14-0319-cv

United States Court of Appeals

for the

Second Circuit

JUNE SHEW, STEPHANIE CYPHER, PETER OWENS, BRIAN MCCLAIN, HILLER SPORTS, LLC, MD SHOOTING SPORTS, LLC, CONNECTICUT CITIZENS' DEFENSE LEAGUE, COALITION OF CONNECTICUT SPORTSMEN, RABBI MITCHELL ROCKLIN, STEPHEN HOLLY,

Plaintiffs-Appellants,

– v. –

DANNEL P. MALLOY, in his official capacity as Governor of the State of Connecticut, KEVIN T. KANE, in his official capacity as Chief State's Attorney of the State of Connecticut, REUBEN F. BRADFORD, in his official capacity as Commissioner of the Connecticut Department of Emergency Services and Public

(For Continuation of Caption See Inside Cover)

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Plaintiff Hiller Sports, LLC is a Connecticut Limited Liability Company. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Plaintiff MD Shooting Sports, LLC is a Connecticut Limited Liability Company. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Plaintiff The Connecticut Citizens' Defense League is a Connecticut non-stock business entity. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Plaintiff The Coalition of Connecticut Sportsmen is a Connecticut non-stock business entity. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Dated: May 16, 2014

s/ Charles J. Cooper
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JURISDICTIONAL STATEMENT

Plaintiffs allege that provisions of Connecticut law violate the United States Constitution. The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court entered judgment on January 31, 2014, and Plaintiffs noticed their appeal the same day. This appeal is from a final judgment that disposes of all parties' claims. The Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Connecticut's ban on commonly possessed firearms that the State labels "assault weapons" violates the Second Amendment.

2. Whether Connecticut's ban on standard capacity ammunition magazines that the State labels "large capacity" magazines violates the Second Amendment.

3. Whether certain provisions of Connecticut's ban are unconstitutionally vague.

INTRODUCTION

Connecticut bans its law-abiding citizens from protecting themselves, their families, and their homes with semiautomatic firearms it deems to be "assault weapons" and ammunition magazines it deems to be of "large capacity." Under the Supreme Court's decision in *District of Columbia v. Heller*, Connecticut can

justify its ban only if it can prove that the banned items are "not typically possessed by law-abiding citizens for lawful purposes." 554 U.S. 570, 625 (2008).

That is a hopeless task. The semiautomatic firearms the State misleadingly calls "assault weapons" include some of the nation's most popular firearms. Indeed, "[m]illions of Americans possess the firearms banned by this act" for lawful purposes. SPA16. These weapons are no more powerful than firearms that are not banned, and they fire at the same rate as all semiautomatics—one round for each pull of the trigger. To the extent the features that make a firearm an "assault weapon" make a functional difference at all, they promote accuracy and hence make a firearm safer and more effective to use.

Magazines capable of holding more than ten rounds of ammunition are even more ubiquitous. There are tens of millions in the United States, and they come standard with many of the nation's most popular firearms. The defensive appeal is obvious: a gun owner who runs out of ammunition before an assailant does is likely to become a crime victim, and it is more likely that this will happen if the gun owner is stuck with a substandard capacity magazine.

The district court upheld the State's ban despite finding that the banned firearms and magazines "are 'in common use' within the meaning of *Heller*." SPA17. *Heller* forecloses this result. As the Court explained in *McDonald v. City of Chicago*, *Heller* "found that [the Second Amendment] right *applies* to

handguns," and it thus concluded that "citizens *must* be permitted to use" them. 130 S. Ct. 3020, 3036 (2010) (emphases added) (quotation marks omitted). The same result should obtain here, and it is unnecessary for this Court to apply a levels-of-scrutiny analysis to strike down Connecticut's ban.

While the district court held Connecticut's ban satisfies intermediate scrutiny, *Heller* forecloses this result as well. Handguns "are the overwhelmingly favorite weapon of armed criminals." 554 U.S. at 682 (Breyer, J., dissenting). Yet, the Supreme Court held that the District of Columbia's law banning them "would fail constitutional muster" under any standard of heightened scrutiny. *Id.* at 629. The same must be true for Connecticut's ban on firearms and magazines less favored by armed criminals.

Because laws banning protected firearms are "off the table," *id.* at 636, the district court's contrary ruling must be reversed. The district court also erred in rejecting Plaintiffs' vagueness challenge.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS

Plaintiffs filed this action for declaratory and injunctive relief on May 22, 2013, JA33, and they filed an amended complaint on June 11, JA82. They claimed that several provisions of Connecticut Public Act 13-3, as amended by Public Act 113-220, violate the United States Constitution. In particular, Plaintiffs contended

that the Act's bans on semiautomatic "assault weapons" and "large capacity" magazines violate the Second Amendment and the Equal Protection Clause and that several provisions of the Act are unconstitutionally vague.

Plaintiffs moved for a preliminary injunction on June 26, 2013, JA136, and for summary judgment on August 23, JA322. The State filed a motion for summary judgment on October 11, JA774.

On January 30, 2014, Judge Alfred V. Covello granted summary judgment for the Defendants on all claims and denied as moot Plaintiffs' motion for a preliminary injunction. *See* JA30; SPA4-5 (citation not yet available). Specifically, the district court granted the State's motion for summary judgment with respect to Plaintiffs' claim that the State's ban on "assault weapons" and "large capacity" magazines violates the Second Amendment. The district court found that "[t]he Connecticut legislation here bans firearms in common use," SPA16, and thus that it "levies a substantial burden on the plaintiffs' Second Amendment rights," SPA17. The district court nevertheless applied intermediate scrutiny to uphold the State's ban, concluding that it is substantially related to the State's interest in public safety and crime prevention. SPA22-27. The court likewise rejected plaintiffs' equal protection and void-for-vagueness claims. SPA27-48. On January 31, 2014, the court entered judgment, and Plaintiffs noticed their appeal. SPA1; JA2852.

II. STATUTORY BACKGROUND

The Act became law on April 4, 2013, and was amended on June 18, 2013. As relevant here, the Act creates new offenses with severe criminal penalties for previously lawful activities involving the acquisition and possession of rifles, handguns, shotguns, and magazines.

A. Prohibitions on Rifles, Handguns, and Shotguns

The Act redefined "assault weapon" under Connecticut law to include an enumerated list of 183 rifles, pistols, and shotguns, as well as "copies or duplicates" of most of those firearms. CONN. GEN. STAT. §§ 53-202a(1)(A)-(D). All but one of the enumerated firearms is semiautomatic. *See* SPA43; JA1090. The Act further broadened the definition of "assault weapon" in CONN. GEN. STAT. § 53-202a(1)(E) by replacing the prior two-feature test with a one-feature test:

Rifles

> (i) A semiautomatic, centerfire rifle that has an ability to accept a detachable magazine and has at least one of the following:
> (I) A folding or telescoping stock;
> (II) Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing;
> (III) A forward pistol grip;
> (IV) A flash suppressor; or
> (V) A grenade launcher or flare launcher; or

(ii) A semiautomatic, centerfire rifle that has a fixed magazine with the ability to accept more than ten rounds; or
(iii) A semiautomatic, centerfire rifle that has an overall length of less than thirty inches; or

Pistols

(iv) A semiautomatic pistol that has an ability to accept a detachable magazine and has at least one of the following:
(I) An ability to accept a detachable ammunition magazine that attaches at some location outside of the pistol grip;
(II) A threaded barrel capable of accepting a flash suppressor, forward pistol grip or silencer;
(III) A shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to fire the firearm without being burned, except a slide that encloses the barrel; or
(IV) A second hand grip; or
(v) A semiautomatic pistol with a fixed magazine that has the ability to accept more than ten rounds; …

Shotguns

(vi) A semiautomatic shotgun that has both of the following:
(I) A folding or telescoping stock; and
(II) Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing; or
(vii) A semiautomatic shotgun that has the ability to accept a detachable magazine; or
(viii) A shotgun with a revolving cylinder; or
(ix) Any semiautomatic firearm that meets the criteria set forth in subdivision (3) or (4) of subsection (a) of section 53-202a of the general statutes, revision of 1958, revised to January 1, 2013 ....

It generally is a Class C felony to transport, import into the state, or offer for sale an "assault weapon," CONN. GEN. STAT. § 53-202b(a)(1), and a class D felony to possess an "assault weapon," *id.* § 53-202c(a). Pre-ban owners of these firearms who registered them by January 1, 2014, may continue to possess them in a limited number of locations. *Id.* §§ 53-202d(a)(2)(A), 53-202d(f). Such grandfathered firearms may only be transferred within the state to a licensed gun dealer, *id.* § 53-202d(b)(2), upon the owner's death, *id.*, or to the police, *id.* § 53-202e.

B. Prohibitions on Magazines

The Act defines "large capacity magazine" as a magazine or similar device "that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition." *Id.* § 53-202w(a)(1). It generally is a Class D felony to possess, distribute, import into the state, or purchase such a device. *Id.* §§ 53-202w(b)-(c). As with pre-ban firearms, one who possessed a magazine with a capacity of more than ten rounds prior to the ban was required to register by January 1, 2014, *id.* § 53-202x(a)(1), and may only transfer the magazine within the state to a limited class of people, *id.* § 53-202w(f).

SUMMARY OF THE ARGUMENT

1. The Second Amendment guarantees law-abiding citizens the right to possess and use firearms. Connecticut infringes that right by prohibiting its citizens from possessing popular semiautomatic firearms that it labels "assault

weapons" and standard capacity magazines that it labels "large capacity magazines." Like the District of Columbia's handgun ban, Connecticut's ban would fail any standard of heightened constitutional scrutiny. The district court thus erred by finding that the ban does not violate the Second Amendment.

2. The district court also erred in declining to hold that certain provisions of the Act are void for vagueness. In particular, the Act prohibits "copies or duplicates" of an enumerated list of firearms without defining that term or otherwise providing any guidance as to how similar one firearm must be to another to qualify. *See id.* §§ 53-202a(B)-(D). Such an amorphous standard invites the kind of uncertainty and arbitrary enforcement decisions the void for vagueness doctrine prohibits. The Act also defines a "large capacity" magazine to include a magazine that "can be readily restored or converted to accept, more than ten rounds of ammunition." *Id.* § 53-202w(a)(1). It fails, however, to supply information about the knowledge, skill, or tools available to the person doing the restoration or conversion. The Sixth Circuit struck down a similar provision as unconstitutionally vague, *see Peoples Rights Organization, Inc.*, *v. City of Columbus*, 152 F.3d 522 (6th Cir. 1988), and this Court should do the same.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review on all issues is de novo because the district court resolved the case on cross-motions for summary judgment. *Novella v. Westchester Cnty.*, 661 F.3d 128, 139 (2d Cir. 2011).

II. CONNECTICUT'S BAN ON COMMON FIREARMS AND MAGAZINES VIOLATES THE SECOND AMENDMENT[1]

A. The Act Bans "Arms" that Are Protected by the Second Amendment

The Second Amendment issue at the heart of this case turns on a simple question: Are the semiautomatic firearms and magazines banned by Connecticut "Arms" protected by the Second Amendment? If they are, a flat ban on their possession is unconstitutional.

1. The text of the Second Amendment provides that "the right of the people to keep and bear *Arms*, shall not be infringed." U.S. CONST. amend. II (emphasis added). It follows that there are certain "instruments that constitute bearable arms," *Heller*, 554 U.S. at 582, that law-abiding, responsible, adult citizens have an inviolable right to acquire, possess, and use.

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[1] With limited differences throughout, Part II of this section is substantially similar to Part II of the argument section of the opening brief for the Plaintiffs-Appellants-Cross-Appellees in *New York State Pistol & Rifle Ass'n v. Cuomo*, No. 14-36 (Doc. 75), another case pending before this Court that raises many of the same issues.

Heller confirms this implication of the constitutional text. There, the Supreme Court held that the Second Amendment "*elevates above all other interests* the right of law-abiding, responsible citizens to use *arms* in defense of hearth and home." *Id*. at 634-35 (emphases added). Thus, all that needs to be done to resolve a challenge to a flat ban on possession of certain weapons is to determine whether they are "arms" protected by the Second Amendment. Any further evaluation of allegedly competing public-policy considerations is foreclosed by the constitutional text. That text is the "very *product* of an interest-balancing by the people," and "[t]he very enumeration of the right [to keep and bear arms] takes out of the hands of government … the power to decide on a case-by-case basis whether the right is *really worth* insisting on." *Id*.

The government cannot justify a ban on some protected arms by pointing to the availability of other protected arms that are not banned. "It is no answer," *Heller* held, "to say … that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Id*. at 629. As the decision affirmed by *Heller* put it, the District of Columbia's attempt to justify its handgun ban on the grounds that " 'residents still have access to hundreds more' " types of firearm was "frivolous." *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007).

McDonald confirms this understanding of *Heller*. There, the Court explained that

> in *Heller*, we held that individual self-defense is the central component of the Second Amendment right. Explaining that the need for defense of self, family, and property is most acute in the home, we found that this right applies to handguns because they are the most preferred firearm in the nation to keep and use for protection of one's home and family. Thus, we concluded, citizens must be permitted to use handguns for the core lawful purpose of self-defense.

130 S. Ct. at 3036 (citations, emphasis, quotation marks, and brackets omitted). In short, because the Court found that the Second Amendment "*applies* to handguns," it concluded that "citizens *must* be permitted to use" them. *Id*. (emphasis added).

2. While this Court has rejected the view that "courts must look solely to the text, history, and tradition of the Second Amendment to determine whether a state can limit the right without applying any sort of means-end scrutiny," *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 n.9 (2d Cir. 2012) (citing, *inter alia*, *Heller v. District of Columbia*, 670 F.3d 1244, 127174 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (hereafter, "*Heller II*")), it need not revisit that decision to hold that laws banning the possession of protected arms are flatly unconstitutional.[2] Indeed, this Court has expressly recognized that *Heller* at a minimum "stands for the … proposition that where a state regulation is entirely

[2] Plaintiffs reserve the right to argue before the en banc Court and the Supreme Court that that decision was error.

inconsistent with the protections afforded by an enumerated right … it is an exercise in futility to apply means-ends scrutiny." *Id.* As *Heller* demonstrates, a law banning possession of protected arms is the paradigmatic example of a law entirely inconsistent with the Second Amendment.

Other circuits that typically apply a levels-of-scrutiny inquiry to Second Amendment claims recognize that certain laws are so antithetical to the Second Amendment that they are "categorically unconstitutional." *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). The Seventh Circuit, for example, held that the State of Illinois's "flat ban on carrying ready-to-use guns outside the home" was flatly unconstitutional. *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012). The Ninth Circuit likewise found that "applying heightened scrutiny was unnecessary" to strike down San Diego's limitation of concealed-carry permits to citizens who demonstrate "a unique risk of harm." *Peruta v. County of San Diego*, 742 F.3d 1144, 1168-70 (9th Cir. 2014). While *Kachalsky*'s ultimate holding is in tension with these decisions, the source of that tension is not in the recognition that some laws are wholly inconsistent with the Second Amendment, but rather in the Court's insistence that Second Amendment "core" protection is limited to the home. 701 F.3d at 94. That "critical difference" is not implicated here, as Connecticut's bans extend into the home. *Id.*

B. *Heller* Establishes the Test for Determining Which Weapons Are Constitutionally Protected "Arms"

Heller holds that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." 554 U.S. at 582. The burden thus falls on the government to demonstrate that a particular type of bearable arm falls outside the Second Amendment's scope. *See Ezell*, 651 F.3d at 702-03 (The government bears the burden to "establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right.").

To meet this burden, the government must show that a weapon is "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. *See also id.* at 627 (weapons "highly unusual in society at large" are not protected). As the district court acknowledged, *Heller* "make[s] clear ... that weapons that are 'in common use at the time' are protected under the Second Amendment." SPA14. This standard is based on historical practices and "the historical understanding of the scope of the right." *Heller*, 554 U.S. at 625. On the one hand, "[t]he traditional militia" that the Second Amendment was designed to protect "was formed from a pool of men bringing arms in common use at the time for lawful purposes like self defense." *Id.* (quotation marks omitted). On the other hand, the right to bear arms coexisted with a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " *Id.* at 627.

Courts and legislatures do not have the authority to second-guess the choices made by law-abiding citizens by questioning whether they really "need" the arms they have chosen to possess. While *Heller* did identify several "reasons that a citizen may prefer a handgun for home defense," the Court held that "*[w]hatever 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." *Id*. at 629 (emphasis added). Thus, if the government cannot show that a certain type of weapon is "not typically possessed by law-abiding citizens for lawful purposes," *id*. at 625, that is the end of the matter—weapons of that type are protected "arms" and cannot be banned.

McDonald underscores this point. In dissent, Justice Breyer argued against incorporation of the Second Amendment right because "determining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make," such as, "What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic?" *McDonald*, 130 S. Ct. at 3126 (Breyer, J., dissenting). Justice Alito's controlling opinion squarely rejected this argument: "Justice BREYER is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions …. [W]hile his opinion in *Heller* recommended an interest-balancing test, the Court

specifically rejected that suggestion." *Id*. at 3050. When determining which weapons are protected, it is the choices commonly made by the American people that matter, not judges' or legislators' assessments of those choices.

It is likewise irrelevant that criminals may prefer to use a certain firearm for the same reasons that law-abiding citizens do. Justice Breyer emphasized that "the very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous." *Heller*, 554 U.S. at 711 (Breyer, J., dissenting). The *Heller* majority, by contrast, focused on the choices of law-abiding citizens, not the choices of criminals or the reasons why criminals make those choices.

Finally, the inquiry focuses on the choices commonly made by *contemporary* law-abiding citizens. *Heller* emphasized that the District of Columbia's "handgun ban amounts to a prohibition of an entire class of 'arms' that *is* overwhelmingly chosen by American society" for self-defense, *id*. at 628 (emphasis added), and it rejected as "bordering on the frivolous" "the argument … that only those arms in existence in the 18th century are protected," *id*. at 582.

C. The Semiautomatic Firearms Singled Out by Connecticut Cannot Be Banned

Connecticut bans a list of specifically identified rifles, shotguns, and handguns, CONN. GEN. STAT. §§ 53-202a(1)(A)-(D), "copies or duplicates" of most of those firearms, *id.* §§ 53-202a(1)(B)-(D), and semiautomatic firearms with

certain features, *id.* § 53-202a(1)(E). The semiautomatic AR-15 rifle is representative of the type of firearm "assault weapons" bans prohibit. *See New York State Rifle & Pistol Ass'n v. Cuomo*, -- F. Supp. 2d --, 2013 WL 6909955, at *10 (W.D.N.Y. Dec. 31, 2013). Both of those facts—that Connecticut targets semiautomatic firearms and that the AR-15 is representative of those firearms—demonstrate that Connecticut bans arms protected by the Second Amendment.

1. There is no class of firearms known as "semiautomatic assault weapons." "Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists …." *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting). Anti-gun publicists promoting "assault weapons" bans have sought to exploit "the public's confusion over fully automatic machine guns versus semi-automatic assault weapons" to "increase the chance of public support for restrictions on these weapons." JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA, Conclusion (Violence Policy Center 1988), *available at* www.vpc.org/studies/awaconc.htm.

While "semiautomatic assault weapons" is not a recognized category of firearms, "semiautomatic" is. And it is semiautomatic firearms that Connecticut's "assault weapons" ban targets. The "automatic" part of "semiautomatic" refers to the fact that the user need not manipulate the firearm to place another round in the

chamber after each round is fired. But unlike an automatic firearm, a semiautomatic firearm will *not* fire continuously on one pull of its trigger; rather, a semiautomatic firearm requires the user to pull the trigger each time he or she wants to discharge a round. *See Staples v. United States*, 511 U.S. 600, 602 n.1 (1994). There is a significant practical difference between a fully automatic and a semiautomatic firearm. According to the United States Military, for example, the maximum effective rates of fire for various M4- and M16-series firearms is between 45-65 rounds per minute in semiautomatic mode, versus 150-200 rounds per minute in automatic mode. JA2677. *See also* JA2592 & JA2600 Exhibits C&D (videos illustrating that "firing in semi auto mode was … almost *4 times slower* than in full auto mode").

There is a venerable tradition in this country of lawful private ownership of semiautomatic firearms. The Supreme Court has held as much, concluding in *Staples* that semiautomatics, unlike machine guns, "traditionally have been widely accepted as lawful possessions." *Staples*, 511 U.S. at 612. Semiautomatic firearms have been commercially available for over a century. *See Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting); David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 413 (1994). Yet apart from the now-expired 10-year federal "assault weapons" ban, they have not been banned at the federal level. And currently over 85% of the states do not ban

semiautomatic "assault weapons." (In addition to Connecticut, only California, Hawaii, Maryland, Massachusetts, New Jersey, and New York have enacted bans on "assault weapons," with varying definitions of the prohibited firearms. *See* CAL. PENAL CODE §§ 30600, 30605; HAW. REV. STAT. § 134-8; MD. CODE, CRIM. LAW § 4-303; MASS. GEN. LAWS ch. 140, § 131M; N.J. STAT. §§ 2C:39-5(f), 2C:39-9(g); N.Y. PENAL LAW §§ 265.02(7), 265.10(1)-(3).)

What is more, ownership of semiautomatic firearms is exceedingly common among law-abiding citizens. For example, statistics indicate that in 2011 82% of the three million handguns manufactured for the domestic market were semiautomatic, JA147, and that in early 2010 about 40% of the rifles sold in the United States were semiautomatic, NICHOLAS J. JOHNSON ET AL., FIREARMS LAW & THE SECOND AMENDMENT 11 (2012).

2. It is no answer to say that Connecticut bans only a subset of semiautomatic firearms. Indeed, this line of argument is foreclosed not only by *Heller* but also by *Staples*, which identified the AR-15—the archetypal "assault weapon"—as a traditionally lawful firearm.

The firearms that Connecticut bans are no more dangerous than firearms that the State does not ban. Indeed, "wounds caused by common civilian hunting rifles and shotguns like those in use for the past 150 years or so are typically far more severe and destructive to tissue than many so-called 'assault weapons.' " JA764;

see also JA2598 & JA2600 Exhibit L (video). The firearms Connecticut bans also fire at the same rate as all other semiautomatics—one round for each pull of the trigger. The features banned by Connecticut do not increase the rapidity with which a firearm can be fired.

To the extent the features singled out by Connecticut's "assault weapons" ban make any functional difference, they tend to *improve* a firearm's utility and safety for self-defense and other lawful purposes. *See* JA290-91. For example:

- A telescoping stock promotes accuracy by allowing the stock to be adjusted to fit the individual user's physique, thickness of clothing, and shooting position. JA239; *see also What Should America Do About Gun Violence?: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 8 (2013), *available at* www.judiciary.senate.gov/imo/media/doc/1-30-13KopelTestimony.pdf (written testimony of David B. Kopel) ("Kopel Testimony"); JA2594 & JA2600 Exhibit I (video discussing different types of stocks, including telescoping stocks).
- A pistol grip makes it easier to hold and stabilize a rifle when fired from the shoulder and therefore promotes accuracy. JA240; *see also* Kopel, *Rational Basis Analysis*, 20 J. CONTEMP. L. at 396 ("The defensive application is obvious, as is the public safety advantage in preventing stray shots."). A pistol grip can also assist with retention, making it more difficult for an

assailant to wrest a firearm away from a law-abiding citizen. JA240; JA2593. It does not promote firing from the hip; indeed, a rifle with a straight grip and no pistol grip would be more conducive to firing from the hip. JA240; JA2593.

- A thumbhole stock is a hole carved into the stock of a firearm through which a user inserts his or her thumb. *See* JA2600 Exhibit I (video discussing different types of stocks, including thumbhole stocks). It promotes accuracy by improving comfort and stability in handling a firearm. *See* JA240. It also promotes self-defense by making it more difficult for an assailant to snatch away the victim's weapon.
- A flash suppressor is a "common accessory" that "reduces the flash of light" from a firearm shot and thus "decreases shooter's blindness—the momentary blindness caused by the sudden flash of light from the explosion of gunpowder." Kopel, *Rational Basis Analysis*, 20 J. CONTEMP. L. at 397. *See also* JA2595.

3. These are all legitimate safety-improving features that law-abiding citizens may prefer to have incorporated in their semiautomatic firearms. But under *Heller*, of course, the key point is that millions of law-abiding citizens choose to possess firearms with those features. This is demonstrated by the AR-15, which is illustrative of the type of weapon the Act bans.

The AR-15 is America's "most popular semi-automatic rifle," *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting), and in recent years it has been "the best-selling rifle type in the United States," Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue*, 60 HASTINGS L.J. 1285, 1296 (2009). By a conservative estimate, as of early 2013 nearly four million had been manufactured in the United States for the commercial market since 1986. JA146. Other sources estimate that there were 5 million AR-15s in private hands by early 2013. Dan Haar, *America's Rifle: Rise of the AR-15*, HARTFORD COURANT, March 9, 2013, http://articles.courant.com/2013-03-09/business/hc-haar-ar-15-it-gun-20130308_1_ar-15-rifle-new-rifle-the-ar-15 (last visited May 15, 2014). In 2011, AR-15s represented at least 18 percent of the rifles and seven percent of all firearms made in the United States for the domestic market. JA145-46. By comparison, at 17.9 percent, General Motors had the largest share of the American auto market in 2013. *See* Timothy Cain, *USA Auto Sales Brand Rankings – 2013 Year End*, GOOD CAR BAD CAR (Jan. 3, 2014), www.goodcarbadcar.net/2014/01/2013-usa-auto-sales-figures-by-brand-results.html. Indeed, in 2012 alone it is estimated that nearly one million "modern sporting rifles" (a category consisting primarily of AR- and AK-platform rifles) were manufactured in the United States or imported for sale—more than twice the number of America's best-selling vehicle (the Ford F-150) sold that year. JA2605;

JA2607-08. And all of these numbers are poised to grow, as data indicates that modern sporting rifles like the AR-15 have been increasingly popular in recent years. JA2607.

AR-15s are commonly and overwhelmingly possessed by law-abiding citizens for lawful purposes. For example, a survey of owners of AR-platform rifles found that the top reasons for owning the firearms include self-defense, hunting, and recreational and competitive target shooting—lawful purposes all. JA185. Indeed, AR-15s are "likely the most ergonomic, safe, and effective firearm … for civilian self-defense." JA766; *see also, e.g.*, Eric R. Poole, *Ready To Arm: It's Time To Rethink Home Security*, *in* GUNS & AMMO, BOOK OF THE AR-15 15-22 (Eric R. Poole ed., 2013). And the AR-15 "is the leading type of firearm used in national matches and in other matches sponsored by the congressionally established Civilian Marksmanship program." SPA16 n.40. The State was thus correct to concede that Plaintiffs "may genuinely prefer to own an AR-15 ... rifle for personal and recreational use." Defs'. Reply Br. in Further Support of Their Mot. for Summ. J., *Shew v. Malloy*, No. 13-739 (D. Conn. Jan. 7, 2014), Doc. 117, at 13.

The fact that "assault weapons" form only a small fraction of guns used in crime underscores that AR-15s and other banned firearms are commonly possessed by law-abiding citizens for lawful purposes. *See, e.g.*, JA1576-77. Indeed,

evidence indicates that "well under 1% [of crime guns] are 'assault rifles.' " GARY KLECK, TARGETING GUNS 112 (1997). Rounding up to 1% and assuming that all such rifles used in crimes are AR-15s results in an estimate that AR-15s were used in 4,784 gun crimes in 2011. *See* JA433 (478,400 victims of gun crime in 2011). Even if all of these crimes involved different AR-15s (and they plainly did not, as many incidents involved multiple victims), that would mean that *more than 99.8%* of the (conservatively) estimated 3.3 million AR-15s in the United States through 2011, *see* JA146, were not used in a gun crime that year and thus were owned for lawful purposes.

D. Magazines Capable of Holding More than 10 Rounds of Ammunition Cannot Be Banned

While ammunition magazines are not themselves firearms, they are an integral part of the firearms that are equipped with them. The fact that Connecticut attacks the magazines directly rather than firearms equipped with them does not change the constitutional analysis: if magazines capable of holding more than ten rounds are typically possessed for lawful purposes, they cannot be banned.

1. Magazines capable of holding more than ten rounds of ammunition are common to the point of ubiquity among the law-abiding gun owners of this country. Indeed, calling these devices "large capacity" magazines is an utter misnomer—they are a standard feature on many of this nation's most popular firearms.

For example, in the 2013 edition of Gun Digest, a standard reference work that includes specifications of currently available firearms, about two-thirds of the distinct models of semiautomatic centerfire rifles are normally sold with standard magazines that hold more than ten rounds of ammunition. GUN DIGEST 2013 455-64, 497-99 (Jerry Lee ed., 67th ed. 2013). This is consistent with the fact that the AR-15, one of this nation's most popular rifles, typically comes standard with a 20- or 30-round magazine. JA148; *see also* JA178 (survey data indicating that AR-platform rifle owners most commonly use 20- and 30-round magazines).

Magazines capable of holding more than ten rounds are also standard on many of this nation's most popular handgun models. For example, annual ATF manufacturing and export statistics indicate that in 2011 about 61.5% of the 2.6 million semiautomatic handguns made in the United States were in calibers typically using magazines that hold over ten rounds. JA147.

Although precise figures are not available, the total number of magazines capable of holding more than ten rounds in this country is at least in the tens of millions. A 2004 report to the Department of Justice by Christopher Koper (an expert for Connecticut in this case) indicates that (a) as of 1995 there were 25 million such magazines available; (b) nearly 4.8 million were imported for commercial sale between 1994 and 2000; and (c) by 2000 importers had received permission to import an additional 42 million. JA578.

2. There are many reasons why a law-abiding citizen would not want to be limited to substandard capacity ammunition magazines. The most obvious is to decrease the risk of running out of ammunition before being able to repel a criminal attack. It is no answer to say that the average gun owner is unlikely to need to fire more than ten rounds to protect himself. The average gun owner often will not need to fire a *single* round in self-defense, but that does not justify banning guns altogether. And if a gun owner is attacked, there is a good chance he will be attacked by multiple offenders. According to survey data, for example, in 2008 nearly 800,000 violent crimes (17.4% of the total) involved multiple offenders. JA286.

Police department practices make clear that standard capacity magazines holding more than ten rounds have defensive benefits. Police departments typically issue handguns with magazines that hold more than ten rounds. *See* JA147; MASSAD AYOOB, THE COMPLETE BOOK OF HANDGUNS 50, 87-90 (2013). And they do so for good reason. For example, in 2011 New York City police officers fired more than ten rounds in 29% of incidents in which they fired their weapons to defend themselves and others. JA761; NEW YORK CITY POLICE DEPARTMENT, ANNUAL FIREARMS DISCHARGE REPORT 2011 17, 23 (2012), www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/nypd_annual_firearms_discharge_report_2011.pdf. This is based partly on the fact that police

officers often miss their targets. *See* JA286; Thomas J. Aveni, *Officer Involved Shootings: What We Didn't Know Has Hurt Us*, at 7 (Police Policy Studies Council 2003), www.theppsc.org/Staff_Views/Aveni/OIS.pdf (showing NYPD "hit ratios" of 38% at 0-2 yards and 17% at 3-7 yards). When police officers are not around, of course, law-abiding citizens are left to defend themselves. Indeed, "defensive gun use" is very common, with a leading study estimating that "each year in the U.S. there are about 2.2 to 2.5 million [defensive gun uses] of all types by civilians against humans." Gary Kleck & Marc Gertz, *Armed Resistance to Crime*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995). And statistics such as those discussed above demonstrate why citizens may prefer to have standard capacity magazines holding more than ten rounds in the event they need to use a gun defensively.

Standard capacity magazines are superior for defensive purposes than the alternatives. Numerous tests conducted by law enforcement and the military have documented that the most reliable magazines are the magazines a firearm was designed to use; reduced capacity magazines have been shown to have more malfunctions than standard magazines in several types of firearms. JA761. Furthermore, the most obvious alternatives—carrying multiple firearms or multiple magazines—are poor substitutes for equipping a firearm with a standard capacity magazine. Criminals, not their targets, choose when and where to attempt a crime.

While criminals can ensure that they are equipped with whatever weapons they deem necessary, it is implausible to expect citizens to have multiple firearms available at all times in the event they are attacked. And while carrying multiple magazines may be less burdensome than carrying multiple firearms, the need to replace an empty magazine—particularly when under the stress of a criminal attack—can significantly impair a person's capacity for self-defense. *See* JA241-45; JA2597. Replacing a spent magazine while under the stress of a criminal attack is even more unrealistic for individuals with disabilities or other physical limitations that prevent them from changing magazines quickly. Some of the plaintiffs in this case fit this profile. *See, e.g.*, JA261-62 (Ms. Cypher describing the difficulty she has changing a magazine due to the loss of her right arm to cancer); JA274 (Mr. Owens describing the difficulty he has changing a magazine due to the loss of functional use of the left side of his body because of a stroke).

Standard-capacity magazines may be preferable for other lawful purposes. Target shooting is one example. Indeed, some nationally established shooting competitions are designed for firearms capable of holding more than ten rounds. JA237. Hunting is another. *See id.*; Kopel Testimony at 15 (explaining that hunters often need to take multiple shots); David B. Kopel, "*Assault Weapons*," *in* GUNS: WHO SHOULD HAVE THEM 193 (David B. Kopel ed., 1995) (same).

3. Magazines capable of holding more than ten rounds have been in existence for a long time and, like semiautomatic firearms, they traditionally have been regarded as lawful possessions. Indeed, such magazines are at least as old as the Second Amendment. The Girandoni air rifle was in existence at the time, and it had a magazine capable of holding twenty rounds; Merriweather Lewis carried one on the Lewis and Clark expedition. *See* JIM GARRY, WEAPONS OF THE LEWIS & CLARK EXPEDITION 95-96, 99-100 (2012). Many lever-action rifles with magazines capable of holding more than ten rounds were introduced around the time of the adoption of the Fourteenth Amendment, including models produced by the Volcanic Repeating Arms Company in the 1850s, Henry in the 1860s, and Winchester in the 1860s and 1870s. *See* HAROLD F. WILLIAMSON, WINCHESTER: THE GUN THAT WON THE WEST 13 (1952); NORM FLAYDERMAN, FLAYDERMAN'S GUIDE TO ANTIQUE AMERICAN FIREARMS AND THEIR VALUES 304-06 (9th ed. 2007); ARTHUR PIRKLE, 1 WINCHESTER LEVER ACTION REPEATING FIREARMS: THE MODELS OF 1866, 1873 & 1876 44 (1994).

Magazine bans like Connecticut's are extremely rare. Magazine capacity has been unregulated at the federal level with the exception of the 1994-2004 federal ban, which applied to post-enactment magazines capable of holding more than ten rounds. *See* JA1011. Only a small minority of states have magazine bans similar to Connecticut's (there are only seven additional statewide bans). And

Connecticut's is among the strictest. Two states (Colorado and New Jersey) generally limit magazine capacity to 15 rounds rather than 10 rounds. *See* COLO. REV. STAT. § 18-12-301; N.J. STAT. § 2C:39-1(y). California does not require registration of magazines owned prior to its ban. *See* CAL. PENAL CODE § 32310. And Hawaii's ten-round magazine limit applies only to handguns. *See* HAW. REV. STAT. § 134-8(c).

E. Connecticut's Semiautomatic "Assault Weapons" and "Large Capacity" Magazine Bans Are Flatly Unconstitutional

Connecticut cannot show that the semiautomatic firearms and ammunition magazines it bans are "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. Indeed, the evidence conclusively shows that law-abiding citizens do commonly own the banned firearms and magazines for lawful purposes. For this reason alone, under *Heller*, the State's ban is unconstitutional. Period. "The Constitution leaves [Connecticut] a variety of tools for combating [gun violence]." *Id.* at 636. But banning arms protected by the Second Amendment is not one of them. The Second Amendment takes that option "off the table." *Id.*

The district court departed from *Heller* in reaching the opposite conclusion. The court found that the semiautomatic firearms and standard-capacity magazines banned by Connecticut are constitutionally protected. With respect to the former, it found that "[m]illions of Americans possess the firearms banned by this act for

hunting and target shooting." SPA16. With respect to the latter, it found that "millions of Americans commonly possess firearms that have magazines which hold more than ten cartridges." SPA16-17. The court thus concluded that the banned firearms and magazines are protected by the Second Amendment. *Id.* For the reasons explained above, there is ample evidence supporting the district court's conclusion that the banned firearms and magazines are commonly owned within the meaning of *Heller* and thus constitutionally protected. At any rate, given the widespread public ownership of these items, Connecticut cannot bear its burden to prove otherwise.

The district court's conclusion that "assault weapons" and "large-capacity" magazines are in common use is consistent with the findings of several other federal courts. *See Heller II*, 670 F.3d at 1261 ("We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use' …."); *New York State Rifle & Pistol Ass'n*, 2013 WL 6909955, at *11 (finding that "there can be little dispute that tens of thousands of Americans own ['assault weapons'] and use them exclusively for lawful purposes" and that magazines that hold more than 10 rounds are "also popular" and "in common use nationally"); *Fyock v. City of Sunnyvale*, -- F. Supp. 2d --, 2014 WL 984162, at *4 (N.D. Cal. Mar. 5, 2014) ("[M]agazines having a capacity to accept more than ten rounds are in common use …. [I]t is safe to say that whatever the

actual number of such magazines in the United States consumers' hands is, it is in the tens-of-millions, even under the most conservative estimates.").

Under *Heller*, that should be the end of the analysis. The district court disagreed, attempting to distinguish *Heller* on the ground that "the challenged legislation provides alternate access to similar firearms." SPA21. Other courts have employed similar reasoning. *See Heller II*, 670 F.3d at 1261-62; *Fyock*, 2014 WL 984162, at *6; *New York State Rifle & Pistol Ass'n*, 2013 WL 6909955, at *13. But this does not distinguish *Heller* in the least. Indeed, the District of Columbia attempted to defend its handgun ban on the same grounds: "The Council had a manifestly reasonable basis to conclude that handguns are unusually dangerous," the District argued, and "[i]t adopted a focused statute that continues to allow private home possession of shotguns and rifles, which some gun rights' proponents contend are actually the weapons of choice for home defense." Brief for Petitioners at 49-50, 54, *Heller*, No. 07-290 (Jan. 4, 2008). The Supreme Court rejected this argument and found the handgun ban flatly unconstitutional.

The district court also thought *Heller* distinguishable because the Act "does not categorically ban a universally recognized class of firearms." SPA21. But, as explained above, the Act does ban certain firearms of a universally recognized *type*—semiautomatic. And *Heller* indicates that when analyzing a ban on arms the critical question is whether "the *type of weapon at issue* [is] eligible for Second

Amendment protection." 554 U.S. at 622. Semiautomatic firearms fit this description, and the fact that the State does not ban *all* semiautomatic firearms cannot strip the ones it does ban of Second Amendment protection or make them more susceptible to State regulation. This is particularly true when the firearms the State does ban are among the most popular semiautomatic firearms in the nation, and when the features the State targets tend to promote accuracy and ease of use by law-abiding citizens.

In any event, the Act's exemptions for members of the military and certain state and local employees make clear that the General Assembly did not really believe that it was leaving available to the general public firearms that afford equally effective means of self-defense. Under the Act, state and local law enforcement officials and members of the military are authorized to acquire and possess otherwise prohibited firearms and magazines. CONN. GEN. STAT. § 53-202b(b)(1); *id.* § 53-202c(b); *id.* § 53-202w(d). Significantly, those exceptions allow law enforcement officials to possess banned items for use while "off duty,"[3]

[3] The district court disagreed with this interpretation of the Act and instead took the perplexing position that the exceptions only allow law enforcement officials to possess banned firearms and magazines "in the discharge of their official duties whether on or off duty." SPA32. Regardless of whether it is possible to discharge one's "official duties" while "off duty," the district court's analysis is atextual and rests in large part on a misattributed and superseded provision of Connecticut law. *See id.* n.64 (citing Public Act 13-3 § 27(b) as § 6(b)(1)); Conn. Pub. Act. 13-220 § 6(b) (reprinted at JA925 and codified at CONN. GEN. STAT. 53-202c(b)(2)) (superseding Public Act 13-3 § 27(b)).

and they contain no limitation on the purposes for which military personnel may possess them. *Id.* § 53-202b(b)(1)(B); *id.* § 53-202c(b)(2); *id.* § 53-202w(d)(2). That the General Assembly included an exception broad enough to permit specified individuals to defend themselves at home using banned firearms and magazines underscores the fact that those items cannot be readily replaced with other equally efficacious means of self-defense. Indeed, even if law enforcement officers were only permitted to possess banned firearms and magazines while on-duty the assertion that those items are not useful for defensive purposes would be equally undermined, as law enforcement officials, like other law-abiding citizens, possess firearms for the purpose of defending themselves and others. *See* JA2599.

In the final analysis, there is no principled distinction between the ban at issue in *Heller* and the ban at issue here. While they aim at different weapons, they both make it unlawful for law-abiding citizens to possess "arms" that the Second Amendment guarantees them the right to keep and bear. Indeed, early advocates of "assault weapons" bans expressly insisted that a focus on "assault weapons" would "strengthen the handgun restriction lobby." SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA, Conclusion. Under *Heller*, both types of bans are equally and categorically unconstitutional.

F. Connecticut's Ban Fails Any Potentially Applicable Standard of Scrutiny

Because Connecticut's "assault weapon" and "large capacity" magazine ban is "directly at odds with" the Second Amendment, it would be "an exercise in futility to apply means-ends scrutiny." *Kachalsky*, 701 F.3d at 88 & n.9. And at any rate, the ban would fail that analysis.

1. Under the law of this Circuit, "heightened scrutiny is triggered … by those restrictions that … operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *Id*. at 93. The district court correctly found that the restrictions at issue meet this requirement. SPA17. Indeed, they foreclose altogether the ability of law-abiding citizens to use banned firearms and ammunition magazines, and "there are no alternative options" available for possessing them. *Kachalsky*, 701 F.3d at 93.

Connecticut's ban is unlike other laws this Court has found not to impose a substantial burden on Second Amendment rights. In *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012), for example, this Court found that federal law banning transportation of firearms acquired out of state into a person's state of residence did not substantially burden Second Amendment rights. But the law challenged in *Decastro* did not ban outright the possession of protected arms. Instead, it simply placed "minor limitations on the channels through which" a

particular firearm could be acquired. *Id.* at 170 (Hall, J., concurring). And in *Kwong v. Bloomberg*, this Court suggested that New York City's pistol permit fee imposed an insubstantial burden upon plaintiffs who had produced "no evidence … that the fee [was] prohibitively expensive." 723 F.3d 160, 167 (2d Cir. 2013) (emphasis deleted). The Court expressly distinguished "the hypothetical situation where a plaintiff was unable to obtain a residential handgun license on account of an inability to pay" the fee. *Id.* at 167 n.12.

2. Because Connecticut's ban substantially burdens Second Amendment rights, "the question becomes how closely to scrutinize [the] statute to determine its constitutional mettle." *Kachalsky*, 701 F.3d at 93. *Heller* and *Kachalsky* demonstrate that strict scrutiny applies. Like the District of Columbia's handgun ban, Connecticut's ban on protected semiautomatic firearms and ammunition magazines extends into the home. *Heller* rejected Justice Breyer's "interest-balancing" approach, 554 U.S. at 634-35, which Justice Breyer expressly based on "First Amendment cases applying intermediate scrutiny," *id.* at 704 (Breyer, J., dissenting). Thus, even if it allows for a levels-of-scrutiny analysis, *Heller* forecloses application of intermediate scrutiny to bans on protected arms in the home.

Kachalsky is to similar effect. There, this Court applied intermediate scrutiny because the case did not concern "the 'core' protection of self-defense in

the home." 701 F.3d at 93. While the Court did not reach the question whether strict scrutiny applies to laws that do extend into the home, it strongly signaled that it does. In discussing what standard to apply, the Court reasoned that it did "not believe … that heightened scrutiny must *always* be akin to strict scrutiny when a law burdens the Second Amendment," *id*. (emphasis added)—implying that strict scrutiny *sometimes* applies. And if strict scrutiny *ever* is to apply, the Court's language demonstrates that it applies to laws that restrict Second Amendment rights in the home. To wit: "Second Amendment guarantees are at their zenith within the home"; "the Second Amendment's core concerns are strongest inside hearth and home"; and "the state's ability to regulate firearms is circumscribed in the home." *Id*. at 89, 94, 96.

In deciding to apply intermediate rather than strict scrutiny, the district court adopted the reasoning of the district court in *New York State Rifle & Pistol Ass'n*. That reasoning is unconvincing. First, the district court stated that "courts throughout the country have nearly universally applied some form of intermediate scrutiny in the Second Amendment context." SPA21 n.47 (quoting *New York State Rifle & Pistol Ass'n*, 2013 WL 6909955, at *12). But courts generally have held that the level of scrutiny depends on the law being challenged and on whether the plaintiff is a law-abiding citizen, not that intermediate scrutiny applies in every case. And like this Court, several other courts have suggested that strict scrutiny

applies to laws that ban the right of law-abiding citizens to keep and bear protected arms in the home. *See, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying "intermediate, rather than strict, scrutiny" because the challenged law "was neither designed to nor has the effect of prohibiting the possession of any class of firearms"); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("we assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny"); *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012) ("A regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family—triggers strict scrutiny." (citations omitted)).

And courts have not always applied intermediate scrutiny in Second Amendment cases. As explained above, both the Seventh and Ninth Circuits struck down restrictions on carrying firearms in public as categorically inconsistent with the Second Amendment. The Illinois Supreme Court did the same. *People v. Aguilar*, 2 N.E.3d 321, 327-28 (Ill. 2013). And the Seventh Circuit applied a standard "more rigorous" than intermediate scrutiny "if not quite 'strict scrutiny' " to order Chicago's ban on shooting ranges preliminarily enjoined. *Ezell*, 651 F.3d at 708. The Ninth and Seventh Circuit's approach is particularly noteworthy

because both courts have applied intermediate scrutiny to other Second Amendment challenges. *See United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010). That courts have applied intermediate scrutiny in other cases does not mean that it should apply here.

Second, the district court reasoned that applying strict scrutiny "would appear to be inconsistent with" the Supreme Court's acknowledgement of "presumptively lawful regulatory measures" in *Heller* and *McDonald*. SPA21 n.47 (*quoting New York State Rifle & Pistol Ass'n*, 2013 WL 6909955, at *12). But there is no inconsistency. "The traditional restrictions go to show the scope of the right." *McDonald*, 130 S. Ct. at 3056 (Scalia, J., concurring). They do not rule out strict scrutiny for laws restricting activities *within* the scope of the Second Amendment right, especially for laws that burden the right to keep and bear arms in the home, any more than "exceptions for obscenity, libel, and disclosure of state secrets" rule out strict scrutiny for content-based speech restrictions under the First Amendment. *Heller*, 554 U.S. at 635. Thus, for example, in light of traditional understandings about possession of firearms by violent criminals, *see, e.g.*, Journal of Convention: Wednesday, February 6, 1788, *reprinted in* DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 86 (1856) (proposal by Samuel Adams that "the said Constitution be never

construed to authorize Congress … to prevent the people of the United States, who are peaceable citizens, from keeping their own arms"), violent felons have no rights under the Second Amendment, and no level of scrutiny (other than rational basis) applies to any restrictions on their ability to possess a firearm.

Furthermore, the district court's reasoning proves too much. Laws are not "presumptively valid" under *any* standard of heightened scrutiny. Even under intermediate scrutiny "[t]he burden of justification is demanding and it rests entirely on the State." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Thus, if the district court's reasoning were sound, the Supreme Court's recognition of "presumptively valid" firearms restrictions would rule out any form of heightened scrutiny for Second Amendment claims, not just strict scrutiny. But *Heller*'s rejection of rational basis review for rights within the scope of the Second Amendment, 554 U.S. at 628 n.27, demonstrates that this cannot be right.

Third, while the district court reasoned that First Amendment jurisprudence supports application of intermediate scrutiny, SPA21 n.47, it in reality *undermines* it. Because restrictions on law-abiding citizens possessing protected arms in their homes strike at the very core of the Second Amendment right, they are akin to content-based restrictions on speech that strike at the very core of the First Amendment right and therefore trigger strict scrutiny.

Connecticut's ban also is dissimilar to laws that trigger only intermediate scrutiny under the First Amendment. *Heller II* and *New York State Rifle & Pistol Ass'n* likened bans on certain semiautomatic firearms and standard-capacity magazines to a "content-neutral" restriction on the "time, place, and manner" of speech. *Heller II*, 670 F.3d at 1257; *New York State Rifle & Pistol Ass'n*, 2013 WL 6909955, at *14. But Connecticut's ban is a ban—it is a complete ban on possession of the affected firearms *at all times* and *in all places*. Intermediate scrutiny is reserved for content-neutral laws that "leave open ample alternative channels for communication of the information" in question. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quotation marks omitted). "Additional restrictions such as *an absolute prohibition on a particular type of expression*" are subject to strict scrutiny. *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added). By analogy, Connecticut's absolute prohibition on particular types of firearms and ammunition magazines is subject to strict scrutiny.

Nor is Connecticut's ban "content neutral." In the First Amendment context, "[t]he principal inquiry in determining content neutrality … is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. The analogous inquiry in this context is whether Connecticut has adopted the challenged regulations because of disagreement with law-abiding citizens possessing certain firearms for lawful

purposes like self-defense. There can be no question that Connecticut fails this test—indeed, members of the State Senate who supported the Act said that the banned weapons "enable[ ] mass destruction," JA965, and are "meant for war," JA969. There is nothing "neutral" about this view, which runs directly counter to that of millions of law-abiding American gun owners.

Additional First Amendment doctrines likewise rule out intermediate scrutiny by analogy here. For example, intermediate scrutiny applies to regulations of commercial speech, which "occurs in an area traditionally subject to government regulation" and occupies a "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). This case, by contrast, concerns possession of protected "arms" in the home, where the state's authority to regulate firearms traditionally is very narrowly "circumscribed" and where "Second Amendment guarantees are at their zenith." *Kachalsky*, 701 F.3d at 89, 94.

3. The district court's error in applying intermediate scrutiny ultimately is immaterial, for Connecticut cannot satisfy intermediate scrutiny, much less strict scrutiny. In order to meet intermediate scrutiny, the State must prove that its law is "substantially related to the achievement of an important government interest." *Id.* at 96. As explained above, "*[t]he burden of justification is demanding and it rests entirely on the State*." *Virginia*, 518 U.S. at 533 (emphasis added). While this

Court has held that "[i]n making this determination, 'substantial deference to the predictive judgments of [the legislature]' is warranted," *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (second set of brackets in original)), this does not mean that the State is relieved of its burden to justify the law. To the contrary, the State must offer "sufficient evidence to establish a substantial relationship between [its ban] and an important governmental goal." *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (emphasis deleted). And this Court must "assure that, in formulating its judgments, [Connecticut] has drawn reasonable inferences based on substantial evidence." *Turner*, 520 U.S. at 195. The State cannot "get away with shoddy data or reasoning." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality).

Connecticut's ban on certain semiautomatic firearms and standard-capacity magazines fails intermediate scrutiny. As with much else in this case, this is the only conclusion consistent with *Heller*. Connecticut, of course, attempts to justify the ban solely on the basis of public safety, as did the District of Columbia with its handgun ban. Yet, the Supreme Court held that the ban would fail "any of the standards of scrutiny [the Court has] applied to enumerated constitutional rights," *Heller*, 554 U.S. at 628—including intermediate scrutiny. Again, handguns are "the overwhelmingly favorite weapon of armed criminals." *Id.* at 682 (Breyer, J.,

dissenting). Indeed, even in the context of mass public shootings Connecticut's own evidence indicates that the most common weapons used in mass shootings are semiautomatic handguns. JA1932. If banning handguns is not substantially related to advancing public safety, it follows *a fortiorari* that neither is Connecticut's ban on arms that are less popular with criminals.

The district court's focus on mass shootings, *see, e.g.*, SPA25-26 & nn.49, 52, highlights another way in which *Heller* underscores the unconstitutionality of Connecticut's ban. Justice Breyer argued in dissent that the District of Columbia's handgun ban was "tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban." *Heller*, 554 U.S. at 682 (Breyer, J., dissenting). While this was not enough to save the District of Columbia's ban, the fit between the problem of mass shootings and Connecticut's ban on certain semiautomatic firearms and standard-capacity magazines is not even as tight. Mass shootings, of course, generally occur in public. Indeed, part of the *definition* of a mass shooting in a principal data source relied on by Connecticut's experts is that the incident occurs "in a public place." JA1931; JA2198-99. Yet, Connecticut bans semiautomatic "assault weapons" and "large capacity" magazines *even in the home*. This alone demonstrates that Connecticut's "complete ban" cannot be justified unless "each activity within the proscription's scope is an appropriately targeted evil." *Ward*, 491 U.S. at 800.

The problem of violence that takes place in public is not remedied by targeting possession of arms in the home.

4. Connecticut's ban thus fails intermediate scrutiny as a simple doctrinal matter. But Connecticut cannot meet its burden to prove that its ban is substantially related to public safety in any event.

As an initial matter, there is no basis for concluding that Connecticut's legislature drew "reasonable inferences based on substantial evidence" in passing the Act. *Turner*, 520 U.S. at 195. At a minimum, the legislature plainly did not have before it the expert declarations prepared for use in this litigation. *Cf. White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 171 (2d Cir. 2007) (holding that government is limited to "pre-enactment evidence" when attempting to justify law under intermediate scrutiny in First Amendment "secondary effects" context).

At any rate, there is no empirical evidence for the proposition that semiautomatic "assault weapon" and "large capacity" magazine bans advance public safety. As Connecticut's expert Professor Koper recently acknowledged, his research for the Department of Justice on the 10-year federal ban "showed no discernable reduction in the lethality or injuriousness of gun violence" while the ban was in effect. JA1682. Professor Koper's initial report for the Department of Justice "found no statistical evidence of post-ban decreases in either the number of

victims per gun homicide incident, the number of gunshot wounds per victim, or the proportion of gunshot victims with multiple wounds." JA634. His final report concluded that the ban could not be "clearly credit[ed] … with any of the nation's recent drop in gun violence" and that "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement." JA516. Professor Koper also acknowledged "studies suggest[ing] that state-level [assault weapon] bans have not reduced crime." JA594 n.95.

The lack of evidence that bans like Connecticut's have improved public safety should not be surprising. It is highly unlikely that such prohibitions will deter any violent criminal from using a banned firearm or magazine. *See, e.g.*, JAMES D. WRIGHT & PETER H. ROSSI, ARMED & CONSIDERED DANGEROUS xxxv (2d ed. 2008) ("[M]ost of the methods through which criminals acquire guns and virtually everything they ever do with those guns are *already* against the law."); ANTHONY J. PINIZZOTTO ET AL., VIOLENT ENCOUNTERS 50 (U.S. Dep't of Justice 2006) (97% of handguns used to assault law enforcement officers participating in study were acquired illegally). This is borne out by Connecticut's own evidence, which indicates that "large capacity" magazines were used in 53.3% (8 out of 15) of mass shootings between September 1994 and September 2004, when the federal ban was in place. JA2202-03. This is *higher* than the overall percentage of "large capacity" magazine use in mass shootings from 1982 to 2013, which was 51.5%

(34 out of 66). JA2199. Unlike criminals, of course, law-abiding citizens, by definition, will obey the law. This means that Connecticut's ban will actually impair public safety to the extent it deprives law-abiding citizens of accuracy enhancing features and ammunition capacity that criminals will continue to employ. This is not a novel proposition. In a passage Thomas Jefferson copied into his personal quotation book, the influential Italian criminologist Cesare Beccaria reasoned that laws forbidding the

> wear[ing] of arms … disarm[ ] those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? … [Such a law] certainly makes the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder.

See Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right To Bear Arms*, 49 L. & CONTEMP. PROBS. 151, 153-54 (1986).

Because criminals will not obey the law, Connecticut argues that the Act will make the banned firearms and magazines more difficult for criminals to acquire. Professor Koper cites data suggesting that criminal use of "assault weapons" and "large capacity" magazines decreased during the federal ban. *See* JA1404-07. And he reasons that Connecticut's law may be more effective than the federal ban by prohibiting the transfer of grandfathered pre-ban "large

capacity" magazines and by expanding the definition of "assault weapons." *See* JA1409.

But there are at least two major flaws with this analysis. First, the public safety rationale for Connecticut's ban is undermined if the federal ban actually did decrease criminal use of "assault weapons" and "large capacity" magazines because despite any such decrease "the ban did not appear to have a measureable effect on overall gun crime." JA1406. In other words, requiring criminals to substitute different weapons for the banned ones did not improve public safety.

Second, Professor Koper's reasoning ignores an obvious reason why Connecticut's law necessarily will be *less* effective than the federal ban in curtailing criminal access to "assault weapons" and "large capacity" magazines: the banned items continue to be legal in the vast majority of the states that do not have laws similar to Connecticut's. As Professor Koper has acknowledged, "the impact of [state 'assault weapons'] laws is likely undermined to some degree by the influx of ['assault weapons'] from other states …." JA594 n.95.

The most likely and logical result of the Act is to deprive law-abiding citizens of firearms and magazines that criminals will continue to use. But even if this were not the case Connecticut *still* would not be able to show that it would be reasonable to expect its ban to advance public safety to any appreciable degree. As an initial matter, what was true of the federal ban is also true of

Connecticut's: "the maximum potential effect of the ban on gun violence outcomes [is] very small …." NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 97 (Charles F. Wellford et al. eds., 2005). As Professor Koper has acknowledged, "assault weapons" "were used in only a small fraction of gun crimes prior to the ban: about 2% according to most studies and no more than 8%." JA515; *see also* JA290 (Kleck Declaration). And consistent with criminals' general preferences, most of the "assault weapons" used in crimes were handguns, not rifles like the AR-15. JA515. While Connecticut has expanded the definition of "assault weapon" in certain respects, there is no evidence suggesting that the firearms banned by the Act are used in any more than a small fraction of gun crimes. Magazines holding more than ten rounds of ammunition are also irrelevant for most gun crimes. As Professor Koper has acknowledged, "available studies on shots fired show that assailants fire less than four shots on average, a number well within the 10-round magazine limit …." JA603 (citation omitted); *see also* JA286 (Kleck Declaration).

The district court focused its analysis on mass shootings. Mass shootings are, as Professor Koper acknowledges, "particularly rare events." JA1683. Indeed, "[a]ccording to a Bureau of Justice statistics review, homicides that claimed at least three lives accounted for less than 1% of all homicide deaths from 1980 to 2008." JA376. Focusing on mass shootings thus highlights the

minimal impact Connecticut's ban is likely to have on the vast majority of violent crime.

But as rare as mass shootings are, much rarer still are mass shootings that would be affected by criminals obeying Connecticut's ban (itself a farfetched proposition). The ban would not prevent the incidents from happening. As Professor Koper acknowledged in the context of the federal ban, "[b]ecause offenders can substitute non-banned guns and small magazines for banned [guns and magazines], there is not a clear rationale for expecting the ban to reduce assaults and robberies with guns." JA594. The same is true of Connecticut's ban.

There also is not a clear rationale for expecting the ban to reduce the lethality of mass shootings. According to Professor Koper, it is Connecticut's "large capacity" magazine ban that "particularly … ha[s] the potential to prevent and limit shootings in the state." JA1410. The theory, of course, is that mass shooters with larger magazines are able to fire more shots than mass shooters with smaller magazines. To support this proposition Professor Koper cited data indicating that mass shooters using "large capacity" magazines kill and injure more victims than other mass shooters. *See* JA1401. But even if this is true (as Professor Koper acknowledges, shortcomings in available data make studying mass shootings particularly challenging, JA1683), it does not show that these

mass shooters were able to commit their atrocities *because* they used "large capacity" magazines. The more likely explanation is that these shooters *chose* such magazines because they intended to shoot a lot of people. And if that is the case, had these shooters been thwarted in obtaining "large capacity" magazines they could have compensated by carrying additional smaller magazines or additional guns. *See, e.g.*, JA286-87.

Empirical evidence supports this proposition. For example, a study of incidents from 1984 to 1993 in which "six or more victims were shot dead with a gun, or twelve or more total were wounded" found that "[f]or those incidents where the number of rounds fired and the duration of the shooting were both reported, the rate of fire never was faster than about one round every two seconds, and was usually much slower than that." KLECK, TARGETING GUNS 124-25. "None of the mass killers maintained a sustained rate of fire that could not also have been maintained—even taking reloading time into account—with either multiple guns or with an ordinary six-shot revolver and the common loading devices known as 'speedloaders.' " *Id*. at 125. Furthermore, as more recent incidents demonstrate, a mass shooter may simply change magazines each time one is spent. *See* Kopel Testimony at 19 ("At Newtown, the murderer changed magazines many times, firing only a portion of the rounds in each magazine …. In the Virginia Tech murders, the perpetrator changed magazines 17 times.").

Finally, a criminal with multiple guns can avoid the need to reload by changing guns when the first gun runs out of ammunition. The perpetrators of a majority of mass shootings between 1984 and 1993 carried multiple firearms. KLECK, TARGETING GUNS 125, 144 (table 4.2). Connecticut's evidence indicates that the same is true for mass shootings since 1993. JA2200.

Of course, defensive gun uses "are about three to five times as common as criminal uses, even using generous estimates of gun crimes." Kleck & Gertz, *Armed Resistance to Crime*, 86 J. CRIM. L. & CRIMINOLOGY at 170. And, as explained above, there are valid reasons why law-abiding citizens may prefer to possess firearms and magazines banned by Connecticut for self-defense, and millions of Americans have indeed chosen to possess them. Under *Heller*, it must be the choices of these law-abiding citizens that govern, not speculation about the effects of a ban on a small subset of gun crimes.

In the final analysis, then, Connecticut is left with nothing but speculation to support its ban. "Regarding interventions for public mass shootings, there is no conclusive information about which policies and enforcement and prevention strategies might be effective." INSTITUTE OF MEDICINE OF THE NATIONAL RESEARCH COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 47 (Alan I. Leshner et al. eds., 2013). This is highlighted by Professor Koper's repeated use of terms like "tentative," "could

have had a potentially significant impact," "it is possible," and "potential," *see, e.g.*, JA1403; JA1406; JA1407; JA1409, as well as his research for the Department of Justice, which recognized the need for "further research validating the dangers of" "assault weapons" and "large-capacity" magazines, JA613. Under any standard of heightened review, this is not enough. Connecticut "had to provide … more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden," and its ban must be struck down. *Moore*, 702 F.3d at 942.

III. PROVISIONS OF THE ACT ARE UNCONSTITUTIONALLY VAGUE

A statute is void for vagueness under the Due Process Clause if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *accord Arriaga v. Mukasey*, 521 F.3d 219, 224 (2d Cir. 2008). Certain of the Act's provisions defining "assault weapons" and "large capacity" magazines run afoul of that standard.

A. Provisions of the Act Are Void to the Extent that Vagueness Permeates Their Text

1. In most facial challenges the plaintiff's burden is to show that "no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or perhaps that "the statute lacks any plainly

legitimate sweep," *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quotation marks omitted). But the Supreme Court "has, at times, … invalidate[d] a criminal statute on its face even when it could conceivably have had some valid application." *Kolender*, 461 U.S. at 358 n.8. And in *City of Chicago v. Morales*, a three-Justice plurality reasoned that a more permissive standard should apply when the plaintiffs challenge a statute that (1) burdens a constitutional right (2) by imposing criminal liability (3) without a *mens rea* requirement. 527 U.S. 41, 55 (1999).

Those factors identify the statutes that are most suspect under the void for vagueness doctrine, *see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *Colautti v. Franklin*, 439 U.S. 379, 390 (1979), and the *Morales* plurality said that such statutes are susceptible to attack "[w]hen vagueness permeates [their] text," 527 U.S. at 55.

2. All three factors are present in this case. As the district court concluded, the Act "levies a substantial burden on the plaintiffs' Second Amendment rights" by prohibiting the possession of many of the nation's most popular firearms. SPA17. Even if this Court ultimately rejects Plaintiffs' Second Amendment challenge, there can be no serious dispute after *Heller* that the Act burdens the exercise of a constitutional right.

The Act also criminalizes the distribution, transportation, sale, and possession of "assault weapons" and standard capacity magazines with no scienter requirement. There is no scienter requirement on the face of the statute, *see* CONN. GEN. STAT. §§ 53-202b(a)(1), 53-202c(a), 53-202w(b)-(c), and at least one Connecticut court has refused to read such a requirement into the prior "assault weapons" ban, *see State v. Egan*, No. 10251945, 2000 WL 1196364, at *4 (Conn. Super. Ct. July 28, 2000). The Act thus exhibits all three features of a statute that *Village of Hoffman Estates* and the *Morales* plurality said is especially susceptible to facial challenge.

3. Although this Court has not decided whether and when the *Morales* standard governs, *see United States v. Rybicki*, 354 F.3d 124, 132 n.3 (2d Cir. 2003) (en banc) ("We therefore need not adopt, and do not mean to suggest our preference for, either [approach]."); SPA35 n.66, it should apply that standard here. Doing so best comports with the decisions of the Supreme Court, which often decline to apply the *Salerno* standard when considering challenges to laws that burden the exercise of constitutional rights. Thus, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court held a statute facially invalid on the ground that it posed a "substantial obstacle" to the exercise of the fundamental right to abortion in a "large fraction" of cases. 505 U.S. 833, 895 (1992). *See also id.* at 972-73 (Rehnquist, C.J., concurring in judgment in part and dissenting in

part) (arguing that *Salerno*'s "no circumstance" standard required different result). And in *Bowen v. Kendrick*, the Court said that a statute is facially invalid under the Establishment Clause if its "primary effect" is the advancement of religion. 487 U.S. 589, 602 (1988). *See also id.* at 627 n.1 (Blackmun, J., dissenting) (noting and agreeing with majority's failure to apply *Salerno*'s "no circumstances" standard); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124-25 (10th Cir. 2012) (collecting numerous other Supreme Court cases). The teaching of those cases is that at least where a statute burdens a fundamental right, courts should entertain facial challenges more willingly than *Salerno*'s dictum suggests.

4. The same considerations that justify invalidating provisions of the Act "permeate[d]" by vagueness, *Morales*, 527 U.S. at 55, also compel the conclusion that those provisions can satisfy due process only if they speak with particular clarity. "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights," *Village of Hoffman Estates*, 455 U.S. at 499, and the Act does so by burdening the fundamental right to keep and bear arms. Thus, the provisions at issue here can only survive if they are especially clear. *See Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999) ("An enactment imposing criminal sanctions or reaching a substantial amount of constitutionally protected conduct may withstand facial constitutional scrutiny only

if it incorporates a high level of definiteness.”). And while another statute might tread more lightly on fundamental rights by imposing civil rather than criminal penalties, incorporating a scienter requirement, or regulating only the conduct of sophisticated parties that can be expected to carefully parse ambiguous statutes, *Village of Hoffman Estates*, 455 U.S. at 498-99, the provisions at issue here include no such limitations.

B. Certain Provisions of the Act Are Unconstitutionally Vague

1. “Copies or Duplicates”

The Act defines “assault weapon” to include “copies or duplicates … with the capability of any” of the firearms listed in CONN. GEN. STAT. §§ 53-202a(B)-(D), “that were in production prior to or on April 4, 2013.” The district court in *New York State Rifle & Pistol Association* recently struck down similar language in New York’s “assault weapons” ban as impermissibly vague, 2013 WL 6909955, at *24, and the same result should obtain here. Like New York’s prohibition on semiautomatic “version[s]” of automatic weapons, N.Y. PENAL LAW § 265.00(22)(c)(viii), Connecticut’s ban on “copies or duplicates” leaves the public to guess at whether particular firearms are sufficiently related to their prohibited cousins such that their simple possession is a crime. “The statute provides no criteria to inform this determination,” *New York State Rifle & Pistol Ass’n*, 2013 WL 6909955, at *24, for it specifies neither a definitive source for discerning a

firearm's design history nor how similar one firearm must be to another to qualify as a "cop[y] or duplicate[ ]." *See Robertson v. City & County of Denver*, 874 P.2d 325, 334-35 (Colo. 1994) (striking down as impermissibly vague ordinance that failed to "specify any source which would aid in defining" whether pistol was banned as a "modification[ ]" of another firearm); *accord*, *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 253 (6th Cir. 1994).

The district court's reliance on dictionary definitions of copy and duplicate only reinforces the Act's vagueness. According to the district court, "[a] 'copy' is defined as 'an imitation, or reproduction of an original work.' A 'duplicate' is defined to include 'either of two things that exactly resemble or correspond to each other.' " SPA40 (The district court attributed these definitions to this Court's decision in *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001), but in fact the relevant quotation comes from the Illinois Supreme Court's decision in *Wilson v. County of Cook*, 968 N.E. 2d 641, 652 (Ill. 2012)). These definitions do not assist the law-abiding citizen seeking to comply with Connecticut's ban. How similar must a firearm be to a banned firearm to count as an "imitation" or "reproduction" of a banned firearm? What type of alteration is required to make sure that a firearm does not "exactly resemble" a banned firearm? The Act simply does not provide guidance on these matters.

The Act's reference to the "capability" of enumerated firearms does not help matters. For one thing, the Act does not say which "capabilities" are material—must the firearm be capable of firing the same round, fitting in the same gun case, or being held by someone with the same strength? Even if the statute supplied answers to such questions, assessing the "capabilities" of a particular firearm would still be a fraught metaphysical inquiry with no clear answer to be found in the statute. *Compare Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 739 (2013) (floating home was not "capable" of being used for transportation over water), *with id.*, at 751-52 (Sotomayor, J., dissenting) (yes, it was). Finally, the reference to firearms that were "in production prior to or on April 4, 2013" simply adds to the bewilderment. The statutory phrase is permeated with vagueness and must be struck down.

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

The Act is also vague in prohibiting possession of a magazine that "can be readily restored or converted to accept more than ten rounds of ammunition." CONN. GEN. STAT. § 53-202w(a)(1). In *Peoples Rights Organization, Inc. v. City of Columbus*, the Sixth Circuit struck down as unconstitutionally vague a city ordinance that similarly made it a crime to possess "any firearm which *may be restored* to an operable assault weapon." 152 F.3d 522, 537 (6th Cir. 1998) (emphasis added). Holding that "the phrase 'may be restored' fails to provide

sufficient guidance to a person of average intelligence as to what is prohibited," the *Peoples Rights Organization* court explained that "[n]o standard is provided for what 'may be restored[ ]' [means,] such as may be restored by the person in possession, or may be restored by a master gunsmith using the facilities of a fully-equipped machine shop." *Id.* (second and third alterations in original).

So too here. Whether a magazine "can be readily restored or converted" to accept more than ten rounds depends on the knowledge, skill, and tools available to the person doing the restoration or conversion—critical information that the Act does not supply. *See, e.g.*, JA250 (Shew Affidavit) ("I am not trained as a gunsmith. I do not know how to alter or modify an ammunition magazine."). Without a clearer standard for when a magazine "can be readily restored or converted" to accommodate more than ten rounds, the Act's prohibition on such magazines is inherently vague and a "trap [for] the innocent." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

The district court said that magazines that "can be restored to their entirety without much effort are 'clear[ly] what the ordinance as a whole prohibits,' " and that the Act accordingly "provides fair warning to a person of ordinary intelligence as to the prohibited conduct." *See* SPA 45-46 (quoting *Grayned*, 408 U.S. at 110). But like the statute itself, the district court's "without much effort" standard fails to specify who is doing the conversion or what tools that person has at his disposal.

This Court should follow the Sixth Circuit's decision in *Peoples Rights Organization* and hold that the phrase "can be readily restored or converted" is unconstitutionally vague.

CONCLUSION

For the foregoing reasons, Connecticut's ban on "assault weapons" and "large capacity" magazines violates the Second Amendment, and certain provisions defining those terms are unconstitutionally vague. The district court's judgment to the contrary should be reversed, and the case should be remanded for entry of summary judgment for Plaintiffs.

Dated: May 16, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B)(i) because this brief contains 13,896 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: May 16, 2014

s/ Charles J. Cooper
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SPECIAL APPENDIX

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SPA-1

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JUNE SHEW, et al.,
plaintiffs,

v.

DANNEL P. MALLOY, et al.
defendants.

CASE NO. 3:13CV739(AVC)

JUDGMENT

This action having come before the court for consideration of the parties' cross motions for summary judgment, and

The court having considered the motions and the full record of the case, and having granted the defendants' motion for summary judgment and denied the plaintiff's motion on January 30, 2014, it is hereby,

ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants.

Dated at Hartford, Connecticut, this 30th day of January, 2014 at Hartford, Connecticut.

ROBIN TABORA, Clerk

By: s/s
Renee Alexander
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JUNE SHEW, et al.,	:	
plaintiffs,	:	
	:	
v.	:	CIVIL NO: 3:13CV739(AVC)
	:	
DANNEL P. MALLOY, et al.,	:	
defendants.	:	

RULING ON THE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This is an action for a declaratory judgment seeking a determination as to the constitutionality of Connecticut's recent gun control legislation, which made several changes to the state's regulation of firearms. The plaintiffs[1] have filed a motion for a preliminary injunction (Doc. 14) and a motion for summary judgment[2] (Doc. 60). The defendants[3] have filed a cross-motion for summary judgment (Doc. 78).

The instant action follows the enactment of Conn. P.A. 13-3, entitled "An Act Concerning Gun Violence Prevention and Children's Safety" (hereinafter "the legislation"), which became

[1] The named plaintiffs are June Shew, Mitchell Rocklin, Stephanie Cypher, Peter Owens, Brian McClain, Stephen Holly, Hiller Sports, LLC, MD Shooting Sports, LLC, the Connecticut Citizens' Defense League, and the Coalition of Connecticut Sportsmen.

[2] The motion requests declaratory judgment and permanent injunctive relief.

[3] The named defendants are Dannel Malloy, Kevin Kane, Reuben Bradford, David Cohen, John Smriga, Stephen Sedensky III, Maureen Platt, Kevin Lawlor, Michael Dearington, Peter McShane, Michael Regan, Patricia Froehlich, Gail Hardy, Brian Preleski, David Shepack, and Matthew Gedansky.

effective on April 4, 2013. It was thereafter amended by Public Act 13-220.[4]

The present action is brought pursuant to 28 U.S.C. §§ 2201, 2202, 42 U.S.C. § 1983 and equitable common law principles concerning injunctions. The issues presented are whether the legislation: 1) violates the plaintiffs' right under the Second Amendment to the U.S. Constitution to keep and bear arms;[5] 2) violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution;[6] and 3) contains portions that are unconstitutionally vague.[7]

At the outset, the court stresses that the federal judiciary is only "vested with the authority to interpret the law . . . [and] possess[es] neither the expertise nor the prerogative to make policy judgments." Nat'l Fed'n of Indep.

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[4] The amendment covered, *inter alia*, "large capacity magazines," and became effective June 18, 2013.

[5] The Second Amendment provides: "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

[6] The Fourteenth Amendment provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

[7] With respect to this constitutional doctrine, the plaintiffs object to the following specific terms in numerous provisions of the legislation: 1) a grip allowing a non-trigger finger to be below the action when firing, Conn. Gen. Stat. § 53-202a(1)(E)(i)(II), (vi)(II); 2) "copies or duplicates" with the capability of other firearms in production by the effective date, Conn. Gen. Stat. § 53-202a(1); 3) inaccurately named firearms, Conn. Gen. Stat. §53-202a(1)(A)-(D); and 4) the modification, alteration, or assembly of magazines and components.

Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012). Determining "whether regulating firearms is wise or warranted is not a judicial question; it is a political one." New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 2013 WL 6909955 at *1 (W.D.N.Y. Dec. 31, 2013) (hereinafter "NYSRPA"). The Connecticut General Assembly has made a political decision in passing the recent gun control legislation.

The court concludes that the legislation is constitutional. While the act burdens the plaintiffs' Second Amendment rights, it is substantially related to the important governmental interest of public safety and crime control.[8] With respect to the equal protection cause of action, while the legislation does not treat all persons the same, it does not treat similarly situated persons disparately. Finally, while several provisions of the legislation are not written with the utmost clarity, they are not impermissibly vague in all of their applications and, therefore, the challenged portions of the legislation are not unconstitutionally vague.

Therefore, the plaintiffs' motion for summary judgment is DENIED and the defendants' cross-motion for summary judgment is

[8] Insofar as the court concludes that the weapons and magazines regulated are commonly used for lawful purposes, and that the legislation impinges upon a Second Amendment right, the analysis warrants intermediate rather than strict scrutiny.

GRANTED. The plaintiffs' motion for preliminary injunction is DENIED as moot.[9]

FACTS

An examination of the pleadings, exhibits, memoranda, affidavits and the attachments thereto, discloses the following undisputed material facts:

On July 1, 2013, the Connecticut General Assembly passed Conn. P.A. 13-3, prohibiting, *inter alia*, the ownership of numerous semiautomatic firearms.[10] The act followed the events of December 14, 2012, in Newtown, Connecticut, where a lone gunman entered a grade school and shot and killed 26 individuals, including 20 school children.

Building on previous legislation,[11] the definitional scope for an assault weapon has been expanded, including additional semiautomatic firearms.[12] However, the legislation does not

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[9] Because the court grants the defendants' motion for summary judgment, the plaintiffs' motion for preliminary injunction is rendered moot.

[10] Citing Conn. Gen. Stat. § 53-202a(A)-(D), the defendants state "[a]s a result of the Act, there are now 183 assault weapons that are prohibited by make and model in Connecticut."

[11] In 1993, the Connecticut General Assembly passed Conn. 1993, P.A 93-306, which prohibited possessing, selling, or transporting, what the Act defined as "assault weapons," with limited exceptions.

[12] Assault weapon is a term of common modern usage, without a universal legal definition. It is generally defined as "any of various automatic or semiautomatic firearms." See "assault weapon" *Merriam-Webster.com*, Merriam-Webster 2011. An "assault rifle" is generally defined as "a gun that can shoot many bullets quickly and that is designed for use by the military." See "assault rifle" *Merriam-Webster.com*, Merriam-Webster 2011.

prohibit bolt action rifles or revolvers,[13] nor most shotguns, all of which, subject to regulation, remain authorized.[14] Further, much of the legislation is not the subject of this litigation.[15]

Assault Weapons

The legislation defines an assault weapon as any of a number of specifically listed makes and models[16] of semiautomatic centerfire rifles, semiautomatic pistols, or semiautomatic shotguns (collectively, hereinafter "semiautomatic firearms") "or copies or duplicates thereof with the capability of" such, that were in production prior to or on April 4, 2013.[17] In addition, the legislation bans an individual from possessing

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[13] Bolt action rifles are not semiautomatic. Revolvers, which use multiple chambers and a single barrel, are also not semiautomatic.

[14] The legislation prohibits roughly 2.5% of the gun stock in the United States. Professor Laurence Tribe, in testimony before the Senate Judiciary Committee stated that "depending upon the definition of assault weapon, assault weapons represent 15% of all semi-automatic guns owned in the U.S., which in turn represent about 15% of all firearms owned in the U.S." That is, 15% of 15%, or 2.5%. See Prepared Testimony by Laurence H. Tribe, exhibit 61 at p. 24.

[15] For example, not contested is Section 66 of Public Act 13-3, which "established a task force to study the provision of behavioral health services in the state with particular focus on the provision of behavioral health services for persons sixteen to twenty-five years of age, inclusive." Conn. P.A. 13-3, § 66(a), eff. April 4, 2013; as amended by Conn. 2013 P.A. 13-220.

[16] For example, AK-47 rifles, Centurion 39 AK pistols, and IZHMASH Saiga 12 shotguns are among the specifically listed firearms.

[17] See Conn. Gen. Stat. § 53-202a(1)(B)-(D).

parts of an assault weapon that can be "rapidly" put together as a whole assault weapon.[18]

The legislation further provides that a firearm can qualify as an assault weapon even if it is not specifically listed in the statute as long as it meets one of several criteria. This is sometimes referred to as the "one-feature" test.[19] Under this test, an assault weapon is "[a] semiautomatic, centerfire rifle that has an ability to accept a detachable magazine" and has either:

> (I) A folding or telescoping stock;
> (II) Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing;
> (III) A forward pistol grip;
> (IV) A flash suppressor; or
> (V) A grenade launcher or flare launcher . . . .[20]

A semiautomatic pistol with a detachable magazine[21] and a semiautomatic shotgun[22] that include similar features are also

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[18] In other words, a person cannot shield an assault weapon from violating the act by simply breaking it down into parts that can be put back together rapidly. See Conn. Gen. Stat. § 53-202a(a)(1)(ii).

[19] See Conn. Gen. Stat. § 53-202a(1)(E). The one-feature test is a change from the 1993 Act which employed a two-feature test whereby it prohibited firearms that had at least two listed features.

[20] Conn. Gen. Stat. § 53-202a(1)(E)(i)(I)-(V).

[21] This type of pistol qualifies as an assault weapon if it has any of the following features: "(I) an ability to accept a detachable ammunition magazine that attaches at some location outside of the pistol grip; (II) A threaded barrel capable of accepting a flash suppressor, forward pistol grip

considered assault weapons.[23] Finally, a semiautomatic, centerfire rifle that has a fixed magazine with the ability to accept more than ten rounds or that has an overall length of less than thirty inches, as well as a shotgun with the ability to accept a detachable magazine or a revolving cylinder are prohibited as assault weapons.[24]

Large Capacity Magazines

The June amendment[25] also prohibits, with certain exceptions, "large capacity magazines" (hereinafter "LCMs"). The legislation defines LCMs to be "any firearm magazine, belt, drum, feed strip or similar device that has the capacity of, or can be readily restored or converted to accept, more than ten rounds of ammunition, but does not include: (A) A feeding device that has been permanently altered so that it cannot accommodate more than ten rounds of ammunition, (B) a .22 caliber tube ammunition feeding device, (C) a tubular magazine that is

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or silencer; (III) A shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to fire the firearm without being burned, except a slide that encloses the barrel; or (IV) A second hand grip." Conn. Gen. Stat. § 53-202a(E)(iv)(I)-(IV).

[22] This type of shotgun qualifies as an assault weapon if it has both "i) a folding or telescoping stock and ii) any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing." Conn. Gen. Stat. § 53-202a(1)(C)(i)-(ii).

[23] See Conn. Gen. Stat. § 53-202a(1)(E)(ii)-(viii).

[24] See Conn. Gen. Stat. § 53-202a(1)(E)(ii),(iii),(vii) and (viii).

[25] Conn. P.A. 13-220.

contained in a lever-action firearm, or (D) a magazine that is permanently inoperable."[26]

Exceptions

The legislation, however, is not an outright ban with respect to the enumerated firearms because many of its provisions contain numerous exceptions. For example, a person is exempt if they "lawfully possesse[d] an assault weapon" before April 4, 2013, the effective date of the legislation, and "appl[ied] by January 1, 2014 to the Department of Emergency Services and Public Protection for a certificate of possession with respect to such assault weapon."[27] In addition, LCMs may be possessed, purchased, or imported by "[m]embers or employees of the Department of Emergency Services and Public Protection, police departments, the Department of Correction, the Division of Criminal Justice, the Department of Motor Vehicles, the Department of Energy and Environmental Protection or the military or naval forces of this state or of the United States

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[26] See Conn. P.A. 13-220, § 1(a)(1). By way of clarification, the court notes that Connecticut has yet to codify this section of the law. The plaintiffs make numerous references in their briefing to "Conn. Gen. Stat. 53-202p" and its various subsections. Presumably the plaintiffs are citing the law using LexisNexis's internal citation, which provides the text as "P.A. 13-220, s. 1, at CGS 53-202p." At the bottom of the page, in the Editor's Notes, Lexis states: "[t]he placement of this section is not final" and "this section should be referenced by its Public Act citation, found in the legislative history following the statute text." The court will refer to this section by its Public Act citation.

[27] See Conn. Gen. Stat. § 53-202D(a)(2).

for use in the discharge of their official duties or when off duty."[28] Finally, the legislation allows exempt personnel "who retire[] or [are] otherwise separated from service" an extension of time to declare lawfully possessed assault weapons and LCMs used in the discharge of their duties.[29] Any person who is not exempted and "possesses an assault weapon . . . shall be guilty of a class D felony . . . ."[30]

On May 22, 2013, in response to the legislation, the plaintiffs filed the complaint in this action.

STANDARD

A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Summary judgment is appropriate if, after discovery, the nonmoving party "has failed to make a sufficient showing on an

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[28] Conn. P.A. 13-220 § 1(d)(1).

[29] See e.g. Conn. P.A. 13-220 §§ 2(a)(2) and 7(a)(2).

[30] See Conn. Gen. Stat. § 53-202c(a). The legislation also provides that "[a]ny person who, within [Connecticut], distributes, transports or imports into the state, keeps for sale, or offers or exposes for sale, or who gives any assault weapon, except as provided by sections 52-202a to 53-202k, inclusive, shall be guilty of a class C felony and shall be sentenced to a term of imprisonment of which two years may not be suspended or reduced by the court." Conn. Gen. Stat. § 53-202b(a)(1).

essential element of [its] case with respect to which [it] has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.'" Am. Int'l Group, Inc. v. London Am. Int'l Corp., 644 F.2d 348, 351 (2d Cir. 1981) (quoting Heyman v. Commerce and Indus. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975)).

A dispute concerning a material fact is genuine "if evidence is such that a reasonable jury could return a verdict for the nonmoving party." Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). The court must view all inferences and ambiguities in a light most favorable to the nonmoving party. See Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991), cert. denied, 502 U.S. 849 (1991). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Maffucci, 923 F.2d at 982.

DISCUSSION

I. Second Amendment Challenge

The plaintiffs first argue that assault weapons and LCMs are commonly possessed for self-defense in the home. Specifically, the plaintiffs argue that "[t]he firearms and magazines that Connecticut bans are lawfully manufactured (many

in Connecticut itself) and are lawfully purchased by millions of Americans after passing" national and state-required background checks. The plaintiffs argue that the banned firearms and magazines "are in common use by . . . millions of law-abiding citizens for self-defense, sport, and hunting." The plaintiffs state that the new restrictions are not the national norm[31] and are "anything but long-standing."

The defendants respond that the plaintiffs' "absolutist interpretation" of the Second Amendment conflicts with the established framework of cases decided by the U.S. Supreme Court and the U.S. Court of Appeals for the Second Circuit. Specifically, the defendants argue that the assault weapons and magazines at issue in this case are outside this established framework.[32] The defendants argue that "the Act only marginally impacts Plaintiffs' ability to obtain firearms and magazines for lawful home and self defense." The defendants argue that "Connecticut's regulatory scheme provides ample avenues through

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[31] The plaintiffs state that "the laws of most states and federal law have no restrictions on magazine capacity or the number of rounds that may be loaded in a magazine, nor do they restrict guns that some choose to call 'assault weapons.'"

[32] The defendants state that 1)"[t]he Act is a reasonable and logical extension of a twenty-year old Connecticut statute that mirrors analogous laws that have existed for decades in other jurisdictions," and thus a longstanding restriction on the possession of certain firearms; 2)"the Act does not prohibit an entire class of firearms, like all conventional handguns that are the 'quintessential self-defense weapon' . . . [n]or does it even ban all semiautomatic firearms;" and 3)the act "bans a tiny subset of unusually dangerous military-style weapons and magazines that 'are designed to enhance their capacity to shoot multiple human targets very rapidly."

which citizens may purchase and obtain permits to carry the thousands of lawful firearms and magazines that are available to them, including four different permit options that most law-abiding citizens should have no difficulty obtaining."

Recent Second Amendment jurisprudence within the second circuit has produced a two-part approach for determining the constitutionality of gun related legislation. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 88 (2d Cir. 2012) cert. denied, 133 S. Ct. 1806 (U.S. 2013); U.S. v. Decastro, 682 F.3d 160, 166 (2d Cir. 2012) cert. denied, 133 S. Ct. 838 (U.S. 2013).[33]

First, the court determines if the provision in question impinges upon a Second Amendment right. That is, whether the regulated firearms or magazines are commonly used for lawful purposes and, if they are, whether the legislation substantially burdens a Second Amendment right. If so, the court's second step is to determine and apply the appropriate level of scrutiny.[34] See Heller v. D.C., 670 F.3d 1244, 1261 (D.C. Cir. 2011)("Heller II") (finding that the court must "ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether

[33] Other circuits have taken a similar approach to the Second Amendment. See e.g., Heller v. D.C., 670 F.3d 1244, 1261 (D.C. Cir. 2011)("Heller II"); Ezell v. City of Chicago, 651 F.3d 684, 701-04 (7th Cir. 2011); U.S. v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); U.S. v. Reese, 627 F.3d 792, 800-01 (10th Cir. 2010); U.S. v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

[34] See *Infra* Part I.A., discussing constitutional levels of scrutiny.

the provision passes muster under the appropriate level of constitutional scrutiny").

Second Amendment jurisprudence is currently evolving, and the case law is sparse. See District of Columbia v. Heller, 554 U.S. 570, 636 (2008)(noting that Heller "represents the [Supreme] Court's first in-depth examination of the Second Amendment, [and] one should not expect it to clarify the entire field . . ."). Id.[35] The second circuit thereafter recognized that Heller "raises more questions than it answers." Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 88 (2d Cir. 2012).[36]

What the Heller court did make clear, however, is that weapons that are "in common use at the time" are protected under the Second Amendment. Heller, 554 U.S. at 627.[37] The court explained that the determination is "fairly supported by the historical tradition of prohibiting the carrying of dangerous

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[35] Heller struck down as violative of the Second Amendment, a D.C. statute that banned hand gun possession in one's home, as well as a "prohibition against rendering any lawful firearm in the home operable for the immediate purpose of self-defense". Id. In a subsequent case, the Supreme Court held that the right to keep and bear arms is "fully applicable to the States" through the Fourteenth Amendment. McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010).

[36] Heller "declined to announce the precise standard of review applicable to laws that infringe the Second Amendment right because the laws at issue . . . would be unconstitutional '[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.'" Decastro, 682 F.3d at 165 (quoting Heller 554 U.S. at 628-629).

[37] The Heller court did not, however, identify what "time" it meant when it used the phrase "in common use at the time." New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 2013 WL 6909955 at *9 (W.D.N.Y. Dec. 31, 2013) (hereinafter "NYSRPA").

and unusual weapons." Heller, 554 U.S. at 627 (citing U.S. v. Miller, 307 U.S. 174, 179 (1939)).[38] Whether legislation substantially burdens a Second Amendment right is heavily dependent on the firearms in question being in "common use."

Heller also concluded that regulations rendering firearms in the home inoperable at all times "makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." Id. at 630 (emphasis added).

In Heller II, a case determining the constitutionality of a District of Columbia amendment "promulgated in effort to cure constitutional deficits that the Supreme Court had identified in *Heller*," the U.S. Court of Appeals for the District of Columbia Circuit thought "it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use.'" Heller II, 670 F.3d 1244, 1261 (D.C. Cir. 2011).[39] However, the court could not "be certain whether

[38] Furthermore, the Supreme Court emphasized that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Heller, 554 U.S. at 626-27. The Supreme Court also stated that "[l]ike most rights, the Second Amendment right is not unlimited." Id. at 570. Thus, the Supreme Court logically concluded that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." McDonald, 130 S. Ct. at 3047; see also Kachalsky, 701 F.3d at 89 (concluding that McDonald reaffirmed Heller's assurances that Second Amendment rights are far from absolute and that many longstanding handgun regulations are "presumptively lawful").

[39] Similarly, the NYSRPA court found that the statistics provided by the parties on the popularity and percentage of ownership of assault weapons paint very different pictures and "leave many questions unanswered." NYSRPA

these weapons are commonly used or are useful specifically for self-defense or hunting and therefore whether the prohibitions of certain semi-automatic rifles and magazines holding more than ten rounds meaningfully affect the right to keep and bear arms." Heller II, 670 F.3d at 1261.

The Connecticut legislation here bans firearms in common use. Millions of Americans possess the firearms banned by this act for hunting and target shooting. See Heller II, 670 F.3d 1244, 1261 (finding "[a]pproximately 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").[40]

Additionally, millions of Americans commonly possess firearms that have magazines which hold more than ten

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WL 6909955 at *10. Since Heller did not elaborate on what time it meant "when it held that protected weapons are those that are 'in common use at the time', . . . it is anomalous that a weapon could be unprotected under the Second Amendment one moment, then, subject only to the whims of the public, garner protection in the next moment." Id. Even so, a firearm must also be possessed for lawful purposes, and the NYSRPA court found "[o]n this point, too, the parties [were] deeply divided." Id. at 11.

[40] The AR-15 type rifle, which is an assault weapon under the legislation, is the leading type of firearm used in national matches and in other matches sponsored by the congressionally established Civilian Marksmanship Program. Plaintiffs' SOF, ¶¶ 123-124. In 2011, AR-15s accounted for at least 7% of all firearms and 18% of all rifles made in the U.S. for the domestic market that year. See Declaration of Mark Overstreet at 2-4 ("Overstreet Decl."). Additionally, "the banned features are commonly found (either individually or in combination) on AR-15 type modern sporting rifles." See Declaration of Paul Hiller at 3.

cartridges.[41] See Heller II, 670 F.3d at 1261 (finding that "fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more [of] such magazines were imported into the United States between 1995 and 2000)."[42]

The court concludes that the firearms and magazines at issue are "in common use" within the meaning of Heller and, presumably, used for lawful purposes. The legislation here bans the purchase, sale, and possession of assault weapons and LCMs, subject to certain exceptions, which the court concludes more than minimally affect the plaintiffs' ability to acquire and use the firearms, and therefore levies a substantial burden on the plaintiffs' Second Amendment rights. Accordingly, the court must proceed to the next step of the analysis and determine which level of scrutiny applies.

A. Levels of Scrutiny

Cases that involve challenges to the constitutionality of statutes often discuss what have become known as "levels of

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[41] Numerous rifle designs utilize magazines with a capacity of more than ten cartridges including the M1 Carbine, AR-15, and Ruger Mini-14 series, and, in recent decades, the trend in semiautomatic pistols has been to those designed to hold ten rounds or more. See Mark Overstreet Decl. at 5-6

[42] Heller II went on to conclude that "[t]here may well be some capacity above which magazines are not in common use but, if so, the record is devoid of evidence as to what that capacity is; in any event, that capacity surely is not ten." Heller II, 670 F.3d at 1261.

scrutiny." The "traditionally expressed levels" are strict scrutiny, intermediate scrutiny, and rational basis review. D.C. v. Heller, 554 U.S. 570, 634 (2008). Levels of scrutiny have developed because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them" and are not subject to the whims of future legislatures or judges. Id. at 634-35. By applying the proper level of scrutiny to challenged legislation, courts are more likely to apply a uniform analysis to their review of such legislation.

"[A] government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." Regents of University of California v. Bakke, 438 U.S. 265, 357 (1978); see also Abrams v. Johnson, 521 U.S. 74, 82 (1997) (noting that, under strict scrutiny, the challenged regulation must be "narrowly tailored to achieve a compelling government interest").

In order to survive intermediate scrutiny, a law must be "substantially related to an important governmental objective." Clark v. Jeter, 486 U.S. 456, 461 (1998). Historically, intermediate scrutiny has been applied to content-neutral restrictions that place an incidental burden on speech,

disabilities attendant to illegitimacy, and discrimination on the basis of sex. U.S. v. Virginia, 518 U.S. 515, 568. (1996).

Under rational basis review, a statute will be upheld "so long as it bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631 (1996); Vacco v. Quill, 521 U.S. 793, 799 (1997). Rational basis is typically applied "[i]n areas of social and economic policy" when a statutory classification "neither proceeds along suspect lines nor infringes fundamental constitutional rights." F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313. (1993).

B. The Appropriate Level of Scrutiny

The plaintiffs argue that the legislation "implicates the possession of firearms inside the home, where [the second circuit] recognizes that Second Amendment rights are at their zenith." Specifically, the plaintiffs argue that "a higher standard than intermediate scrutiny applies to prohibitions on possession of firearms and magazines in the home." The plaintiffs argue that "like the handgun ban in *Heller*, the ban on common firearms and magazines here is categorically void under the Second Amendment. Alternatively, and at a minimum, since the Act prohibits [the] exercise of a fundamental right in the home, it must be evaluated by the highest levels of

scrutiny." Regardless, the plaintiffs argue, the legislation would neither pass intermediate scrutiny nor strict scrutiny.

The defendants respond that "[a]lthough the protections of the Second Amendment may be at their apex in the home, neither Heller, McDonald, Kachalsky, nor any other case establishes a bright line rule for which Plaintiffs advocate."

The Heller majority suggested that laws implicating the Second Amendment should be reviewed under one of the two traditionally expressed levels[43] of heightened scrutiny: intermediate scrutiny or strict scrutiny.

Two recent second circuit decisions, Kachalsky v. Cnty. of Westchester, 701 F.3d 81 (2d Cir. 2012) and U.S. v. Decastro, 682 F.3d 160 (2d Cir. 2012), have addressed the issue of determining the applicable standard to gun restrictions under the Second Amendment. The second circuit concluded that "[h]eightened scrutiny is triggered only by those restrictions that operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." Decastro, 682 F.3d at 166; see also Kachalsky, 701 F.3d at 93 (finding that with the "core"

[43] "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." Heller, 554 U.S. at 628 n.27.

protection of self-defense in the home, "some form of heightened scrutiny [is] appropriate").

Unlike the law struck down in Heller, the legislation here does not amount to a complete prohibition on firearms for self-defense in the home. Indeed, the legislation does not prohibit possession of the weapon cited as the "quintessential self-defense weapon" in Heller, i.e., the handgun. In other words, "the prohibition of [assault weapons] and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves." Heller II, 670 F.3d at 1262. The challenged legislation provides alternate access to similar firearms and does not categorically ban a universally recognized[44] class of firearms.[45]

Here, as in Heller II, the court is "reasonably certain the prohibitions do not impose a substantial burden" upon the core right[46] protected by the Second Amendment. Heller II, 670 F.3d at 1262. Thus, the court concludes that intermediate scrutiny is the appropriate standard in this case.[47]

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[44] See *supra*, note 12.

[45] See e.g., New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, WL 6909955 at *13 (W.D.N.Y. Dec. 31, 2013) (finding New York's Gun Act "applies only to a subset of firearms with characteristics New York State has determined to be particularly dangerous and unnecessary for self-defense").

[46] See *supra* p. 14.

[47] Several factors support this conclusion, which were identified in NYSRPA: "First, although addressing varied and divergent laws, courts throughout the country have nearly universally applied some form of intermediate scrutiny in

C. Intermediate Scrutiny Applied

The plaintiffs argue that the legislation "comes nowhere near" being substantially related to the achievement of an important governmental objective. Specifically, the plaintiffs argue that the "repetitive use of the word 'assault weapon' fails to address how banning any defined feature would reduce crime in any manner." The plaintiffs, citing United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010), argue that "[t]he government must do more than offer 'plausible reasons why' a gun restriction is substantially related to an important government goal." According to the plaintiffs, the defendants "must also 'offer sufficient evidence to establish a substantial relationship between' the restriction and that goal to determine whether the restriction 'violated the Second Amendment by application of the intermediate scrutiny test.'"

The defendants respond that "the government has a compelling interest in protecting public health and safety by eliminating assault weapons and LCMs from the public sphere." Specifically, the defendants argue that "[t]he evidence

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the Second Amendment context . . . Second, application of strict scrutiny would appear to be inconsistent with the Supreme Court's holdings in *Heller* and *McDonald,* where the Court recognized several 'presumptively lawful regulatory measures' . . . [and third,] First Amendment jurisprudence provides a useful guidepost in this arena" (because free speech is "susceptible to several standards of scrutiny, depending on the type of law challenged and the type of speech at issue"). NYSRPA, 2013 WL 6909955 at *12.

demonstrates that the Act is substantially related to that goal because it will: (1) reduce the number of crimes in which these uniquely dangerous and lethal weapons are used; and (2) thereby reduce the lethality and injuriousness of gun crime when it does occur." The defendants argue that the plaintiffs "completely ignore all of the evidence and justifications discussed above, and again rely almost exclusively on their own self-serving and unsupported submissions, self-interested policy positions, and preferred views as to the wisdom of Connecticut's bans and the utility of these weapons and magazines."

Under intermediate scrutiny, "a regulation that burdens a plaintiff's Second Amendment rights 'passes constitutional muster if it is substantially related to the achievement of an important governmental interest.'" Kwong v. Bloomberg, 723 F.3d 160, 168 (2d Cir. 2013)(citing Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).

As the second circuit has noted, "[s]ubstantial deference to the predictive judgments of [the legislature] is warranted . . . [and] [t]he Supreme Court has long granted deference to legislative findings that are beyond the competence of courts." Kachalsky, 701 F.3d at 96 (2d Cir. 2012) (citing Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2727 (2010)).[48]

[48] The Kachalsky court elaborated and stated that "[s]tate regulation under the Second Amendment has always been more robust than of other enumerated

Govermental separation of powers requires the court to declare legislative acts unconstitutional only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." Kachalsky, 701 F.3d at 101 (2d Cir. 2012)(citing United States v. Harris, 106 U.S. 629, 635 (1883)). "The regulation of firearms is a paramount issue of public safety, and recent events in this circuit are a sad reminder that firearms are dangerous in the wrong hands." Osterweil v. Bartlett, 706 F.3d 139, 143 (2d Cir. 2013). The legislature is "far better equipped than the judiciary" to make delicate political decisions and policy choices "concerning the dangers in carrying firearms and the manner to combat those risks." Kachalsky, 701 F.3d at 85 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994)).

Accordingly, the court must only "assure that, in formulating its judgments,[Connecticut] has drawn reasonable inferences based on substantial evidence." Id. at 38 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994)). However, to survive intermediate scrutiny, "the fit between the challenged regulation and the asserted objective [need only] be reasonable, not perfect." United States v. Marzzarella, 614 F.3d 85, 98 (3d Cir. 2010).

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rights," and there is a "general reticence to invalidate the acts of our elected leaders." Kachalsky, 701 F.3d at 100.

Connecticut's General Assembly made its legislative judgment concerning assault weapon and LCM possession after the mass-shooting at Sandy Hook Elementary School. The decision to prohibit their possession was premised on the belief that it would have an appreciable impact on public safety and crime prevention.[49]

The evidence suggests that there is a substantial governmental interest in restricting both assault weapons and LCMs.[50] "Far from being simply 'cosmetic,' [pistol grips, barrel shrouds, and LCMs] . . . all contribute to the unique function of any assault weapon to deliver extraordinary firepower." Heller II, 670 F.3d at 1264;[51] see also Testimony of Brian J. Siebel at 2. The assault weapon features increase a firearm's "lethalness" and are therefore related to a compelling interest

[49] As evidenced in the legislative record: "At the end of that unimaginable day, we learned that we had lost 20 elementary school children and 6 teachers and administrators. They were killed with a weapon of war, a semi-automatic assault rifle, the platform of which – was originally designed for the battlefield and mass killings. . . ." The legislature recognized that "access to guns is a big part of the public health challenges in our country today." See Connecticut Senate Session Transcript for April 3, 2013.

[50] Christopher S. Koper, states that it is his "considered opinion, based on [his] nineteen years as a criminologist studying firearms generally and [his] detailed study of the federal assault weapon ban in particular, that Connecticut's bans on assault weapons and large-capacity magazines, and particularly its ban on LCMs, have the potential to prevent and limit shootings in the state over the long-run." Koper Aff. at 17.

[51] Finding that "[a]lthough semi-automatic firearms, unlike automatic M-16s, fire only one shot with each pull of the trigger, semi-automatics still fire almost as rapidly as automatics. . . ." Heller II, 670 F.3d at 1264 (internal quotation marks and citations omitted).

of crime control and public safety.[52] For example, with respect to LCMs, the evidence suggests that limiting the number of rounds in a magazine promotes and is substantially related to the important governmental interest in crime control and safety.[53] Heller II, 670 F.3d at 1264 (finding "that large-capacity magazines tend to pose a danger to innocent people and particularly to police officers . . . .").

The court concludes that Connecticut has a substantial governmental interest in public safety and crime prevention.[54] This conclusion is not unique to Connecticut, and courts in

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[52] New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 2013 WL 6909955 at *15 (finding that, although the merits of the judgment remain to be seen, substantial evidence supports the finding that the "banned features are usually dangerous, commonly associated with military combat situations, and are commonly found on weapons used in mass shootings" and that "military features of semiautomatic assault weapons are designed to enhance the capacity to shoot multiple human targets rapidly").

[53] This is because limiting rounds in a magazine means that a shooter has to pause periodically to change out his magazine, reducing the amount of rounds fired and limiting the shooters capability of laying "suppressing fire" that can frustrate the efforts of responding law enforcement. See Mello Aff. at ¶¶18,30; Sweeney Aff. at ¶¶15, 20; NYSRPA 2013 WL 6909955 at *17 (finding the link between the ban on large capacity magazines and the state's interest in public safety is strong due to evidence suggesting that banning LCMs "will prevent shootings and save lives").

[54] Other courts have also found that the states have "substantial, indeed compelling, governmental interests" in public safety and crime prevention. Schenck v. Pro-Choice Network, 519 U.S. 357, 376 (1997); Schall v. Martin, 467 U.S. 253, 264 (1984); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 300, (1981); Bloomberg, 723 F.3d 160, 168 (2d Cir. 2013); Kwong v. Woollard v. Gallagher, 712 F.3d 865, 877 (4th Cir. 2013) cert. denied, 134 S. Ct. 422 (U.S. 2013); Kachalsky v. County of Westchester 701 F.3d at 97 (2d Cir. 2012); Heller II, 670 F.3d at 1264; Kuck v. Danaher, 600 F.3d 159, 166 (2d Cir.2010); NYSRPA 2013 WL 6909955 at *15.

other states have recognized the constitutionality of similar gun control legislation.[55]

Connecticut has carried its burden of showing a substantial relationship between the ban of certain semiautomatic firearms and LCMs and the important governmental "objectives of protecting police officers and controlling crime." Heller II, 670 F.3d at 1264. The relationship need not fit perfectly. Obviously, the court cannot foretell how successful the legislation will be in preventing crime. Nevertheless, for the purposes of the court's inquiry here, Connecticut, in passing the legislation, has drawn reasonable inferences from substantial evidence. As such, the legislation survives intermediate scrutiny and is not unconstitutional with respect to the Second Amendment.

II. Equal Protection Cause of Action

The plaintiffs next challenge the legislation as a violation of the Equal Protection Clause of the Fourteenth Amendment because it prohibits the general population from possessing assault weapons and LCMs but creates an exception for certain state, local, or military personnel (hereinafter "exempt personnel"). Specifically, the plaintiffs cite Conn. P.A. 13-220, § 1(d)(1), which they state allows exempt personnel to "have all the magazines and 'assault weapons' they want, even for

[55] See D.C. Code §§ 7-2502.02 and 7-2506.01; N.Y. Penal Law § 265.00.

personal use 'when off duty.'"[56] The plaintiffs argue that "[t]he unconstitutional provisions here discriminating in favor of selected classes may not simply be excised from the Act, because the Act does not make it a crime for the favored classes to possess the subject firearms and magazines."

The defendants respond that the plaintiffs have not satisfied their burden of presenting evidence comparing themselves to individuals that are "similarly situated in all material aspects" and that "[c]ommon sense dictates that they cannot plausibly do so." Specifically, the defendants argue that differences between the general public and members of law enforcement (and the military) are "obvious and even pronounced," because these officers receive professional training and are called on "to actively engage and apprehend dangerous criminals." The defendants argue that these differences apply even after work hours because law enforcement officers are "never truly 'off-duty,' and have a professional obligation to respond to emergencies or criminal activity whenever and wherever they arise."[57]

[56] Conn. P.A. 13-220, § 1(d)(1).
[57] The defendants also state that "members of the military are not similarly situated to the general public because they are governed by applicable federal and military laws, which the State appropriately chose not to contravene or even encroach upon." With respect to military personnel, the plaintiffs state that "the exemption could have been limited to duty purposes" and being compelled to perform law enforcement functions "does not apply to military members and other exempted persons who have no such duties."

The plaintiffs reply that "[w]hile an off-duty exemption may be warranted for officers who may be 'compelled to perform law enforcement functions in various circumstances,' *Silveira v. Lockyer*, 312 F.3d 1052, 1089 (9th Cir. 2002), that does not apply to military members and the other exempted persons who have no such duties."

The provisions at issue in the legislation impose felony penalties on most citizens for the possession and transfer of the subject firearms and magazines. However, exempt personnel may possess assault weapons and LCMs "for use in the discharge of their official duties or when off duty."[58] The legislation allows exempt personnel "who retire[] or [are] otherwise separated from service" an extension of time to declare lawfully possessed assault weapons and LCMs used in the discharge of their duties.[59]

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction, the equal protection of the laws." Plyler v. Doe, 457 U.S. 202, 210 (1982). However, as the Supreme Court has explained, the equal protection clause does not forbid

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[58] See Conn. P.A. 13-220 § 1(d)(1); Conn. Gen. Stat. § 53-202c(b)(2). Several provisions do not read exactly this way, but are nearly the same. For example, part of one provision reads: ". . . for use by such sworn member, inspector, officer or constable in the discharge of such sworn member's, inspector's, officer's or constable's official duties or when off duty." Conn. P.A. 13-3, § 23(d)(2).

[59] See e.g. Conn. P.A. 13-220 §§ 2(a)(2) and 7(a)(2).

classifications. Nordlinger v. Hahn, 505 U.S. 1, 10, (1992) (noting that "most laws differentiate in some fashion between classes of persons"). "It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." Id.; see also Silveira v. Lockyer, 312 F.3d 1052, 1088 (9th Cir. 2002) (finding that "[f]irst, in order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately"); City of Cleburne, Tex. V. Cleburne Living Center, 473 U.S. 432, 439 (1985) (emphasis added).

Some courts have concluded that a Second Amendment analysis, as conducted here in section I, is sufficient to assess the alleged burdening of Second Amendment rights and have declined to conduct a separate equal protection analysis.[60] Many courts subjected the equal protection challenge to rational basis review.[61] Kwong v. Bloomberg, 723 F.3d 160, 164 (2d Cir. 2013) (finding a "geographic classification was not suspect, the statute itself did not burden a fundamental right, and the

[60] See Wollard v. Gallagher, 712 F.3d 865, 873 n.4 (4th Cir. 2013) (declining to conduct a separate equal protection analysis for Maryland's "good-and-substantial-reason requirement" for obtaining a handgun permit, because the equal protection claim was "essentially a restatement of [the] Second Amendment claim").

[61] In applying constitutional scrutiny to a legislative classification or distinction, if it "neither burdens a fundamental right nor targets a suspect class, we will uphold [the classification or distinction] so long as it bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631 (1996); see also Vacco v. Quill, 521 U.S. 793, 799 (1997).

legislative classification bore a rational relation to legitimate interest”).[62] In Silveira v. Lockyer, the court recognized the “similarly situated” requirement in an equal protection cause of action when analyzing a similar off-duty officer provision, but ostensibly omitted it in its analysis because the provision was “easily resolved” under rational basis review. Silveira, 312 F.3d at 1089 (9th Cir. 2002).[63]

Notwithstanding, the plaintiffs have not met the threshold requirement of demonstrating that they are similarly situated to the exempted personnel in the legislation.

The court concludes that law enforcement, unlike the general public, often confront organized groups of criminals with the most dangerous weaponry. Furthermore, the differences between the general public and law enforcement are similar to the differences between the public and members of the military, if not even more pronounced.

[62] See also Coal. of New Jersey Sportsmen, Inc. v. Whitman, 44 F. Supp.2d 666, 685 (D.N.J. 1999) aff'd, 263 F.3d 157 (3d Cir. 2001) (applying rational basis review with respect to an equal protection cause of action in a case concerning an assault weapons ban); National Rifle Ass’n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 211-12 (5th Cir. 2012) (applying rational basis review to a firearm regulation because it did not “impermissibly interfere with the exercise of a fundamental right”).

[63] The Silveria court concluded that “[i]t is manifestly rational for at least most categories of peace officers to possess and use firearms more potent than those available to the rest of the populace in order to maintain public safety.” Silveira, 312 F.3d at 1089.

The charge of protecting the public, and the training that accompanies that charge, is what differentiates the exempted personnel from the rest of the population. Hence, the court agrees with the defendants that law enforcement should not be expected to apprehend criminals without superior or comparable firepower, but should only be accorded this advantage when "compelled to perform law enforcement functions." Silveira, 312 F.3d at 1089. Similarly, members of the military and government agency personnel who use the otherwise banned firearms and magazines in the course of their employment should also have an advantage while maintaining public safety even if not technically "on the clock."

While not perfectly crafted, the court concludes that the challenged provisions only allow for the use of assault weapons and LCMs for law enforcement or for similar public safety purposes. The court reads the provisions in question to mean that exempted personnel may use assault weapons and LCMs for use in the discharge of their official duties whether on or off duty.[64] In addition, the extension of time to declare the assault

[64] In fact, § 6(b)(1) of P.A. 13-3 states that "nor shall any provision in sections 53-202a to 53-202k, inclusive, as amended by this act, prohibit the possession or use of assault weapons by sworn members of these agencies when on duty and when the possession or use is within the scope of such member's duties." Conn. P.A. 13-220, § 6(b)(1). It would be absurd to require the use of an assault weapon to be within the scope of the member's duties when "on duty" but allow for recreational use by members of these agencies while "off duty." Likewise, another provision does not require exempt personnel to declare possession with "respect to a large capacity magazine used for official duties." P.A. 13-3 § 2(a)(2).

weapons and LCMs is consistent with other provisions that allowed non-exempt personnel to declare their LCMs and firearms that were lawfully possessed before the legislation came into effect.[65]

The court concludes that the plaintiffs have failed to prove the threshold requirement that the statute treats differently persons who are in all relevant aspects alike. Thus, these provisions do not violate the Equal Protection Clause of the Fourteenth Amendment.

III. <u>Void-for-Vagueness Cause of Action</u>

Finally, the plaintiffs argue that portions of the legislation are unconstitutionally vague. Specifically, the plaintiffs argue that the gun and magazine bans here "impose severe criminal penalties but include no scienter elements." The plaintiffs argue that they are "entitled to challenge it both facially and as applied."

The defendants respond that "[a] statute is not unconstitutionally vague simply because some of its terms require interpretation, or because it requires citizens to take steps to ensure their compliance with it." Specifically, the

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[65] <u>See</u> <u>e.g.</u> Conn. P.A. 13-220 §§ 2(a)(2) and 7(a)(2); <u>see</u> <u>also</u> P.A. 13-3 § 24(a).

defendants argue that the plaintiffs cannot meet their burden of showing "the Act has no 'core' at all." The defendants further argue that the "the Act is comprehensible, and clearly covers a substantial amount of core conduct." The defendants state that "there is a wide array of readily available information that gun owners can use to determine, factually, whether their weapons and magazines fall within the Act's proscriptions."

The notion that a statute is void for vagueness is a concept derived from the notice requirement of the due process clause. Cunney v. Bd. of Trustees of Vill. of Grand View, N.Y., 660 F.3d 612, 620 (2d Cir. 2011). It is a basic principle of due process that a statute is unconstitutionally vague if its prohibitions are not clearly defined. Id.; Arriaga v. Mukasey, 521 F.3d 219, 222 (2d Cir. 2008); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement." Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982)(quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

"The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment." Village of Hoffman Estates, 455 U.S. at 498. Specifically, vagueness in statutes with criminal penalties is tolerated less than vagueness in those with civil penalties because of the severity of the potential consequences of the imprecision. Id.[66]

All statutes, however, need not be crafted with "meticulous specificity," as language is necessarily marked by a degree of imprecision." Thibodeau v. Portuondo, 486 F.3d 61, 66 (2d Cir. 2007) (quoting Grayned, 408 U.S. at 110).

Here, the issue is whether the following five provisions survive a facial[67] challenge for vagueness: 1) the pistol grip; 2) copies or duplicates; 3) assault weapons; 4) modification, alteration, or assembly of magazines and components; and 5) magazines with the capacity to accept more than ten rounds. With

[66] The court recognizes that in City of Chicago v. Morales, 527 U.S. 41, 119 (1999) (Stevens, J.), a plurality of the U.S. Supreme Court set forth a "permeated with vagueness test" for criminal laws with no *mens rea* requirement. For these statutes, when "vagueness permeates the text of such a law, it is subject to facial attack." Morales, 527 U.S. at 119. The second circuit has not declared a preference for this so-called "permeated with vagueness" test or the "impermissibly vague in all its applications" test recognized in U.S. v. Rybicki, 354 F.3d 124, 129 (2d Cir. 2003). The court's conclusions here, however, are the same whether applying the Morales test or the "vague in all applications test."

[67] The defendants challenge the provisions discussed below on "on their face" and "as applied." Challenges mounted "pre-enforcement," that is, before the plaintiffs have been charged with a crime under the legislation, are properly labeled as a 'facial challenge.'" Richmond Boro Gun Club, Inc. v. City of New York, 97 F.3d 681, 685 (2d Cir. 1996).

a facial challenge, the plaintiffs "must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987) (emphasis added); see also Village of Hoffman Estates 455 U.S. at 494-95 (1982); Richmond Boro Gun Club, Inc. v. City of New York, 97 F.3d 681, 684 (2d Cir. 1996).

A. Grip

The plaintiffs argue that every rifle and shotgun meets the definition of an "assault weapon" under Conn. Gen. Stat. § 53-202a(1)(E)(i)(II),(vi)(II). Specifically, the plaintiffs argue that the "provision is vague because it applies or does not apply to every rifle and shotgun depending on how it is being held, but fails to give notice of any assumption that it is being held in a specific manner."[68]

The defendants respond that "[c]ourts must interpret statutes both to avoid absurd results and constitutional infirmity." Specifically, the defendants contend that "[t]he language at issue obviously exists to prohibit any grip that results in any finger in addition to the trigger finger being directly below the action of the weapon when it is held in the

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

normal firing position, which is horizontal." As such, the defendants argue that the plaintiffs cannot "challenge the law as facially vague based on their ridiculous scenario."

The relevant provision of the act provides that it is unlawful to possess a firearm that has: "[a]ny grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing." Conn. Gen. Stat. § 53-202a(1)(E)(II).

A "cardinal function" in interpreting a statute is to "ascertain and give effect to the intent of the legislature." Kuhne v. Cohen & Slamowitz, LLP, 579 F.3d 189, 193 (2d Cir. 2009) certified question accepted, 13 N.Y.3d 791 (2009) and certified question withdrawn, 14 N.Y.3d 786; (quoting Tom Rice Buick-Pontiac v. Gen. Motors Corp., 551 F.3d 149, 154 (2d Cir. 2008)).[69] "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation

[69] However, where a court finds it necessary, "general terms should be so limited in their application as not to lead to an absurd consequence." United States v. Fontaine, 697 F.3d 221, 228 (3d Cir. 2012) The court should "presume that the legislature intended exceptions to its language, which would avoid absurd results." Id. (quoting United States v. Kirby, 74 U.S. 482, 486-87 (1868))(internal quotation marks omitted).

must always be the language itself, giving effect to the plain meaning thereof." Slamowitz, LLP, 579 F.3d at 193.

The court interprets the language to prohibit a scenario in which the weapon is in the normal horizontal firing position. Therefore, the provision covers some, if not most applications.[70] Hence, the challenge fails because the provision is only plausibly vague when applied to a specific use of the weapon. See Richmond Boro Gun Club, Inc. 97 F.3d at 685 (finding "[a]lthough application of this standard might, in some cases, be ambiguous, it was sufficient to cover [other cases] and, thus, to preclude a facial vagueness challenge"). The provision is not impermissibly vague in all its applications and, as such, it is not unconstitutionally vague.

B. "Copies or Duplicates"

The plaintiffs next argue that an ordinary person is expected to know the features of 183 named models in order to know whether a specific firearm is lawful, as well as be expected to 1) "be intimately familiar with" each of the listed models of rifles, pistols, and 1 model of shotgun, 2) "know which versions of the listed models were in production prior to

[70] While the vertical firing position may be "normal" for certain activities, such as duck hunting, it is not the overall normal firing position. Ideally, the legislation would have included a more descriptive statement than "when firing." The California penal code includes such a statement when it provides the phrase "[n]ormal firing position with barrel horizontal" in its chapter on "Unsafe Handguns" and related definitions. See Cal. Penal Code § 31900-31910.

the effective date of April 4, 2013," 3) know whether a gun "is a 'copy' or 'duplicate' of any one of these named models" and 4) know whether a gun "has 'the capability of any such' listed firearm." Specifically, the plaintiffs argue that "[o]rdinary people and police officers have no such knowledge of the design history of these scores of firearms."

The defendants respond that when "properly considered in the broader context of the statute as a whole, it is unlikely that any individual will ever need to know whether a firearm is a 'copy or duplicate' because all but one of the specifically enumerated weapons has the requisite military features to qualify as an assault weapon under the applicable features test." Specifically, the defendants argue that "[i]n the vast majority of circumstances, an individual need only physically examine his or her weapon and then read the statute to determine whether it is prohibited." The defendants also state that "the terms 'copy' and 'duplicate' are not vague on their face because they are readily understandable based on their commonly understood meanings." The defendants argue that the "[p]laintiffs' claim that ordinary individuals have no way of knowing the 'production date' of their firearm is simply wrong," because if the firearm does not have a serial number it was either produced before 1968 or it is unlawful to possess under federal law.

The relevant provisions of the legislation provide that a weapon is an assault weapon if it is "[a]ny of the following specified [semiautomatic firearms], or copies or duplicates thereof with the capability of any such [semiautomatic firearms], that were in production prior to or on April 4, 2013."[71] The statute goes on to list numerous firearm models.

In analyzing statutory text, the court "presume[s] that it speaks consistently with the commonly understood meaning of [its] term[s]." Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) (citing Walters v. Metropolitan Ed. Enters., Inc., 519 U.S. 202, 207 (1997)). "A 'copy' is defined as 'an imitation, or reproduction of an original work.' A 'duplicate' is defined to include 'either of two things that exactly resemble or correspond to each other.'" Id. (internal citations omitted).[72]

The Supreme Court of Illinois, in Wilson v. Cnty. of Cook, concluded that "[a] person of ordinary intelligence would understand that [the section with the "copies or duplicates" language] includes the specific weapons listed and any imitations or reproductions of those weapons made by that manufacturer or another. When read together with the listed

[71] Conn. Gen. Stat. § 53-202a(1)(B),(C) and (D).

[72] The Kuhlman court found that the "'copies or duplicates' language was added to the Ordinance in order to prevent manufacturers from simply changing the name of the specified weapons to avoid criminal liability." Kuhlman, 261 F.3d at 311.

weapons, the provision is not vague." Wilson v. Cnty. of Cook, 968 N.E.2d 641, 652-53 (Ill. 2012).

In New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 2013 WL 6909955 (W.D.N.Y. Dec. 31, 2013), however, the court found that a provision[73] of the New York Penal Law regulating "semiautomatic version[s] of an automatic rifle, shotgun or firearm" was "excessively vague, as an ordinary person cannot know whether any single semiautomatic pistol is a 'version' of an automatic one." Id. at *24 (emphasis added).

Here, the "copies or duplicates" language is not vague, and is more clear than the "version" language that was the subject of the NYSPRA case. Not only must a firearm be exactly the same or an imitation of a listed firearm under the current legislation, it must be the functional equivalent. As such, the provision does not leave a person without knowledge of what is prohibited and the language at issue is not unconstitutionally vague.

C. Assault Weapons

The plaintiffs next argue that the legislation "lists 'assault weapons' by reference to 183 diferent names," but in many cases the listed names "do not correspond to the names that are actually engraved on the specific firearms," which leaves a

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[73] New York Penal Law § 265.00(22)(c)(viii).

person "without knowledge of what is prohibited." Specifically, the plaintiffs argue that "[w]hile the validity of all the listed names cannot be litigated in this case, the court should declare that, consistent with due process, the Act's prohibitions may not be applied to firearms that are not engraved with precise names listed in the Act."

The defendants respond that "an individual does not need to know whether a firearm is included by name in the enumerated firearms provisions to determine whether it is banned. With the exception of the Remington 7615, all of the specifically enumerated weapons have the requisite action-type and military features that qualify them as an assault weapon under the applicable features test." The defendants also respond that "even if the existence of the generic features test were not dispositive – which it is – Plaintiffs' claim lacks merit because most guns have identifying information engraved directly on the gun."[74]

The legislation defines an assault weapon as "any of the following specified semiautomatic firearms: Algimec Agmi; Armalite AR-180;. . . the following specified semiautomatic

[74] Specifically, the defendants argue that "most individuals will be able to determine whether their firearm is prohibited simply by locating the make and model engravings that most firearms have;" and if no such engravings exist, by the firearms serial number, calling the manufacturer, calling a federally licensed firearms dealer, or calling the Special Licensing and Firearms Unit at the Department of Emergency Services and Public Protection.

centerfire rifles . . .: (i) AK-47; (ii) AK-74;. . . the following specified semiautomatic pistols . . .:(i) Centurion 39 AK; (ii) Draco AK-47; . . . the following semiautomatic shotguns . . .: All IZHMASH Saiga 12 Shotguns . . . ."[75]

The legislation's "generic features test"[76] provides notice as to what weapons qualify as an assault weapon, with the exception of the Remington 7615. The specific list of firearms, which includes the Remington 7615, essentially provides further clarification to owners of such weapons, if there were any doubt as to whether their weapon passed the generic features test. Thus, the court concludes that, when read together with the listed banned features of Conn. Gen. Stat. §§ 202a(1)(E)(i)(I)-(V),(iv)(I)-(IV) and (vi)(I)-(II), the provision does not leave a person without knowledge of what is prohibited and the provision is not unconstitutionally vague.

D. Modification, Alteration, or Assembly

The plaintiffs argue "[t]he Act's definition of an 'assault weapon' as a collection of unassembled parts involves components that an ordinary person may not even recognize as firearm-related."[77] Specifically, the plaintiffs argue that "[o]ne must

[75] See Conn. Gen. Stat. § 53-202a(1)(A)-(D).

[76] For example, these provisions provide that a semiautomatic centerfire rifle with a thumbhole stock (the generic feature) qualifies as an assault weapon. See Conn. Gen. Stat. §§ 202a(1)(E)(i)(I)-(V),(iv)(I)-(IV),(vi)(I)-(II).

[77] The plaintiffs state that several provisions in the act refer to the potential to "restore," "convert," "assemble" or "alter" magazines or parts

be intimately familiar with 183 listed firearms, must be able to identify all of the parts thereof, and must know that combinations of some parts may be 'rapidly assembled' into 67 firearms under three other categories."

The defendants respond that these claims lack merit because "the Second Circuit and numerous district courts have made clear that the applicable standard for assessing facial vagueness is actually the reverse of what Plaintiffs propose; a law survives a facial vagueness challenge if there are any conceivable applications of it." Specifically, the defendants argue that "[t]he term 'rapidly' is commonly understood to mean 'happening in a short amount of time' or 'happening quickly.'" The defendants state that "[t]he challenged language exists to prevent an individual from circumventing the ban by disassembling their weapon, only to rapidly reassemble it back into an assault weapon when they wish to use it."

Relevant provisions of the legislation provide that an "[a]ssault weapon means: . . . A part or combination of parts designed or intended to convert a firearm into an assault weapon, as defined in subparagraph (A)(i) of this subdivision, or <u>any combination of parts</u> from which an assault weapon, as defined in subparagraph (A)(i) of this subdivision, may be <u>rapidly</u> assembled if those parts are in the possession or under

in any given way. The plaintiffs also state other provisions place the adverbs "readily" and "rapidly" to modify these verbs.

the control of the same person;. . . "Large capacity magazine" means any firearm magazine, belt, drum, feed strip or similar device that has the capacity of, or can be readily restored or converted to accept, more than ten rounds of ammunition, but does not include (A) A feeding device that has been permanently altered so that it cannot accommodate more than ten rounds of ammunition . . . ."[78]

The Connecticut legislature did not have to specify the exact amount of time in which a weapon could be "rapidly assembled."[79] Such precision is not always possible due to the confines of the English language. "The Constitution does not require impossible standards." United States v. Petrillo, 332 U.S. 1, 7 (1947).[80]

Assault weapons and LCMs, broken into parts, which can be restored to their entirety without much effort, are "clear[ly] what the ordinance as a whole prohibits." Grayned v. City of

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[78] See Conn. Gen. Stat. §§ 202a(1)(A)(ii); Conn. P.A. No. 13-220(a)(1).

[79] See e.g., Coal. of New Jersey Sportsmen, Inc. v. Whitman, 44 F. Supp.2d 666, 681 (D.N.J. 1999) aff'd, 263 F.3d 157 (3d Cir. 2001) (concluding that "[s]urely the Legislature, intent on reaching assault weapons which could be altered in minor ways or disassembled to avoid the purview of the other assault weapon definitions, did not have to specify in hours and minutes and with reference to specific tools and degrees of knowledge the parameters of what 'readily assembled' means").

[80] See also U.S. v. Catanzaro, 368 F. Supp. 450, 454 (D. Conn. 1973) (finding that the phrase "which may be readily restored to fire" was not unconstitutionally vague *in se* and that it did not fail to provide fair warning to a person of ordinary intelligence that the item which is the subject matter of this indictment was a "firearm" within the terms of the National Firearms Act).

Rockford, 408 U.S. 104, 110 (1972). The court concludes that this challenged provision provides fair warning to a person of ordinary intelligence as to the prohibited conduct and, therefore, it is not unconstitutionally vague.

E. Capacity to Accept More than Ten Rounds

The plaintiffs finally argue that many rifles and shotguns have tubular magazines in which cartridges are inserted one behind the other.[81] Specifically, the plaintiffs argue that the capacity of firearms "to accept cartridges in tubular magazines varies with the length of the rounds inserted therein." That is, the plaintiffs argue that the act is vague as to whether a magazine that accepts ten or less standard cartridges but more than ten smaller, non-standard rounds is unlawful.

The defendants respond that "[a]lthough it is true that the maximum capacity of tubular magazines can vary, Plaintiffs claim nevertheless lacks merit." Specifically, the defendants argue that "[a]n individual therefore need only locate and read the firearm's specifications to determine if the firearm can accept more than ten of any of its standard rounds . . . . If the magazine can accept more than ten of any standard round, it is clearly prohibited." The defendants further argue that very few

[81] The plaintiffs state that, for the same reasons, § 530-202a(1)(E)(ii), providing that "the definition of 'assault weapon' includes: 'A semiautomatic, centerfire rifle that has a fixed magazine with the ability to accept more than ten rounds . . ." is also unconstitutionally vague.

tubular magazines would be "impacted by the ambiguity that Plaintiffs posit," and "[b]ecause the ten round limit will be clear and unambiguous in virtually all of its applications, therefore, it is not facially vague."

The legislation explicitly states that "[l]arge capacity magazine' means any firearm magazine, belt, drum, feed strip or similar device that has the capacity of, or can be readily restored or converted to accept, more than ten rounds of ammunition, but does not include: (A) A feeding device that has been permanently altered so that it cannot accommodate more than ten rounds of ammunition, (B) a .22 caliber tube ammunition feeding device, (C) a tubular magazine that is contained in a lever-action firearm, or (D) a magazine that is permanently inoperable . . . ."[82] The legislation states that an "[a]ssault weapon means: . . . (E) Any semiautomatic firearm regardless of whether such firearm is listed in subparagraphs (A) to (D), inclusive, of this subdivision, and regardless of the date such firearm was produced, that meets the following criteria: . . . (ii) A semiautomatic, centerfire rifle that has a fixed magazine with the ability to accept more than ten rounds . . . ."[83]

[82] Conn. P.A. 13-220, § 1(a)(1).

[83] See Conn. Gen. Stat. §§ 202a(1)(A)(ii).

Here, the court concludes that this provision of the legislation, if applied to standard cartridges, is not impermissibly vague in all its applications and, as such, it is not unconstitutionally vague.[84]

IV. CONCLUSION

For the foregoing reasons, the plaintiffs' motion for summary judgment (document no. 60) is DENIED; the defendants' cross motion for summary judgment (document no. 78) is GRANTED; and the plaintiffs' motion for preliminary injunction (document no. 14) is DENIED as moot.

It is so ordered this 30th day of January, 2014, at Hartford, Connecticut.

/s/
Alfred V. Covello,
United States District Judge

[84] See e.g., Coal. of New Jersey Sportsmen, Inc. v. Whitman, 44 F. Supp.2d 666, 680 (D.N.J. 1999) aff'd, 263 F.3d 157 (3d Cir. 2001) (finding "the possibility of shorter, non-standard shells, which may or may not be in existence. . . is irrelevant when the statute's prohibition clearly encompasses the standard shells intended for the magazine").