matter very briefly.

THE COURT: Yes.

MR. LEHMAN: There was that *Graham* case that also is a magazine case and is before Your Honor. And as you know, my friends here and I agreed amongst ourselves to consolidate that one here. And the idea was to have those Plaintiffs just file a joinder with our motion.

THE COURT: So, remind me: Which case number is that?

MR. LEHMAN: I don't have the number right in front of me, Your Honor, but that was *Graham vs. Jennings*.

THE COURT: Graham, G-R-A-H-A-M?

MR. LEHMAN: Yes, that was assigned to Your

Honor, and we entered a stipulation indicating our plan for consolidating that one and for a joinder that was going to be very simple, not any other argument that would complicate the record, but just sort of standing facts.

THE COURT: So, you already filed something. Did I sign it?

MR. LEHMAN: I think the stipulation was signed. We've not done the joinder or anything. I think we've all been kind of preoccupied for preparing for this, but that can be done very quickly to make sure it's not an awkward procedural situation.

THE COURT: So, what you're saying is there's a stipulation saying we're going to do this, but we haven't actually done that yet?

MR. LEHMAN: Right --

THE COURT: Okay.

MR. LEHMAN: -- the act of stipulating to consolidating it and submitting the joinder.

THE COURT: And so, I was actually looking this morning because I saw a case because I think I had -- I either have four or five of these, I'm not sure how many exactly, but there was one that I looked at it. And it was, you know, SS 1 for SB 6. Is that the case you're talking about?

MR. LEHMAN: Yes. It's a magazine challenge as

well.

THE COURT: Yeah, yeah. So, thank you for that because I was wondering: How is that going to be different than this case?

MR. LEHMAN: It's not.

THE COURT: So, if it's joined to this one, that would be great, as far as I'm concerned.

MR. LEHMAN: That's the plan. I just wanted to update Your Honor about what was going on so you weren't wondering why we hadn't done anything.

THE COURT: Okay.

MR. LEHMAN: Thank you.

THE COURT: Let me ask just one other question. I feel confident that if I deny the motion for preliminary injunction, you're going to appeal to the Third Circuit.

MR. LEHMAN: I think that's right.

THE COURT: So, I also have this trial scheduled in November, whenever it's scheduled. Do you actually plan to do any discovery for that or you basically -- maybe I'm not asking the question very well.

You know, your argument to date has been essentially, This is a pure legal question. Look at the statute. It's unconstitutional. It's over.

I'm just wondering, if I were to deny your motion, I'm guessing it would take the Third Circuit a while

to figure out what they were going to do about it. Are you planning to -- would you be planning to engage in discovery in the mean time or what, or is that something that you figure -- that's a scenario that's not been contemplated yet?

MR. LEHMAN: It's not been contemplated yet, although our position in this case and generally in these sorts of cases post-*Bruen*, to the extent it involves a ban on arms themselves, is that discovery is not necessary at all. And so, I think we would -- I don't anticipate that that would change, although, I guess, you know, depending on the basis upon which the motion was denied might factor into that calculus, but I don't anticipate any discovery.

THE COURT: So, one of the things is to the extent that, either for the purposes of this motion or for later on, that I'm concerned about the historical regulation of arms, looking for what I believe the Supreme Court described as relevantly similar regulation, for present purposes, in other words for this motion, do you think Bowie knives are relevantly similar?

MR. LEHMAN: No. No, Your Honor. And as we kind of -- we addressed somewhat in the reply brief, really those regulations, number one, address arms that were not in lawful -- you know, not in common use for lawful purposes. They were perceived at the time to be overwhelmingly not

using -- not being used for lawful purposes and being used instead for, you know, mob violence and things like that.

So, we don't think the State has proffered any relevantly similar regulations, although we don't think it would matter if they had, because what the Supreme Court has said is if they're in lawful use for common purposes today, we don't really care about what happened before. And so, in the context of handguns, they said, Well, who cares if they thought they were dangerous and unusual several hundred years ago. They're not today, so it doesn't matter what they thought before.

THE COURT: All right. And on kind of the same general topic, my impression from something that I think was hinted at in *Bruen*, and maybe it was said in *Heller*, I can't remember. It sticks in my head, but I couldn't place where it was that I had seen it. To the extent I get into historical regulation, I don't have to go out and do my own independent history. I can rely -- I can basically take whatever it is that the parties give me, which at this point is the Defendant has given me stuff, and you haven't.

Right?

MR. LEHMAN: Right.

THE COURT: Okay. Thank you, Mr. Lehman. It's all been very helpful.

MR. LEHMAN: Just as a slight followup to answer

your question, if you were to do that, you could essentially just, you know, reread *Bruen* for that purpose, because they undertook the entire task of going back through the historical record and in the context of banning arms determining, you know, how it should be valued.

THE COURT: Well, was there something in *Bruen* about Bowie knives?

MR. LEHMAN: They went through that discussion of Bowie knives, sword canes, clubs, you know, a variety of daggers, a variety of things that, you know, at the time were perceived to be almost exclusively in use by criminals.

THE COURT: All right. Okay. Thank you.

MR. LEHMAN: Thank you.

THE COURT: Mr. Pileggi.

MR. PILEGGI: May it please the Court, good morning, Your Honor. Francis Pileggi of Lewis Brisbois for the Plaintiffs, Your Honor. I just have a logistical question. I think Your Honor assigned one hour for each side, and we've already exceeded --

THE COURT: Well, I used up the first 15 minutes --

MR. PILEGGI: So, I just don't know how much time I have.

THE COURT: -- so that doesn't count. Why don't you go ahead. I mean --

MR. PILEGGI: Excuse me.

THE COURT: -- you know --

MR. PILEGGI: I'll try to be brief.

THE COURT: -- for the magazine, I mean, I guess it seems to me like one of the questions is: Are they arms or not, which is what -- the Defendant says they're not arms. And I guess, regardless of the answer to that question, I guess, even if I were to agree with the Defendants, they're not arms, I'm kind of wondering whether that even makes any difference --

MR. PILEGGI: Well, Your Honor --

THE COURT: -- I mean, because of their relationship to things that are arms.

MR. PILEGGI: Right. Well, Your Honor, I want to be responsive to your question, so let me start out by answering your question. And then if I have a few extra minutes, I'll go back --

THE COURT: Yeah, yeah. Don't worry about the time.

MR. LEHMAN: -- to the other ones. Your Honor, the Third Circuit has already found that ammunition fits within the definition, the constitutional concept of arms.

THE COURT: But we're not talking ammunition here; right?

MR. PILEGGI: Well, that's a very good point,

Your Honor. But in terms of magazines, I'll answer it another way. Magazines have -- while we're specifically talking about what they refer to as large-capacity magazines as opposed to just any old magazines. And magazines, these large-capacity magazines have been determined by at least one Federal Court -- actually, let me stick with the Third Circuit. The Third Circuit found that there's no long-standing history of large-capacity magazine regulation. So, I think whether or not they're --

THE COURT: Which case was that?

MR. PILEGGI: That's the *Association of New Jersey Rifle & Pistol Clubs vs. The Attorney General of New Jersey*, 910 F.3d. 106, Pages specifically 116 to 117 and Footnote 18. And that case has a very lengthy procedural history, Your Honor --

THE COURT: Right, right. But I've seen --

MR. PILEGGI: -- many, many --

THE COURT: -- that case, but it was more for procedural history.

MR. PILEGGI: Right. So, this particular decision that said that, Your Honor, was in 2018, but you'll see that subsequent to 2018, there were many other iterations. And I don't know if you want me to go through the procedure.

THE COURT: All right. So, actually, just so at

10:05:28 1 least the one iteration of it was an appeal from a
10:05:31 2 preliminary injunction --
10:05:33 3 MR. PILEGGI: Correct.
10:05:34 4 THE COURT: -- was in 2018. The appeal from the
10:05:37 5 preliminary injunction, was that some kind of final
10:05:39 6 decision?
10:05:39 7 MR. PILEGGI: That was the first appeal from the
10:05:42 8 denial of the preliminary injunction. And then there was
10:05:45 9 many other subsequent decisions, but I don't think that
10:05:48 10 particular finding was either changed or altered in the
10:05:53 11 subsequent history.
10:05:53 12 THE COURT: And so, the finding was that a
10:05:55 13 large-capacity magazine was protected by the Second
10:05:59 14 Amendment?
10:05:59 15 MR. PILEGGI: Well, let me give you the quote,
10:06:01 16 and then if I can answer the question after I give that
10:06:04 17 quote.
10:06:04 18 THE COURT: Sure, that would be good.
10:06:05 19 MR. PILEGGI: Part of my answer is the quote.
10:06:08 20 The quote is, "There is no long-standing history of
10:06:10 21 large-capacity magazine regulation." And in further answer
10:06:15 22 of your question, Your Honor, they applied the pre-*Bruen*
10:06:18 23 intermediate scrutiny test.
10:06:20 24 So, our position would be if they were applying
10:06:24 25 the correct standard under *Bruen*, the result might be

10:06:28 different. But at least it's relevant to the answer to your
10:06:31 question that at least in the context of that decision --
10:06:35 THE COURT: Well, when you say the answer might
10:06:36 be different, the *Bruen* -- the analysis might be different,
10:06:48 but surely your position is the answer would be the same.
10:06:50 MR. PILEGGI: Well, Your Honor, under *Bruen* the
10:06:53 test is: Is it consistent with the nation's tradition of
10:06:57 firearm regulation? And the Third Circuit found that
10:07:01 regarding large-capacity magazines, there was no history of
10:07:05 regulation. There is no history of regulation of
10:07:09 large-capacity magazines. So, if we're applying the *Bruen*
10:07:11 standard instead of the pre-*Bruen* intermediate standard, I
10:07:15 think the conclusion, based on that finding, would have to
10:07:17 be different. And I'm not suggesting that's the only
10:07:21 analysis, but that's a very big part of the analysis. Of
10:07:24 course, we also have the common use aspect and the other
10:07:29 aspects of it.
10:07:29 THE COURT: Maybe I'm remembering things wrong,
10:07:31 because I haven't looked at this case for today's
10:07:35 proceedings, but I thought the denial of the preliminary
10:07:38 injunction was reversed.
10:07:39 MR. PILEGGI: Your Honor, there's a very lengthy
10:07:42 history. I think the net result was, and I apologize if I
10:07:47 don't have all this committed to memory, but I think
10:07:50 eventually it ended up being the case that was vacated

post-*Bruen*. So, eventually after many years, it ended up being appealed to the U.S. Supreme Court. And one of the things that was done, among several other Circuit Courts --

THE COURT: Right, right.

MR. PILEGGI: -- that were -- decisions were vacated and remanded in light of *Bruen*. And I think -- I will double-check, Your Honor. I'll be happy to submit something later today, but I'm pretty sure that a final iteration of that case ended up before the Supreme Court. And that's one of the cases that was vacated --

THE COURT: Okay.

MR. PILEGGI: -- and then sent back.

MR. LEHMAN: Your Honor, very briefly. A case that I have in New Jersey was just consolidated with that case. And most recently I think the Third Circuit remanded it for proceedings consistent with *Bruen*. And that's where it stands today.

MR. PILEGGI: It's a very long procedural history.

THE COURT: Okay.

MR. PILEGGI: So, Your Honor, if I can just summarize an answer to your question. Of course it's an important issue whether or not it's considered within the constitutional concept of arms. But the fact that the Third Circuit's already, at least in one iteration of that case,

10:08:58 determined that there is no long-standing history of
10:09:01 regulation of large-capacity magazines, I think that's
10:09:05 helpful to the analysis.
10:09:13 Well, I'm going to be respectful of the Court's
10:09:17 time, so I'm just going to try to give a very abbreviated
10:09:20 discussion of some of the topics. I'd like to, if I can
10:09:23 very briefly, just by way of background and context, mention
10:09:26 the timing of the legislative process where these challenged
10:09:31 statutes were passed.
10:09:32 THE COURT: Although, my impression is they were
10:09:34 passed before *Bruen*.
10:09:36 MR. PILEGGI: Well, Your Honor, with one caveat,
10:09:38 the legislature in the Senate and the House voted in favor
10:09:44 of it before *Bruen*. Then, to be specific, it was June 19th
10:09:50 of 2022.
10:09:51 June 23rd, a week later, approximately a week
10:09:54 later, *Bruen* came out. And then seven days later, the
10:09:59 Governor signed it.
10:10:00 The important point I'd like to make, Your
10:10:02 Honor, is that they had at least a week after *Bruen* to
10:10:08 consider *Bruen*, to determine if, based on *Bruen* the
10:10:13 legislation that they had voted on, but had not yet become
10:10:16 law, should be modified in any way. But they didn't.
10:10:19 And in addition to that, after *Bruen*, two
10:10:24 decisions of the Court of Appeals that were on appeal to the

10:10:28 Supreme Court were vacated.

10:10:30 THE COURT: And I guess, what's your point here?

10:10:32 MR. PILEGGI: My point is that it's relevant in
10:10:34 terms of the legislature not caring whether or not this
10:10:39 statute complied with *Bruen*. They had an opportunity to
10:10:42 read *Bruen* and consider, and it's possible that they read
10:10:46 *Bruen*, and said, You know what, it's still fine. We
10:10:48 don't --

10:10:48 THE COURT: This doesn't sound very relevant to
10:10:50 me because I don't recall seeing any of these cases turning
10:10:53 on whether or not the legislature cared about things or not.

10:10:56 MR. PILEGGI: All right. Then, Your Honor,
10:10:58 this, I think, might be -- I know it is in our briefs, and I
10:11:03 think it's worth emphasizing.

10:11:05 House Bill 450 was based -- the first, and we
10:11:09 have this in our briefs, and I'll just be very, very
10:11:12 abbreviated on this. In the synopsis of the prior iteration
10:11:17 of HB 450, which was Senate Bill 68, it specifically said
10:11:21 that this is based on a Maryland statute. And this statute
10:11:26 is constitutional because it's based on a Fourth Circuit
10:11:30 decision called *Kolbe* which upheld it.

10:11:33 Well, the point I'm trying to make, and I didn't
10:11:36 make it very good the first time. I'm going to try this
10:11:39 time --

10:11:39 THE COURT: But this one seems -- I think it is

probably a much more relevant point.

MR. PILEGGI: Yes, so let me focus on this one. So, after *Bruen* was decided -- well, let me back up.

THE COURT: So, but I think I got this from the briefing. The Fourth Circuit approved whatever the Maryland law was or said it wasn't unconstitutional. And then when the Supreme Court issued *Bruen*, they vacated and remanded a lot of different Courts of Appeal cases, including the Fourth Circuit one.

MR. PILEGGI: Right.

THE COURT: And I forget, but what I forget is has the Fourth Circuit done something since then?

MR. PILEGGI: I don't think any final decision has been made on that, to my knowledge. But the point is HB 450 was based on a Maryland statute very similar that banned certain types of firearms and certain magazines. And at least in the synopsis of the bill, the first iteration of the bill, they said, This is fine because it's been upheld by the Fourth Circuit. But that Fourth Circuit decision that they relied on has been vacated.

THE COURT: Right, but I didn't go to check this, because in my general knowledge, which I hope is correct, when the Supreme Court issues a decision, and it has cert pending petitions of a similar nature, isn't it general practice to vacate and remand them for consideration

in light of whatever decision is just decided, so that the -- while the Fourth Circuit -- because it's been vacated is not law. The vacating and remanding doesn't really indicate anything about whether or not the Fourth Circuit was wrong or right or maybe it indicates they did the wrong analysis because they used the two-step thing and the Supreme Court has said, No, it's a one-step thing.

So, but that doesn't really -- I don't know. That's what I would get out of that.

Am I missing something?

MR. PILEGGI: Your Honor, I respect your analysis, and I'm not going to disagree with it other than to say the decision on which the legislation was originally based saying that this is fine, has been vacated. And now what the result of a vacated decision is, maybe they'll go back and apply the new standard and reach the same result. Nobody knows, but I don't think it's the same as saying, Okay, that's a sound analysis.

THE COURT: Do you know what the -- because *Bruen* was, you know, last June. We're now, what, I don't know, eight or nine months since then. Is that case still with the Fourth Circuit?

MR. PILEGGI: Your Honor, I have to double-check. I've looked. I didn't look before I came here today, but I did look. And my understanding is that a

lot of those similar cases that were vacated, at least two that I know of, the Court remanded back to the District Court for historical finding, although it's very much a disputed issue whether it was necessary to remand it. But I don't know that any final decision has been made subsequent to the case being vacated.

THE COURT: So, hold on a second. I think Mr. Lehman might know, one way or another.

MR. LEHMAN: Your Honor, I distinctly recall listening to the oral argument that recently happened since it came back down, so I think --

THE COURT: So, it's under --

MR. LEHMAN: The oral argument has happened, and they just haven't issued their decision yet, I believe is where that stands.

THE COURT: Okay.

MR. PILEGGI: I follow these things pretty closely, and I think I would have heard if there was a decision.

THE COURT: Right. So, that's the kind of thing, you know, obviously, if the Fourth Circuit says something before I say something, that's a very significant data point.

MR. PILEGGI: Yes. If I find out about it, Your Honor, I will promptly notify the Court.

10:15:46 THE COURT: That's why we talked about this at
10:15:47 the beginning.
10:15:48 MR. PILEGGI: So, a lot of things are happening
10:15:50 around the country on this, obviously.
10:15:52 THE COURT: Right. So, that's the reason why I
10:15:54 have lawyers to keep me advised of those things.
10:15:58 All right. Go ahead.
10:15:59 MR. PILEGGI: Your Honor, I think with the
10:16:00 limited time left, I'm just going to focus on the Delaware
10:16:03 Constitution, because I don't think my friend intentionally
10:16:06 did not -- he did not focus on that regarding --
10:16:08 THE COURT: So, yeah. So, limit yourself on
10:16:13 this, but go ahead.
10:16:14 MR. PILEGGI: I'll try to be brief, but I will
10:16:15 limit myself to the Delaware Constitution for the applicable
10:16:20 standard of review. Your Honor, I was fortunate to
10:16:23 successfully argue both Delaware Supreme Court decisions,
10:16:27 the only Delaware Supreme Court decisions that have defined
10:16:30 the scope of Article I Section 20 in terms of the right to
10:16:34 bear arms outside the home, which is the analog to the
10:16:37 Second Amendment, but which, by its terms and as it's been
10:16:40 defined by the Supreme Court, is much broader because --
10:16:44 THE COURT: Well, so the much broader because
10:16:47 the Constitution says, and I forget exactly what, but it
10:16:50 says hunting and maybe it says sporting purposes or, I mean,

it has things other than self-defense --

MR. PILEGGI: Right.

THE COURT: -- expressly in it.

MR. PILEGGI: Right.

THE COURT: So, in that sense, even though Mr. Lehman's argument is that's all covered by the Second Amendment, too, so it makes you kind of wonder. But I take it that, yeah, having express purposes in the Delaware Constitution certainly creates breadth, in my opinion.

The question more, though, is or the question that I would have and part of the reason why I was thinking, and this might be a good thing to get the Delaware Supreme Court to address is how much a decision in *Bruen*, which I take it is after these two Delaware Supreme Court decisions, how much that creates uncertainty about what the Delaware Supreme Court would say. And so, that's my concern.

MR. PILEGGI: I'd like to address that, if I may, Your Honor. In both the *Doe vs. Wilmington Housing Authority* and the *Bridgeville vs. Small* case, the Delaware's high court emphasized the truism which was also observed in the Late Justice Holland's book on the Delaware Constitution. The truism that the U.S. Constitution provides the floor of minimum rights. The States can't provide fewer than those minimum rights, but they can provide greater rights.

10:18:25 And that's what Article I Section 20 does. It
10:18:28 creates greater rights than the Second Amendment. And those
10:18:32 two cases establish beyond question that Article I
10:18:36 Section 20 provides greater rights.
10:18:38 Now, the State's argument is that the review
10:18:42 standard should provide fewer rights. If I understand the
10:18:46 State's argument, they're suggesting that notwithstanding
10:18:49 *Bruen*, which got rid of the one step too many, got rid of
10:18:53 the intermediate scrutiny test, that even though the
10:18:55 Delaware Constitution provides greater rights, it should be
10:18:59 reviewed based on a more restrictive standard, which I don't
10:19:03 think is consistent with *Bruen*. And it's not consistent
10:19:06 with the Delaware Supreme Court's view of Article I
10:19:09 Section 20 as being -- providing much broader rights.
10:19:12 THE COURT: So, the standard review that the
10:19:14 Delaware Supreme Court gave in your two cases, how would you
10:19:17 describe that?
10:19:18 MR. PILEGGI: Intermediate scrutiny.
10:19:20 THE COURT: So, my understanding of State
10:19:29 Constitutions, generally, I mean, because there's a certain
10:19:32 truism to what Justice Holland said, which is if the U.S.
10:19:36 Supreme Court guarantees you certain rights, anything the
10:19:41 State does can't detract from that amount of protection.
10:19:46 MR. PILEGGI: Right. It provides a floor.
10:19:48 THE COURT: It is a floor, but that doesn't

10:19:50 1 necessarily mean that, you know -- and I've seen this in the
10:19:56 2 Fourth Amendment context -- that doesn't necessarily mean
10:19:58 3 that every time the Supreme Court refines its mode of
10:20:07 4 analysis of a particular issue, that that now is a part of a
10:20:12 5 refining of the Delaware Constitution.
10:20:16 6 The Delaware Supreme Court historically, you
10:20:20 7 know, based on bits and pieces of information I have, has
10:20:23 8 been very assertive. And I think Justice Holland, in
10:20:37 9 particular perhaps, that, you know, the Delaware
10:20:41 10 Constitution has a different history and, you know, they can
10:20:45 11 do things differently.
10:20:48 12 And so, one of the things that it seems to me is
10:20:52 13 they could continue to do intermediate analysis, say, Look
10:20:56 14 we cover hunting. And what's the other thing?
10:20:59 15 MR. PILEGGI: Recreation.
10:21:00 16 THE COURT: Recreation and the home. Yeah, we
10:21:03 17 cover hunting and recreation. You know, we cover these
10:21:05 18 things that we think are broader because they're explicitly
10:21:09 19 called out, but that doesn't necessarily mean that we now
10:21:14 20 are going to adopt one -- you know, *Bruen* said the Court of
10:21:21 21 Appeals are wrong when they do the two-step analysis.
10:21:26 22 They didn't, because they couldn't, say the
10:21:29 23 Delaware Supreme Court is wrong when it does two-step
10:21:32 24 analysis; right?
10:21:33 25 MR. PILEGGI: You are correct, Your Honor, but

maybe I can answer your question by focusing on the part of Article I Section 20 that is identical, the right to bear arms for the protection of self.

Based on *Doe* and *Bridgeville*, the Delaware Supreme Court said, We should apply the intermediate scrutiny to any challenges based on Article I Section 20, including the right to bear arms for the protection of one's self inside the home. I think we can all agree that the United States Supreme Court said, That's not the right standard to determine the right to bear arms within the home --

THE COURT: So --

MR. PILEGGI: -- under *Heller*.

THE COURT: So, you would have me or the Third Circuit basically overrule the Delaware Supreme Court?

MR. PILEGGI: No, Your Honor. The way I would look at it is let's start with the truism that we all agree with that the United States Supreme Court decides what the floor of minimum rights are when you're --

THE COURT: Based on the U.S. Constitution?

MR. PILEGGI: Based on the U.S. Constitution. That's the floor. A state can't go below that floor. A state can provide greater rights, but can't provide fewer rights.

So, if we start with the overlap of Article I

Section 20 with the Second Amendment, the right to keep and bear arms within the home. Let's keep it simple for this purpose, for my purpose. That's an identical right in the Delaware Constitution and the U.S. Constitution.

The Delaware Supreme Court pre-*Bruen* said, When we're reviewing these issues, we apply the intermediate scrutiny test. I think it's a fair conclusion after *Bruen* that that would provide fewer rights applying intermediate scrutiny to the right to keep and bear arms within the home. Applying the intermediate scrutiny standard would be more restrictive and would provide fewer rights than applying the *Bruen* standard, which is essentially none of the three tiers of scrutiny. I think that's a fairly safe statement based on *Bruen* and based on Article I Section 20.

THE COURT: But you would require me to, I don't know, predict that when the last thing the Delaware Supreme Court has said is, We apply intermediate scrutiny, that in the future they would not do that?

MR. PILEGGI: Well, based on -- at least to the extent that there's an overlap of Article I Section 20 to keep --

THE COURT: Okay.

MR. PILEGGI: At least to that extent.

THE COURT: We can quibble on how much it applies to, but the point is you want me to take the last

word from the Delaware Supreme Court interpreting the Delaware Constitution and say that the U.S. Supreme Court's interpretation of the U.S. Constitution has changed how the Delaware Supreme Court would analyze this particular provision?

MR. PILEGGI: Well, Your Honor, with all due respect, the way I would say it is we're applying the truism that the State cannot provide fewer rights than the U.S. Constitution provides. And by applying the old -- well, by applying the *Doe vs. WHA* standard to that right, we -- the State would be applying or providing fewer rights than the U.S. Supreme Court said are the minimum rights.

THE COURT: You know, Mr. Pileggi, the Delaware Constitution doesn't have to have a Second Amendment analog at all; right?

MR. PILEGGI: That is correct, Your Honor.

THE COURT: And so, if it didn't, they'd be providing fewer rights.

MR. PILEGGI: If the Delaware Constitution did not have an analog to the Second Amendment, you wouldn't have -- let's say there was no Article I Section 20.

THE COURT: Yeah, yeah. That's what I'm saying.

MR. PILEGGI: And before 1987, which is relatively recent for historical purposes, that's when Article I Section 20 was passed, there was none. So, let's

say we're in 1985. There is no Article I Section 20. And let's say *Bruen* came out in 1985.

Well, or *Heller* came out in 1985. At the very least, Delaware residents would have the right to keep a handgun in their home for self-defense.

THE COURT: Sure. Sure. Yeah, yeah, because of the U.S. Constitution, but not because of the Delaware Constitution.

MR. PILEGGI: Right, but to complete the analogy, the Delaware Supreme Court couldn't come out in 1986 and say, You're not allowed to have a firearm in your home for self-defense because there's nothing in the Delaware Constitution.

THE COURT: Right. They would not be interpreting the Delaware Constitution. They'd just be applying U.S. Constitutional law.

MR. PILEGGI: Right. So, let's fast forward to 1989, Article I Section 20.

THE COURT: Yeah, yeah. So, I don't think this is --

MR. PILEGGI: Okay.

THE COURT: I understand what you're saying. I'm pretty sure I disagree with it --

MR. PILEGGI: Okay.

THE COURT: -- so I don't think it's productive

to talk about this anymore.

So, what I'm thinking, Mr. Pileggi, is I'll give you another five minutes, period, then we're going to take a break, and then we'll switch over to the State. Okay?

MR. PILEGGI: Yes, Your Honor. Fine. Thank you.

In the five minutes I have left then, I'd like to talk about the difference between automatic and semi-automatic. In another case that I was successful in arguing, the *Delaware State Sportsmen's Association vs. Garvin*, there are two cases by that name. There's a 2018 case and there's a 2020 case. I'm referring to the 2020 case.

In the 2020 case that we won and the State did not appeal, the Superior Court in that decision disagreed with the State. In that case, the State was trying to conflate the difference between an automatic weapon and a semi-automatic weapon.

And I respectfully suggest they're doing the same thing in this case. They're trying to blur the distinction, the very important distinction, between an automatic firearm and a semi-automatic firearm. And the best --

THE COURT: And the firearms that we're talking about here, they're all semi-automatic; right?

MR. PILEGGI: Correct. But in their briefing, Your Honor, and it came up a little bit in your colloquy with my friend, they keep referring to machine guns, which everyone knows are banned, and nobody in this case is arguing are covered under the Second Amendment. We might as well be talking about rocket-propelled grenades because that is not something that is covered. We're not arguing that it's covered.

THE COURT: Well, no, no. So, part of the reason, because I think I was the one who introduced machine guns or, for that matter, sawed-off shotguns, you know, I understand they are not at issue in this case. But one of the things that I'm trying to do is to, for lack of a better word, try to consider the broader scope than just what's exactly at issue in this case because I think -- you know, I may change my mind about this -- but I think there's a lot of uncertainty about exactly what the Supreme Court's decisions, what the implications are of those for much of anything other than handguns.

And I think there's a lot of things just in the opinion that kind of go this way, kind of go that way or at least maybe they don't, but there's suggestions. And you know, Justice Alito, Justice Cavanaugh, Chief Justice Murray, Justice Cavanaugh. You know, Justice Cavanaugh and the Chief Justice said, Properly interpreted, the Second

Amendment allows a variety of gun regulations. As we've explained, the sorts of weapons protected were those in common use at the time. We think that limitation is fairly supported by the historic tradition of prohibiting the carrying of dangerous and unusual weapons.

Justice Alito said, Our holding today in *Bruen* decides nothing about the kinds of weapons that people may possess.

And so, that's the reason why I'm asking questions, maybe all over the lot, because I'm interested in more, though I don't really have any power to say anything about it, than just the particular two pieces of legislation that are what is the subject of today's hearing.

In any event, I'm sorry for that digression. Go ahead.

MR. PILEGGI: No. I'll just conclude with this, Your Honor, because I don't want to extend -- I don't want to use up more time than Your Honor has given me. I'll just close with one statement.

In that *Garvin* -- excuse me, in that *Delaware State Sportsmen's Association vs. Garvin*, the 2022 case -- 2020 case, the Superior Court disagreed with the State's attempt to say there's no real important distinction between automatic weapons and semi-automatic weapons. They tried to conflate the two. And I think they're trying to do the same

thing here.

And my point is there's an extremely important, well-established distinction. And the best example of that is automatic weapons, like machine guns, have been banned. They're still banned. And nobody in this case is suggesting they shouldn't be banned.

Semi-automatic weapons have never enjoyed a tradition of regulation consistent with *Bruen*. And that's why the distinction between semi-automatic and automatic weapons for this case is an important distinction, as was recognized in *Garvin*.

Thank you, Your Honor.

THE COURT: Besides for machine guns, what other kind of fully automatic weapon is there?

MR. PILEGGI: Well, Your Honor, the best answer to that question is there are a lot of modifications you can make. The machine gun is the best example. But if Your Honor wants, I can submit a long list of examples. That's the best example, but there are weapons -- there are modifications you can make to a weapon to make it automatic, but that's the most common example.

But none of the weapons that are banned here in this legislation that we're challenging are anything other than -- excuse me -- no one suggests they're anything other than semi-automatic.

10:33:30 THE COURT: Right.

10:33:32 MR. PILEGGI: And the most common example --

10:33:34 THE COURT: Are there any other presently banned weapons that are -- you said machine gun is the most common. What's in second place; do you know?

10:33:48 MR. PILEGGI: Well, Your Honor, I think my understanding is that the best way to -- instead of trying to think of an example, whether it's a Tommy gun or something, is to apply the definition. As I understand it, an automatic weapon is when you pull the trigger, bullets will continue to fire as long as your finger is on that trigger. Semi-automatic, you have to pull the trigger each time you want a bullet to fire.

10:34:12 THE COURT: Right.

10:34:13 MR. PILEGGI: That's the best and it's a simplistic definition.

10:34:17 THE COURT: And so, maybe --

10:34:18 MR. PILEGGI: So, if you want a definition of whether or not -- which one of those definitions applies as opposed to the name of the firearm, because I think many firearms can be modified and adapted to fit one or two of those -- either one of those definitions. I don't know if that answers your question or not.

10:34:36 THE COURT: No, actually that's helpful. Thank you.

10:34:42 So, one of the things about the large-capacity
10:34:45 magazine that was in the briefing was because the cutoff
10:34:52 here is 17; right?
10:34:55 MR. PILEGGI: Correct.
10:35:00 THE COURT: If the large-capacity magazine ban
10:35:09 was upheld, would there be any firearms that could no longer
10:35:14 be used?
10:35:17 MR. PILEGGI: Your Honor, that's a good
10:35:19 question. And there are so many different types of firearms
10:35:22 out there, I'd hesitate to give you a definitive answer for
10:35:26 all firearms. Excuse me. I'll keep my hands in my pocket.
10:35:32 But I do think a statistic would be helpful. It might help
10:35:36 to inform the answer to that question.
10:35:40 THE COURT: But before you give me that, just in
10:35:43 terms of, Yes, Judge, here's one firearm that only works
10:35:49 with a magazine that's goes above 17, you can't name one
10:35:57 right now?
10:35:57 MR. PILEGGI: I can't name one, but I'd be happy
10:36:00 to supplement by the end of the day the answer to that
10:36:03 question.
10:36:03 THE COURT: Okay. So, what were you going to
10:36:06 say?
10:36:06 MR. PILEGGI: In Page 16 of our reply brief, we
10:36:09 cite to a 2022 report that indicates that 52 percent of
10:36:14 modern sporting rifles in this country have magazines with a

capacity of 30 rounds. So, in partial response to Your Honor's question, whether or not those firearms could be used, somebody would have to go out and buy -- either buy a new magazine or try to retrofit their firearm to find a magazine, if they could, that would fit their firearm for a majority of the modern sporting rifles in this country. That's a pretty big statistic.

If you want, Your Honor, I can supplement to make sure I get an answer --

THE COURT: Well, I mean, if you've got -- so, if you've got some example of a firearm that can't operate unless it has a magazine that has at least 18 rounds, yeah, if you'd send me a letter saying what that is and how we know that's true, that would be helpful. You don't have to do it by the end of the day, but probably by the end of Monday would be helpful.

MR. PILEGGI: Okay, Your Honor. I will make sure I send you that letter, one way or another, based on --

THE COURT: Okay. That would be great.

MR. PILEGGI: Okay.

THE COURT: Hold on a second, Mr. Pileggi. Mr. Lehman said there are 10 million plus or minus firearms out there that probably meet the legislation's definition of what's banned in the assault rifle, assault pistol categories.

10:38:34 Is there any information about -- I think maybe
10:38:44 you just gave it to me. Is half the magazines that are sold
10:38:50 each year for or I wrote down here, 50 percent of the
10:38:58 magazines sold in 2022, but I guess I'm missing what that
10:39:02 goes with, were 30 rounds or more.
10:39:07 MR. PILEGGI: I can answer that in two parts,
10:39:10 Your Honor, just to make it clear. On Page 16 of our reply
10:39:14 brief, we refer to a 2022 report that 52 percent of modern
10:39:19 sporting rifles have magazines with a capacity of 30 rounds.
10:39:23 THE COURT: When you say "have," you mean are
10:39:24 sold sort of in conjunction with?
10:39:26 MR. PILEGGI: In existence today based on sales
10:39:30 in the past. But the other thing I want to point out in
10:39:33 answer to your question, Your Honor, is --
10:39:35 THE COURT: So, if one were approximating, if
10:39:41 there's 10 million of these sorts of weapons out there,
10:39:47 maybe a reasonable estimate is 50 percent of them have a
10:39:51 large-capacity magazine within the meaning of the law?
10:39:55 MR. PILEGGI: Based on that statistic, but there
10:40:00 are a lot of other statistics. And if I can just refer to
10:40:03 our reply brief, Your Honor, at Pages 9 and 10 of our reply
10:40:08 brief, there are a lot of other statistics. For example, we
10:40:11 cite to a National Shooting Sports Foundation Report that
10:40:18 ten years ago one out of every -- well, let me be more
10:40:23 specific. We're talking about how many of these are out

10:40:25 there, and there are a lot of statistics in our reply brief. I'm just trying, in the interest of time, to pick one because I know that there are many statistics out there, and I don't want to bore you with statistics.

But how about if I leave you with this: In the Ninth Circuit in *Duncan vs. Becerra*, and there are a lot of cases with that name. This is a 2020 decision. In that case, which was later vacated en banc, but not for this purpose, a panel of the Ninth Circuit observed that one of the banned rifles, the AR-15 is the most popular rifle in America today and comes standard with a 30-round magazine. So, that doesn't give you a specific number, but at least according to a panel of the Ninth Circuit in that case, the most popular rifle in America today comes standard with a 30-round magazine. So --

THE COURT: Okay. Well, that's actually very helpful.

MR. PILEGGI: And I know you don't want me to take up any more time, Your Honor, but our reply brief does cite a lot of statistics about how many millions of rifles are out there.

THE COURT: Okay. All right.

Thank you, Mr. Pileggi.

MR. PILEGGI: Thank you, Your Honor.

THE COURT: All right. So, we'll take a 10 or

10:41:38 15 -- let's take a 15-minute break.

10:41:41 And, Mr. Ross, you know, I'm not going to limit you to an hour here or your side to an hour because, for one thing, I've given them probably an hour and a half already. So, for what it's worth.

10:41:58 Okay?

10:41:59 MR. ROSS: Thank you, Your Honor.

10:42:00 THE COURT: All right. We'll be in recess.

10:42:01 (A brief recess was taken.)

10:42:01 DEPUTY CLERK: All rise.

10:59:30 THE COURT: All right. Mr. Ross.

10:59:36 MR. ROSS: Thank you, Your Honor. Two housekeeping matters before we get into the substance. If 10:59:38 Your Honor still needs the case number for *Graham*, we have 10:59:40 it handy for Your Honor.

10:59:43 THE COURT: Just tell me what it is. I don't think it matters.

10:59:46 MR. ROSS: 23-00033.

10:59:46 THE COURT: Okay.

10:59:49 MR. ROSS: Secondly, Your Honor, we have some slides. I don't know that we'll get through all of them. 10:59:51 We'll have them up on the screen. We also have a printout of them if it would be helpful for Your Honor to have a printout.

10:59:52 THE COURT: Sure.

10:59:55

10:59:57

11:00:00

11:00:00

MR. ROSS: May I approach to hand up copies?

THE COURT: Sure.

MR. ROSS: Thank you, Your Honor. May it please the Court.

After nearly 50 pages of briefing and about an hour and a half of argument, it's clear that the Plaintiffs' argument on the constitutional issue reduces to the following proposition. There are millions of assault weapons and large-capacity magazines in the United States; and therefore, they can't be banned under *Bruen*.

You see it in a lot of places in the briefing. We've heard it today. And I think perhaps most clearly --

THE COURT: Right. I think Mr. Lehman was pretty clear if it's -- I think that is the -- obviously, there's more to it, but yeah, if it's not dangerous and unusual, and it's not unusual because there's 10 million of them, it's over.

MR. ROSS: That's right, Your Honor. We see that in the briefing. We've heard it today. And we believe that oversimplified approach fundamentally misconstrues the relevant law. We believe that this claim starts from that faulty premise. They've offered almost no evidence in support of their position. And the little evidence that they've offered fails in comparison to our evidence.

I would note there was discussion --

11:01:32 THE COURT: I mean, it's fair to characterize
11:01:34 their view as the two pieces of legislation are facially
11:01:38 valid; right?
11:01:39 MR. ROSS: Because, yes, for one reason, which
11:01:42 is that there are -- two reasons. There are a lot of
11:01:46 assault weapons, and there are a lot of large-capacity
11:01:49 magazines.
11:01:50 THE COURT: Right, right. But, I mean, if
11:01:51 they're right, that's all that they need to do?
11:01:54 MR. ROSS: Unquestionably, if that's all that's
11:01:56 relevant, they've gotten there. But as we believe it's
11:02:00 clear from *Bruen*, and Mr. Moritz will talk in detail about
11:02:05 *Bruen*, that the analysis requires far more facts than that.
11:02:10 There was discussion during counsel's argument
11:02:13 about the motivation for the Bowie gun laws, the motivation
11:02:19 for the Tommy gun laws. There's no evidence from the
11:02:24 Plaintiffs on any of that. Their flawed analysis and
11:02:28 absence of evidence, we believe, means they're not entitled
11:02:31 to an injunction.
11:02:32 So, briefly, a roadmap on what we plan to do
11:02:34 today, Your Honor.
11:02:34 THE COURT: Actually, they may not have, but
11:02:38 like the idea that the Bowie knife law was in response to
11:02:44 crime, isn't that what your expert said?
11:02:46 MR. ROSS: Yes, but what he -- all counsel said

is it was done because it was perceived that it was used by criminals. That's the entirety of their facts. We believe there's --

THE COURT: Yeah, but that seems to be -- the sawed-off shotgun, that's what the Supreme Court said; right?

MR. ROSS: It is part of the analysis, Your Honor. It is not, however, the beginning and the end of the analysis. So, what we would plan to do today, and we're going to tweak some of this, because we've heard Your Honor is I'm going to talk about the factual record and the issue of whether or not large-capacity magazines are arms. Mr. Moritz is going to discuss the Second Amendment framework and the arguments. And I'll discuss the Delaware Constitution. And unless Your Honor has questions, we've heard you, and we don't plan to discuss the other factors on the preliminary injunction.

We believe that the questions before the courts dealing with these types of cases is highly fact dependent. It's why we submitted five declarations, nearly 200 pages, 39 exhibits for the experts and another 16 on our brief. We believe that sort of detailed factual analysis is required by *Bruen*. And, indeed, it's consistent with what other courts around the country are doing. And I'm not going to spend time cataloging them, but I do think one very recent

Order is useful, and the exchange here is on Slide 3.

This is the case of *Cheeseman vs. Platkin*, which is in the District of New Jersey. The case number is 1:22-cv-4360. Multiple cases are pending in the District Court in New Jersey challenging New Jersey's assault weapon statute, and the State moved to consolidate.

Mr. Cheeseman, represented by Plaintiffs' counsel, opposed consolidation. And on the left side, we have an excerpt for why he didn't think consolidation was necessary. He said, Because there's really only two questions. One, are they bearable arms? And two, are they in common use? It's the same basic two-part test we've heard today.

On February 3rd, the Court rejected it, and we have excerpts from the ruling on the right. The historical evidence, which is the central issue here, needed to be developed in the case. And the Court consolidated in order to develop the historical evidence in discovery.

Now, this was issued ten days before the Plaintiffs filed their reply brief, and yet they elected to stay with the same argument that the Court found unpersuasive there.

THE COURT: Well, of course, I mean, with due respect to my colleagues in New Jersey, they believe that they are right. They don't have to change just because a

District Court judge in New Jersey said otherwise.

MR. ROSS: They're entitled to proceed as they like. We think, though, it is insightful and instructive on the question of whether or not this argument is the extent of the analysis. It doesn't mean they have to change their view.

THE COURT: And, also, I mean, part of the reason why -- because they essentially had the same issue at some point ago in this case when we were talking about the schedule. And it seemed to me that being certain that if they lost, they would appeal. And thinking there was some possibility if you lost, you would appeal. That it would be good to have a record, which I was in no position at the time to definitively say one way or the other just because the Court of Appeals might appreciate a record.

MR. ROSS: Understood. Of course. And I recognize the Court doesn't prejudge anything when, for example, it orders consolidation. If the Plaintiffs' theory is correct, though, then the record of historical regulation is actually basically irrelevant because for them the entirety of the analysis is millions, it's over.

THE COURT: No.

MR. ROSS: I recognize no one has decided that yet.

THE COURT: I think they would agree with you on

that.

MR. ROSS: Right. And Mr. Moritz will explain, when he's talking about the Second Amendment analysis, why we think it's fundamentally different.

Now, because of that choice, which is obviously their choice to make, substantially all of the factual evidence, which we believe is important, is uncontested. And there's not time today and I'm not going to go through all of that.

THE COURT: Well, I mean, I asked that question at the beginning, and they concede that.

MR. ROSS: Yeah. Nevertheless, I think to understand the Second Amendment analysis, we believe it is highly fact dependent. I do want to touch briefly on some of the key undisputed facts. And there are a few facts where the parties do seem to join issue, and I would like to spend a few minutes on this.

THE COURT: All right.

MR. ROSS: So, first, let's talk about the statutes, what they are. Your Honor has talked about HB 450 SS 1 for SB 6. HB 450 bans the 44 semi-automatic assault long guns, 19 semi-automatic assault pistols.

In response to Your Honor's question about the pistols, we had time to do a little bit of additional looking at the break. And I know that at least one of the

articulated models also has a fully automatic version available, but we don't have sort of full evidence on that.

What is uncontested is that there are numerous handguns, rifles, shotguns, including semi-automatic ones, that are not covered by the statute. They're not banned, including types of guns that have been referred to as commonly used for self-defense like the handgun. And there's no claim to the contrary from the Plaintiffs.

THE COURT: I mean, based on nothing other than my own experience, I would estimate the number of semi-automatic handguns to greatly exceed 10 million in this country, but I have no idea what that is. I mean, the ones that are not banned.

MR. ROSS: Right. That's exactly right, Your Honor. There is a category that, specifically the enumerated ones, and then those that meet the definition of copycat which are banned. But it is uncontested that there are an enormous number of weapons that are not affected by the statute.

With respect to SS 1 for SB 6 -- and I should note before I move on, there are also certain exceptions in the statute, including weapons that were owned before. There's a qualified law enforcement officer exception.

With respect to the magazines, what are banned are magazines that can hold more than --

11:09:20 THE COURT: But while you note there are these
11:09:22 exceptions, whether or not there's a law enforcement officer
11:09:27 exception or whether or not there's a grandfather clause,
11:09:35 aren't they irrelevant to the constitutional issue?
11:09:38 MR. ROSS: So, I don't believe they are
11:09:42 irrelevant for a few reasons. First of all, at the federal
11:09:48 level, we believe the right that's at issue, the right with
11:09:51 respect to the Second Amendment, concerns weapons in common
11:09:54 use for the purpose of self-defense. And we believe that,
11:09:58 as you think about that, we have not only shown through the
11:10:02 evidence in the record so far that these aren't those, but
11:10:05 we've explained that those weapons are unaffected.
11:10:09 With respect to the Delaware Constitutional
11:10:11 issue, which I'll get to, it's important to note that the
11:10:14 two cases that the Plaintiffs rely upon were both complete
11:10:19 and total ban cases. No gun ownership whatsoever in the
11:10:23 common area of apartments. And subject to a few hunting
11:10:26 licenses, no guns possessed in State Parks. They were
11:10:30 referred to as total bans.
11:10:32 These statutes -- neither of these statutes is a
11:10:36 total ban. And so, when you think about the appropriate
11:10:39 framework for Delaware, which we'll get to, it matters,
11:10:42 according to the Delaware Supreme Court, how you think about
11:10:45 the appropriate standard of review.
11:10:47 The large-capacity magazine statute bans

magazines that can hold more than 17 rounds. It happens to be higher than the limitations in many of the other statutes around the country. Importantly, no claim, and this goes to a question that Your Honor had, and I'll get into it in a little bit more in a couple minutes -- no claim that upholding the large-capacity magazine ban would render any weapon whatsoever inoperable.

THE COURT: That's where things stand right now, but I am giving Mr. Pileggi a chance to tell me otherwise.

MR. ROSS: Understood. And we'll take it up -- as of this morning when we walked in and to date, there's been no claim. If they want to make an argument, we will deal with it.

But it's clear that neither of these is a categorical ban. And the Plaintiffs in Footnote 1 of the reply talk about the analysis "in the context of bans."

THE COURT: And I'm sorry, but you also say there are no categorical bans, but I believe, either you or Mr. Moritz, said when I asked at the beginning if the legislature passed a categorical ban, would anything be different, and the answer was no; right?

MR. ROSS: I think I answered the question. I'm not sure. If that was the question as to whether or not the analysis would change if it's a categorical ban, I thought there was a question about how the application of a broader

group of guns, but I didn't understand you to be talking about a complete categorical ban of all guns.

THE COURT: Well, no. The question was, and maybe I didn't frame it right, but it was: The assault weapons, 450, HB 450 is prospective. And essentially, I didn't use the word retroactive, but if you made it retroactive and, you know, would that be a problem under the Second Amendment? And I thought the answer was no.

MR. ROSS: Correct, because even going backwards, it's not a category. It doesn't change the fact whether you're looking forwards or backwards. This is not a categorical ban.

THE COURT: Well, actually I meant the categories that are in the statute.

MR. ROSS: Yes. And the categories that are in the statute are not categorical bans. They're specifically enumerated weapons, and then a definition of other guns that may not have the name, but have the features.

THE COURT: Right. So, we're actually just disagreeing on what it means to be categorical.

What I meant, and I'm thinking you're not actually disagreeing with, is if those particular weapons were banned retroactively, that would not present a different issue.

MR. ROSS: That is correct, Your Honor.

11:13:37 THE COURT: Okay. Now, we understand each
11:13:39 other.
11:13:40 MR. ROSS: I'm sorry?
11:13:41 THE COURT: We understand each other.
11:13:42 MR. ROSS: Okay. And what I was meaning to say
11:13:44 when I was talking about a categorical ban is that there is
11:13:48 no claim that, for example, unlike the Delaware cases, all
11:13:54 firearms or even all members of a category of firearms are
11:13:59 banned by the statute. We're talking about specifically an
11:14:02 enumerated set with guns. And it leaves many --
11:14:07 THE COURT: Well, so are there assault rifles
11:14:10 that are not banned by this statute?
11:14:12 MR. ROSS: So, there are semi-automatic weapons.
11:14:18 Long -- I don't want to avoid the question, but it would
11:14:22 depend upon how you define an assault rifle, but there
11:14:25 are --
11:14:26 THE COURT: Well, maybe a way to say this is:
11:14:33 Is there something that would fit within the definition -- I
11:14:37 can't remember now whether HB 450 has a definition or
11:14:40 whether it's just a list of particular manufacturers and
11:14:43 copycats. Are there other "semi-automatic assault long
11:14:54 guns" that are not banned?
11:14:57 MR. ROSS: So, I want to be -- I want to answer
11:14:59 the question. So, no, in the sense that semi-automatic
11:15:04 assault long gun is a defined term in the statute. There

are -- if we move away from the statutory nomenclature, there are long, like rifle, semi-automatic weapons. Like there can -- my understanding is semi-automatic hunting rifle is a long -- you know, it would have a length that is similar. It would be semi-automatic. It is not banned.

So, it is, as Your Honor suggested in his question, a statute that doesn't say every gun that simply meets these criteria are banned, and that's how we get there. It says, Here's a list of specifically enumerated assault long guns, a list of specifically enumerated assault pistols, and then copycat weapons which are specifically defined as weapons which have the following characteristics.

So, let's talk a little bit more about the banned guns. It's uncontested on the record that what we're talking about are guns that have military origins. And I understand from the discussion this morning, simply having the origin there, you can go a lot of different ways.

Let's talk about the specific ways these guns have gone. What they have done is retained nearly all of the features of the military weapons. They have interchangeable parts. And the only difference that's been identified is that they fire semi-automatically versus fully automatically.

And I want to come back to that. But what we're going to see is that because of the similarity in features

with their military counterparts, they share features that make these guns incredibly lethal. It's uncontested, these guns are actually marketed as being weapons of war. We have some of the advertisements in the record. And actually, if you look at the -- it's hard to read, but the Daniel Defense advertisement on the right for a civilian weapon, the very bottom talks about the fact that this gun is useful at home or whether you're patrolling a foreign land -- and if we can blow back out -- with a picture of a soldier. This is how they are marketed.

So, let's talk about the history of one of these just to help better understand. We can't get through all 63, and we'll use the one that Plaintiffs' counsel talked about, the AR-15, which has been described by the Fourth Circuit accurately as the semi-automatic version of the M16 developed for the military.

And if we could go to Slide 8. This is a field test. It's formerly classified.

THE COURT: I saw this stuff about, you know, killing Vietnamese, and blowing their arms off and big holes here and there. I understand that they -- at least some of these have a capacity to be more dangerous or more lethal, maybe even unnecessarily more lethal than other guns.

THE COURT: So, I don't know. Go ahead, but I don't -- I'm not sure how actually relevant this is.

11:18:18 MR. ROSS: Sure. So, I want to speak to the record and answer Your Honor's question. We don't need to roll through these.

11:18:26 One of the limited areas where there is disagreement between the parties is in the suitability and relative validity of these weapons versus other weapons. And we do believe it is relevant because we do think the dangerousness question matters.

11:18:43 And what this evidence goes to is the fact that these guns are more dangerous in comparison to other weapons that are out there. These weapons are more dangerous than, for example, the handguns.

11:18:59 THE COURT: Right. And I think generally speaking, yeah, you've kind of -- I forget what the name of your expert was, but Mr. Yurgealitis, but whoever it was, you know, that on the whole, the banned weapons or the banned assault weapons have more fire power than non-banned weapons generally. I wouldn't say that was -- my impression is that's not actually disputed.

11:19:48 MR. ROSS: Okay. Well, if it's not disputed, we'll move on. I will just note, so that we're clear, on Page 7 of both of the opening briefs, there is a suggestion, particularly because of the fact they say that when they're used with .223-caliber ammunition, they're not particularly dangerous. They're well suited for home defense. They are

incredibly dangerous.

It also goes to the risk they pose because it goes to the risk, for example, that is present to police when they're dealing with these. The fact that these weapons with .223 --

THE COURT: Right. I saw that --

MR. ROSS: -- usually can fire through --

THE COURT: -- they penetrate 2X4 studs in a house.

MR. ROSS: The three-eighths inch hardened steel, Your Honor. Yes, Your Honor. So, I'm not going to belabor that. If there's no dispute on that, that's great. But we do think that's a critical factor on the issue.

THE COURT: And you were going to say -- let's assume that's not disputed. You were also going to explain the relevance.

MR. ROSS: Yes. I think part of the relevance is because part of the relevant analysis when you have -- and Mr. Moritz will speak to this in greater detail, right -- one of the things -- we think dangerousness matters. We don't think you simply look at the numbers and say, Well, they're not unusual, that's the end of the analysis.

We think dangerousness matters. We speak directly to dangerousness, not only generally, because

11:21:07 certainly it's true all weapons are dangerous. And it's
11:21:10 true that all guns when fired have the potential to kill.
11:21:13 That's not our argument, and we're not trying to ban all
11:21:16 guns.
11:21:16 But what is relevant for dangerousness is that
11:21:20 these weapons are uniquely dangerous even compared to other
11:21:25 guns. And it goes to that component of the Second Amendment
11:21:30 analysis.
11:21:30 THE COURT: And when you say "that component of
11:21:33 the Second Amendment analysis," you agree that all the guns
11:21:45 here that are in the bills, they are arms within the meaning
11:21:52 of the Second Amendment?
11:21:54 MR. ROSS: No, we do not. We do not believe
11:21:56 that -- because it goes to in common usage for self-defense,
11:21:59 and we don't believe that to be the case.
11:22:01 THE COURT: Right. And so the in common usage
11:22:03 or in common usage for self-defense, that is, in your
11:22:07 reading of the law, a question of whether or not something
11:22:10 is an arm or not?
11:22:12 MR. ROSS: That goes -- that's part of the
11:22:13 threshold analysis, yes, Your Honor.
11:22:15 THE COURT: So, hand grenades would not be an
11:22:18 arm?
11:22:18 MR. ROSS: Based on my understanding, it's not
11:22:22 a -- it's not within the scope of protection by the Second

Amendment, not in common use for self-defense. Yeah. Correct.

THE COURT: Bazooka would not be an arm?

MR. ROSS: Correct.

THE COURT: But things like knives, tasers would be arms?

MR. ROSS: Well, subject to the record, and I will actually get to the tasers point in a minute, if I can indulge, Your Honor?

THE COURT: Sure.

MR. ROSS: I do want to spend a couple minutes, and I don't want to belabor it, but I do think given, particularly what counsel said at the end about how we've attempted to conflate semi-automatic and fully automatic, I do want to talk about the firing nature of these weapons. It's been suggested that to compare them to fully automatic weapons is disingenuous. That's at Page 8. Six, excuse me, of Gray's opening brief.

And what they say on Page 6 is that they distinguish these from machine guns which they say can fire between 750 and in the thousand rounds. And we have two points we think are important on that, Your Honor.

First of all, the suggestion that the inability to naturally fire or fully automatic makes them less lethal is simply inaccurate. As the Fourth Circuit noted, the

difference between semi-automatic and fully automatic is, in their words, slight and the uncontested record evidence -- Mr. Yurgealitis' Exhibit T is that from the military's perspective, semi-automatic fire is often superior to automatic fire in modern combat and has been described as the most important firing technique. So, the idea that while if it just doesn't fire fully automatic, it's not nearly as lethal, that's not true.

The other important note is it is uncontested that there are numerous inexpensive products available that allow these guns to fire at rates comparable to the 750-to-1,000-round-per-minute figure that we saw in their briefing. Here's --

THE COURT: And just to go back to your first point there that it's preferable to have a semi-automatic, not fully automatic, I take it that that at least partly fits in with the Plaintiffs' theory that these are useful for self-defense?

MR. ROSS: No, that's from the Army's perspective in terms of armed combat.

THE COURT: Well, but, I mean, self-defense potentially is armed combat; right?

MR. ROSS: Certainly one of the things that a soldier in the theater of war is trying to do, one thing is defend himself. Another can be offensive. What we don't

11:25:03 believe those features do is make them useful for
11:25:06 self-defense in the situations that civilians are regularly
11:25:11 involving themselves in. And I would note there is not a
11:25:13 single example that the Plaintiffs have cited ever of any
11:25:19 individual ever using either one of the banned weapons, or a
11:25:26 substantially similar weapon or a large-capacity magazine in
11:25:30 a self-defense situation. And for good reason.
11:25:34 You know, there are technical reasons that these
11:25:37 weapons are not well suited. And with respect to the use of
11:25:40 large-capacity magazines in self-defense, the Plaintiffs'
11:25:43 evidence indicates that in 82 percent of situations, no
11:25:47 shots are fired. And as Alice's statistical analysis of the
11:25:50 NRA's database indicates that the average number of shots
11:25:54 fired in a self-defense situation is 2.2. So, we're not
11:25:58 talking about anyone that needs anywhere near 17 rounds
11:26:03 handy to be able to defend themselves.
11:26:05 THE COURT: Well, so I looked at her
11:26:06 declaration, and I did see that her analysis was, I believe,
11:26:13 that no case that could be identified had ever involved more
11:26:18 than ten shots being fired.
11:26:19 MR. ROSS: It's consistent with my recollection.
11:26:21 That's right, Your Honor. Certainly well below the 17 that
11:26:24 we're talking about here.
11:26:26 And then beyond her analysis, no identification
11:26:30 of any incident ever where the Plaintiffs have said, This is

a situation where if a person didn't have access to anything that's banned, their ability to defend themselves would be compromised.

So, with respect to these modifications that allow these to be shot at rates that are functionally equivalent to fully automatic weapons, here's one example. We discuss several of them in our brief. It's a $49 adapter, the Hellfire Stealth. It is advertised as installing invisibly in the grip and touted for the fact that it allows you to shoot at 900 rounds per minute, which is towards the higher end of the 750 to 1,000 figure that the Plaintiffs said.

THE COURT: The legislation, either piece, do either of them say one of the purposes was to, I don't know, prevent the convention, the conversion, this kind of thing?

MR. ROSS: No, Your Honor, but what they do talk about is the importance of enacting a legislation, among other things, to prevent mass shootings. And the capacity to take one of these and modify them where you can shoot at the equivalent of 900 rounds per minute would be relevant to that interest in protecting against those.

No need to go on -- to move the slides up, but just to keep moving. On the right side of the slide, you see the handgun, the AR-15 is turned sideways, and towards the bottom there's the handle. Actually, let's just jump to

the next slide just to see.

So, where the finger is pointing, just to contextualize this, we can call it out, that's an enlargement of that bottom part of the handle, and that's where it goes. It's a little round knob that fits in there. And we're not going to play the video. We've cited to them in our brief, but you know, features like this allow somebody to take a hundred-round magazine and shoot it in six seconds. Plaintiffs ignore the modification available for these products in their entirety.

I also want to talk briefly about the origin of the term assault weapon because it's been suggested that it was somehow --

THE COURT: You know, I don't think it's important --

MR. ROSS: Fine.

THE COURT: -- where the terms come from. I mean, I gather there's a public relations aspect to both sides of it. And I understand, you know, German, I can't pronounce the word, but World War II, literally translates more or less to assault weapon.

MR. ROSS: Yeah, and I'm not going to belabor -- if you could just put the slide up for one second. The Gun Digest Book Assault Weapons from 1986, but let's take that down. I've already touched on this, but there is a critical

dispute between the parties, notwithstanding very limited evidence from the Plaintiffs on this, on the design features, making them useful for home defense. They both claim that at Page 7 of their opening briefs.

They don't have an expert declaration on it. They actually cite a law review article by a Professor Kopel, which I would invite the Court to read. It's the rationale basis analysis for the assault weapon prohibition. And I just want to spend a minute, because this is the foundation of their claim about the importance of these weapons for defense, just to talk about what that argument rests upon.

The first thing in the excerpt that we see on Slide 15 is a suggestion by Professor Kopel that there's no real utility in requiring shooters to have to change their magazines, that it does nothing to enhance safety. Both the Third Circuit and Fourth Circuit and common sense, we would suggest, make clear why that's not the case. Those are actually some of the most important times in a mass shooting.

He goes on to say in this middle callout that it's elementary ballistics that these weapons are not unusually destructive. And then they go on to say that actually semi-automatic assault weapons are not designed to kill. And this is, this article with these claims, is

basically the entirety of the foundation for their argument that these are useful for self-defense.

THE COURT: Well, does it matter whether they're useful or not because -- and it's been mentioned this morning, but I do remember, you know, vaguely seeing this in the briefing, that if people purchase it or possess it for self-defense, does it matter whether it's the best -- and Yurgealitis spent a lot of time on this, too. Does it matter that it's not, perhaps in most people's judgment, the best self-defense weapon or maybe even not really a very sensible self-defense weapon generally?

MR. ROSS: We do think the evidence matters for a few reasons, Your Honor. First of all, we think that the evidence that the Plaintiffs have is a retailer survey, which if you actually read the survey itself, cautions against actually relying upon it. But put that to the side.

It goes to the weight to be given to that where someone's claiming they're buying it for that reason. It also is relevant, Your Honor, because we acknowledge that Supreme Courts held that a core -- the core of the Second Amendment is self-defense. And the utility of whether it is actually useful for that purpose we believe is important to considering whether you have infringed on a right that is protected by the Second Amendment, if you get through all the other aspects of the test. But I think if you have

something clearly that's not useful in self-defense that is relevant where the purpose of the Second Amendment is to protect self-defense, to protect one's ability, excuse me, to defense themselves.

THE COURT: So, does this go into the question of regulation, or is this a question of whether the things are arms in the first place?

MR. ROSS: So, I think it bears on the first question, which is whether or not they're in common use for self-defense. So, it does bear on that threshold question.

And then it also bears upon, even if you were within it, as you think about the scope of regulation and the nature of the fact that it is relevant there, but it is directly relevant to the question of whether or not these products are in common use for these purposes.

And in multiple courts, including the First Circuit in *Morman* and the D.C. circuit in *Heller II* have found that they're not well suited for self-defense. I have slides. You're going to see slides, but you don't have to go through them, given what we discussed before on the destructive power of these weapons.

I would note that the news reports of people who have been -- from doctors who have been shot with these weapons really mirrors what you see in the Vietnam field test report because they shared the same destructive power.

11:33:55 If it would be useful, I'll just spend a minute very briefly
11:33:59 talking about why it is that there is such a fundamental
11:34:02 difference. And it's due to something called cavitation,
11:34:05 which is that when the bullets that are shot by these
11:34:08 weapons traveling at, you know, 3,000 feet per second or
11:34:11 more compared to, say, one thousand --
11:34:13 THE COURT: I don't think I really need to
11:34:15 understand the science of this --
11:34:16 MR. ROSS: Okay.
11:34:17 THE COURT: -- as my day job.
11:34:20 MR. ROSS: Well, we'll move on. We have a
11:34:22 video. It's in the slides, if Your Honor cares to see it,
11:34:24 but we don't need to burden the Court with watching it here.
11:34:29 It is uncontested in this factual record that
11:34:33 these weapons are not well suited for hunting, not for
11:34:38 recreational. That, in fact, their ability to use these in
11:34:42 shooting competitions is often regulated, that they are, in
11:34:45 fact, well suited --
11:34:48 THE COURT: Well, so, Mr. Ross, the number that
11:34:53 I was using with the Plaintiffs that there's 10 million of
11:34:56 these out there already, you know, give or take a million or
11:35:00 two, do you disagree with that?
11:35:03 MR. ROSS: No, we don't. We're not --
11:35:05 THE COURT: So, they're not suitable for
11:35:07 hunting. They're not suitable for target shooting. They're

not suitable for self-defense. Why do 10 million people have these?

MR. ROSS: Well, people's perceptions as to what they may want to do with them certainly is one thing. And it's not to suggest that someone might not buy it thinking they want to use it for that purpose. But the question here, we believe, is suitability, not someone's subjective belief as to I'd like to have it for this reason, but an actual evidentiary question of their utility.

THE COURT: Let me just think about that for a minute.

MR. ROSS: So --

THE COURT: Hold on just a second. So, basically your position would be if lots of people purchased firearms of one kind or another thinking they can use them in self-defense, but essentially experts say they're not good self-defense weapons, then they're not in common use for self-defense?

MR. ROSS: Well, I think that's -- so, I think there's -- the question whether or not common use for self defense has a number of factors. One of which is: Is there evidence that they're actually being used for this? And on this record, there is none.

As to thinking about, you know, the effect of regulation on one's ability to defend, we do think the

utility point here, which is from the evidentiary perspective basically undisputed, is relevant. And I would also note, just thinking further about Your Honor's question of, you know, well, why are people buying them, well, one reason I think people are buying them, as we saw earlier, they're being marketed as, You can own what soldiers own.

THE COURT: So, that would be more like a collection sort of purpose?

MR. ROSS: It is like a collection or a desire to own something similar to what soldiers own, either to collect them or simply to feel like, you know, I want to be like a soldier. But that doesn't put it into one of the enumerated categories.

With respect to the numbers that Your Honor's asked about and that counsel talked about, what is uncontested is that the number of assault weapons is a very small fraction of all guns in circulation, that they're owned by a very small percentage of people.

THE COURT: So, roughly 2.5 percent?

MR. ROSS: Roughly, give or take, something in that low single digit, yes, Your Honor.

In terms of the -- that's in terms of the fractions of guns that are represented by these. It's, I believe, an even smaller percentage, I believe it's in the one-and-a-half percent on terms of the percentage of people

that own them, because many people own multiple weapons.

Also, undisputed that the growth in these figures, much of it has occurred within the last decade or so since the repeal of the assault weapons ban. And Mr. Moritz will talk about this, but the idea that there's never been a regulation of these weapons, there was, in fact, the assault weapons ban.

THE COURT: Right. But the fact that there was an assault ban -- well, you said Mr. Moritz will talk about it. I'll let him talk about it.

MR. ROSS: Okay. I do want to talk about another number that the Plaintiffs make much of in their reply brief, and it's the 200,000. And I just told Your Honor I was going to get here, which Justice Alito talked about it in his concurrence in *Caetano*. And per the Plaintiffs, that 200,000 is basically enough to say, You've got a protected Second Amendment right.

Of course, the Supreme Court recognizes that you can regulate machine guns. And even today, the Plaintiffs said they're not suggesting you can't regulate machine guns. But if we look at what's on the right, this is a letter from the Bureau of Alcohol, Tobacco and Firearms showing there are literally hundreds of thousands of machine guns that are out there.

And, therefore, if this basic numerical analysis

was enough, 200,000 is enough, the Plaintiffs can't reconcile that with the idea that you can actually regulate machine guns.

THE COURT: I thought I saw in the briefing somewhere that there were 800,000 machine guns.

MR. ROSS: Well, so that is an overall figure. The figure we see here, the 175 is -- and that larger figure would include, for example, guns in law enforcement in the United States. The pre-1986 176,000 figure, until 1986 they were not illegal to manufacture. And so, this is a number of legal civilian-owned machine guns in the United States.

And so, which, by the way, goes to another important point, Your Honor, in terms of the figures and the 10 million. That is a very general number, which we'll assume for Plaintiffs' purposes. It does not attempt to differentiate those that are used by law enforcement. It doesn't attempt to differentiate those that are used by criminals. So, the number of those weapons that are actually even owned and used by private civilians is smaller.

THE COURT: So, in a case of -- you know, you're saying in common use for the lawful purposes. Whose burden is it to address that point?

MR. ROSS: We believe it is the Plaintiffs' burden, Your Honor, to establish that what we're talking

about is something that would fall within the protection of the Second Amendment. Once you're within that, then the State has an obligation to find historically --

THE COURT: All right. *Bruen* makes that pretty clear.

MR. ROSS: Right, but I think to trip that wire, the Plaintiffs have to get into the Second Amendment rights. And so, it's their burden to establish they're talking about a protected right.

Very briefly on large-capacity magazines, just some context. Uncontested that, like assault weapons, they were developed for the military. We're talking about things like we see on the right here, magazines that hold a hundred rounds. They are marketed for their killing power.

Here's an example of advertising which offers a 60-round magazine, talks about their advantages in a fire fight, twice the violence. Critically, critically uncontested that there are many legally compliant magazines available.

Here's just one website. And what I've done here, you can see the red box about halfway down. These are just magazines available for the AR-15. And they're separated at the bottom by their capacity. And what you see is that this website alone has 105 different magazines available for purchase for the AR-15, all of which would be

legally compliant.

So, whether a weapon was shipped originally with a larger magazine, this goes back to Your Honor's question: Does any weapon need any of these to function? They do not.

Mr. Moritz -- the regulatory history is also largely uncontested, and Mr. Moritz is going to deal with that in the context of the Second Amendment. I want to take just a few minutes before handing it off to him to talk about why large-capacity magazines are not arms.

It is, as we talked about, the Plaintiffs' burden, we believe, to establish they are protected. We have submitted a declaration from Professor Dennis Baron, who talks about how, from the founding through ratification, arms were different from controls. Accoutrements were accessories like ammunition holders.

THE COURT: Well, so I did look at that declaration, too. My impression was that, you know, in 1790 people carried their bullets in a pouch that they wore on a belt.

MR. ROSS: Yeah.

THE COURT: This is the cartouche pouch, and I forget what, cartridge, belt, pallet, whatever, is even like all the westerns on TV where they all have the bullets. I mean, different kind of thing.

So, I was wondering, because now the pouch

attaches to the gun, which is not something that happened in 1790. I'm kind of wondering: So, how does that play out?

MR. ROSS: Sure. Certainly. I think Professor Baron's point is that in languages used at the time, the reference to arms was something that was different, not only from where you carried it, but a number of other accessories that were used in connection with the gun. And that the term arm is focused on the weapon itself and not accessories.

And it's not just in the 1790s that magazines were thought of as accessories. If we can go to Slide 30. Here's the Heckler & Koch catalog. We've blown up, because I was having a hard time reading the heading on the right "Accessories." And what we see in this, and this is Exhibit 7 to our brief, that the magazines are listed as accessories, along with things like cases and weapons used to maintain them.

And it was the *Ocean State Tactical* Court, also relying on Professor Baron's expert declaration, which found that these weapons -- that these magazines, excuse me, were not arms protected by the Second Amendment. It went through the textual analysis.

THE COURT: Would I be correct in thinking that the *Ocean State* is on appeal to the First Circuit right now?

MR. ROSS: That's my understanding. Plaintiffs

11:45:19 call it an outlier. It is, to our knowledge, the only case
11:45:22 that's considered this issue. It is not, however, the only
11:45:26 case to have found that magazines are not protected by the
11:45:30 Second Amendment. The *Oregon Firearms Foundation* case from
11:45:34 the District of Oregon in 2022, which is cited in our
11:45:37 briefing, found that in *Duncan v. Bonta* the Ninth Circuit's
11:45:42 2020 en banc opinion.
11:45:43 Now, the Plaintiffs say we ignore the contrary
11:45:46 precedent at Page 13 of the reply, but they haven't cited
11:45:49 any. They haven't cited any cases saying that they fall
11:45:53 within the Second Amendment.
11:45:54 And I want to be clear about what the State's
11:45:56 position here is and is not. The Plaintiffs say they're
11:46:01 implicitly protected because they're necessary to exercise
11:46:04 the Second Amendment right. That's at Page 13 of the reply.
11:46:07 There's no evidence of that here, Your Honor. There's no
11:46:10 evidence that these specific banned magazines are necessary.
11:46:16 THE COURT: And that kind of comes from your
11:46:17 point that any firearm in existence can work with a
11:46:21 non-banned magazine?
11:46:22 MR. ROSS: Yes, and it's critical -- that's
11:46:24 exactly right and critical. In the reply brief, the
11:46:28 Plaintiffs suggest that the State's position is that the
11:46:29 Second Amendment only protects the right to bear an
11:46:33 inoperable arm, and that's not the case here. There's no

evidence that any arm is rendered inoperable.

It also disposes of the argument at Page 15 of the reply that the State can't ban magazines or other components integral in an operating firearm. There's no evidence that any of these are.

And before I sit down, the last thing I wanted to --

THE COURT: And in that regard, silencers are banned; right?

MR. ROSS: They were banned. And we believe -- thank you for returning me there, Your Honor, that the silencer -- counsel, to anyone who's asked about it, said we're not saying that's an arm. And we think the analysis is the same and, in fact, the *Ocean State Tactical* Court made that very point.

THE COURT: Okay.

MR. ROSS: Lastly, I want to take a minute to talk about the *Association of New Jersey*, the Third Circuit case in 2018 where we acknowledge did find in that case that magazines were protected by the Second Amendment. Of course, it predates by four years *Bruen*. It didn't consider the textual analysis.

THE COURT: So, you know, one of the questions that comes up sometimes when you're in my situation is when the Court of Appeals says something, are they saying it in a

way that's binding, or are they saying it because, you know, if something is an appeal from a preliminary injunction, you're generally not having actual facts found. You're talking about probabilities.

Was what they said something that would be binding unless *Bruen* has changed it?

MR. ROSS: So, on the issue and the fact presented, we think, yes, but we think as the U.S. Supreme Court noted in *Cooper Industries* cited by the Middle District of Pennsylvania in *Misja vs. Pennsylvania State Educational Association* 2016 Westlaw 1165 1732 at 5, that questions which merely lurk in the record, either brought to the attention of the Court nor ruled upon are not to be considered as having been so decided so as to constitute precedence. So, if we were simply getting up and saying, Your Honor, we just don't think that the Second Amendment should apply to magazines, that argument, we believe, is foreclosed.

The question of whether or not, given the textual analysis that was required four years after the fact, how that is applied to those is a question that the Third Circuit has not touched.

THE COURT: But as I was earlier telling Mr. Pileggi, you would have me say that I'm not bound by what the Third Circuit said because the Supreme Court has

used a different mode of analysis subsequently, and that I predict the Third Circuit would change its -- either not regard itself -- well, probably not regard itself as bound by it, something along those lines?

MR. ROSS: Well, look, I think the outcome is the same. I think the way we would think about it is the following, Your Honor, which is the Supreme Court has made clear what needs to be considered. It's just simply not something that was ever presented to the Third Circuit.

So, the Third Circuit hasn't spoken on the inquiry that is now mandated by the Supreme Court.

THE COURT: Well, that sort of gets to a different thing, which is in *Bruen*, I think maybe in Heller II, but somewhere, the Supreme Court seemed to suggest that things could be decided based on the record that the parties presented; right?

MR. ROSS: There is language to that effect. Yes, Your Honor.

THE COURT: And so, does that mean that the parties, you-all, could present whatever it is you're presenting. A judge could make a ruling on that. Then some other Plaintiff comes along and says, you know what, I have some different stuff I'd like to cite to you. So, we can do it again, and maybe the outcome will be different because the record is different?

MR. ROSS: So, I suspect neither the Supreme Court nor any other Court would like a rule that says you can say, well, I have one more fact; and therefore, you have to --

THE COURT: Not the same Plaintiff. A different Plaintiff.

MR. ROSS: No, no. I didn't mean that. Plaintiff 2, I have one more fact. You've done the type of analysis. I have one more fact, and I think it changes it.

And I think there's an interesting question as to how it's going to play out, given some of that language. But I think we're not anywhere near that scenario. We're dealing with an issue that simply wasn't on the table in 2018 in terms of the textual analysis.

And so, we're not in a World War coming in and saying, Well, they gathered a bunch -- they had, you know version one of Professor Baron's declaration, and we have version two, and he's got way more stuff. We have evidence on points that simply were not considered and are now directly relevant.

THE COURT: Well, on that regard, maybe this is Mr. Moritz's burden, but I do actually recall seeing in *Bruen* lots of discussion about why Bowie knives and slungshots, I think, were not carrying the day in that case. And am I allowed to rehash that material?

MR. ROSS: So, you are treading into Mr. Moritz's, and so this is probably a nice point for me to segue way to him, unless Your Honor has anything on what I've covered.

THE COURT: I would like to hear from him.

MR. ROSS: Sure.

THE COURT: Thank you, Mr. Ross.

MR. ROSS: And then, I have, just at the end, a minute or two on the Delaware Constitution, but we can save that until the end.

MR. MORITZ: Good morning, Your Honor. Garrett Moritz from Ross Aronstam on behalf of the Defendants.

THE COURT: Good morning.

MR. MORITZ: So, I'll try to start by going right to your question, but what I'm going to spend the first part of my presentation on is going through the legal standard for Second Amendment challenges, where we are after *Bruen* and what the State makes of it.

But to answer your question about Bowie knives and slungshots, and it is, indeed, slungshots, not slingshots. They're different things. The question, the framework in *Bruen*, I'm going to go through this, is whether historical regulations are relevantly similar. For the handgun restriction, the very broad handgun regulation that was at issue in *Bruen*, the permitting, the may issue, it was

not relevantly similar, but it doesn't say that all of the history and historical tradition of the United States is out the window. It says, That's the thing you have to look to, and that's what we're going to try to do.

So, to walk through this, let's start on the legal standard. We'll start with Slide 32. I'm not going to read it to you, but we'll start with the text of the Second Amendment. And it provides that there's a right of the people to keep and bear arms that shall not be infringed. And what *Bruen* says is that the Second Amendment in that language codified a preexisting right, and that the right is not unlimited, and it's not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.

What was that preexisting right? If you look at *Heller*, *Heller* goes on for about ten pages, Pages 593 to 603 of the U.S. Reporter version, talking about that the preexisting right, as of the time of the American Bill of Rights, was a right of self-defense. It talks about the English Bill of Rights. It was a right of self-defense, a right of self preservation. The State Constitutional provisions put in place on the right to bear arms around the time of the U.S. Bill of Rights, self-defense.

The ones immediately after, self-defense. If you read those ten pages of *Heller*, it's all about that

preexisting right being a fundamental basic right to defend yourself before the authorities can arrive.

Let's go to Slide 3. So, *Bruen* says the Second Amendment presumptively protects conduct if it is within the Second Amendment's plain text. So, it creates this presumption. And that analysis, as *Bruen* does it, is to say whether the regulated item fits within the category of bearable arms, and whether the regulated item is in common use today for self-defense. That's *Bruen* at 2134.

And so, that analysis, whether something is within the preexisting right, I want to be very clear here. It's more than just is something an arm. There was some dialogue going back and forth. Is a bazooka an arm? Of course a bazooka is an arm, but it's not an arm that's within the preexisting right, as *Bruen* lays it out.

Now, there's some debate we've joined about this step.

THE COURT: And the reason why it's not a preexisting right is what?

MR. MORITZ: Because it's not something that is in common use for self-defense.

THE COURT: But the only reason it's not in common use for or maybe not the only reason, but a reason why it's not in common use for self-defense is because it's already -- you know, you'd be arrested if you walked around

with a bazooka.

MR. MORITZ: Look, the Supreme Court says, Is it in common use for self-defense? Is it in common use today for self-defense, those sorts of formulations? And it's just not. And so, it's an extreme -- there's a reason, I think, that that's where our society is is that it's an extremely destructive, offensive military weapon. And military weapons, the Supreme Court has talked about that.

THE COURT: Yeah, in any event, I think it's pretty crystal clear.

MR. MORITZ: Right.

THE COURT: The way you have this up here, two questions from *Bruen*.

MR. MORITZ: Mm-hmm.

THE COURT: One is: Does it fit within the category of bearable arms? And so, there is a wide range of weapons that fit within the category of bearable arms --

MR. MORITZ: Right.

THE COURT: -- which would include a bazooka.

MR. MORITZ: Right.

THE COURT: But then the second question is whether the item is in common use today for self-defense, and you have to answer that question yes before you then say, okay, it's an arm within the meaning of the Second Amendment.

MR. MORITZ: Yeah. Well, the way I would put it is: Is it within the preexisting right of the Second Amendment? Yes. Is it an arm within what's protected by the Second Amendment?

THE COURT: Well, so the majority opinions in *Bruen* and maybe in *Heller II*, but I think in *Bruen*, particularly say: Is it within the plain text? You've got it up there. Plain text. How does common use today for self-defense meet the plain text requirement?

MR. MORITZ: You're absolutely right that it's a really interesting question, and I've spent some time reading it. And I think this is exactly what *Bruen* and *Heller* do.

And here's how they get there. What does the plain text say? It says the right of the people to bear -- keep and bear arms shall not be infringed. And then it asks: What is that right? And it says that right is this right to self-defense, to use weapons in common use for self-defense. And it's not -- I'm not making this up.

In part 3A of the *Bruen* decision, the plain text analysis, that's at 2134, the Supreme Court analyzed this. Are handguns in common use today for self-defense within the plain text component? There's a whole heading on that. That's where *Bruen* does that part of the analysis.

Then it flips to the historical tradition of

11:59:15 weapons regulation, a separate heading.

11:59:17 THE COURT: Can you just hold on one second?

11:59:19 MR. MORITZ: Sure.

11:59:43 THE COURT: So, I'm looking at the opinion and I've got 3A, which is about six or seven paragraphs.

11:59:51 MR. MORITZ: Mm-hmm.

11:59:51 THE COURT: And by the end of that, it says, and I'm quoting, "The Second Amendment's plain text, thus, presumptively guarantees Petitioners Koch and Nash a right to bear arms in public for self-defense."

12:00:16 MR. MORITZ: Mm-hmm.

12:00:16 THE COURT: What you're saying here is the common use business is dealt with right at the beginning of that section?

12:00:27 MR. MORITZ: Right, the very first paragraph, Your Honor.

12:00:29 THE COURT: Is there more discussion about common use for self-defense? Because most of the references to it that I marked in my copy of the opinion occur later. Does that also impact any of the subsequent analysis or is it once you've got to the end of 3A is that no longer --

12:01:22 MR. MORITZ: Yeah.

12:01:22 THE COURT: -- relevant?

12:01:23 MR. MORITZ: Right. So, when you do the historical analysis, the next part of the historical

analysis looks heavily on to what is the impact on the ability to self defend. That's how the Court explained, or it didn't say it was exhaustive, but it says two of the considerations are to look at whether -- how the regulation impacts self-defense. And we'll get to that shortly as I march through this.

If the Plaintiff succeeds in establishing that the Second Amendment presumptively applies, then the *Bruen* analysis requires the Government to prove that its firearms regulation is consistent with the nation's historical tradition. If we go to Slide 34, we have some callouts of that. That's the Government's burden to prove that the regulation is part of the historical tradition. And I would point out in Footnote 1 of the joint reply brief that the Plaintiffs submitted -- we'll put that up on the screen. If you look at what the Plaintiffs say, this is Footnote 1 of the joint brief, the complete standard mandated by the Supreme Court requires, one, determining through textual analysis that the Second Amendment protected an individual right to armed self-defense; and two, relying on the historical understanding of the amendment to demark the limits of the exercise of that right.

And then it says, once that first test is met, it becomes the burden of the State to demonstrate that the burdensome restrictions upon the right to own common arms

are consistent with this nation's historical tradition so as to fall outside of the Second Amendment's unqualified command.

That's not our brief. That's the Plaintiffs' brief.

And so, how is a Trial Court judge to determine what the historical tradition is? *Bruen* speaks to this at Footnote 6. Your Honor alluded to this.

THE COURT: Mr. Moritz, before you get there, maybe this is what Mr. Ross said, but the State's position is these are not arms protected by the Second Amendment. End of story. We go home.

MR. MORITZ: I would say it this way: These are not arms that are presumptively within the scope of the Second Amendment. But then the second part is even if they are presumably --

THE COURT: But if they're not presumptively within, that's the same thing as saying they're not within.

MR. MORITZ: Correct.

THE COURT: Presumably, you can't do something later to overcome the presumption that they're not in.

MR. MORITZ: Thank you, Your Honor. Absolutely, yes. That's only part one of our argument, though. We have a historical piece, too.

THE COURT: So, on part one, you're actually in

agreement with the Plaintiffs that that's essentially just a legal question, or are you in agreement that, in fact, that's a question you don't need any record for?

MR. MORITZ: You do need a record for that. You do need a record for that because the question of common use for self-defense is something that you can't find by looking at a piece of paper in the Constitution. You do need to know something about what the reality is in the world. And so, that does require an evidentiary record of some kind.

So, but let's get to the historical tradition. If something is within the scope of the preexisting right presumptively protected by the Second Amendment, the regulation could still be upheld if the Government meets its burden to prove that it's consistent with historical tradition. Courts are permitted -- this is Footnote 6 of *Bruen* -- or entitled to decide a case based on historical record compiled by the parties. There is a historical record compiled here by the Defendants.

THE COURT: Right. This is the footnote I was thinking about.

MR. MORITZ: Exactly.

THE COURT: I don't know why I couldn't remember where I had seen it.

MR. MORITZ: Yeah. Straight from *Bruen*. And *Bruen* and *Heller* are clear that they do not -- oh, and by

12:05:21 the way, Mr. Lehman, I think he said that something along
12:05:24 the lines of *Bruen* already did all the historical analysis
12:05:28 that's needed.
12:05:28 That's not what *Bruen* said. It said, Courts are
12:05:32 entitled to rely on the parties. It said, We're not
12:05:35 deciding, you know, every issue of history. In fact, *Bruen*
12:05:39 and *Heller* are clear that they do not exhaustively answer
12:05:43 all the questions about the historical tradition or how it
12:05:46 applies. But *Bruen* does provide guidance, if we go to Slide
12:05:50 37.
12:05:51 *Bruen* talks about what you do when you're
12:05:54 dealing with modern arms regulations that couldn't really
12:05:58 have been -- anticipated the founding unprecedented societal
12:06:02 concerns or dramatic technological changes requiring a more
12:06:06 nuanced approach. You do reasoning by analogy with more
12:06:11 modern arms and arms regulations. And even if a modern-day
12:06:16 regulation is not a dead ringer for historical precursors,
12:06:19 it still may be analogous enough to pass constitutional
12:06:22 muster.
12:06:23 What does it mean for a regulation to be
12:06:26 analogous enough? So, at Slide 38, we have the explanation
12:06:31 from *Bruen*. It's whether the historical regulation is
12:06:35 relevantly similar to the modern firearm regulations.
12:06:40 What does that mean? It's one layer after
12:06:43 another here, but we're getting close to the end of this.

Slide 39. We have the explanation from *Bruen*. Again, they say we're not providing an exhaustive survey of everything that would make a regulation relevantly similar, but we do think *Heller* and *McDonald* point towards two metrics. How and why the regulations burden a law-abiding citizen's right to self-defense.

So, that's where all the self-defense regulations come in in historical analysis. How and why the regulations burden of law-abiding citizens, a right to self-defense. And that it's a central component -- individual self-defense is a central component of the Second Amendment right.

So, we go to Slide 40. And the Supreme Court says that the central considerations engaging in the analogical inquiry are: One, whether modern and historical regulations impose a comparable burden on the right of armed self-defense; and two, whether that burden is comparably justified.

That's what it says the historical analysis is. And that is why in the *Heller* decision, Justice Alito's majority opinion emphasized that quintessential self-defense weapons have strong protections while "weapons most useful in military service M16s and the like may be banned."

So, that's the Second Amendment framework we're applying. I'd like to turn now to applying it based on the

really unrebutted factual record on this motion that Mr. Ross touched on and which is in our papers and in our expert declarations.

All right. So, Mr. Ross explained why LCMs are not even arms. Assault weapons and LCMs, if you were to consider them under this framework, are not in common use for self-defense. They're not quintessential self-defense weapons. They're weapons that are most useful in military service. Those are the kinds of things that the Supreme Court has said may be banned.

And whether you take common use or self-defense -- which I do strongly submit is what the Supreme Court in both *Bruen* and *Heller* is talking about as a preexisting right -- but whether you take common use for self-defense or just common use for lawful purposes, the undisputed record on this motion is enough to show that assault weapons are not in common use.

We've heard about numbers today. Even using the 10-million figure that Mr. Lehman gave out, of the more than 470 million guns in the United States, Your Honor said that comes out to somewhere in the ball park of 2.5 percent. 2.5 percent --

THE COURT: That number is 470 million now?

MR. MORITZ: So, yes, that is -- I believe it's Footnote 14 of our opposition brief.

12:09:38 THE COURT: Okay.

12:09:39 MR. MORITZ: It cites to sources for that. It might be higher since it's been a few weeks since we filed that, but that's what we put in there. And we provided record support for that.

12:09:51 THE COURT: All right.

12:09:52 MR. MORITZ: 2.5 percent is not common, let alone in common use for self-defense. And so, the Second Amendment challenge, as you indicated, can end there.

12:10:00 THE COURT: Well, so what number would be in common use?

12:10:04 MR. MORITZ: That's something that is, I think, developing. I don't have the exact number, but it's not 2.5 percent. When you're talking about handguns, something that the Supreme Court described as, you know, the most popular self-defense weapon, and that was something -- clearly, that's enough.

12:10:22 THE COURT: It was undisputed in their case.

12:10:23 MR. MORITZ: Right. We're not anywhere near that. And --

12:10:28 THE COURT: But so, could the State sort of piecemeal this? We'll ban a MAC-10 in this piece of legislation. Wait a few weeks and ban an AR-15 and so forth. And, you know, the more specific you make it, it's not going to be in common use. You've got -- so, I don't

know. How should you deal with that?

I mean, there's, what, 38 categories, 44 categories of assault weapons that are banned in the State's legislation. Presumably any one of them is not actually in common use. Maybe all of them together are in common use.

MR. MORITZ: Well, I don't think they are. And, certainly, there's certainly no evidence of that. But I don't see why there couldn't be a challenge to a suite of regulations if the State did one regulation, regulation two, regulation three. And after 20 years, there are no guns of any kind that could be used for self-defense anymore, could there be a challenge brought to the overarching military regime based on the Second Amendment? I'm sure there could.

And so, I think there's a response to that problem, which isn't at all this case. I don't think the State has tried to, you know, go after one particular model. It's a pretty robust list, and it's -- and so, that's what we have here.

History. So, even if the Court finds that Plaintiffs have succeeded in establishing the Second Amendment presumptively covering the regulations, which we submit they do not, Defendants, nonetheless, have met their burden, basically, met it without any rebuttal, to prove that the regulations are part of our nation's historical tradition of weapons regulation, at least for purposes of

12:12:25 today's motion. To try to get out of the analogy inquiry
12:12:32 that *Bruen* mandates for recently emerging weapons
12:12:35 technologies, Plaintiffs make a claim that really these
12:12:39 technologies are not unusual, even going back to the
12:12:43 founding.

12:12:44 So, take a look at Slide 41, and this is from
12:12:49 the DSSA Plaintiffs' brief, Footnote 6. And they make the
12:12:53 claim that ammunition magazines capable of holding more than
12:12:57 17 rounds have been around -- have been in common use for
12:13:02 centuries. And the only evidence Plaintiffs provide for
12:13:05 this is the report of this lone Girandoni air rifle taken on
12:13:10 the Lewis & Clark Expedition.

12:13:12 But we looked at the book that they cite, and
12:13:14 here's what their own source says on Slide 42 about that.
12:13:18 It says that the Girandoni air rifle Merriweather Lewis had
12:13:22 was a type of rifle that Austrian soldiers used during the
12:13:28 Napoleonic Wars. That Napoleon, not an activist, I'm pretty
12:13:29 sure, thought that those were the kinds of weapons of
12:13:32 assassins. No one knows how Lewis got it. There's no other
12:13:36 good evidence for Girandoni-style air rifles having made it
12:13:38 to the United States during that era. That the one air
12:13:42 rifle was being used to impress tribes on the expedition.
12:13:47 And even in 1845 when it was auctioned at an estate sale, it
12:13:53 was described then as a great curiosity.

12:13:56 We pointed this out at Footnote 1 of our

opposition. Plaintiffs don't respond to it. They continue to claim in their reply brief.

There are ample examples of large-capacity magazines in critical moments of the nation's history. But the only thing they cite is this Merriweather Lewis Girandoni air rifle. It's just not supported even by their own source.

Defendants have submitted an unrebutted expert affidavit from Professor Kevin Sweeney. We have this at Slide 43. He is a professor of history emeritus at Amherst.

THE COURT: One thing that I noticed, looking at some of these declarations, is that many of the experts that you all have are presumably filing more or less similar declarations in most of the other litigation that's going on on this topic; is that right?

MR. MORITZ: They are filed in some other cases. I think that's generally correct.

THE COURT: I mean, I take it the states that have passed the legislation are sort of working together to sustain the legislation; is that right?

MR. MORITZ: As you probably know, Attorney Generals offices at the state level around the country coordinate on various issues, and there is some of that going on.

THE COURT: All right.

12:15:18 MR. MORITZ: Okay. So, Professor Sweeney is a very eminent historical professor specializing in material culture in the 1700s and the founding era. And he goes into -- this is Slide 44 -- how common were repeating firearms in the 18th Century in the United States. Extraordinarily rare. And many did not even have contextual magazines.

Giradoni's air rifle was a curiosity, just like Plaintiffs' own source says. We don't offer this unrebutted evidence to claim that the Second Amendment only protects weapons coming at the time of the founding. That is not our argument.

We're just offering this to show that assault weapons and LCMs are a new technology. They're a new issue that's come out in the 20th Century. They're being dealt with in modern times. They're not something from the founding, and that puts us in the analogy inquiry under *Bruen*.

So, let's go to the analogy.

THE COURT: Well, in terms of a new technology --

MR. MORITZ: Mm-hmm.

THE COURT: -- whether it's new or my favorite, patentable sense, that's one thing. But it also occurs to me that why would -- you know, most legislatures try to

12:16:44 legislate about things that are perceived to be problems.

12:16:46 MR. MORITZ: Right.

12:16:47 THE COURT: And there's doesn't seem to be any evidence in the record that whatever the amount of repeating firearms that there were in the 19th Century were leading to anything like the problems that the legislature seems to have been trying to address in the law.

12:17:21 So, I guess the question or it seems to me like if we're getting to this point, you have to consider both things. And that's presumably the reason why you're talking about Bowie knives is that was perceived to be a problem.

12:17:34 MR. MORITZ: Right. The Bowie knife craze, as Professor Spitzer called it at Paragraph 22, that was an issue in the 1830s, and in that time period we're dealing with another one. It's -- you know, we're in the social concern that wasn't an issue in the 1800s that we have today, but you have to look for analogs to it.

12:17:55 And so, if we go to Slide 45, we have Professor Robert Spitzer. He is someone who's devoted his career to studying gun regulation, writing books and articles about it. I'm not going to go over his CV, but to summarize some of his evidence, Slide 46 -- and I can tell Your Honor has spent some time with his declaration -- but he goes through the historical tradition of weapons regulation in the United States. He talks about in this 1830s forward through the

12:18:33 1 1800s time period, Bowie knives and similar fighting knives.
12:18:38 2 Go back to the prior slide, please. The Bowie
12:18:40 3 knives and fighting knives were heavily regulated in that
12:18:43 4 area.
12:18:43 5 And to touch on the question Your Honor asked --
12:18:45 6 THE COURT: I'm sorry, Mr. Moritz. Do you think
12:18:47 7 it makes any difference to your argument that most of the
12:18:53 8 things you're citing, all of the things, almost all the
12:18:56 9 things that are up here are mostly not firearms?
12:19:01 10 MR. MORITZ: I don't think so. I think that the
12:19:08 11 weapons regulation, the problems that society were dealing
12:19:11 12 with are -- and we're going to get to some 20th Century
12:19:15 13 firearms --
12:19:15 14 THE COURT: But this is pretty much -- haven't
12:19:18 15 they said the 20th Century is irrelevant?
12:19:20 16 MR. MORITZ: I don't think that that's quite
12:19:22 17 right, because they said that if the later regulation is
12:19:26 18 inconsistent with this historical tradition, then it's
12:19:30 19 irrelevant. But if it's part of -- it doesn't say that if
12:19:33 20 it's part of a pattern. And machine gun regulations,
12:19:37 21 sawed-off shotgun regulation that -- I don't think there's
12:19:40 22 any question that that's acceptable.
12:19:44 23 Scalia said that would be startling to suggest
12:19:46 24 that the Second Amendment would protect those kinds of
12:19:49 25 items. So, I think that the well-accepted 20th Century

firearms regulation are just part of the historical tradition that goes back to Bowie knives.

And so, to go to one of Your Honor's questions from earlier, Bowie knives, as Professor Spitzer says, there was this craze for Bowie knives, and they were associated with problems. They were viewed as something that were being used in dueling, in criminal activity, but they were proliferating. There was a craze for them. Lots of people, you know, were acquiring them or making them.

Blunt weapons. We talked about that. Very extensive regulation of bludgeons, billy clubs, slungshots, et cetera, and we go on with other regulations.

Now, let's go to the next slide, Slide 47. So, in the mid-1920s to mid-1930s, there's this round of State machine gun regulation followed by the Federal National Firearms Act in 1934, which at that time imposed a tax on machine guns and sawed-off shotguns.

And then in 1986, the Gun Control Act at the federal level made it unlawful to possess a machine gun with some grandfathering and other exceptions. And Professor Spitzer -- everyone agrees, Supreme Court, Justice Scalia, the Plaintiffs' counsel here today, we all agree those machine gun regulations are not a Second Amendment problem. They're well within the nation's historical tradition.

Just to touch on one thing you asked about, I

thought it was interesting, because there's a claim that Tommy guns were -- you know, like people were running wild with them in terms of using them for criminality. But what Professor Spitzer actually says at Paragraph 52 of his declaration is that, Although guns like the Tommy gun and the BAR, which is another machine gun, were actually used relatively infrequently by criminals, when they were used, they exacted a devastating toll and garnered national attention, such as the Valentine's Day Massacre, which was a very notorious and horrific piece of the Tommy gun.

THE COURT: Yeah, I remember that one.

MR. MORITZ: So, the machine gun problem was one that it was a concern because when it happened, when they were used by criminals, it was really, really bad, but not that they were being used constantly or anything like that. It was -- that's the actual record on Tommy guns.

All right. Slide 48, I'm going to try to get through this quickly, so I can hand off to Mr. Ross. We've got a table of magazine restrictions in the 1917 to 1934 time period. It represented more than 50 percent of the population at the time, almost half of the states.

These 20th Century regulations, including the machine gun restrictions -- so, they weren't a departure from our nation's history. And I've talked about the fact that it's accepted.

So, there's a lot more covered in Professor Spitzer that I'll get to today, but I won't -- in the interest of time, I'll move past it. But Professor Spitzer -- we can go to Slide 49 -- talks about a pattern that throughout American history, both firearms and other dangerous weapons, were subject to, you know, a wide range of regulations.

And there was a process. They have to enter society. They have to proliferate. There has to be violence and concerns from society, and then they get regulated. And if we go to Paragraph 50, he specifically talks about how gun technologies emerge in the military context, come over to the civilian context and eventually are regulated.

And so, what we have here are assault weapons. We have military technology. World War II. The German emergence of that, really in the United States. The testing we saw in the M16, AR-15 in Vietnam. This is something that's happening in the late 20th Century and within a decade or two of assault weapons starting to move from their military origin into civilian hands. States start to ban them.

The Federal Government bans them from 1994 to 2004 and also bans what was defined by the Federal Government at that time as large-capacity magazines, which

was just a ten-round cutoff, not a 17-round cutoff. That federal assault weapons ban from 1994 to 2004 was not an outlier. It's right within the tradition of restricting or prohibiting weapons viewed as particularly problematic that runs throughout our historical tradition, and that flows from the unrebutted historical evidence we presented on this motion.

And Professor Spitzer bolsters this. That's at Slide 51. I'm not going to put that up, but that's the conclusion that we've reached, and we've submitted to you. And it's a conclusion that Professor Spitzer, a serious scholar in the history of American gun regulation, has reached. And it's unrebutted, and the Plaintiffs made the choice not to put in any contrary evidence.

So, looking at the considerations that *Bruen* identifies as central for determining whether historical regulations by analogy are relevantly similar, let's go to Slide 52. The things that *Bruen* says are central in the analogy inquiry are whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified. *Bruen* at 2133.

On the first of these considerations, we made the record to show that the regulations place little burden on armed self-defense because the unrebutted expert record

here establishes that assault weapons and LCMs are not well suited for self-defense.

And on the second consideration, any limited burden on self-defense is comparably justified because the quintessential self-defense weapon, handguns, are unaffected. As Justice Scalia wrote in *Heller*, weapons most useful in military service may be banned. M16s and the like may be banned.

Assault weapons, they're like M16s. Assault weapons are most useful in military service. Relevantly similar, assault weapons regulations, relatively similar to the regulation of machine guns and to Bowie knives, with the social concerns of the 1830s. Restricting assault weapons comports with our nation's historical tradition of weapons regulation.

On this motion, we've made that record. And although they are not even arms, if they were to be considered arms, the same holds for large-capacity magazines. Plaintiffs have not shown a likelihood of success on their Second Amendment challenge.

I'm glad to answer any questions on this piece.

THE COURT: I do have right this minute just one question, which is during the time when the Federal Government banned assault weapons from 1994 to 2004 -- so I understand from something I read somewhere that that

12:27:24 legislation was sunsetted after ten years. But was there
12:27:32 litigation as to whether or not that violated the Second
12:27:35 Amendment?
12:27:35 MR. MORITZ: It's interesting, Your Honor. I
12:27:37 haven't done a comprehensive study of that, but I would
12:27:40 think if there was some really meaningful litigation over
12:27:43 that, it would have come up in our research. I think the
12:27:45 fact that, you know, Congress was able to pass that
12:27:49 legislation and it existed for ten years, it's pretty
12:27:53 telling as far as, you know, what is our historical
12:27:58 tradition and whether what was happening now is really true
12:28:00 to the historical tradition as opposed to sort of a modern
12:28:05 development in how people think about weapons regulation.
12:28:08 THE COURT: I mean, it's a question that occurs
12:28:10 to me, but I'm not sure in the end whether it would have any
12:28:16 impact on the Supreme Court's analysis because essentially
12:28:23 what happens in the -- once you get past reconstruction,
12:28:30 what happens doesn't inform any relevant understanding of
12:28:38 what's covered or not covered by the Second Amendment right.
12:28:40 MR. MORITZ: I don't think that's correct. I
12:28:41 think that's too strong. I would say the following: I
12:28:44 would say the most relevant is that the Bill of Rights and
12:28:49 1868 time period, no question. And the things that are
12:28:52 immediately around that era, those are the most relevant.
12:28:55 But the Supreme Court doesn't say throw the rest of American

history out. It's useless. It actually says post-enactment, subsequent history can be very relevant for interpreting the widely-held understanding.

What it says, what *Bruen* says is, when inconsistent with the 20th Century or late 19 -- I think it's late 19th Century -- when late 19th Century regulations, there was a spade of regulations of pistols or something like that. When they were inconsistent with the history of weapons regulation, don't pay attention to those. But if it's -- it doesn't say when it's consistent, when it fits the pattern.

THE COURT: But, I mean, you know, part of the inconsistency in *Bruen* for the New York legislation is what it was inconsistent with was an absence of earlier legislation; right? What was it inconsistent with?

MR. MORITZ: Because it -- so, what it was inconsistent with is that it was putting almost absolute burden on the most popular form of self-defense today in terms of, you know, handguns. And so, that, again, looking at the core, what's the analysis *Bruen* says to do in historical analysis? What's the burden on self-defense, on the ability to self defend in the analogical inquiry?

And they go through that. And they say this is a huge burden, saying people basically can't have -- you know, putting a very, very restrictive may issue a

12:30:53 permitting regime on handguns, is the burden of self-defense
12:30:58 too much?
12:30:59 THE COURT: The way the Supreme Court was
12:31:01 looking at it was, you know, it's the State's burden. And
12:31:07 so, you basically can't come up with anything that supports
12:31:14 it.
12:31:20 And here, you've got -- going back to the
12:31:24 National Firearms Act or whatever it's called in 1994, your
12:31:37 argument is actually the earlier legislation dealt with
12:31:43 various other kinds of arms, mostly other arms. And there
12:31:48 was a lot of regulation, shall we say, at the margins. And
12:31:56 so, this is consistent with that. So, maybe it doesn't
12:32:00 carry much weight, but it carries a little bit of weight?
12:32:03 MR. MORITZ: I think that's pretty close, but I
12:32:05 would say the following, which is machine guns and then
12:32:11 later in the late 20th Century, assault weapons. You can't
12:32:15 look to the 1800s and say, ah-ha, like that same weapon was
12:32:20 dealt with. You have to proceed by analogy.
12:32:23 So, the more important things are in the 1800s.
12:32:26 But how those traditions continued to be applied in the
12:32:31 1930s or in the 1960s, that's relevant. And they were
12:32:35 consistent.
12:32:35 THE COURT: And actually I think you just said
12:32:37 something which I hadn't really thought about which is so
12:32:40 regulation of machine guns and sawed-off shotguns, which we

seem to agree is constitutional, then that becomes part of the tradition of relevantly similar, or if it is relevantly similar, but it's something that can be considered for relevantly similar litigation or regulation, I mean. Because even if it's not exactly in the right time frame, you know, it's kind of like the transitive law. You know, that's valid, so there must be something earlier that makes it valid. And so, even though -- even to the extent that we can't necessarily identify what that is, because I don't think in the Supreme Court case, which I haven't read, but I don't think in the Supreme Court case they were probably talking about Bowie knives. It's a reflection of something that you're now trying to get a reflection on something kind of analogous.

MR. MORITZ: I think that that is a fair way to look at it, Your Honor, that, you know, it's not like you just ignore these things that we recognize are valid regulations. They're part of the picture, too.

THE COURT: Yeah. Well, so, I mean, that's part of what I've been trying to think about over the last week or so when I've been thinking about this was how, if at all, to integrate machine guns and sawed-off shotguns which, to some extent, seemed more relevant to me than Bowie knives or at least more understandable. How they fit, how they would -- you know, it would seem to me wrong, as a practical

matter, to only take what the Supreme Court could -- to take what the Supreme Court says about the method of analysis and not consider things that are apparently consistent with that method of analysis, like machine guns and sawed-off shotguns.

MR. MORITZ: Look, I think you're wrestling with what we've been working through as well, and our conclusion is that it is consistent with that. The only, you know, slight amendment I think I would add is that although Bowie knives might seem very -- you said like you don't think it's quite as relevant because Bowie knives are -- you know, I mean, the thing that jumps out is that they're so much less dangerous than an assault weapon.

I think that that actually is helpful for us, that people in the 1830s and the states that were restricting -- you know, it's a broad swath of the United States. If they could put those types of sweeping restrictions on Bowie knives in the 1830s, assault weapons, given the issues they have, I think, is a foreshadow of that historical tradition.

THE COURT: If you have this number on the top of your head, how many states put restrictions on Bowie knives in the 1830s?

MR. MORITZ: I believe it was -- oh, in the 1830s?

12:36:20 THE COURT: Or in that general.
12:36:21 MR. MORITZ: Yeah.
12:36:22 THE COURT: I assume the Bowie knife craze ended
12:36:25 after a few years, after a decade or two.
12:36:27 MR. MORITZ: Yeah. So, I believe in the end it
12:36:29 was north of 40 states, but it took several decades. It
12:36:32 went on --
12:36:32 THE COURT: I mean, because there weren't even
12:36:33 40 states in the 1830's.
12:36:35 MR. MORITZ: Exactly. Exactly. But in the
12:36:37 1830s, you know, this is --
12:36:41 THE COURT: But, you know, sorry to keep
12:36:44 interrupting, Mr. Moritz, but basically you'd say almost
12:36:49 every state that could passed a Bowie knife law?
12:36:54 MR. MORITZ: An awful lot. Let me just -- if
12:36:56 you just bear with me one moment. If you go to Exhibit C to
12:37:01 Spitzer's declaration.
12:37:02 THE COURT: Yeah. I don't have the exhibits
12:37:03 with me.
12:37:04 MR. MORITZ: Can we bring that up perhaps?
12:37:06 Spitzer's declaration, Exhibit C. That's a chart that's
12:37:09 pretty handy. And it has a table of regulations by state
12:37:12 and it gives the year.
12:37:20 Exhibit C. Exhibit C. While we're bringing
12:37:28 that up, it goes through the states, and it lists by the

12:37:31 year of the regulation. And I mean, almost every column --
12:37:38 and I have a clean printout. I could hand it up if that's
12:37:41 useful.
12:37:42 THE COURT: All right. I'd be interested in
12:37:44 seeing it.
12:37:45 MR. MORITZ: Oh, here we go. May I approach?
12:37:48 THE COURT: I can -- sure. Why don't you
12:37:52 just --
12:37:52 MR. MORITZ: Any way, you get the picture. The
12:37:55 column that says Bowie knives far left.
12:37:58 THE COURT: I think I did see this somewhere.
12:38:00 Maybe it was --
12:38:03 MR. MORITZ: And, yeah, as you'll see, it's
12:38:06 right in that sweet spot. The 1830s, the
12:38:09 post-reconstruction era. 1860s. 1870s.
12:38:12 THE COURT: I see Alaska was busy enacting
12:38:15 something 50-odd years before it was a state. I guess
12:38:19 territorial legislature or something.
12:38:24 All right. Well, that's -- okay. All right.
12:38:30 So, Mr. Moritz, I think we need to finish with
12:38:34 you here.
12:38:36 Mr. Ross, if you're going to talk to me about
12:38:38 the Delaware Supreme Court, let's skip that. Okay?
12:38:42 MR. ROSS: Okay.
12:38:42 THE COURT: And were you going to talk about

12:38:44 something else?

12:38:44 MR. ROSS: Only one thing in response to Your
12:38:46 Honor's question about how the legislature -- how an issue
12:38:50 arises and that's what cause a legislature to act. The only
12:38:54 thing I would point Your Honor to is to the declaration of
12:38:56 Ms. Allen at Exhibit C. She has a list of firearms and
12:39:01 public mass shootings. And what you see is that in the
12:39:04 first 14 -- first five years between 1982 and about 1987,
12:39:10 there are 14. There's one, just one in 1985 and one in
12:39:14 1986. In the final 22 months, there are 15. And you have
12:39:19 to go back more than 20 years to find another year looking
12:39:23 backwards where there was just one.

12:39:26 So, apropos of Your Honor's point of what
12:39:29 legislatures do is they see issues and they react to them.
12:39:32 That's exactly what happened here.

12:39:33 THE COURT: Yeah. I mean, it's probably
12:39:37 irrelevant to the -- not irrelevant, but not very
12:39:43 significant to the Second Amendment question, but it seems,
12:39:51 you know, the recitation of events at the beginning of HB
12:39:57 450, it makes it pretty clear what legislature was reacting
12:40:01 to; right?

12:40:01 MR. ROSS: It does, and it is consistent, and
12:40:04 I'm not going to go back to what Mr. Moritz talked about --
12:40:06 where technologies emerge. And we're talking about, you
12:40:09 know, assault weapons post-Vietnam. The issue increases.

Public mass shootings. Legislatures responded. It's consistent with the historical legislation.

Thank you, Your Honor.

THE COURT: Unless you're really burning to tell me something.

MR. LEHMAN: I'm really burning to tell you perhaps one thing.

THE COURT: All right. Come on and do it then.

MR. LEHMAN: I was supposed to start judging a high school mock trial competition over at the State courthouse ten minutes ago, so I'm going to have to let them know I'm late. But there was one thing that came up, Your Honor, during your discussion with Mr. Moritz about -- first, I think you were correct. I think if you look back through *Bruen* -- I don't have the page for you. I could certainly find it and let you know about it later, but --

THE COURT: No.

MR. LEHMAN: -- I'm fairly confident they said forget about the 20th Century in the context of these discussions. And I'll tell you why is because you asked what was inconsistent with the New York situation. And what was inconsistent with the history in the New York situation was it was inconsistent with the tradition of banning dangerous and unusual arms.

And so, when you look back and you say, okay,

12:41:18 well, there are also these sawed-off shotgun regulations and
12:41:22 machine gun regulations in the 20th Century, the idea under
12:41:25 *Bruen*, particularly because the Court essentially said you
12:41:28 can disregard the 20th Century, is not to look back and say,
12:41:31 well, now those are part of the tradition. What is the
12:41:34 tradition is only banning dangerous and unusual arms. Those
12:41:37 are dangerous and unusual. They were not in common use for
12:41:40 lawful purposes at the time. They're still not.
12:41:43 The arms that are at issue here are in common
12:41:46 use for lawful purposes. And the only other thing would be
12:41:50 just to remind the Court that the law is -- the case law is
12:41:52 very clear, that the question is about common use for lawful
12:41:55 purposes. I think probably consciously the State has
12:41:58 repeated self-defense hundreds of times, but you can have
12:42:01 other --
12:42:01 THE COURT: That's the last word from *Bruen*,
12:42:04 right. They repeated it, not a hundred times, but more than
12:42:08 ten times.
12:42:09 MR. LEHMAN: Right. Well, as I explained
12:42:10 earlier, Your Honor, naturally in that case that was the
12:42:12 focus because it was concealed to carry handguns. But in
12:42:16 several other Supreme Court decisions and various Circuit
12:42:19 Court decisions, it's been made very clear that other
12:42:20 purposes are absolutely lawful, recreation, hunting, you
12:42:24 know.

12:42:24 THE COURT: And I can understand why -- I'm
12:42:27 going to have to think about it, but I can understand why
12:42:29 you say that because, yes, you don't go hunting with
12:42:33 carrying a concealed weapon so you can sneak up on the deer.
12:42:36 So, what you say is, and I don't mean any criticism by this,
12:42:42 it's perfectly plausible. It's one of those things you have
12:42:48 to spend some time, more time studying these things.
12:42:50 And, of course, I'm not actually at this
12:42:54 point -- you know, the issue before me is not to come to a
12:42:58 final decision on any of this. It's to, you know, judge the
12:43:01 likelihood of success or probability of success on the
12:43:06 merits which indicates a certain -- so, it's a different
12:43:15 determination.
12:43:16 So, is there anything else you want to say?
12:43:18 MR. LEHMAN: I would only say we heard a lot
12:43:19 about suitability, Your Honor, which is totally immaterial.
12:43:22 THE COURT: Sorry. Did you say --
12:43:24 MR. LEHMAN: Suitability.
12:43:25 THE COURT: Oh, suitability.
12:43:26 MR. LEHMAN: We heard a lot about the
12:43:28 suitability of these specific arms for self-defense in the
12:43:31 home. It's immaterial, and the Court has made clear that
12:43:35 what the people choose is what controls, not what the State
12:43:38 thinks they ought to have.
12:43:40 And we've also heard that these are weapons most

12:43:44 suitable for military purposes, which I think begs the
12:43:47 question why they all have military counterparts and aren't
12:43:51 actually used by the military.
12:43:52 So, with that, Your Honor, I think I would
12:43:55 conclude.
12:43:55 THE COURT: All right.
12:43:56 MR. LEHMAN: I don't know if Mr. Pileggi has
12:43:58 anything, but if he does, Your Honor, I would appreciate
12:44:01 being excused for a moment.
12:44:03 THE COURT: Yes. No, we're going to be done in
12:44:04 a minute, one way or another.
12:44:06 Do you have anything, Mr. Pileggi?
12:44:07 MR. PILEGGI: I promise I will be limited to one
12:44:09 minute.
12:44:10 THE COURT: Okay. One minute.
12:44:13 And, Mr. Lehman, you ought to step out and take
12:44:16 care of this because it's important, this what you have --
12:44:20 MR. LEHMAN: Thank you, Your Honor.
12:44:21 THE COURT: -- to do.
12:44:22 MR. PILEGGI: I'll be done before he's out the
12:44:23 door, Your Honor.
12:44:24 THE COURT: Yeah, he needs a head start.
12:44:26 MR. PILEGGI: I just wanted to respond to Your
12:44:29 Honor's question when I was at the podium and also something
12:44:32 about whether or not armed -- excuse me, whether or not

magazines are considered arms. That same Third Circuit decision from 2018 that we referred to --

THE COURT: Right.

MR. PILEGGI: -- *Association of New Jersey*, they also said, in addition to ammunition, this arms -- excuse me, that magazines are considered arms within the meaning of the Second Amendment.

So, I know you asked me that question, and I focused on the ammunition part, but that same decision said that magazines as well within the definition of arms under the Second Amendment.

I just wanted to follow up, because it's also rebuttal to what my friend said that we didn't cite to any cases that rebutted the *Ocean State* decision which --

THE COURT: So, under that reading, it would still leave the question of whether or not there's a historical tradition of regulation?

MR. PILEGGI: And that same decision said there is no historical tradition of regulation of large-capacity magazines. So, that completes the circle, Your Honor.

Thank you.

THE COURT: Okay. All right. Thank you.

All right. Well, thank you for all your time this morning. I am cognizant that I need to get a decision to you, and so I will endeavor to do that. And I don't have

12:45:55 a sense right now of what the right balance is between
12:46:08 thoroughness and recognizing that this is a preliminary
12:46:11 injunction. So, I don't know how long it will take, but I
12:46:14 do understand it's significant and important that I get
12:46:18 something out so you all can make decisions about what to do
12:46:22 next.

12:46:22 All right. So thank you. We'll be in recess.

12:46:26 (Everybody said, Thank you, Your Honor.)

12:46:27 DEPUTY CLERK: All rise.

12:46:28 (Court was recessed at 12:46 p.m.)

I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Heather M. Triozzi
Certified Merit and Real-Time Reporter
U.S. District Court

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CERTIFICATION OF SERVICE

I hereby certify that on August 16, 2023, I electronically filed the foregoing Defendants-Appellees' Supplemental Appendix with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that four (4) paper copies of the foregoing Defendants-Appellees' Supplemental Appendix shall be filed by Federal Express to the Office of the Clerk, United States Court of Appeals for the Third Circuit, within 5 days of the date of electronic filing of the Supplemental Appendix.

Dated: August 16, 2023

/s/ David E. Ross
Counsel for Defendants-Appellees