14-0036-cv(L), 14-0037-cv(XAP)

United States Court of Appeals

for the

Second Circuit

WILLIAM NOJAY, THOMAS GALVIN, ROGER HORVATH, BATAVIA MARINE & SPORTING SUPPLY, NEW YORK STATE RIFLE AND PISTOL ASSOCIATION, INC., WESTCHESTER COUNTY FIREARMS OWNERS ASSOCIATION, INC., SPORTSMEN'S ASSOCIATION FOR FIREARMS EDUCATION, INC., NEW YORK STATE AMATEUR TRAPSHOOTING ASSOCIATION, INC., BEDELL CUSTOM, BEIKIRCH AMMUNITION CORPORATION, BLUELINE TACTICAL & POLICE SUPPLY, LLC,

Plaintiffs-Appellants-Cross-Appellees,

– v. –

ANDREW M. CUOMO, Governor of the State of New York, ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, JOSEPH A. D'AMICO, Superintendent of the New York State Police,

Defendants-Appellees-Cross-Appellants,

(For Continuation of Caption See Following Page)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF PINK PISTOLS, AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

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LAWRENCE FRIEDMAN,

Defendants-Appellees

CORPORATE DISCLOSURE STATEMENT

Pink Pistols is an unincorporated association.

Dated: May 6, 2014

s/ Brian S. Koukoutchos
Brian S. Koukoutchos
Attorney for Amicus Curiae

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INTEREST OF AMICUS CURIAE

Pink Pistols is a shooting society that honors diversity and is open to all. It advocates the responsible and lawful use of firearms for self-defense, whether by sexual minorities (a group that FBI statistics identify as particularly subject to violence based on discriminatory animus) or by other Americans, all of whom have a Second Amendment right to armed self-defense. Pink Pistols has chapters across the United States and continues to experience rapid growth; the newest chapter is in Salt Lake City, Utah.[1] The parties have consented to the filing of this brief.

INTRODUCTION

New York's SAFE Act ("the Act"), prohibits a gun owner (1) from possessing a magazine capable of holding more than ten rounds of ammunition and from loading more than seven rounds into a magazine or (2) from possessing a semiautomatic rifle, pistol, or shotgun that the Act deems an "assault weapon." These bans will be referred to as the Act's "Large Capacity Magazine" ("LCM") ban and its "Assault Weapons" ("AW") ban. Because the Act categorically outlaws common firearms and standard magazines that are "of the kind in common use … for lawful purposes," *District of Columbia v. Heller*, 554 U.S. 570, 624

[1] This brief was not authored in whole or in part by a party's counsel, nor has a party or a party's counsel contributed money to fund the and submission of this brief. In addition to amicus, its members and its counsel, the National Rifle Association of America, Inc., contributed funds to the support this submission.

(2008) (citation omitted), the Act cannot be reconciled with the Second Amendment.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS CIVILIAN OWNERSHIP OF FIREARMS THAT ARE OF THE KIND IN COMMON USE FOR LAWFUL PURPOSES.

A. *Heller* Forbids Any Form of Interest-Balancing in this Case.

In *Heller*, the Supreme Court ruled that the line between permissible regulations and impermissible bans on firearms *is not* to be established by balancing the individual right protected by the Second Amendment against competing government interests such as public safety, *because that balance has already been struck*: the Second Amendment itself "is the very *product* of an interest-balancing by the people," and "[t]he very enumeration of the right takes out of the hands of government … the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. at 634, 635 (original emphasis). The Court therefore invalidated the ban and *expressly disavowed* the "interest-balancing" and intermediate scrutiny proposed by Justice Breyer's dissent as inappropriate when dealing with a categorical restriction on a class of firearms. *See id.* at 634-35 (opinion of the Court). In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Court reiterated that *Heller* "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest-balancing." *Id.* at 3047 (controlling opinion of Alito, J.). As Judge Posner has written, "the

Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts." *Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir. 2012).[2]

Although this Court applied intermediate scrutiny in *Kachalsky v. County of Westchester*, it acknowledged that a law must be tested against the Second Amendment's "text, history, and tradition." 701 F.3d 81, 89 n. 9 (2d Cir. 2012). Under *Kachalsky*, interest-balancing is inappropriate here, where we confront a *categorical ban* on the sale of AWs and a *categorical ban* on mere possession of LCMs, *even within the confines of the home*—where this Court recognized that "Second Amendment guarantees are at their zenith." *Id*. at 89. In contrast, the statute in *Kachalsky* was not a ban, *see id.* at 98, nor did it invade the home:

> New York's licensing scheme affects the ability to carry handguns only *in public*, while the District of Columbia ban applied *in the home* "where the need for defense of self, family, and property is most acute." This is a critical difference. The state's ability to regulate firearms and, for that matter, conduct, is qualitatively different in public than in the home.

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[2] The court below opined that this Court has "categorically" condemned what the district court deprecated as "the so-called 'history-and-tradition' model" of the Second Amendment—a mode of analysis that the Court below attributed to Judge Kavanaugh. *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, --- F. Supp. 2d ---, 2013 WL 6909955, at *9 (W.D.N.Y. Dec. 31, 2013) (citing *Heller v. District of Columbia*, 670 F.3d 1244, 1284 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting)). But the judicial obligation to hew closely to the Second Amendment's "historical tradition" arises from *Heller* itself. 554 U.S. at 626; *see also id*. at 624 (dispensing with the decision in *United States v. Miller*, 307 U.S. 174 (1939), because it contained "[n]ot a word *(not a word)* about the history of the Second Amendment." (original emphasis)).

Id. at 94 (quoting *Heller*, 554 U.S. at 628) (original emphasis).

B. The Second Amendment Guarantees the Right to Firearms that Are Commonly Used by Law-Abiding Citizens for Lawful Purposes.

The Second Amendment extends to "arms 'in common use at the time' for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. Conversely, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," such as "machineguns." *Id.* at 624, 25. Applying this "common use" test, *Heller* struck down D.C.'s handgun ban because it "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Id.* at 628.

II. THE SAFE ACT'S BAN ON LCMS OUTLAWS A NEARLY UNIVERSAL FEATURE OF FIREARMS COMMONLY USED FOR LAWFUL PURPOSES.

The district court noted that "Defendants concede [that LCMs] are in common use nationally," and it found that what the SAFE Act banned as LCMs were in fact "standard magazine[s]." 2013 WL 6909955, at *11. "'There 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.'" *Id.* (quoting *Heller II*, 670 F.3d at 1261). Therefore, the district court ruled that:

> Given their popularity in the assumably [sic] law-abiding public, this Court is willing to proceed under the premise that these magazines are commonly owned for lawful purposes.
>
> Further, this Court finds that a restraint on the amount of ammunition a citizen is permitted to load into his or her weapon—whether 10 rounds or seven—is also more than a "marginal, incremental or even appreciable restraint" on the right to keep and bear arms. Certainly, if the firearm itself implicates the Second Amendment, so too must the right to load that weapon with ammunition.

Id. (citations omitted).[3] Even under intermediate scrutiny, a restriction must be "substantially related to the achievement of an important governmental interest." *Kachalsky*, 701 F.3d at 96. Although "[t]he State's justification for the law need not be perfect, [] it must be 'exceedingly persuasive.'" 2013 WL 6909955, at *19 (quoting *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012)).

On this rationale, the court below invalidated the SAFE Act's restriction on loading more than seven rounds into a ten-round magazine: "[T]he seven-round limit is largely an arbitrary restriction that impermissibly infringes on the rights guaranteed by the Second Amendment." *Id*. at *2. The district court cogently observed that enforcing this magazine limit, especially in the home where "the Second Amendment right is at its zenith[,] … presents the possibility of a disturbing perverse effect, pitting the criminal with a fully-loaded magazine against the law-abiding citizen limited to seven rounds":

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[3] This is where the constitutional inquiry, both here and in *Heller II*, really should have terminated, because the determination that a firearm is in common use for lawful purposes *is the decisive issue under Heller*, *see* 554 U.S. at 624-25, 627; it is not merely a threshold to the application of intermediate scrutiny.

> It stretches the bounds of this Court's deference to the predictive judgments of the legislature to suppose that those intent on doing harm (whom, of course, the Act is aimed to stop) will load their weapon with only the permitted seven rounds. In this sense, the provision is not "substantially related" to the important government interest in public safety and crime prevention.

Id. at *18.

The same analysis dooms the Act's 10-round magazine limit, because it is just as "arbitrary" and likewise "stretches the bounds of this Court's deference to the predictive judgments of the legislature to suppose that" *criminals* "will load their weapon with only the permitted" 10-round magazines. Thus, the 10-round magazine limit likewise has "a disturbing perverse effect, pitting the criminal with a fully-loaded magazine" of 15 rounds, 30 rounds, or more, "against the law-abiding citizen limited to" a 10-round magazine. *Id*. at *18, *19.

The court below tried to distinguish the 7-round and 10-round restrictions, reasoning that magazines can be limited to a physical capacity of ten rounds "under the principal presumption that the law will reduce their prevalence and accessibility in New York State, and thus, inversely, increase public safety," which the rule about loading only seven rounds into a 10-round magazine will not, "because 10-round magazines remain legal." *Id*. at *18. But outlawing magazines of more than ten rounds cannot be justified by the supposition that doing so might diminish the availability of LCMs to criminals who could otherwise obtain such magazines by stealing them from citizens (if citizens were still allowed to own them). This is be-

cause *90%* of the guns used in crimes in New York are brought into the state by criminals who obtain the firearms—with their standard-issue 15-, 17-, or 30-round magazines—from other states where LCMs remain legal.[4] Thus, the district court's effort to distinguish the 7-round limit it invalidates from the 10-round limit it upholds is mere *ipse dixit.* Although "[t]he State's justification for the law need not be perfect, [] it must be 'exceedingly persuasive.'" *Id.* at *19. New York's is not.

America's one million law enforcement agents are virtually all armed with handguns holding more than ten rounds of ammunition.[5] In the NYPD, "officers have a choice of three different 16-shot 9mm pistols for uniform carry" and "an estimated 20,000 of the city's estimated 35,000 sworn personnel carry the Glock 19," which accommodates magazines of 15, 17 or 19 rounds.[6] Such firepower is essential in police encounters with criminals. Even at close range, officers who fire handguns miss more often than they hit. Years of data reveal that shots fired by

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[4] *See* Laura Ly, *New York City's Biggest Gun Bust Ever Yields 254 Weapons, 19 Arrests*, CNN.COM (Aug. 20, 2013, 12:07 PM EDT) ("[Mayor] Bloomberg said Monday that the percentage of guns used in crimes that are brought in from out of state had increased from 85 to 90%."), www.cnn.com/2013/08/19/justice/new-york-illegal-guns/ (last visited May 5, 2014).

[5] *See* MASSAD AYOOB, THE COMPLETE BOOK OF HANDGUNS 87, 90 (2013).

[6] *Id*. at 89. "Nearly every law enforcement agency in the state carries hand guns that have a 15 round capacity." Jim Hoffer, *Additions To Be Made to Gun Laws for Law Enforcement*, WABC EYEWITNESS NEWS (Jan. 17, 2013), http://abclocal.go.com/wabc/story?section=news/local/new_york&id=8958116 (last visited May 5, 2014).

NYPD officers miss 83% of the time when the assailant is within 21 feet, and *even when the assailant is within six feet, the police still miss 62% of the time*.[7] Police officers, even with extensive training, deem LCMs essential to protect themselves from criminals—a point driven home by the universal police dismay that greeted the SAFE Act, which had been enacted so thoughtlessly that it did not exempt the police from the magazine limit. Such inattentive haste indicates that New York's legislature did not actually conduct *any* balancing of the constitutional rights and public interests at stake here. "State Senator Eric Adams, a former NYPD Captain," immediately proposed an amendment "to exempt police officers from the high-capacity magazine ban. In his words, 'You can't give more ammo to the criminals.'"[8] The universal use of pistols with LCMs by a million American police officers by itself proves that pistols with LCMs are "in common use" for "lawful purposes like self-defense," *Heller*, 554 U.S. at 624, and that civilians are equally entitled to them. If the defendants were correct that LCMs are useful only for mass slaughter of the innocent, then "such killing machines have no place in the hands of domestic law enforcement."[9] In truth, LCMs are essential self-defense tools,

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[7] *See* Brian McCombie, *An Inside Look at FBI Handgun Training*, GUNS & AMMO: HANDGUNS (June 20, 2013), www.handgunsmag.com/2013/06/20/new-fbi-handgun-training/ (last visited May 5, 2014).

[8] *See* Hoffer, WABC EYEWITNESS NEWS, *supra* note 6.

[9] *See* David B. Kopel, "*Assault Weapons*," *in* GUNS: WHO SHOULD HAVE THEM 176, 202 (David B. Kopel ed., 1995).

which New York tacitly—but unavoidably—concedes by arming its police with 15-round handgun magazines and 30-round patrol-rifle magazines.[10] Police carry firearms purely for defensive purposes. Official NYPD firearms policy is that officers "shall not discharge their firearms in defense of property" or "to subdue a fleeing felon who presents no threat," but *only* to "protect themselves or another person from imminent death or serious physical injury."[11]

If police need that much firepower to defend themselves, *a fortiori* law-abiding citizens need the same firepower, if not more.[12] Police have many: (1) they wear bullet-proof vests; (2) they carry extra magazines; (3) they carry a hidden back-up pistol; (4) they have additional firepower in their cars, such as a shotgun or a patrol rifle (and the latter is usually an AR-15 with a 30-round magazine);[13] (5) they have additional weapons on their belts, including Tasers, trun-

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[10] *See supra* notes 5-6; *infra* note 13.

[11] NEW YORK POLICE DEPARTMENT PATROL GUIDE, PG 203-12 (a), (c), (d) (2004), www.pbs.org/pov/everymotherson/special_nypd_deadly.php.

[12] *See* Kopel, *in* GUNS: WHO SHOULD HAVE THEM, *supra* note 9, at 202.

[13] The AR-15, whether built by Colt, Bushmaster or another manufacturer, is the most common police patrol rifle in America. *See e.g.*, Michael Remez, *A Civilian Version of an M-16: Bushmaster Rifle a Common Choice*, HARTFORD COURANT (Oct. 25, 2002), articles.courant.com/2002-10-25/news/0210252068_1_bushmaster-firearms-john-allen-williams-distributor-in-washington-state (last visited May 5, 2014); *see also NY Gunman Killed in Police Shootout* (video), FOXNEWS.COM (Mar. 14, 2013), radio.foxnews.com/2013/03/14/ny-gunman-killed-in-police-shootout/ (last visited May 6, 2014) (showing NY State Police using AR-15s); *NYC Subway's Anti-Terror Steps the New Normal*, CBSNews.com (Sept. 1, 2011, 12:55 PM),

cheons, and Mace or pepper spray; (6) they often have a partner in the car who is similarly armed; and (7) reinforcements are only a radio call away. Civilians lack such resources, so their need for standard pistol magazines that hold as many rounds as possible is both acute and undeniable.

It is no answer to say that, because the police are well-armed, citizens need not be. That proposition is wrong as a matter of law—because the Second Amendment guarantees the rights of *individuals*—and tragically false as a matter of fact. No citizen enjoys a constitutional right to police protection,[14] and the police are often not around when a citizen is being assaulted.[15] Nor can the Act be redeemed by listing the firearms that it does *not* ban. "It is no answer to say …

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www.cbsnews.com/news/nyc-subways-anti-terror-steps-the-new-normal/ (showing NY city police using AR-15s). The AR-15 platform "has become the carbine of choice" for the nation's law-enforcement officers. *See* Officer Richard Nance, *Eight Years with My Colt M4 Commando: Protect and Serve*, *in* GUNS & AMMO: BOOK OF THE AR-15 48 (Eric Poole ed., 2013). Colt alone supplies patrol rifles to dozens of law-enforcement agencies in New York, including the NYPD, the NY State Police, and the police departments of Buffalo, Rochester, Syracuse, and even Scarsdale. *See Agencies that Carry Colt Firearms*, www.colt.com/ColtLaw Enforcement/AgenciesthatCarry.aspx (last visited May 5, 2014). The AR-15's standard-issue magazine holds 30 rounds. *See, e.g.*, BOOK OF THE AR-15, *supra*, at 3, 18, 32-33, 52, 70, 82, 146.

[14] *See, e.g.*, *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756-67 (2005); *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981).

[15] Consider these statistics: in 2012 the police were unable to protect citizens from 14,827 murders, 84,376 rapes, 354,520 robberies and 760,739 aggravated assaults. *Crime in the United States 2012, Violent Crime*, FBI, www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime/violent-crime (last visited May 5, 2014) (browse by violent crime category).

that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller*, 554 U.S. at 629. "[R]estating the Second Amendment right in terms of what IS LEFT after the regulation rather than what EXISTED historically, as a means of lowering the level of scrutiny, is exactly backward from *Heller*'s reasoning." *National Rifle Ass'n of America, Inc. v. BATFE*, 714 F.3d 334, 345 (5th Cir. 2013) (Jones, J.; joined by Jolly, Smith, Clement, Owen, and Elrod, JJ., dissenting from denial of rehearing en banc) (original emphasis).

Civilians are often left to defend themselves, and the Second Amendment guarantees that they may do so with firearms that are "in common use" and "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624, 625. Semiautomatic pistols and rifles with large magazines are "the most preferred firearm[s] in the nation to 'keep' and use for protection of one's home and family …." *Id*. at 628-29. As in *Heller*, the state has outlawed a class of arms "overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Id*. at 628.

III. THE ACT'S BAN ON SO-CALLED "ASSAULT WEAPONS" OUTLAWS AN ENORMOUS CLASS OF FIREARMS COMMONLY USED FOR LAWFUL PURPOSES.

Observing that "tens of thousands of Americans own these guns and use them exclusively for lawful purposes such as hunting, target shooting, and even

self-defense," 2013 WL 6909955, at *11, the court below deemed "the weapons at issue [] commonly used for lawful purposes":

> Further, because the SAFE Act renders acquisition of these weapons illegal under most circumstances, this Court finds that the restrictions at issue more than "minimally affect" Plaintiffs' ability to acquire and use the firearms, and they therefore impose a substantial burden on Plaintiffs' Second Amendment rights.

Id. The court below acknowledged that "[t]he Supreme Court has previously described the AR-15"—the archetype of what the SAFE Act outlaws as a military "assault weapon"—as "'the *civilian* version of the military's M–16 rifle.'" *Id*. at *15 (quoting *Staples v. United States*, 511 U.S. 600, 603 (1994)) (emphasis added). *Staples* explained that, unlike *fully automatic* "machineguns," *semiautomatic* firearms such as the AR-15 rifle "traditionally have been widely accepted as lawful possessions." 511 U.S. at 612.[16] Yet in defiance of that guidance from the Supreme Court, the court below incomprehensibly drew the opposite conclusion and held that New York was free to outlaw such a common, semiautomatic firearm because "there is no dispute that the AR–15 type rifle *derives* from a weapon designed for fully-automatic military use on the battlefield." 2013 WL 6909955, at *15 (emphasis added).

This is incoherent and New York cannot make it sensible by repeatedly mis-

[16] At issue in *Staples* was the scienter requirement for conviction under a federal law outlawing ownership of an unregistered machinegun—a firearm that the defendant (whose conviction was reversed) believed to be a common semiautomatic rifle. *See* 511 U.S. at 615.

characterizing ordinary, semiautomatic, civilian firearms such as the AR-15 as "assault weapons." That is a calculated bit of disinformation rather than an actual firearms classification:

> 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 to expand the category of "assault rifles" so as to allow an attack on as many additional firearms as possible on the basis of undefined "evil" appearance.

Stenberg v. Carhart, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting).[17] The advocates who coined the misnomer "assault weapon" have been remarkably candid about their cynical effort to mislead the public (and courts and legislatures) into confusing semiautomatic civilian rifles with military machineguns:

> Assault weapons ... are a new topic. The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.

Josh Sugarmann, *Assault Weapons and Accessories in America*, VIOLENCE POLICY CENTER (1988), www.vpc.org/studies/awaconc.htm (emphasis omitted) (last visited May 5, 2014). The court below apparently succumbed to this hoax. But, in

[17] There is a well-established firearms category known as the "assault rifle." This denotes a rifle capable of *both* semiautomatic *and fully automatic* fire; the phrase "semiautomatic assault weapon" is a nonsense word, a contradiction in terms. *See* GARY PAUL JOHNSTON & THOMAS B. NELSON, THE WORLD'S ASSAULT RIFLES 1196 (2010); *see also* MAXIM POPENKER & ANTHONY G. WILLIAMS, ASSAULT RIFLE 9, 12, 212 (2004) (By definition, all assault rifles can be fired in fully automatic mode.).

Staples, the Supreme Court distinguished the semiautomatic AR-15 from the military's fully automatic M-16 and described the AR-15 as a "lawful," "semiautomatic," "civilian," and "entirely innocent" firearm. 511 U.S. at 603, 610-11. In contrast, the court below essentially equates the two weapons and persistently mischaracterizes the AR-15 as a "military style" firearm with "unusually dangerous," military "combat features," which is built for "rapid fire" and "designed for one purpose—to efficiently kill numerous people" by means of "spray firing from the hip." 2013 WL 6909955, at *14-16.

The district court's confusion about firearms thus tracks that of the dissent in *Staples*, where the Supreme Court's opinion described the dissent as conflating semiautomatic firearms with fully automatic machineguns. *See* 511 U.S. at 611-12 & nn.5-6. *See also id.* at 622-23 (Ginsburg, J., concurring in the judgment) (same); *id*. at 624 (Stevens, J., dissenting) (complaining that, "[t]o avoid a slight possibility of injustice to unsophisticated owners of machineguns … the Court has substituted its views of sound policy for the judgment [of] Congress," and that "[t]he Court is preoccupied with guns that 'generally can be owned in perfect innocence.'"); *id.* at 633, 640 (Stevens, J., dissenting) (blurring distinction between semiautomatic and automatic firearms).

Once the term "semiautomatic" is properly understood—one pull of the trigger fires one, and only one, round of ammunition, *see Staples*, 511 U.S. at 602

n.1—there is nothing in the SAFE Act that distinguishes banned semiautomatic "assault weapons" from permissible semiautomatic firearms on a *rational, functional* basis. When pressed, the court below did not deny that banned rifles such as the AR-15 are, in fact, merely semiautomatic. *See* 2013 WL 6909955, at *2. Instead, the district court's opinion, like the SAFE Act itself, justifies outlawing commonplace firearms owned by millions of Americans[18] because they have features that *resemble* military weapons—such as adjustable shoulder stocks, pistol grips, or muzzle brakes. But these are not indicia of "dangerous and unusual" weapons unfit for lawful civilian use and unprotected by the Second Amendment. *Heller*, 554 U.S. at 627. On the contrary, these are features that enhance a gun's accuracy and controllability, thereby increasing its safety and utility for hunting, target-shooting, and self-defense. The court below concedes this point, *see* 2013 WL 6909955, at *14, but insists that these very enhancements of a firearm's accuracy, controllability and utility justify outlawing the gun because they likewise make it more handy for mass-killers and thereby threaten public safety. *Id*. Surely the State of New York has no rational, let alone legitimate, interest in making it more likely that a law-abiding citizen using a firearm for self-defense will miss her

[18] Considering the AR-15 alone, there are approximately five million such rifles in this country and it accounts for 60% of all civilian rifles sold each year in the United States. *See* Dan Haar, *America's Rifle: Rise of the AR-15*, HARTFORD COURANT (Mar. 9, 2013), http://articles.courant.com/2013-03-09/business/hc-haar-ar-15-it-gun-20130308_1_new-rifle-colt-firearms-military-rifle (last visited May 5, 2014).

assailant and wound or kill a member of the family or an innocent passerby. To make it a felony to add features to one's rifle that make it more accurate and safer to use, for both the shooter and the public, is nothing short of perverse.

IV. BANNING SO-CALLED "ASSAULT WEAPONS" AND "LARGE CAPACITY MAGAZINES" WILL DO NOTHING TO REDUCE VIOLENT CRIME.

Even if the interest-balancing that *Heller* forbids were employed here, and even if, contrary to *Heller*, intermediate scrutiny were the correct standard of review, the Act's ban on AWs and LCMs could not stand.

It is undisputed that the State's proof of a threat to public safety must be "exceedingly persuasive," *Windsor*, 699 F.3d at 185, and that the State must mount a "pragmatic defense" of the challenged law and "marshal extensive empirical evidence" that the challenged gun regulation "[i]s vital to public safety." *Moore*, 702 F.3d at 939-40. Indeed, the standard of proof required here is even more demanding because: (1) this categorical ban on firearms reaches into the home, *Heller*, 554 U.S. at 628; and (2) unlike the criminal defendants who have raised Second Amendment defenses to prosecution, the plaintiffs here are not criminals, but "'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

Research on the now-expired federal statute banning AWs and LCMs reveals that such legislation has no discernible impact on firearms violence.[19] The Justice Department's own study found that

> we cannot clearly credit the ban with any of the nation's recent drop in gun violence. And, indeed, there has been no discernible reduction in the lethality and injuriousness of gun violence, based on indicators like the percentage of gun crimes resulting in death or the share of gunfire incidents resulting in injury, as we might have expected had the ban reduced crimes with both AWs and LCMs."[20]

The report concluded that, "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement."[21] The insurmountable problem is that criminals denied AWs and LCMs will simply substitute other firearms: "Because offenders can substitute non-banned guns and small magazines for banned AWs and LCMs, there is not a clear rationale for expecting the ban to reduce assaults and robberies with guns."[22]

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[19] Title XI of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). The federal ban expired in 2004.

[20] CHRISTOPHER S. KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994-2003, REP. TO THE NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE 96 (2004).

[21] *Id.* at 3.

[22] *Id.* at 81 & n.95. These conclusions are consistent with the first study of the federal ban (done in 1997), which recognized that "[a]ny effort to estimate how the ban affected the gun murder rate must confront a fundamental problem, that the maximum achievable preventive effect of the ban is almost certainly too small to detect statistically." JEFFREY A. ROTH & CHRISTOPHER S. KOPER, IMPACT EVALUATION OF THE PUBLIC SAFETY AND RECREATIONAL FIREARMS USE PROTECTION ACT OF 1994 (FINAL REPORT) 79 (Mar. 13, 1997), *available at*

In a follow-up essay in 2013, the principal author of the Justice Department studies, Professor Christopher Koper, reiterated that, "[b]ecause offenders could substitute non-banned guns and small magazines for banned AWs and LCMs, there was not a clear rationale for expecting the ban to reduce assaults and robberies with guns."[23] Although he noted that some stories by media journalists[24] suggested that the federal ban "may have modestly reduced gunshot victimization had it remained in place for a longer period,"[25] Koper concluded that "analyses showed no discernible reduction in the lethality or injuriousness of gun violence during the post-ban years." *Id*. at 165.[26]

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www.urban.org/UploadedPDF/aw_final.pdf. "[T]he evidence is not strong enough for us to conclude that there was any meaningful effect (i.e., that the effect was different from zero.)." *Id*. at 6. Specifically, the research "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. Nor did we find assault weapons to be overrepresented in a sample of mass murders involving guns." *Id*.

[23] Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994-2004, in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 165 (Daniel W. Webster & Jon S. Vernick eds., 2013).

[24] *Id.* at 170.

[25] *Id.* at 158; *see also id.* at 164-65.

[26] Professor Koper filed an affidavit below to take issue with how his conclusions have been characterized by Amicus Pink Pistols and other parties. *See* Supplemental Declaration of Christopher Koper, Doc. 124 (Sept. 23, 2013). But even there he conceded that: (i) "it is true that my research team and I cannot clearly credit the federal ban with decreasing gunshot victimizations during the time it was in effect," *id*. ¶11; (ii) "[b]ecause criminals and mass shooters will be able to substitute legal firearms for the banned assault weapons and LCMs, it is true that

The failure of the federal ban to have *any* discernible effect on gun violence has been confirmed by two government agencies—the National Research Council and the Centers for Disease Control—that conducted comprehensive reviews of *all* the published literature on firearms violence, including Professor Koper's research (in contrast, neither the Defendants nor Professor Koper has tried to refute the conclusions of the NRC and the CDC). The NRC and CDC both found that there is insufficient evidence to conclude that bans on "assault weapons" or other particular firearms or firearm features have had any beneficial effect on gun violence.[27]

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this kind of legislation may not substantially reduce the overall number or rate of gun crimes committed," *id*. ¶13; and (iii) although "there are a few studies" of "state assault weapons bans" that "have suggested that such bans have not reduced crime," Koper "specifically noted, however, that it is hard to draw definitive conclusions from these studies" due to the poor quality of the data, which "undermine[s] the usefulness of the cited studies," *id*. ¶14. Professor Koper also acknowledged, twice, that his belief that AW and LCM bans might conceivably change *the nature, but not the amount or impact*, of firearms violence, was based on data about *all "gun crimes involving semiautomatics*," rather than just gun crimes committed with "assault weapons and other firearms with LCMs." *Id*. ¶18 (emphasis added). *See also id.* ¶24 at 12 (relying on evidence about "gun attacks with semiautomatics" in general, not only AWs and LCMs).

[27] *See* NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 97 (Charles F. Wellford et al. eds., 2005) ("[G]iven the nature of the [1994 assault weapons ban], the maximum potential effect of the ban on gun violence outcomes would be very small and, if there were any observable effects, very difficult to disentangle from chance yearly variation and other state and local gun violence initiatives that took place simultaneously."); Centers for Disease Control, *Recommendations To Reduce Violence Through Early Childhood Home Visitation, Therapeutic Foster Care, and Firearms Laws*, 28 AM. J. PREV. MED. 6, 7 (2005) (With respect to "bans on specified firearms or ammunition," the CDC Task Force found that "[e]vidence was insufficient to determine the effectiveness of [bans, for] the prevention of violence."); *see also* Robert A. Hahn et al., *Fire-*

Unsurprisingly, professional rank-and-file police officers (as distinguished from elected or politically appointed law-enforcement executives) oppose bans on AWs and LCMs.[28] "New York law enforcement officials have been almost unanimous in their criticism of the new law."[29] In his congressional testimony, Joseph Constance, the Chief of Detectives and a twenty-five-year veteran of the Trenton police, explained that New Jersey has had an AW/LCM ban in place for years and that the "practical value of such bans" is zero.[30] "Despite their intimidating appearance, no auto-loading rifle is as dangerous as an old-fashioned double-barreled 12-gauge shotgun."[31] Bans on AWs or LCMs "have no effect on the stemming of crime or the provision of public safety" because they only affect law-abiding citizens: "rank-and-file officers in New Jersey knew to a certainty that criminals would continue to obtain guns illegally, no matter how strict our gun laws are. Our

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arms Laws and the Reduction of Violence: A Systematic Review, 28 AM. J. PREV. MED. 40, 49 (2005).

[28] *See* Kopel, *in* GUNS: WHO SHOULD HAVE THEM 189 (polls show 75% of street patrol officers oppose AW bans).

[29] Alfred Regnery, *Law Enforcement to New York Politicians: Don't Ban Guns*, BREITBART (May 9, 2013), www.breitbart.com/Big-Government/2013/05/09/Law-Enforcement-to-New-York-Politicians-Dont-Ban-Guns.

[30] *Assault Weapons: A View from the Front Lines: Hearing on S. 639 and S. 653 Before the S. Comm. on the Judiciary*, 103d Cong. 83-84 (1993) (statement of Joseph Constance).

[31] *Id.* at 83. *See* Kopel, *in* GUNS: WHO SHOULD HAVE THEM 164 (a common "recreational" shotgun unregulated by any AW ban "can fire six 00 buckshot shells, each shell containing twelve .33 caliber pellets [for a total of 72 deadly projectiles], in three seconds. Each of the pellets is about the same size as the bullet fired by a[] [Russian] AKS (a semiautomatic look-alike of an AK-47 rifle).").

prediction of failure has been borne out. Simply put, ladies and gentlemen, criminals do not fill out forms."[32]

The court below reasoned that the SAFE Act was nonetheless justified because "the very features that increase a weapon's utility for self-defense" when used by a law-abiding citizen "also increase its dangerousness to the public at large" when the weapon is used by a criminal or a lunatic. 2013 WL 6909955, at *14. Remarkably, the court's *only* authority for this topsy-turvy analysis was the *dissent* in *McDonald*, 130 S.Ct. at 3107 (Stevens, J., dissenting). *See* 2013 WL 6909955, at *14. But to ban firearms because criminals use them is to tell law-abiding citizens that their liberties depend not on *their conduct*, but on the *conduct of the lawless*, and that the law can vouchsafe the law-abiding only such rights as the lawless will allow. This is perverse. Just as "[t]he First Amendment knows no heckler's veto," the Second Amendment cannot tolerate restrictions on law-abiding citizens' right to bear arms based on a threat to public safety posed *not* by those citizens *but by criminals who obtain and use such firearms illegally*. *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004) (holding that the risk of a violent and dangerous public reaction to speech is insufficient rationale to infringe the rights of the speaker).

[32] *See Assault Weapons*, 103d Cong. at 84.

V. THE SAD TRUTH IS THAT THE SAFE ACT WOULD NOT HAVE PREVENTED THE ATROCITY THAT SPAWNED IT—THE MASSACRE AT THE NEWTOWN SCHOOL.

Unable to demonstrate that the SAFE Act will reduce firearms violence generally, the defendants and the court below retreat to the position that the Act might at least reduce the carnage from mass shootings. *See* 2013 WL 6909955, at *15. The district court's authority for this proposition is what it describes as "an exhaustive study of mass shootings in America." *Id.* But what the court cites is not a research study by criminologists, but a news article written by a journalist for *Mother Jones* magazine. *See id.* (citing Mark Follman, et al., *A Guide to Mass Shootings in America*, MOTHER JONES, Feb. 27, 2013).[33] The article has been criticized and systematically dismantled in the scholarly literature. *See, e.g.*, James Alan Fox et al., *Mass Shootings in America: Moving Beyond Newtown*, 18 HOMICIDE STUDIES 125 (2013).[34] Despite the horrors of recent mass shootings, the truth is that "[m]ass shootings have not increased in number or in overall death toll, at least not over the past several decades." *Id*. at 128. The *Mother Jones* article reached the opposite conclusion only because it manipulated and cherry-picked the historical record, excluding any data that did not fit its predetermined conclusion. *Id*. Moreover,

[33] The article is available at www.motherjones.com/politics/2012/07/mass-shootings-map.

[34] The online version of this journal can be found at hsx.sagepub.com/content/18/1/125.

Mother Jones did not even apply its skewed selection criteria "consistently." *Id*. at 129. The *only* thing that "has increased with regard to mass murder … is the public's fear, anxiety, and widely held belief that the problem is getting worse." *Id*. at 130.

Professor Fox concluded—and this conclusion has not been challenged—that the notion that "restoring the federal ban on assault weapons will prevent these horrible crimes" is a "myth." *Id*. at 136. "[A] comparison of the incidence of mass shootings during the 10-year window when the assault weapon ban was in force against the time periods before implementation and after expiration shows that the legislation had virtually no effect" on mass shootings. *Id*. The problem is the "overwhelming majority of mass murderers use firearms that would not be restricted by an assault weapons ban. … In fact, only one quarter of these mass murderers killed with an assault weapon; they easily could have identified an alternate means of mass casualty if that were necessary." *Id*. "Eliminating the risk of mass murder would involve extreme steps that we are unable or unwilling to take—abolishing the Second Amendment … and rounding up anyone who looks or acts at all suspicious." *Id*. at 141.

In the end, we confront the unfortunate but stubborn fact that the SAFE Act would have changed nothing at the Newtown school. Limiting magazines to a capacity of ten rounds would have made no difference: Adam Lanza used 30-round

magazines, but he changed many of them out before they were exhausted and he could just as easily and just as quickly have used a series of 10-round magazines.[35] Or instead of reloading his AR-15, he could have employed the two semiautomatic pistols that he was carrying or the shotgun that he took to the school but left in his car.[36] Deranged mass killers tend to arm themselves with multiple guns, just as Adam Lanza did.

Nor did the rate of fire of Lanza's semiautomatic AR-15 make a difference, because it was the same as every other semiautomatic rifle—one pull of trigger fires only one bullet. Even if *all* semiautomatic rifles were outlawed, Lanza could still have used a 150-year-old lever-action rifle such as the Volcanic, the Henry, or the Winchester—cowboy guns familiar to us from myriad movies and TV westerns. Lanza fired 154 shots in about five minutes; that's 30 shots per minute.[37] That same rate of fire can be achieved with a Winchester lever-action carbine from 1866,[38] or with a Volcanic lever-action rifle from the 1850s (which had a 30-round

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[35] N.R. Kleinfield et al., *Newton Killer's Obsessions, in Chilling Detail*, N.Y. TIMES, Mar. 28, 2013, at A1.

[36] *Id.*

[37] *See* Mary Ellen Clark & Noreen O'Donnell, *Newtown School Gunman Fired 154 Rounds in Less than 5 Minutes*, REUTERS U.S. ED. (Mar. 28, 2013), www.reuters.com/article/2013/03/28/us-usa-shooting-connecticut-idUSBRE92R0EM20130328.

[38] *See* GUN: A VISUAL HISTORY 174 (Chris Stone ed., 2012); MILITARY SMALL ARMS 147 (Graham Smith ed., 1994).

magazine);[39] that rate of fire might even be exceeded by a Henry Model 1860, which was advertised as capable of 60 shots per minute.[40]

Finally, Lanza could have accomplished his atrocities without any rifle at all, but with a mere revolver that could rapidly be reloaded with the use of common speed-loaders or full- or half-moon clips.[41] Further evidence of this comes from *The Public Inquiry into the Shootings at Dunblane Primary School on 13 March 1996*, led by Lord Cullen.[42] On that day, a madman named Thomas Hamilton walked into a primary school in Scotland and, within four minutes, shot 30 teachers and children with a 9mm Browning semiautomatic pistol before killing himself.[43] Hamilton shot his victims with the Browning semiautomatic that he kept reloading with twenty-round magazines (he fired 105 rounds in total).[44] However, the *Public Inquiry* concluded that Hamilton could have inflicted the same bloodshed with either of the revolvers that he was also carrying:

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[39] *See* MILITARY SMALL ARMS, at 146.

[40] *See* K.D. KIRKLAND, AMERICA'S PREMIER GUNMAKERS: WINCHESTER 8 (2013). *See also* Kopel, *in* GUNS: WHO SHOULD HAVE THEM 166 ("Even including time for reloading, a simple revolver or a bolt-action hunting rifle can easily fire [as] fast" as Patrick Purdy did in January 1989, when he shot 34 children at a schoolyard in California with a semiautomatic rifle).

[41] *See* Joseph von Benedikt, *Double Down: Get Your DA Revolver Skills Up to Snuff with These Pro Tips*, *in* GUNS & AMMO: HANDGUNS 62-63 (Aug./Sept. 2013).

[42] *See* www.ssaa.org.au/research/1996/1996-10-16_public-inquiry-dunblane-lord-cullen.pdf.

[43] *See id.* ¶¶ 1.3, 6.10.

[44] *Id.* ¶ 3.39.

> [W]ith a revolver it is possible to maintain a speed of firing which approaches that of the self-loading pistol. Further, as I stated earlier, the use of a speedloader in conjunction with a revolver which had a cylinder which could be swung out would enable a whole set of cartridges to be removed and replaced very quickly."[45]

The *Public Inquiry* concluded that use of an old-fashioned double-barrel shotgun—a weapon unrestricted by the SAFE Act—would have been far more deadly. An individual could, within the same span of time that transpired at Dunblane, discharge and reload a double-barreled shotgun 105 times—the same number of shots that killer Hamilton had fired—but with much more carnage from the approximately 675 to 1000 projectiles that would be fired if one were using buckshot.[46] As a result of the Dunblane school massacre, the British government outlawed virtually all private ownership of handguns—an option that the Second Amendment forbids.

Thus firearms technology that is 150 years old and that is entirely unrestricted by the SAFE Act would have wrought the same death toll at the Newtown school as the semiautomatic AR-15 that Lanza used. The monstrosity at Newtown was not the weapon, but the depraved individual who wielded it.

CONCLUSION

The challenged provisions of the SAFE Act should be struck down.

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[45] *Id.* ¶ 9.51.
[46] *Id.* ¶ 9.53.

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Respectfully submitted,

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This brief complies with the type-volume limits of Federal Rules of Appellate Procedure 32(a)(7)(B) and 28.1(e)(2)(A) because the brief contains 6,991 words.

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Dated: May 6, 2014

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