

## NEW YORK'S NOT SO "SAFE" ACT: THE SECOND AMENDMENT IN AN ALICE-IN-WONDERLAND WORLD WHERE WORDS HAVE NO MEANING

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### I. INTRODUCTION

Use and manipulation of the pejorative term “assault weapon” is a classic case of “an Alice-in-Wonderland world where words have no meaning.”<sup>1</sup> The Second Amendment provides that “the right of the people to keep and bear *Arms*, shall not be infringed.”<sup>2</sup> Arms, such as rifles, pistols, and shotguns, do not lose their constitutional protection because the legislature describes them with a derogatory term. Indeed, “no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act . . .”<sup>3</sup>

The term “assault weapon” generically means a weapon used in an assault.<sup>4</sup> Military usage refers to certain fully automatic machine guns as “assault rifles.”<sup>5</sup> Military forces worldwide issue

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<sup>1</sup> *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring).

<sup>2</sup> U.S. CONST. amend. II (emphasis added).

<sup>3</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

<sup>4</sup> See *People v. Alexander*, 595 N.Y.S.2d 279, 282 (App. Div. 1993) (describing a tire iron used in an assault as “the assault weapon”).

<sup>5</sup> U.S. ARMY, ST-HB-07-03-74, SMALL ARMS IDENTIFICATION AND OPERATION GUIDE—EURASIAN COMMUNIST COUNTRIES 105 (1973) (“Assault rifles are short, compact, selective-fire weapons that fire a cartridge intermediate in power between submachinegun and rifle

assault rifles to their troops, not semiautomatic rifles made for civilian use.<sup>6</sup> One could just as well say that having a barrel on a rifle is “military-style,” as it is found on every military rifle and is far more significant than the shape of a grip or stock. In short, “assault weapon” has become “a political term, developed by anti-gun publicists” to ban firearms “on the basis of undefined ‘evil’ appearance.”<sup>7</sup>

In 1994, Congress passed a law defining and restricting “semiautomatic assault weapons”—itself an oxymoron—to include a short list of named firearms and certain firearms with two specified generic characteristics.<sup>8</sup> It did not restrict possession of such firearms that were lawfully possessed on its effective date.<sup>9</sup> Magazines holding more than ten rounds were similarly restricted but grandfathered.<sup>10</sup> After the law expired ten years later, Congress saw fit not to reenact it.<sup>11</sup>

Neither the federal law nor its expiration had any effect on the homicide rate, which had been falling since almost two years before the enactment of the law in September 1994 and has continued to remain low since the law expired in 2004.<sup>12</sup> The Bureau of Justice Statistics has reported: “Firearm-related homicides declined 39%, from 18,253 in 1993 to 11,101 in 2011.”<sup>13</sup> Moreover, while the

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cartridges. Assault rifles . . . are capable of delivering effective full automatic fire . . .”).

<sup>6</sup> See *Citizens for a Safer Cmty. v. City of Rochester*, 627 N.Y.S.2d 193, 198 (Sup. Ct. 1994) (“[T]he guns subject to this law are not military weapons, but merely look like military weapons, since they are identical in action to sporting guns and are not capable of full automatic fire.”).

<sup>7</sup> *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (quoting Bruce H. Kobayashi & Joseph E. Olson, *In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons”*, 8 STAN. L & POL’Y REV 41, 43 (1997)).

<sup>8</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102, 108 Stat. 1796, 1997–98.

<sup>9</sup> *Id.* at 1997. Prosecutors sometimes loosely use the term “assault weapon” in indictments to make defendants look bad. *See, e.g.*, *United States v. Huet*, No. 08-0215, 2010 U.S. Dist. LEXIS 123597, at \*9–10 (W.D. Pa. Nov. 22, 2010), *rev’d on other grounds*, 665 F.3d 588, 597 n.7, 603 (3d Cir. 2012). In that case, the prosecution alleged that a rifle was an “assault weapon,” but the district court found that not to be the case even under the expired federal law, commenting that “[t]he SKS (or M59/66) is a legal, common semi-automatic rifle that is used as a hunting rifle,” and “is owned by American gun owners in the hundreds of thousands.” *Id.* at \*11, \*30.

<sup>10</sup> § 110103, 108 Stat. at 1999.

<sup>11</sup> *See* 150 CONG. REC. 18108 (2004) (statement of Sen. Levin) (“[I]n a matter of hours, the assault weapons ban will expire.”).

<sup>12</sup> *See* D’Vera Cohn et al., *Gun Homicide Rate Down 49% Since 1993 Peak; Public Unaware*, PEW RES. CENTER (May 7, 2013), <http://www.pewsocialtrends.org/2013/05/07/gun-homicide-rate-down-49-since-1993-peak-public-unaware/>.

<sup>13</sup> MICHAEL PLANTY & JENNIFER L. TRUMAN, U.S. DEPT OF JUSTICE, FIREARM VIOLENCE, 1993–2011, at 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/fv9311.pdf>.

banned “assault weapons” are mostly rifles, they are used in disproportionately fewer crimes: “About 70% to 80% of firearm homicides and 90% of nonfatal firearm victimizations were committed with a handgun from 1993 to 2011.”<sup>14</sup>

In 2000, New York passed a law nearly identical to the federal law, defining “assault weapon” based on two generic features.<sup>15</sup> But on January 15, 2013, after the bill was just introduced the day before,<sup>16</sup> the Secure Ammunition and Firearms Enforcement (SAFE) Act was signed into law, declaring countless numbers of ordinary firearms to be “assault weapons” based on a single generic characteristic.<sup>17</sup> Having been so relabeled, these firearms purportedly lost their Second Amendment protection and were banned, other than those registered by a deadline.<sup>18</sup> Yet nothing changed other than how the word was used. As the Supreme Court once noted: “This recalls Lewis Carroll’s classic advice on the construction of language: ‘When *I* use a word, Humpty Dumpty said, in rather a scornful tone, it means just what *I* choose it to mean—neither more nor less.’”<sup>19</sup>

Constitutional rights may not be extinguished by such linguistic manipulation. The test for Second Amendment protection is not based on what a legislature may call various arms, but, as the Supreme Court held in *District of Columbia v. Heller*,<sup>20</sup> on whether they are “in common use” and “typically possessed by law-abiding citizens for lawful purposes.”<sup>21</sup>

The following analyzes the basis of *Heller*’s “common use” test. It then discusses the settled fact that the firearms and magazines that the SAFE Act bans are in common use by millions of law-abiding citizens for self-defense, sport, and hunting. Next, it puts the particular features that are banned under a microscope to ask what makes these features so “dangerous and unusual” that they must be

<sup>14</sup> *Id.*

<sup>15</sup> Compare Act of Aug. 8, 2000, ch. 189, § 10, 2000 N.Y. Laws 2788, 2792–93 (amended 2013), with § 110102, 108 Stat. at 1997–98.

<sup>16</sup> Michelle Breidenbach, *The Safe Act “Emergency”: How Cuomo, Past Governors Bypassed Public to Make Laws*, SYRACUSE.COM (Mar. 13, 2013), [http://www.syracuse.com/news/index.ssf/2013/03/state\\_emergency\\_gun\\_law.html](http://www.syracuse.com/news/index.ssf/2013/03/state_emergency_gun_law.html).

<sup>17</sup> Act of Jan. 15, 2013, ch. 1, § 37, 2013 N.Y. Laws 1, 13–15 (codified at N.Y. PENAL LAW § 265.00.22 (McKinney 2014)). On March 29, 2013, Governor Cuomo signed into law S2607-D, a budget bill, Part FF of which amended certain provisions of the Act. Act of Mar. 29, 2013, ch. 57, pt. FF, 2013 N.Y. Laws 290, 389 (codified in scattered sections of the N.Y. PENAL LAW).

<sup>18</sup> § 48, 2013 N.Y. Laws at 26 (codified at N.Y. PENAL LAW § 400.00.16-a).

<sup>19</sup> See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 n.18 (1978) (quoting LEWIS CARROLL, THROUGH THE LOOKING GLASS 123 (1897)) (internal quotation marks omitted).

<sup>20</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>21</sup> See *id.* at 624–25.

prohibited. Following that, the analysis shifts to why the ban on standard magazines and on having more than seven rounds in a magazine violates the Second Amendment. Finally, given that the right to keep arms is fundamental, it discusses whether strict scrutiny or intermediate scrutiny applies. It concludes that the arguments that seek to justify the SAFE Act reflect a fundamental misunderstanding of the basic nature of the right to keep and bear arms and of the nature of the actual firearms and their features that are prohibited.

## II. THE SECOND AMENDMENT GUARANTEES THE RIGHT TO KEEP FIREARMS THAT ARE COMMONLY POSSESSED BY LAW-ABIDING CITIZENS FOR LAWFUL PURPOSES

The guarantee of the Second Amendment simply does not allow a state to ban commonly possessed firearms based on arbitrarily defined features such as how they are held and the capacity of their magazines. *Heller* explained that “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”<sup>22</sup> The Court continued:

The traditional militia was formed from a pool of men bringing arms “in common use at the time” for lawful purposes like self-defense. . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.<sup>23</sup>

Indeed, the premise of the Second Amendment is that the right to keep and bear arms promotes “[a] well regulated Militia, [which is] necessary to the security of a free State.”<sup>24</sup> That is why it protects “ordinary military equipment” of the type “supplied by [militiamen] themselves and of the kind in common use at the time.”<sup>25</sup> At the founding, “weapons used by militiamen and weapons used in

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<sup>22</sup> *Id.* at 582.

<sup>23</sup> *Id.* at 624–25.

<sup>24</sup> U.S. CONST. amend. II.

<sup>25</sup> *Heller*, 554 U.S. at 624 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)) (internal quotation marks omitted). That included a musket or firelock, bayonet, and ammunition, which “every free able-bodied white male citizen” aged eighteen to forty-five years old was required to “provide himself with” under the first Federal Militia Act. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271. If the bayonet made the musket “military style,” that did not remove it from Second Amendment protection.

defense of person and home were one and the same.”<sup>26</sup>

Thus, “the sorts of weapons protected were those ‘in common use at the time.’ We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>27</sup> Other than that, *Heller* referred to longstanding restrictions, but none involve a prohibition on firearm possession by law-abiding persons.<sup>28</sup> *Heller* did draw the line at fully automatic machine guns, such as the M-16 and heavy ordnance:

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks.<sup>29</sup>

In contrast to “M-16 rifles and the like,” semiautomatic rifles that fire only once per trigger pull are hardly “most useful in military service,” which is why they are not issued as standard service weapons to any military force in the world. But *Heller* does not suggest that *any* “military” feature disqualifies a firearm from Second Amendment protection—the original militia would “bring the sorts of lawful weapons that they possessed at home to militia

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<sup>26</sup> *Heller*, 554 U.S. at 625 (quoting *State v. Kessler*, 614 P.2d 94, 98 (Or. 1980)) (internal quotation marks omitted). That continues to be the case for some firearms, such as the Beretta 9mm semiautomatic pistol. See *United States v. Emerson*, 270 F.3d 203, 227 n.22 (5th Cir. 2001).

<sup>27</sup> *Heller*, 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179). *Heller* cites, inter alia, William Blackstone’s *Commentaries on the Laws of England*. 4 WILLIAM BLACKSTONE, COMMENTARIES \*149 (“The offense of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land . . . .”); see also *O’Neill v. State*, 16 Ala. 65, 67 (1849) (“[I]f persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offence, without coming to actual blows.”). The offense thus involved “going armed” with such weapons to terrify others, not on possessing them in the home. BLACKSTONE, *supra*, at \*149.

<sup>28</sup> *Heller*, 554 U.S. at 626–27.

<sup>29</sup> *Id.* at 627.

duty.”<sup>30</sup>

In *Heller*, the District of Columbia and its amici argued that handguns may be banned because persons could defend themselves with rifles and shotguns, which were argued to be superior for self-defense.<sup>31</sup> *Heller* responded: “It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. . . . There are many reasons that a citizen may prefer a handgun for home defense . . . .”<sup>32</sup> *Heller* further held: “The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for th[e] lawful purpose [of self-defense].”<sup>33</sup> Reasons also exist why a citizen may prefer a rifle or shotgun.

New York’s current reading of the Second Amendment as being devoid of any real protection parallels arguments it made in support of the District of Columbia in *Heller*. The amici curiae brief for New York by then Attorney General Andrew M. Cuomo, among others, argued that “the Second Amendment has no application to state laws.”<sup>34</sup> It analyzed the Second Amendment as nothing more than a provision to protect “state sovereignty over militias,”<sup>35</sup> which did not “explicitly guarantee an individual right to own a gun.”<sup>36</sup> Since *Heller* rejected those arguments, New York’s fall-back position now is that it can ban any firearm it wishes by arguing that it is outside the scope of the Second Amendment.

The Second Circuit has repeated *Heller*’s holding that “the Second Amendment does not protect those weapons not typically possessed

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<sup>30</sup> *Id.*

<sup>31</sup> See Brief for Petitioners at 54, *Heller*, 554 U.S. 570 (No. 07-290) (“[The District] 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 of Violence Policy Center et al. as Amici Curiae in Support of Petitioners at 30, *Heller*, 554 U.S. 570 (No. 07-290) (“[S]hotguns and rifles are much more effective in stopping a [criminal]. . . . [H]andguns—compared with larger shotguns and rifles that are designed to be held with two hands—require a greater degree of dexterity.” (second alteration in original) (quoting CHRIS BIRD, THE CONCEALED HANDGUN MANUAL: HOW TO CHOOSE, CARRY, AND SHOOT A GUN IN SELF DEFENSE 40 (1998)).

<sup>32</sup> *Heller*, 554 U.S. at 629. Similarly, newspapers may not be banned because magazines are available. See *Cincinnati v. Discovery Network*, 507 U.S. 410, 418 (1993) (applying heightened scrutiny to and invalidating a “categorical prohibition on the use of newsracks to disseminate commercial messages”).

<sup>33</sup> *Heller*, 554 U.S. at 628.

<sup>34</sup> Brief for New York et al. as Amici Curiae in Support of Petitioners at 1, *Heller*, 554 U.S. 570 (No. 07-290).

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.* at 9.

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by law-abiding citizens for lawful purposes . . .”<sup>37</sup> Specifically, “the Second Amendment does not protect [defendant’s] personal possession of machine guns.”<sup>38</sup> Again, that is the type of firearm *Heller* said is outside the scope of the Second Amendment.<sup>39</sup>

The Second Circuit also upheld a federal restriction on transport into one’s state of a firearm acquired outside the state because “it does nothing to keep someone from purchasing a firearm in her home state,” and thus a person had “adequate alternatives” to obtain the very same firearm.<sup>40</sup> By contrast, “heightened scrutiny is triggered” for restrictions “like the complete prohibition on handguns struck down in *Heller*,” which it characterized as a “substantial burden” on the right.<sup>41</sup> The SAFE Act too involves complete prohibitions on common firearms and magazines.<sup>42</sup>

While at the time of this writing it remains to be seen how the Second Circuit may resolve the SAFE Act, the Supreme Court in *Heller* plainly held that the Second Amendment protects the right of law-abiding citizens to keep firearms that are commonly possessed for lawful purposes.

### III. THE BANNED FIREARMS MEET THE *HELLER* TEST FOR PROTECTED ARMS

Under any definition of the term as used in current political discourse, “assault weapons” are in common use. The broader the definition, the more common the use. The SAFE Act’s changing of the definition from the two-feature test to the one-feature test necessarily included countless more firearms than before.

The firearms that New York bans are lawfully manufactured or imported and are lawfully purchased by millions of Americans after passing the National Instant Criminal Background Check<sup>43</sup> as well as any state-required checks.<sup>44</sup> These firearms meet the test of

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<sup>37</sup> United States v. Zaleski, 489 F. App’x 474, 475 (2d Cir. 2012) (quoting *Heller*, 554 U.S. at 625) (internal quotation marks omitted).

<sup>38</sup> *Zaleski*, 489 F. App’x at 475.

<sup>39</sup> *Heller*, 554 U.S. at 627–28.

<sup>40</sup> United States v. Decastro, 682 F.3d 160, 168 (2d Cir. 2012).

<sup>41</sup> *Id.* at 166.

<sup>42</sup> Similarly, a ban on firearms with obliterated serial numbers was upheld by the Third Circuit only because it did not ban any type of firearm at all: “Because unmarked weapons are functionally no different from marked weapons, [the prohibition] does not limit the possession of any class of firearms.” United States v. Marzzarella, 614 F.3d 85, 98–99 (3d Cir. 2010).

<sup>43</sup> See 18 U.S.C. § 922(t) (2013).

<sup>44</sup> See, e.g., CAL. PENAL CODE § 30105 (West 2014); WASH. REV. CODE ANN. § 9.41.090 (West 2014).

being “typically possessed by law-abiding citizens for lawful purposes.”<sup>45</sup> It cannot be seriously contended that such persons are not law-abiding citizens.

Well before *Heller*, in *Staples v. United States*,<sup>46</sup> the Supreme Court noted the fundamental difference between a common semiautomatic rifle and a machine gun issued to the Armed Forces: “The AR-15 is the civilian version of the military’s M-16 rifle, and is . . . a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire.”<sup>47</sup>

Acknowledging “a long tradition of widespread lawful gun ownership by private individuals in this country,” *Staples* noted: “Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. . . . [D]espite their potential for harm, guns generally can be owned in perfect innocence.”<sup>48</sup> The Court noted that “[a]utomobiles . . . might also be termed ‘dangerous’ devices,”<sup>49</sup> although they are not uncommon or unusual. Contrasting ordinary firearms, such as the AR-15 rifle involved in that case, from “machineguns, sawed-off shotguns, and artillery pieces,” the Court noted that “guns falling outside those [latter] categories traditionally have been widely accepted as lawful possessions.”<sup>50</sup>

As noted, *Heller* drew the line between common handguns and long guns, which fire only one shot per trigger pull, and fully automatic machine guns.<sup>51</sup> That followed a long tradition in American law. Semiautomatic rifles, pistols, and shotguns “are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property.”<sup>52</sup> *Parker v. District of Columbia*,<sup>53</sup> which *Heller* affirmed, noted: “The modern handgun—and for that matter the rifle and long-barreled

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<sup>45</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

<sup>46</sup> *Staples v. United States*, 511 U.S. 600 (1994).

<sup>47</sup> *Id.* at 603; see *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 804 (1988) (describing the M-16 selective fire rifle as the “standard assault rifle”).

<sup>48</sup> *Staples*, 511 U.S. at 603, 611.

<sup>49</sup> *Id.* at 614.

<sup>50</sup> *Id.* at 611–12.

<sup>51</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008).

<sup>52</sup> *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972); see also *United States v. Emerson*, 270 F.3d 203, 216, 264–65 (5th Cir. 2001) (noting the “Beretta semi-automatic pistol” is protected by the Second Amendment).

<sup>53</sup> *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), aff’d sub nom. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon, and it passes *Miller*'s standards.”<sup>54</sup> Rifles in particular have long been held to be protected under the Second Amendment,<sup>55</sup> including in New York precedent.<sup>56</sup>

The majority in *Heller v. District of Columbia (Heller II)*<sup>57</sup> relied on legislative findings and applied intermediate scrutiny to uphold the District's ban on firearms it calls “assault weapons” and magazines holding over ten rounds.<sup>58</sup> It did so despite its following acknowledgment that should have resolved the case based on the *Heller* test:

We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in “common use,” as the plaintiffs contend. Approximately 1.6 million AR-15s alone have been manufactured since 1986 . . . . As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds . . . .<sup>59</sup>

Based on the same evidence, Judge Kavanaugh noted in his dissent that “[t]he AR-15 is the most popular semi-automatic rifle,” and that “[s]emi-automatic rifles are commonly used for self-defense in the home, hunting, target shooting, and competitions.”<sup>60</sup> Judge

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<sup>54</sup> *Id.* at 398.

<sup>55</sup> *State v. Kerner*, 107 S.E. 222, 224 (N.C. 1921) (discussing the protected arms: rifles, muskets, shotguns, and pistols); *Andrews v. State*, 50 Tenn. 165, 179 (1871) (“[T]he rifle of all descriptions, the shot gun, the musket, and repeater, are such [protected] arms.”).

<sup>56</sup> *Moore v. Gallup*, 45 N.Y.S.2d 63, 66 (App. Div. 1943) (“[T]he arms to which the Second Amendment refers include weapons of warfare to be used by the militia, such as swords, guns, rifles and muskets . . . .”), *aff’d*, 59 N.E.2d 429 (N.Y. 1944); *People v. Raso*, 170 N.Y.S.2d 245, 249 (Cnty. Ct. 1958) (“[T]he Legislature in enacting the ‘concealed’ weapon provision . . . carefully avoided including rifles because of the Federal constitutional provision . . . .”); *Hutchinson v. Rosetti*, 205 N.Y.S.2d 526, 527, 529, 531 (City of N.Y. Mun. Ct. 1960) (holding that the rifle used for defense against a prejudiced mob must be returned based on the individual’s right to bear arms guaranteed under the Second Amendment of the United States Constitution).

<sup>57</sup> *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).

<sup>58</sup> *Id.* at 1261–64.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1287–88 (Kavanaugh, J., dissenting). Like semi-automatic pistols, which cannot be banned under *Heller*, semi-automatic rifles are used by law-abiding persons for lawful purposes:

There is no reason to think that semi-automatic rifles are not effective for self-defense in the home, which *Heller* explained is a core purpose of the Second Amendment right. The offense/defense distinction thus doesn’t advance the analysis here, at least in part because it is the person, not the gun, who determines whether use of the gun is offensive or defensive.

Kavanaugh would have invalidated the District's prohibition.<sup>61</sup>

*New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*<sup>62</sup> (NYSRPA), the district court opinion on the leading challenge to the SAFE Act, found "the archetypal AR-15" to be in common use.<sup>63</sup> "Generally, it is a semiautomatic rifle that has a detachable magazine, has a grip protruding roughly four inches below the action of the rifle, and is easily accessorized and adapted."<sup>64</sup> The court continued:

It is also popular. According to Plaintiffs, since 1986 (when record-keeping began) "at least 3.97 million AR-15 type rifles have been manufactured in the United States for the commercial market." In 2011, AR-15s accounted for 7% of all firearms sold. Plaintiffs also assert that the AR-15 rifles are regularly used for self defense, hunting, and sporting competitions.<sup>65</sup>

Moreover, "there can be little dispute 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."<sup>66</sup> Thus, "for purposes of this Decision, this Court will assume that the weapons at issue are commonly used for lawful purposes."<sup>67</sup> Finally, given that the SAFE Act makes acquisition of the subject firearms unlawful, "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."<sup>68</sup>

The court further found:

Large-capacity magazines are also popular, and Defendants concede they are in common use nationally. Indeed, the "standard magazine" for an AR-15 holds 20 or 30 rounds. Given their popularity in the assumably law-abiding

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*Id.* at 1290.

<sup>61</sup> *Id.* at 1285.

<sup>62</sup> N.Y. State Rifle & Pistol Ass'n v. Cuomo, 990 F. Supp. 2d 349 (W.D.N.Y. 2013).

<sup>63</sup> *Id.* at 364–65.

<sup>64</sup> *Id.* at 364.

<sup>65</sup> *Id.* (citations omitted).

<sup>66</sup> *Id.* at 365 ("[A]round 1990, 'there were an estimated 1 million privately owned [assault weapons] in the U.S. . . .'" (quoting CHRISTOPHER S. KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003, at 10 (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>); see also *Heller II*, 670 F.3d at 1287–88 (Kavanaugh, J., dissenting) ("A brief perusal of the website of a popular American gun seller underscores . . . that semi-automatic rifles are . . . commonly used for self-defense in the home, hunting, target shooting, and competitions.").

<sup>67</sup> N.Y. State Rifle & Pistol Ass'n, 990 F. Supp. 2d at 365.

<sup>68</sup> *Id.*

public, this Court is willing to proceed under the premise that these magazines are commonly owned for lawful purposes.<sup>69</sup>

Finally, the court found “that a restraint on the amount of ammunition a citizen is permitted to load into his or her weapon—whether 10 rounds or seven—is also more than a ‘marginal, incremental or even appreciable restraint’ on the right to keep and bear arms.”<sup>70</sup> Given that “the firearm itself implicates the Second Amendment, so too must the right to load that weapon with ammunition. Round restrictions, whether seven or 10, are therefore deserving of constitutional scrutiny.”<sup>71</sup>

Rifles such as AR-15s are “widely owned by private citizens today for legitimate purposes,” including “for self-defense, hunting, and target shooting.”<sup>72</sup> For instance, AR-15 type rifles are the leading type of firearm used in the National Matches and in other matches sponsored by the Civilian Marksmanship Program,<sup>73</sup> which Congress established “to instruct citizens of the United States in marksmanship” and “to promote practice and safety in the use of firearms.”<sup>74</sup> Competitions with such rifles are sponsored by the National Rifle Association, which has long been recognized in New York law as associated with legitimate use of firearms.<sup>75</sup>

In *People v. James*,<sup>76</sup> a California appellate court asserted that the Second Amendment “does not protect the right to possess assault weapons.”<sup>77</sup> It relied solely on legislative statements that some of the banned guns had been used in crimes, something that could be said for any type of firearm.<sup>78</sup> It concluded: “These are not the types of weapons that are typically possessed by law-abiding

<sup>69</sup> *Id.* (citations omitted) (citing *Heller II*, 670 F.3d at 1261); see also *Heller II*, 670 F.3d at 1261 (“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.”); KOPER ET AL., *supra* note 66, at 10 (“Approximately 18% of civilian-owned firearms and 21% of civilian-owned handguns were equipped with LCMs as of 1994.”).

<sup>70</sup> *N.Y. State Rifle & Pistol Ass'n*, 990 F. Supp. 2d at 365.

<sup>71</sup> *Id.*

<sup>72</sup> Michael P. O'Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 388 (2009) (footnotes omitted).

<sup>73</sup> See *Competitions*, CIVILIAN MARKSMANSHIP PROGRAM, <http://thecmp.org/competitions/> (last visited Feb. 23, 2015).

<sup>74</sup> 36 U.S.C. § 40722(1)–(2) (2013).

<sup>75</sup> E.g., N.Y. PENAL LAW § 265.20.a.7–7-c (McKinney 2014) (providing exemptions for the possession and use of certain firearms at ranges and competitions approved by the National Rifle Association).

<sup>76</sup> *People v. James*, 94 Cal. Rptr. 3d 576 (Cal. Ct. App. 2009).

<sup>77</sup> *Id.* at 585.

<sup>78</sup> *Id.* at 580–81.

citizens for lawful purposes such as sport hunting or self-defense . . .”<sup>79</sup> The court offered no actual evidence whatsoever for that proposition.

By contrast, in *Wilson v. County of Cook*,<sup>80</sup> the Illinois Supreme Court held that it could not say “that assault weapons as defined in this Ordinance categorically fall outside the scope of the rights protected by the second amendment.”<sup>81</sup> The court explained:

[I]t cannot be ascertained at this stage of the proceedings whether these arms with these particular attributes as defined in this Ordinance are well suited for self-defense or sport or would be outweighed completely by the collateral damage resulting from their use, making them “dangerous and unusual” as articulated in *Heller*. This question requires us to engage in an empirical inquiry beyond the scope of the record and beyond the scope of judicial notice about the nature of the weapons that are banned under this Ordinance and the dangers of these particular weapons.<sup>82</sup>

*Wilson* continued: “Unlike *James* and *Heller II*, we have a minimal legislative record to review and need not make assumptions without first attempting to ascertain relevant facts.”<sup>83</sup> As to the suspect legislative declaration that the banned guns were “military” weapons and were most likely to be used in crime,<sup>84</sup> “a legislative declaration does not preclude inquiry by the judiciary into the facts bearing on an issue of constitutional law.”<sup>85</sup>

Some pre-*Heller* state court decisions upheld gun and magazine bans under state arms guarantees. But these decisions do not meet the standard of review required for the Second Amendment by *Heller*, not to mention that they conflict with prior decisions in those same states.<sup>86</sup>

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<sup>79</sup> *Id.* at 586.

<sup>80</sup> *Wilson v. Cnty. of Cook*, 968 N.E.2d 641 (Ill. 2012).

<sup>81</sup> *Id.* at 655.

<sup>82</sup> *Id.* at 656.

<sup>83</sup> *Id.* at 657.

<sup>84</sup> *Id.* at 656.

<sup>85</sup> *Id.* at 657.

<sup>86</sup> See *Richmond Boro Gun Club, Inc. v. City of N.Y.*, 97 F.3d 681, 684 (2d Cir. 1996) (“[The gun ban here] does not infringe upon a fundamental constitutional right.”). Compare *Benjamin v. Bailey*, 662 A.2d 1226, 1232 (Conn. 1995) (adopting the reasonable regulation test and holding that if “some types of weapons” are available, “the state may proscribe the possession of other weapons”), *with Rabbitt v. Leonard*, 413 A.2d 489, 491 (Conn. Super. Ct. 1979) (“[A] Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to bear arms in self defense.”); *Robertson v. Denver*, 874 P.2d 325, 328 (Colo. 1994) (en banc) (“[T]his case does not require us to determine whether that right is fundamental . . .”), *with City of Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972) (en banc)

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In sum, the *Heller* test is that the Second Amendment protects possession of firearms that are commonly possessed by law-abiding persons for lawful purposes. This is an objective standard that cannot be negated by mere use of a pejorative term. Banned firearms, such as the archetypical AR-15 rifle, meet the test.

#### IV. THE FEATURES OF THE BANNED FIREARMS DO NOT REMOVE THEM FROM SECOND AMENDMENT PROTECTION

New York asserts that the banned firearms are dangerous and unusual military-style weapons,<sup>87</sup> even though they are very usual and common among civilians and are not issued to any military force in the world.<sup>88</sup> None of the decisions upholding such bans conduct any searching analysis of the particular features at issue. The use of a particular profile of firearm in one or more heinous crimes may influence legislators to support a ban on guns that "look like that." The chief impetus for the SAFE Act itself was the murder of twenty children and six adults by a deranged man at Sandy Hook Elementary School in 2012.<sup>89</sup> Yet there is no credible evidence that the horrible result would have been any different had a firearm with a different profile been used.

Factual claims should be decided on the basis of actual evidence in the record and not on the basis of bare allegations punctuated with a constant barrage of linguistic defamation. Using the term "assault weapon" in every other sentence of an argument, without any searching analysis of specifically what is meant by the term, proves nothing. The typical features of a firearm that may turn a law-abiding citizen into a felon are not dangerous and unusual, but quite ordinary.

The SAFE Act defines "assault weapon" as "a semiautomatic rifle [or pistol] that has an ability to accept a detachable magazine and"

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("[A] purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993) ("[T]he [fundamental] right to bear arms . . . is subject to reasonable regulation."), and *City of Cincinnati v. Langan*, 640 N.E.2d 200, 203, 205 (Ohio Ct. App. 1994) ("[The ban was upheld despite] evidence that the weapons had a legitimate use for target-shooting competition and defensive purposes."), with *Harrold v. Collier*, 836 N.E.2d 1165, 1171 (Ohio 2005) (noting that strict scrutiny applies to fundamental rights).

<sup>87</sup> See *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 368 (W.D.N.Y. 2013).

<sup>88</sup> See *Citizens for a Safer Cnty. v. City of Rochester*, 627 N.Y.S.2d 193, 198 (Sup. Ct. 1994) ("[T]he guns subject to this law are not military weapons, but merely look like military weapons, since they are identical in action to sporting guns and are not capable of full automatic fire.").

<sup>89</sup> See *N.Y. State Rifle & Pistol Ass'n*, 990 F. Supp. 2d at 355, 369.

one listed feature or “a semiautomatic shotgun that has” one listed feature.<sup>90</sup> A fully automatic weapon or machine gun “fires repeatedly with a single pull of the trigger,” but a semiautomatic “fires only one shot with each pull of the trigger . . .”<sup>91</sup> The United States and numerous states have found the distinction obvious. Possession of an unregistered machine gun has been a serious federal crime since 1934,<sup>92</sup> and it is so under the laws of most states,<sup>93</sup> including New York.<sup>94</sup> The military forces of the world find the distinction quite meaningful. The difference between a gun that requires a separate trigger pull for each shot and one that fires continuously with a single trigger pull is, to put it mildly, rather obvious and fundamental.<sup>95</sup> None of the firearms that New York bans fires any faster than any other semiautomatic firearm, whether used for hunting, defense, or target shooting.

The majority in *Heller II* said that it is “difficult to draw meaningful distinctions between the AR-15 and the M-16,” adding 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.”<sup>96</sup> For that statement, *Heller II* relied on the testimony of Brady Center attorney Brian Siebel at a District of Columbia legislative hearing, asserting that a “‘30-round magazine’ of UZI ‘was emptied in slightly less than two seconds on full automatic, while the same magazine was emptied in just five seconds on semiautomatic.’”<sup>97</sup> This unsworn allegation, which cited no source, lacked any indicia of expertise.<sup>98</sup>

Even if that allegation was true, as Judge Kavanaugh noted in dissent: “[S]emi-automatics actually fire two-and-a-half times slower than automatics,” and “semi-automatic rifles fire at the same general rate as semi-automatic *handguns*,” which are “constitutionally protected under the Supreme Court’s decision in

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<sup>90</sup> N.Y. PENAL LAW §§ 265.00.22(a)–(c) (McKinney 2014).

<sup>91</sup> *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994).

<sup>92</sup> See National Firearms Act, Pub. L. 73-474, 48 Stat. 1236 (1934); *see also* 26 U.S.C. §§ 5845(b), 5861(d) (2013) (prohibiting possession of unregistered machine guns).

<sup>93</sup> See, e.g., CAL. PENAL CODE § 32625 (West 2014); 18 PA. CONST. STAT. ANN. § 908(a), (b)(1) (West 2014).

<sup>94</sup> N.Y. PENAL LAW §§ 265.00.1, 265.02(2).

<sup>95</sup> *Staples*, 511 U.S. at 602 n.1.

<sup>96</sup> *Heller II*, 670 F.3d 1244, 1263 (D.C. Cir. 2011) (citation omitted) (quoting *Staples*, 511 U.S. at 602 n.1).

<sup>97</sup> *Heller II*, 670 F.3d at 1263

<sup>98</sup> Mr. Siebel’s current occupation as a realtor further reflects no credentials as a firearms expert. *See About Me*, BRIAN SIEBEL, <http://www.briansiebel.com/about/> (last visited Feb. 23, 2015).

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*Heller.*<sup>99</sup> Furthermore, “semi-automatic *handguns* are used in connection with violent crimes far more than semi-automatic *rifles* are.”<sup>100</sup>

But it turns out that semiautomatic rifles fire much slower. According to the U.S. Army training manual *Rifle Marksmanship*, the “Maximum Effective Rate of Fire (rounds per min)” in semiautomatic for the M-4 and M16A2 rifles is 45 rounds per minute,<sup>101</sup> not even close to Siebel’s claimed 30 rounds in five seconds. In other words, a semiautomatic would fire *one round per one and one-third second*, not *six rounds per second* as claimed.

If this demonstrates the fallacy of relying on lobbyist exhortations instead of demonstrated facts in the record, it is somewhat moot. Semiautomatic firearms with a detachable magazine are not banned. They must have one more “evil, wicked, mean and nasty” feature.<sup>102</sup> The following discusses the prominent ones.

*A pistol grip that protrudes conspicuously beneath the action of the weapon or a thumbhole stock.*<sup>103</sup> The district court in *NYSRPA* noted plaintiffs’ position that a pistol grip “increases comfort [and] stability,”<sup>104</sup> but found that a pistol grip or thumbhole stock “aid shooters when ‘spray firing’ from the hip.”<sup>105</sup> *Heller II* is cited in support of that assertion, which once again relied on the unsworn testimony of Brady Center lobbyist Brian Siebel at a District of Columbia committee hearing.<sup>106</sup> No explanation is provided of the ergonomics of how a pistol grip or thumbhole stock facilitates hip-firing. It is actually more difficult to hold a rifle with a pistol grip at the hip because the wrist is twisted in an awkward, downward position. Any such firing would be highly inaccurate. A rifle with a traditional straight stock may be held more comfortably at the hip. One can mimic these positions in thin air and understand that.

The Army training manual *Rifle Marksmanship* teaches: “Place

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<sup>99</sup> *Heller II*, 670 F.3d at 1289 (Kavanaugh, J., dissenting).

<sup>100</sup> *Id.* at 1269–70.

<sup>101</sup> DEP’T OF THE ARMY, FM 3-22.9, RIFLE MARKSMANSHIP: M16-/M4-SERIES WEAPONS 2-1 (2008).

<sup>102</sup> To recall the lyrics in the Steppenwolf’s 1960s hit tune *Stay Off the Grass*.

<sup>103</sup> N.Y. PENAL LAW § 265.00.22(a)(ii)–(iii) (McKinney 2014).

<sup>104</sup> N.Y. State Rifle & Pistol Ass’n v. Cuomo, 990 F. Supp. 2d 349, 368 (W.D.N.Y. 2013).

<sup>105</sup> *See id.* at 370.

<sup>106</sup> *Heller II*, 670 F.3d 1244, 1262–63 (D.C. Cir. 2011); *see also* L.J.L. 33rd St. Assoc., LLC v. Pitcairn Properties, Inc., 725 F.3d 184, 194 (2d Cir. 2013) (“[E]xpert valuations of this nature are the product of so many complex factors, and so many assumptions . . . as to make it particularly important that the opponent of the valuations be offered the opportunity to test their conclusions by cross-examination.”).

the weapon's buttstock into the pocket of the firing shoulder.”<sup>107</sup> It further instructs: “The firing hand grasps the pistol grip so that it fits in the ‘V’ formed by the thumb and forefinger. . . . The remaining three fingers exert a slight rearward pressure to ensure that the buttstock remains in the pocket of the shoulder.”<sup>108</sup> Moreover, “unaimed fire must never be tolerated . . .”<sup>109</sup> “Keep the cheek on the stock for every shot, align the firing eye with the rear aperture, and focus on the front sightpost.”<sup>110</sup> The manual does *not* teach soldiers to “spray fire from the hip.”

Indeed, pistol grips of the same type are used in single-shot and bolt-action air guns and rifles used in the Olympics.<sup>111</sup> Such use demonstrates that the function of the pistol grip is to facilitate accurate fire from the shoulder with the best possible ergonomics.

A *folding or telescoping stock*.<sup>112</sup> The district court in *NYSRPA* noted plaintiffs' argument that “a telescoping stock, which allows the user to adjust the length of the stock, does not make a weapon more dangerous, but instead, like finding the right size shoe, simply allows the shooter to rest the weapon on his or her shoulder properly and comfortably.”<sup>113</sup> A folding stock makes a gun easier to transport, such as in an all-terrain vehicle.<sup>114</sup> A telescoping stock allows adjustments to fit the user's physique so the gun can be held more comfortably and be fired accurately.

However, the court found: “Folding and telescoping stocks aid concealability and portability.”<sup>115</sup> But New York elsewhere restricts the overall length of long guns with or without such stocks.<sup>116</sup> “A rifle or shotgun with a telescoping or folding stock is banned by the Act even if it is three feet long in its shortest configuration, and yet a rifle with a straight stock could be as short as 26” and still be

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<sup>107</sup> DEP'T OF THE ARMY, *supra* note 101, at 4-18.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 7-9.

<sup>110</sup> *Id.*

<sup>111</sup> See *Air Rifle Model 800 X*, FEINWERKBAU, WESTINGER & ALtenBURGER GMBH, [http://w  
ww.feinwerkbau.de/en/Sporting-Weapons/Air-Rifles/NEW-Model-800](http://www.feinwerkbau.de/en/Sporting-Weapons/Air-Rifles/NEW-Model-800) (last visited Feb. 23, 2015) (describing a single-shot air rifle with pistol grip and adjustable stock); *Feinwerkbau 800X PCP Air Rifle*, PYRAMYD AIR GUN MALL, [http://www.pyramydair.com/s/m/Feinwerkbau\\_800X\\_PCP\\_Air\\_Rifle/2771](http://www.pyramydair.com/s/m/Feinwerkbau_800X_PCP_Air_Rifle/2771) (last visited Feb. 23, 2015).

<sup>112</sup> N.Y. PENAL LAW § 265.00.22(a)(i) (McKinney 2014).

<sup>113</sup> N.Y. State Rifle & Pistol Ass'n v. Cuomo, 990 F. Supp. 2d 349, 368 (W.D.N.Y. 2013).

<sup>114</sup> See *id.* at 370.

<sup>115</sup> *Id.*

<sup>116</sup> PENAL § 265.00.3 (“Firearm” means . . . any weapon made from a shotgun or rifle . . . [with] an overall length of less than twenty-six inches.”); *id.* § 265.01 (prohibiting the possession of certain firearms).

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legal.”<sup>117</sup>

In response to plaintiffs’ argument that features like a pistol grip and telescoping stock make a rifle more comfortable for the individual user, the district court noted: “But Plaintiffs later argue that the banned features increase the utility for self-defense—which is just another way of saying that the features increase their lethality.”<sup>118</sup> So too, sights on firearms enhance their accuracy and usefulness for self-defense, and in that sense makes them more “lethal,” but “arms” by their very definition are “lethal,” and that is what the Second Amendment guarantees. In *McDonald v. City of Chicago*, the Supreme Court rejected the argument against incorporation of the right into the Fourteenth Amendment based on the idea “that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety.”<sup>119</sup>

*Flash suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator.*<sup>120</sup> The district court upheld banning one of these features with the comment that “[a] muzzle compensator reduces recoil and muzzle movement caused by rapid fire,”<sup>121</sup> but it is obvious that it would do the same in slow fire. Recoil can be painful, and muzzle movement interferes with accuracy. Banning a feature because it reduces pain and increases accuracy seems irrational.

Elsewhere, the court noted that “a muzzle brake reduces recoil. The SAFE Act, however, regulates muzzle ‘breaks.’”<sup>122</sup> Since the

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<sup>117</sup> Reply Memorandum of Law in Further Support of Plaintiffs’ Motion for Summary Judgment at 4, *N.Y. State Rifle & Pistol Ass’n*, 990 F. Supp. 2d 349 (No. 1:13-cv-00291-WMS).

<sup>118</sup> *N.Y. State Rifle & Pistol Ass’n*, 990 F. Supp. 2d at 368 (“[T]he very features that increase a weapon’s utility for self-defense also increase its dangerousness to the public at large.”); see *McDonald v. City of Chi.*, 561 U.S. 742, 889–90 (2010) (Stevens, J., dissenting). But Justice Stevens used that argument in support of his beliefs that “the Court badly misconstrued the Second Amendment” in *Heller* and that it was a mistake to hold “that a city may not ban handguns.” *See id.* at 890 & n.33. Justice Scalia responded: “Maybe what he means is that the right to keep and bear arms imposes *too great* a risk to others’ physical well-being. But as the plurality explains, other rights we have already held incorporated pose similarly substantial risks to public safety.” *Id.* at 799 (Scalia, J., concurring) (citation omitted).

<sup>119</sup> *McDonald*, 561 U.S. at 782 (majority opinion); see *Ill. Ass’n of Firearms Retailers v. City of Chi.*, 961 F. Supp. 2d 928, 942 (N.D. Ill. 2014) (“[W]hatever burdens the City hopes to impose on criminal users also falls squarely on law-abiding residents who want to exercise their Second Amendment right.”).

<sup>120</sup> PENAL § 265.00.22(a)(vi).

<sup>121</sup> *N.Y. State Rifle & Pistol Ass’n*, 990 F. Supp. 2d at 370.

<sup>122</sup> *Id.* at 377.

word “break” does not mean the same as “brake,” and “muzzle break” has no accepted meaning, the court declared that term unconstitutionally vague.<sup>123</sup>

*Semiautomatic shotgun with detachable magazine.*<sup>124</sup> In the NYSRPA litigation, New York was conspicuously silent on why such shotguns are banned, and the district court provided no explanation. A report by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which New York endorsed, noted that shotguns have either tube magazines or detachable magazines, concluding: “In regard to sporting purposes, the [ATF] working group found no appreciable difference between integral tube magazines and removable box magazines.”<sup>125</sup>

*Shotguns with thumbhole stocks or forward pistol grips.*<sup>126</sup> The NYSRPA litigation record is also silent on why the SAFE Act bans semiautomatic shotguns with thumbhole stocks and a second handgrip or a protruding grip that can be held by the nontrigger hand. Another ATF report on which New York relied<sup>127</sup> found the latter feature sporting because it “permits accuracy and maneuverability even for activities such as bird hunting or skeet shooting.”<sup>128</sup>

In sum, it is easy to indulge in clichés about “military” features and “assault weapons.” But when the specific features that are banned are seen under a microscope, it is clear that they are perfectly legitimate, and the prohibition thereof cannot be justified under the Second Amendment.

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<sup>123</sup> *Id.* The court also found the terms “semiautomatic version[s] of an automatic rifle, shotgun or firearm,” a banned feature on pistols, “to be excessively vague, as an ordinary person cannot know whether any single semiautomatic pistol is a ‘version’ of an automatic one.” *Id.* (alteration in original) (quoting PENAL § 265.00.22(c)(viii)) (internal quotation marks omitted).

<sup>124</sup> PENAL § 265.00.22(b)(v).

<sup>125</sup> BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, STUDY ON THE IMPORTABILITY OF CERTAIN SHOTGUNS 10 (2011), available at <https://www.atf.gov/files/firearms/industry/january-2011-importability-of-certain-shotguns.pdf>.

<sup>126</sup> PENAL § 265.00.22(b)(ii)–(iii).

<sup>127</sup> Reply Memorandum of Law in Further Support of State Defendants’ Cross-Motion to Dismiss and/or for Summary Judgment and in Opposition to Plaintiffs’ Cross-Motion for Summary Judgment at 14 n.13, *N.Y. State Rifle & Pistol Ass’n*, 990 F. Supp. 2d 349 (No. 13-cv-00291-WMS) (citing BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, STUDY ON THE IMPORTABILITY OF CERTAIN SHOTGUNS (2012), available at <https://www.atf.gov/files/firearms/industry/july-2012-importability-of-certain-shotguns.pdf>).

<sup>128</sup> BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 127, at 3.

## V. THE BAN ON STANDARD MAGAZINES AND THE SEVEN-ROUND LIMIT FOR SELF-DEFENSE IN THE HOME VIOLATE THE SECOND AMENDMENT

Standard magazines holding more than ten rounds and loaded with more than seven rounds are the norm nationwide.<sup>129</sup> A large proportion, perhaps a majority, of pistols are manufactured with magazines holding more than ten rounds.<sup>130</sup> None of the other forty-nine states limit rounds in a magazine to seven.<sup>131</sup>

Any suggestion that standard magazines are "dangerous and unusual" is belied by the purpose clause of the SAFE Act itself: "Through this legislation, New York is the first in the nation to completely ban all pre-1994 high capacity magazines; to ban any magazine that holds more than seven rounds (rather than a limit of ten) . . ."<sup>132</sup> Even as amended to allow seven rounds in a ten-round magazine, this law, not the larger-capacity magazines, is "unusual." As for being "dangerous," a magazine in itself is not even a weapon. As the District of Columbia Circuit conceded in *Heller II*: "We think it clear enough in the record that . . . magazines holding more than ten rounds are indeed in 'common use,' as the plaintiffs contend."<sup>133</sup>

Use of standard magazines in crime does not justify their prohibition. First, rifles and hence rifle magazines are rarely used in crime.<sup>134</sup> Second, while handguns, which may have magazines of varying capacities, are used in most firearm homicides,<sup>135</sup> "the American people have considered the handgun to be the quintessential self-defense weapon."<sup>136</sup>

It would not suffice to argue that while magazines holding more than ten rounds are in common use nationally, they are not in common use in New York and may be banned. While in 2000 New York banned standard magazines made after a 1994 effective date, it grandfathered those made and possessed by that date.<sup>137</sup> The law did not require that they have been possessed in New York, giving

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<sup>129</sup> See Michael P. O'Shea, *The Steepness of the Slippery Slope: Second Amendment Litigation in the Lower Federal Courts and What It Has to Do with Background Recordkeeping Legislation*, 46 CONN. L. REV. 1381, 1397–98 (2014).

<sup>130</sup> *Id.* at 1397.

<sup>131</sup> See Bill S2230-2013: Enacts the NY SAFE Act of 2013, OPEN, <http://open.nysenate.gov/legislation/bill/s2230-2013> (last visited Feb. 23, 2015).

<sup>132</sup> *Id.*

<sup>133</sup> *Heller II*, 670 F.3d 1244, 1261 (D.C. Cir. 2011).

<sup>134</sup> PLANTY & TRUMAN, *supra* note 13, at 3.

<sup>135</sup> *Id.*

<sup>136</sup> *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

<sup>137</sup> See Act of Aug. 8, 2000, ch. 189, § 10, 2000 N.Y. Laws 2788, 2793 (amended 2013).

New York residents a limitless supply thereof on the national market.<sup>138</sup> But in any case *Heller* set a national standard for common use—lack of common use of handguns in the District of Columbia, which banned them, was irrelevant. “The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is *overwhelmingly chosen by American society* for that lawful purpose.”<sup>139</sup>

The “right” to keep and bear arms, including magazines holding more than ten rounds, or ten-round magazines loaded with more than seven, is not dependent on the likelihood that a person will ever fire more than those numbers in self-defense, or even that a person will ever have to act in self-defense at all. *Heller* invalidated the District of Columbia’s ban on having a firearm operable for self-defense without any showing that a specific plaintiff was likely to be attacked or that shots would need to be fired: “This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.”<sup>140</sup> The issue is whether it is possible for a citizen to exercise the right, not the likelihood that he/she may need to do so. That standard magazines are well-suited and preferred for self-defense is demonstrated by the fact that they are issued to law enforcement<sup>141</sup> and are bought by law-abiding citizens who also use them for target shooting, competitions, and other sporting activities.<sup>142</sup>

It bears recalling that there is no municipal liability “for failure to provide special protection to a member of the public who was repeatedly threatened with personal harm and eventually suffered dire personal injuries for lack of such protection.”<sup>143</sup> That was the ruling in the famous case of Linda Riss, who was repeatedly denied police protection against threatened harm and who was then viciously attacked.<sup>144</sup> As the dissent pointed out: “[I]n conformity to the dictates of the law, Linda did not carry any weapon for self-defense. Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her.”<sup>145</sup> Here too, New York’s assurances that no

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<sup>138</sup> *Id.*

<sup>139</sup> *Heller*, 554 U.S. at 628 (emphasis added).

<sup>140</sup> *Id.* at 630.

<sup>141</sup> The SAFE Act recognizes this by exempting law enforcement from its prohibitions. N.Y. PENAL LAW § 265.20.a.1.(b)–(c) (McKinney 2014).

<sup>142</sup> See O’Shea, *supra* note 129, at 1397–98.

<sup>143</sup> *Riss v. City of N.Y.*, 240 N.E.2d 860, 860, 861 (N.Y. 1968).

<sup>144</sup> *Id.* at 862 (Keating, J., dissenting).

<sup>145</sup> *Id.*

one “needs” what they deem necessary for protection are worthless.

It is no excuse that citizens could keep multiple magazines loaded and change magazines if seven shots are fired or keep multiple firearms loaded. The “let them eat cake” alternative of switching magazines ignores the effects of stress, not to mention of being handicapped, and it ignores that not everyone has a second magazine or keeps one loaded. Keeping several firearms loaded is equally and utterly unrealistic. Many citizens only have one magazine and one firearm.

The test is what guns and magazines are “in common use,” are “typically possessed by law-abiding citizens for lawful purposes,” are “popular weapon[s] chosen by Americans for self-defense,” are “chosen by American society for that lawful purpose [of self-defense],” and are what “a citizen may prefer . . . for home defense.”<sup>146</sup> The newly-minted ban on magazines and the arbitrarily-designated number of rounds loaded therein that are chosen nationwide by Americans is a substantial burden on Second Amendment rights.

Ironically, it is a crime to load more than seven rounds in a magazine for protection of life at one’s home, but ten rounds may be loaded at a firing range of a corporation organized for conservation or to foster proficiency in arms, at a firing range to fire a rifle or shotgun, at an NRA-approved target shooting competition, or at a match sanctioned by the International Handgun Metallic Silhouette Association (IHMSA).<sup>147</sup> By trumping defense of life in one’s home in favor of recreation, the prohibition on having more than seven rounds in a magazine irrationally discriminates against persons who keep firearms for self-defense in their homes, and in favor of persons who participate in recreational shooting.

It is not as if a greater danger of an accidental discharge exists at home, where a firearm would be discharged only in a dire emergency, than at a range, which exists for the purpose of discharging firearms. Nor would that have any relation to the number of rounds in a magazine. An unintentional discharge of a *single* round could endanger human life, and all the rules of gun safety focus on avoiding that possibility. No basis exists to suggest that persons do not practice gun safety in their homes, but do so

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<sup>146</sup> District of Columbia v. Heller, 554 U.S. 570, 624–25, 628–29 (2008).

<sup>147</sup> N.Y. PENAL LAW § 265.20.a.7-f (McKinney 2014). IHMSA was formed “to have some fun. . . . The object of the competition is to knock down metallic silhouettes (chickens, pigs, turkeys and rams) at various ranges . . . .” *Welcome to IHMSA, INT'L HANDGUN METALLIC SILHOUETTE ASS'N*, <http://www.ihmsa.org/history-of-ihmsa.html> (last visited Feb. 23, 2015).

only at ranges.

To be sure, the ability to shoot at ranges promotes important interests. “The right to possess firearms for protection implies a corresponding right to . . . maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective.”<sup>148</sup> But the core right is not less important than what makes its exercise possible.

The district court in *NYSRPA* invalidated the seven-round loaded limit for magazines under the Second Amendment.<sup>149</sup> Using the same reasoning, the court should have also invalidated the ten-round capacity limit, but upheld it instead.<sup>150</sup> The court found: “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.”<sup>151</sup> But it also stretches the bounds of one’s imagination to suppose that those intent on doing harm will load their weapons with magazines that have a capacity of only ten rounds.

Noting that *Heller* found the Second Amendment right to be “at its zenith in the home,” and “highlighted the right of a citizen to arm him or herself for self-defense,” the court found that this restriction has “a disturbing perverse effect, pitting the criminal with a fully-loaded magazine against the law-abiding citizen limited to seven rounds.”<sup>152</sup> The ten-round capacity limit does the same.

Continuing, the court observed: “New York fails to explain its decision to set the maximum at seven rounds, which appears to be a largely arbitrary number.”<sup>153</sup> So too is ten rounds an arbitrary number. Instead of an arbitrary number test, *Heller* held the test to be what is in common use by law-abiding citizens.

Finally, as with the banned firearms, no credible evidence exists that a ban on standard magazines that only law-abiding citizens will obey would make any difference to a criminal intent on evil. Larger capacity magazines are readily available nationwide. Moreover, since criminals have the advantage of planning their attacks, they can easily obtain multiple ten-round magazines to use and can even bring multiple firearms to the place of confrontation.

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<sup>148</sup> Ezell v. City of Chi., 651 F.3d 684, 704 (7th Cir. 2011).

<sup>149</sup> N.Y. State Rifle & Pistol Ass’n v. Cuomo, 990 F. Supp. 2d 349, 371–72 (W.D.N.Y. 2013).

<sup>150</sup> *Id.* at 371.

<sup>151</sup> *Id.* at 372.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

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The SAFE Act makes life safer for criminals and less safe for their victims.

## VI. THE BANS DO NOT SURVIVE HEIGHTENED SCRUTINY

The Second Amendment's textual test is whether the right is "infringed," not whether it is "substantially" infringed or burdened.<sup>154</sup> *Heller* explicitly held that rational basis "could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right," adding: "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."<sup>155</sup>

The ban on guns and magazines here "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose" of self-defense and categorically fails constitutional muster "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."<sup>156</sup> If a standard of review must be applied, it would be strict scrutiny. But the SAFE Act does not even pass intermediate scrutiny.<sup>157</sup>

### *A. As the Right is Fundamental, Strict Scrutiny Must Be Applied*

In *McDonald*, the Supreme Court held that "the right to keep and bear arms is fundamental to our scheme of ordered liberty," and is "deeply rooted in this Nation's history and tradition."<sup>158</sup> It called the right "fundamental" multiple times.<sup>159</sup> *McDonald* rejected the

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<sup>154</sup> "There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36–37 (2004) (O'Connor, J., concurring).

<sup>155</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27. (2008)

<sup>156</sup> *Id.* at 628.

<sup>157</sup> "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Heller II*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). "Whether we apply the *Heller* history- and tradition-based approach or strict scrutiny or even intermediate scrutiny, D.C.'s ban on semi-automatic rifles fails to pass constitutional muster." *Id.* at 1285.

<sup>158</sup> *McDonald v. City of Chi.*, 561 U.S. 742, 767, 780 (2010).

<sup>159</sup> *Id.* at 767, 768, 776, 778. "Assault weapon" bans were upheld by pre-*Heller* courts that believed that the Second Amendment did not even protect an individual right, much less a fundamental right. *See, e.g.*, *Olympic Arms v. Buckles*, 301 F.3d 384, 388–89 (6th Cir. 2002) (upholding the 1994 federal assault weapon ban because Sixth Circuit precedent does not recognize an individual right to own weapons); *Richmond Boro Gun Club, Inc. v. City of N.Y.*, 97 F.3d 681, 684, 686 (2d Cir. 1996) (holding that New York City's assault weapon ban was

view “that the Second Amendment should be singled out for special—and specially unfavorable—treatment.”<sup>160</sup> It refused “to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.”<sup>161</sup>

A right is “fundamental” if it is “explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.”<sup>162</sup> “[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny.”<sup>163</sup> “Under the strict-scrutiny test, [the government has the burden to prove that a restriction] is (1) narrowly tailored, to serve (2) a compelling state interest.”<sup>164</sup>

*Heller* rejected Justice Breyer’s “judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.’”<sup>165</sup> Such a test would allow “arguments for and against gun control” and the upholding of a handgun ban “[b]ecause handgun violence is a problem.”<sup>166</sup> *Heller* explained: “Like the First, [the Second Amendment] is the very *product* of an interest balancing by the people . . . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>167</sup>

Justice Breyer’s “interest-balancing” approach was a form of, and relied on cases applying, intermediate scrutiny.<sup>168</sup> He deferred to the claims in a committee report that favored the handgun ban<sup>169</sup> and relied on empirical studies about the alleged role of handguns

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constitutional because it did not affect a fundamental constitutional right); United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984) (“[T]he right to possess a gun is clearly not a fundamental right . . . .”).

<sup>160</sup> *McDonald*, 561 U.S. at 778–79.

<sup>161</sup> *Id.* at 780. No constitutional right is “less ‘fundamental’ than” others, and “we know of no principled basis on which to create a hierarchy of constitutional values.” Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982).

<sup>162</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

<sup>163</sup> *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>164</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002).

<sup>165</sup> *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

<sup>166</sup> See *id.*

<sup>167</sup> *Id.* at 635.

<sup>168</sup> *Id.* at 690 (Breyer, J., dissenting) (citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 388 (2002) (Breyer, J., dissenting); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Mathews v. Eldridge*, 424 U.S. 319, 339–49 (1976); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)).

<sup>169</sup> See *Heller*, 554 U.S. at 693–96 (Breyer, J., dissenting).

in crime, injuries, and death, rejecting contrary studies questioning the effectiveness of the ban and focusing on lawful uses of handguns.<sup>170</sup> The majority in *Heller* and *McDonald* both entirely disregarded such legislative statements and policy arguments.

*Heller* recognized in dictum some "presumptively lawful regulatory measures," such as the prohibition on firearm possession by a felon.<sup>171</sup> Justice Breyer's *Heller* dissent suggested that "the majority implicitly . . . rejects [a] suggestion [that strict scrutiny should apply] by broadly approving a set of laws . . . whose constitutionality under a strict scrutiny standard would be far from clear."<sup>172</sup> The district court in *NYSRPA* sought to justify intermediate scrutiny of the SAFE Act based in part on Justice Breyer's dissenting view about the dictum in the majority opinion.<sup>173</sup> However, such regulatory measures have been held to be consistent with strict scrutiny.<sup>174</sup>

The Second Circuit has applied intermediate scrutiny to restrictions on carrying handguns outside the home, thus "applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home."<sup>175</sup> That implies that strict scrutiny would apply to gun bans in the home, given that "Second Amendment guarantees are at their zenith within the home."<sup>176</sup>

Other cases applying intermediate scrutiny do not involve bans on possession of guns by law-abiding citizens in the home. For instance, intermediate scrutiny applies to restrictions on possession of firearms by certain convicted criminals.<sup>177</sup> But where a regulation involves law-abiding persons, "a more rigorous showing . . . should be required, if not quite 'strict scrutiny.'"<sup>178</sup>

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<sup>170</sup> See *id.* at 696–703.

<sup>171</sup> *Id.* at 626–27 & n.26 (majority opinion).

<sup>172</sup> *Id.* at 688 (Breyer, J., dissenting).

<sup>173</sup> N.Y. State Rifle & Pistol Ass'n v. Cuomo, 990 F. Supp. 2d 349, 366 (W.D.N.Y. 2013).

<sup>174</sup> *State v. Eberhardt*, 2014-0209, p. 11 (La. 07/1/2014); 145 So.3d 377, 385. The Louisiana Supreme Court took note of the *Heller* dictum and upheld that state's ban on felon firearm possession under the strict scrutiny test of the state arms guarantee, finding that the law serves a compelling state interest and that it is narrowly tailored. *Id.*

<sup>175</sup> *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93–94 (2d Cir. 2012).

<sup>176</sup> *Id.* at 89 (citing *Heller*, 554 U.S. at 628–29).

<sup>177</sup> See *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc); see also *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (concluding that intermediate scrutiny is more appropriate for persons with a criminal history than strict scrutiny).

<sup>178</sup> *Ezell v. City of Chi.*, 651 F.3d 684, 708 (7th Cir. 2011) (examining the Second Amendment where there was a ban on firing ranges in the city and no ban in the home).

### B. The Bans Do Not Satisfy Intermediate Scrutiny

True intermediate scrutiny has teeth—it requires that a law be “substantially related to the achievement of an important governmental interest.”<sup>179</sup> The SAFE Act comes nowhere near that standard. Moreover, “it is [the court’s] task in the end to decide whether [the legislature] has violated the Constitution,” and thus “whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law.”<sup>180</sup> Assertions by bill sponsors or the governor cannot override a constitutional right.<sup>181</sup>

*Heller* made no mention of legislative findings. *McDonald*, which rejected the power “to allow state and local governments to enact any gun control law that they deem to be reasonable,”<sup>182</sup> barely mentioned Chicago’s legislative finding about handgun deaths and accorded it no discussion.<sup>183</sup> Instead, *McDonald* noted that “the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.”<sup>184</sup>

But even if a lesser standard is applied, such as that applied to adult bookstores under the First Amendment, a legislature cannot “get away with shoddy data or reasoning. The municipality’s evidence must fairly support the municipality’s rationale for its ordinance.”<sup>185</sup> If plaintiffs “cast direct doubt on this rationale, either by demonstrating that the municipality’s evidence does not support its rationale or by furnishing evidence that disputes the municipality’s factual findings . . . [then] the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.”<sup>186</sup> That has not taken place here.

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<sup>179</sup> *Kachalsky*, 701 F.3d at 96–97 (emphasis added) (citing *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011); *Skoien*, 614 F.3d at 641–42; *Ernst J. v. Stone*, 452 F.3d 186, 200 n.10 (2d Cir. 2006)).

<sup>180</sup> *Sable Commc’ns. of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989).

<sup>181</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (applying intermediate scrutiny to a content-neutral regulation and holding that the regulation must not burden more speech than necessary). *Turner Broadcasting Systems’* predecessor case reiterated the above holding of *Sable Communications*. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994).

<sup>182</sup> *McDonald v. City of Chi.*, 561 U.S. 742, 783–84 (2010).

<sup>183</sup> *Id.* at 750–51.

<sup>184</sup> *Id.* at 790.

<sup>185</sup> *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002).

<sup>186</sup> *Id.* at 439.

Nothing in the crime data justifies the SAFE Act under intermediate scrutiny. If gun crimes fell after 1994, it could not possibly be attributed to the federal law. The federal law exempted all “assault weapons” that were possessed as of the effective date, and thus the millions of guns already in existence continued to be possessed.<sup>187</sup> Moreover, a semiautomatic rifle with a detachable magazine was not defined as an “assault weapon” unless it had two particular features, such as a pistol grip and a bayonet mount.<sup>188</sup> Manufacturers complied by removing one feature, such as the bayonet mount, and Americans continued to buy essentially the same rifles.<sup>189</sup> It would be ludicrous to suggest that crime fell because bayonet mounts were removed from the newly-made rifles that were otherwise identical. *Post hoc, ergo propter hoc* just doesn’t work here.

That is particularly the case here, given that crime has continued to remain low for years after expiration of the federal law. To repeat what the Bureau of Justice Statistics reported: “Firearm-related homicides declined 39%, from 18,253 in 1993 to 11,101 in 2011.”<sup>190</sup>

The changing views of a government agency about whether the firearms at issue are “sporting” fails to buttress banning them under intermediate scrutiny. In 1989, ATF decided that it no longer considered certain firearms to be “particularly suitable for or readily adaptable to sporting purposes” as required for importation by federal law.<sup>191</sup> ATF had previously considered such firearms to meet the sporting criteria since it was enacted in the Gun Control Act of 1968.<sup>192</sup> Yet the Second Amendment is not confined to firearms that a government agency deems sporting, but extends to firearms “of the kind in common use,” and “popular weapon[s]

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<sup>187</sup> See 18 U.S.C. § 922(v)(2) (2000).

<sup>188</sup> *Id.* § 921(a)(30)(B).

<sup>189</sup> See 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 159 (Daniel W. Webster & John S. Vernick eds., 2013).

<sup>190</sup> PLANTY & TRUMAN, *supra* note 13, at 1.

<sup>191</sup> 18 U.S.C. § 922(v)(2) (2013).

<sup>192</sup> *Id.* ATF’s 1989 change in policy was challenged, but no final decision on the merits was rendered. *Gun South, Inc. v. Brady*, 877 F.2d 858, 866 (11th Cir. 1989) (reviewing the validity of the Bureau’s ninety-day suspension on the importation of certain “assault-type” weapons). The district court found that the reinterpretation was sparked by politics rather than by ATF’s experts, who testified that the rifles at issue continued to be sporting. *Gun South, Inc. v. Brady*, 711 F. Supp. 1054, 1056–60 (N.D. Ala. 1989), (“[A]ll of the evidence in this case demonstrates that the Steyr AUG is designed and marketed to be predominantly a sporting weapon.”), *rev’d*, 877 F.2d 858 (11th Cir. 1989).

chosen by Americans for self-defense.”<sup>193</sup>

Nor do government agencies define the limits of constitutional rights. A politically-charged report by ATF in 1994 asserted that “assault weapons” are designed for “shooting at human beings” and are “mass produced mayhem.”<sup>194</sup> Such rhetoric blatantly ignores that the firearms at issue were and are predominantly owned by law-abiding citizens who bought them after passing background checks, who use them for target shooting, and who would never use them to shoot at a human being other than in lawful self-defense.

In short, the government must do more than offer “plausible *reasons why*” a gun restriction is substantially related to an important government goal; it 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.<sup>195</sup> The SAFE Act cannot be upheld under that standard.

## VII. CONCLUSION

The arguments that seek to justify the SAFE Act reflect a fundamental misunderstanding of the basic nature of the right to keep and bear arms and of the characteristics of the actual firearms and their features that are prohibited. The ultimate justification for banning “assault weapons” and magazines is that they are “arms” that can be misused, but that is the same for all arms. The Second Amendment nonetheless resolves that law-abiding citizens may possess arms. Of course, at the time of this writing, it remains to be seen how the Second Circuit may rule on the SAFE Act or whether the Supreme Court will resolve such issues.

The wisdom of the ages gives meaning to the philosophical origins of the Second Amendment. In his *Commonplace Book*, Thomas Jefferson copied the following from the greatly-admired penal reformer Cesare Beccaria, and it directly indicts the SAFE Act:

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water

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<sup>193</sup> *District of Columbia v. Heller*, 554 U.S. 570, 624, 629 (2008) (quoting *U.S. v. Miller*, 307 U.S. 174, 179 (1939) (internal quotation marks omitted)).

<sup>194</sup> *What Law Enforcement Says About Assault Weapons*, COALITION TO STOP GUN VIOLENCE, <http://csgv.org/resources/2013/what-law-enforcement-says-about-assault-weapons/> (last visited Feb. 23, 2013).

<sup>195</sup> See *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010).

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because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.<sup>196</sup>

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<sup>196</sup> THE COMMONPLACE BOOK OF THOMAS JEFFERSON 314 (Gilbert Chinard ed., 1926) (quoting CESARE BECCARIA, DEI DELITTI E DELLE PENE 141–42 (1786)); see CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 87–88 (Henry Paolucci trans., 1963).