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

United States Court of Appeals

for the

Second Circuit

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, BATAVIA MARINE & SPORTING SUPPLY, WILLIAM NOJAY, THOMAS GALVIN, ROGER HORVATH,

Plaintiffs-Appellants-Cross-Appellees,

(For Continuation of Caption See Inside Cover)

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

RESPONSE AND REPLY BRIEF FOR PLAINTIFFS-APPELLANTS -CROSS-APPELLEES

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– 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,

GERALD J. GILL, Chief of Police for the Town of Lancaster, New York, LAWRENCE FRIEDMAN,

Defendants-Appellees,

FRANK A. SEDITA, III, District Attorney for Erie County,

Defendant.

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SUMMARY OF ARGUMENT

The State of New York has second-guessed the judgment of millions of law-abiding citizens across the United States by deeming certain common semiautomatic firearms and standard-capacity ammunition magazines to be too dangerous for civilian use and banning them. But under the Second Amendment, this is a choice New York is forbidden to make. The firearms and ammunition magazines that New York bans are "arms protected by the Second Amendment." *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008). And such arms *cannot be banned*: when the Second Amendment "right *applies* to" certain types of firearms, "citizens *must* be permitted to use [them] for the core lawful purpose of self-defense." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (emphases added) (quotation marks omitted).

The notion that the features singled out by New York's ban make a firearm more "dangerous" than firearms without those features is preposterous. The banned features have nothing to do with the lethality or stopping power of the rounds fired by a firearm. Rather, the features the State bans tend to enhance a firearm's ergonomics and accuracy and thus *make it safer and more effective for lawful purposes such as self-defense*. The standard-capacity ammunition magazines the State bans likewise promote self-defense by increasing the

likelihood that law-abiding citizens will have ammunition sufficient to thwart a criminal seeking to inflict bodily harm on them and their families.

New York's targeting of firearms with "thumbhole stocks" well illustrates the irrationality of the State's ban. A thumbhole stock is a hole in the stock of a firearm through which the user's thumb can be inserted, allowing the firearm to be held with more comfort and stability. This promotes accuracy and aids in retaining a firearm that a criminal attempts to wrest away. But, under New York's ban, the presence of a thumbhole stock may make the difference between a lawful and an unlawful firearm, as illustrated by the following images, copied from the amicus brief of the National Shooting Sports Foundation in *Shew v. Malloy*, No. 14-0319-cv (2d Cir. May 23, 2014):

While New York's ban is flatly unconstitutional under *Heller*, it also would fail any standard of scrutiny this Court potentially could apply to it. Even under intermediate scrutiny, New York must identify "*substantial* evidence" supporting its legislature's judgment that the State's ban "*will* alleviate [a real harm] *in a material way*." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (emphases added). Three things must be true for the State's ban to advance public safety: (a) the ban must reduce the use of the banned firearms and magazines in crime, (b) the substitution of other firearms and magazines for the banned items must make crime less lethal, and (c) any reduction in the lethality of crime must not be outweighed by a reduction in the effectiveness of self-defense by law-abiding citizens. The State does not have substantial evidence for *any* of these propositions, much less all of them.

The State's seven-round load limit for ten-round magazines is even more patently unconstitutional than its firearm and magazine ban, and the district court correctly held that it violates the Second Amendment. Even if one were to accept the unfounded proposition that New York's ban will limit violent criminals to using ten-round magazines, the notion that those violent criminals will load entirely lawful ten-round magazines with anything less than ten rounds of ammunition is absurd.

Finally, several provisions of the State's ban are void for vagueness under the test announced by a plurality of the Supreme Court in *City of Chicago v. Morales*, 527 U.S. 41 (1999).

ARGUMENT

I. The SAFE Act Is Flatly Unconstitutional Because It Bans Protected Arms.

Under *Heller* and *McDonald*, this case turns on the answer to a single question: whether the firearms the SAFE Act bans are protected by the Second Amendment. That is because if the Second Amendment right "*applies* to" particular firearms, then "citizens *must* be permitted to use [them] for the core lawful purpose of self-defense." *McDonald*, 130 S. Ct. at 3036 (emphases added) (quotation marks omitted). Because New York cannot show that the semiautomatic firearms and ammunition magazines it bans lack constitutional protection, the State's ban is unconstitutional.

1. Seeking to justify its ban, New York applies the incorrect legal standard, arguing that "plaintiffs have not demonstrated that the SAFE Act's restrictions on assault weapons and large capacity magazines 'amount[] to a prohibition on an entire class of "arms" that is overwhelmingly chosen by American society for [self-defense in the home].' " State Br. 31 (alterations by the State) (quoting *Heller*, 554 U.S. at 628). There are two legal errors implicit in this statement. First, it implies that Plaintiffs bear the burden of showing that the arms

New York bans are protected. But *Heller* makes clear that "the Second Amendment extends, prima facie, to *all* instruments that constitute bearable arms." 554 U.S. at 582 (emphasis added). Thus, the *State* bears the burden to establish that the arms it seeks to ban are not protected. *See United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) (concluding that "government ha[d] not proved" that law fell outside scope of Second Amendment's protection); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (placing the burden upon the government to "demonstrate[] that the challenged statute regulates activity falling outside the scope of the Second Amendment right . . . " (quotation marks omitted)); *Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011) (same). Second, the arms that the Second Amendment protects are not limited to those that are "overwhelmingly chosen by Americans" for self-defense. The question, rather, is whether those arms are "in common use . . . for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. Firearms in "common use" include, but are not limited to, those "overwhelmingly chosen" by Americans for lawful purposes. The State thus bears the burden to show that the arms it seeks to ban are "not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. This is a burden the State has not, and cannot possibly, meet, because the firearms it bans include popular firearms that millions of law-abiding citizens possess for lawful purposes. And because the State cannot meet its burden, the inquiry is over. There

is no independent inquiry into whether firearms typically possessed for lawful purposes are "dangerous and unusual weapons," State Br. 25, because such firearms by definition are not dangerous and unusual. *See Heller*, 554 U.S. at 627.

2. The State does not dispute that the AR-15 rifle, which is "representative of the type of weapon the SAFE Act seeks to regulate," SPA22, is the "most popular semi-automatic rifle" in the United States. *Heller v. District of Columbia*, 670 F3d. 1244, 1287 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting). Surely the Nation's most popular semiautomatic rifle and other similar firearms are protected by the Second Amendment.

No one knows exactly how many "semiautomatic assault weapons" there are in the United States, which is unsurprising because the term does not denote an actual category of firearms and the number would shift depending upon which political definition of the term were under consideration. New York's substitution of a "one-feature" test for its prior "two-feature" test shows that the term is readily subject to manipulation. But it is undisputed that the figure is in the millions. (The State says 7 million. *See* State Br. 31.) The State attempts to downplay this fact by arguing that some people own multiple "assault weapons," some are owned by law enforcement, and some are owned by criminals. But these considerations do not help the State's case. The survey data cited by the State found that a plurality of respondents—40%—owned a single "modern sporting rifle" such as an AR-15

and a majority—65%—owned one or two, JA164, indicating that the firearms the State bans are not concentrated in a small number of hands. *See also, e.g.*, NSSF Amicus Br. 9 ("[A]n analysis of the data from ATF and [the International Trade Commission] shows that more than 4.8 million people in the United States currently own at least one modern sporting rifle."). The same survey found that only about 7.5% of owners were active law enforcement officials. JA162. And the percentage of "assault weapons," and particularly "assault rifles," that are used in crime is minuscule. *See, e.g.*, Plaintiffs' Br. 23. For example, from 1995 to 2010 a total of 205 murders were committed in the State of New York with *any* type of rifle, not just "assault" rifles, versus 5,900 with the handguns *Heller* held to be constitutionally protected. *See* JA1985. Nearly five times more people—992—were punched or kicked to death than were killed with a rifle. *Id*. And over ten times more people—2,628—were killed with a knife. *Id*.

The State argues that "large-scale manufacture and distribution of a weapon alone does not qualify it for Second Amendment protection," State Br. 30, but it certainly is evidence that a firearm is in common use and typically possessed by law-abiding citizens for lawful purposes. And such evidence is a formidable obstacle for the State to overcome in seeking to meet its burden to show that the firearms it bans are not constitutionally protected.

Furthermore, the semiautomatic firearms that the State brands as "assault weapons" and bans are, as the State admits, a "sub-class" of the broader category of semiautomatic firearms. State Br. 25. They are not fully automatic machine guns that keep firing as long as the shooter holds down the trigger. Rather, a separate pull of the trigger is required for each round fired. Because they are semiautomatic, the firearms the State bans do *not* have a mechanism allowing the user to choose between automatic and semiautomatic fire. And it is this feature that distinguishes a "civilian" firearm from a "military" one. *Staples v. United States*, 511 U.S. 600, 603 (1994). The State does not even attempt to argue that it could ban *all* semiautomatic firearms, and for good reason—they are overwhelmingly popular with the law-abiding public. For example, ATF statistics indicate that 82 percent of the handguns made for the domestic market in 2011 were semiautomatic. *See* JA143 (Overstreet Declaration).

The Second Amendment's protection of semiautomatic firearms is fatal to the State's ban, for "semiautomatic assault weapons" are not a type or class of semiautomatic firearms that may be treated differently than other semiautomatic firearms for constitutional purposes. Rather, "the term 'assault weapon' . . . is a political term, developed by anti-gun publicists . . . ." *Stenberg v. Carhart*, 530 U.S. 914, 1000 n.16 (2000) (Thomas, J., dissenting). Even the ATF has admitted that "it is somewhat of a misnomer to refer to [semiautomatic] weapons as 'assault

rifles' " because "[t]rue assault rifles are selective fire weapons *that will fire in a fully automatic mode*." JA1633-34 (1989 ATF Report) (emphasis added).

The State's arguments reinforce the fundamental similarity between the semiautomatic firearms it seeks to ban and all other semiautomatic firearms. Semiautomatics, the State argues, "fire almost as rapidly as automatics," which, under *Heller*, can be banned. State Br. 26 (quoting *Heller II*, 670 F.3d at 1263). As an initial matter, the *Heller II* majority relied entirely on the inaccurate, unsworn legislative testimony of a Brady Center lobbyist. The lobbyist claimed that a semiautomatic firearm fired *30 rounds in five seconds*, but an Army manual states the maximum effective rates of semiautomatic fire for various M4- and M16-series firearms to be between 45-65 rounds per minute—roughly *5 rounds in five seconds*. *See* Plaintiffs' Br. 18. Furthermore, the lobbyist's testimony "indicate[d] that semi-automatics actually fire two-and-a-half times slower than automatics." *Heller II*, 670 F.3d at 1289 (Kavanaugh, J., dissenting). But the principal point is that "assault weapons" fire no more rapidly than *other semiautomatic firearms*. Thus, the ability to fire rounds "rapidly" cannot possibly distinguish the firearms the State seeks to ban from other semiautomatic firearms that remain lawful.

Staples further undermines the State's position. The firearm at issue in *Staples* was "an AR-15 rifle." 511 U.S. at 603. And *Staples* recognized that AR-

15 riles are *unlike* firearms such as "machineguns, sawed-off shotguns, and artillery pieces," because they, like other semiautomatic firearms, "traditionally have been widely accepted as lawful possessions." *Staples*, 511 U.S. at 611-12. While *Staples* may not have "*held* . . . that a semiautomatic AR-15 was constitutionally protected," State Br. 25 n.8 (emphasis added), no other conclusion is compatible with its reasoning. Again, the Second Amendment's protection extends to firearms that are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. *Staples* establishes that AR-15s "traditionally have been widely accepted as lawful possessions." 511 U.S. at 612. Ergo, AR-15s, like other semiautomatic firearms, are constitutionally protected.

3. The State asserts that it should be allowed to single out certain semiautomatic firearms on the basis of features that serve "combat-functional ends." State Br. 25. But it cannot be that having a feature initially developed for or useful in military combat causes a firearm to lose constitutional protection. If that were the case, *all* firearms could be banned, for the ability to fire a projectile with stopping power capable of thwarting an enemy's attack plainly has a military application. Furthermore, any such conclusion would be wholly incompatible with the reason why the Second Amendment was included in the Bill of Rights—"to prevent elimination of the militia." *Heller*, 554 U.S. at 599. Militia "men were expected to appear bearing arms supplied by themselves and of the kind in

common use at the time," *id*. at 624, and it was understood that those protected arms could serve "combat-functional ends."

The features the State focuses on do not transform a firearm into a fundamentally different type of weapon. The State says that "[t]he SAFE Act's definition of assault weapon was designed to focus on the lethality of the weapon . . . ." State Br. 13 (quotation marks and brackets omitted). But as Professor Koper, the State's expert in this case, explained in connection with the now-expired federal "assault weapons" ban (the "1994 Federal Ban"):

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

JA460 (emphases added). The same is true of New York's ban.

Indeed, the features the State's ban targets, such as thumbhole stocks, telescoping stocks, muzzle compensators, flash suppressors, and pistol grips, tend to *improve* a firearm's accuracy and usability. Plaintiffs' Br. 20-21. It is exactly backwards from *Heller*'s reasoning to conclude that firearms with features making them *more effective* for lawful purposes lack constitutional protection because those firearms purportedly are more "dangerous" when used by criminals. *Compare Heller*, 554 U.S. at 629 (discussing "reasons that a citizen may prefer a handgun for home defense"), *with id.* at 711 (Breyer, J., dissenting) ("the very

attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous"). Features enhancing a firearm's effectiveness should *enhance* the firearm's constitutional protection, not detract from it.

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

The purpose of the banned features is *not* to facilitate "spray firing," whether from the hip or otherwise. State Br. 27. For shooters desiring to hit a target, whether at the range or to save their lives, *accuracy* is key. And spray-firing from the hip *sacrifices* accuracy: spray-firing is the antithesis of aimed firing, and firing from the hip makes sight-aligned fire impossible. Plaintiffs' expert Guy Rossi, a nationally recognized law enforcement trainer, explains as follows in the context of discussing pistol grips on rifles:

> Pistol grips provide sight-aligned accurate fire . . . . Positioning the rear of the stock *into [the] pocket of the shoulder* and maintaining it in that position is aided by the pistol grip, and is *imperative* for accurate sight alignment and thus accurate shooting with rifles of this design, due to the shoulder stock being in a straight line with the barrel. This is because the shooter's eye functions as the rear sight of the long gun. The more consistent the shooter's eye is in relation to the line of the stock and barrel, the more accurate the shot placement. *This sight alignment between the eye and firearm is not conducive to spray or hip fire.*

JA239 (emphases added).

To be sure, this Court in *Richmond Boro Gun Club, Inc. v. City of New York* stated that the military favors firearms with pistol grips because they "aid[] in 'one-handed firing' at the hip level." 97 F.3d 681, 685 (2d Cir. 1996) (quoting 1989 ATF Report at 7). But this dictum does not address the utility of pistol grips for promoting sight-aligned accurate fire, which the evidence in this case shows they do. What is more, the 1989 ATF Report cited by *Richmond Boro Gun Club*, like Mr. Rossi, emphasizes that a pistol grip on a rifle with a straight-line stock such as the civilian AR-15 or the military M-16 allows the shooter to hold and fire the weapon accurately: "The vast majority of military firearms employ a well-defined pistol grip that protrudes conspicuously beneath the action of the weapon. In most cases, the 'straight line design' of the military weapon *dictates* a grip of this type *so that the shooter can hold and fire the weapon*." JA1634 (emphases added) (footnote omitted). And lest there be any confusion, the military does not train soldiers to routinely fire from the hip. To the contrary, soldiers, like civilians, are taught to "[p]lace the weapon's buttstock into the pocket of the firing shoulder." UNITED STATES DEP'T OF ARMY, RIFLE MARKSMANSHIP, M16-/M4-SERIES WEAPONS 4-18 (2008). And by "exert[ing] a slight rearward pressure" on the pistol grip, soldiers seek to "ensure that the buttstock *remains* in the pocket of the shoulder." *Id*. (emphasis added).

While Plaintiffs by no means endorse the 1989 ATF Report's conclusions, it is of little use to the State here. The report addresses whether ATF should reverse the position it had taken since 1968 that certain semiautomatic rifles with features the State's ban targets are "generally recognized as particularly suitable for or readily adaptable to sporting purposes." 18 U.S.C. § 925(d)(3). ATF interpreted "sporting purposes" "narrow[ly]" to "refer[] to the traditional sports of target shooting, skeet and trap shooting, and hunting," with "target shooting" not including all types of organized shooting competitions. JA1636-37. Furthermore, a firearm "recognized as 'suitable' for use in [these] traditional sports" would not qualify unless it was deemed by ATF to be "particularly suitable for such purposes." JA1641 n.2 (emphasis in original).

Whether a government agency deems firearms with certain features to be particularly suitable for a subset of lawful uses of firearms—a subset *excluding* "the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630—provides precious little guidance for evaluating whether the firearms are constitutionally protected. Indeed, because ATF *acknowledged* that the rifles it was evaluating were "**popular among some gun owners for . . . self-defense**," JA1640 (emphasis added), the 1989 ATF Report if anything supports Plaintiffs' position.

4. Given their ergonomic designs and accuracy enhancing features, it should come as no surprise that the AR-15 rifle and other similar firearms that the

State bans are extremely popular with law-abiding citizens. As Plaintiffs' expert Dr. Gary Roberts has explained, "[t]he semi-automatic AR15 carbine is likely the most ergonomic, safe, and effective firearm for . . . civilian self-defense." JA2053. (Dr. Roberts has extensive experience in ballistics. JA2039.) *See also, e.g.*, FRANK MINITER, THE FUTURE OF THE GUN 35 (2014) ("ARs are popular with civilians and law enforcement around the world because they're accurate, light, portable, and modular. . . . It's also easy to shoot and has little recoil, making it popular with women. The AR-15 is so user-friendly that a group called 'Disabled Americans for Firearms Rights' . . . says the AR-15 makes it possible for people who can't handle a bolt-action or other rifle type to shoot and protect themselves."); ROB PINCUS, DEFEND YOURSELF: A COMPREHENSIVE SECURITY PLAN FOR THE ARMED HOMEOWNER 158-59 (2014) ("In the civilian rifle classes I run, most people have AR-15-type rifles they train with for defensive use . . . . This is the same type of rifle I stage for my own personal-defense use."). This opinion is consistent with a 2010 survey of over 7,000 owners of AR-15s and other "modern sporting rifles," which found that recreational target shooting and home defense are the top two reasons for owning them and that they are chosen for their accuracy and reliability. JA172, 185.

The State argues that "assault weapons" are disproportionately used in crime because "[r]ecords of guns traced because of their use in crimes showed that in

1993, when assault weapons comprised just one percent of all firearms, they nonetheless accounted for 8.1 percent of weapon traces." State Br. 49 (citing JA727 (H.R. Rep. No. 103-489, at 13 (1994))). But there are several problems with the State's data. Congress has declared about trace data: "Not all firearms used in crime are traced and not all firearms traced are used in crime." Consolidated & Further Continuing Appropriations Act, 2013, 127 Stat. 198, 271-72 (2013). It added:

> Firearms selected for tracing are not chosen for purposes of determining which types, makes, or models of firearms are used for illicit purposes. The firearms selected do not constitute a random sample and should not be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe.

Id. at 272.

As Professor Koper explains, tracing data has "limitations for research purposes" because "[g]un tracing is voluntary, and police in most jurisdictions do not submit trace requests for all, or in some cases any, guns they seize." JA489. This means that "firearms submitted to ATF for tracing may not be representative of the types of firearms typically seized by police," and it appears that "assault weapons" are *over*represented in traced firearms, with studies "suggest[ing] that police have been more likely historically to initiate traces for seized AWs than for other seized guns." JA489-90. Indeed, "[a] compilation of 38 sources indicated that AWs accounted for *2%* of crime guns on average" prior to the 1994 Federal

Ban, JA464 (emphasis added), much lower than the State's 8% figure. And Professor Koper's estimates "indicate[d] that AWs accounted for about *2.5%* of guns produced from 1989 through 1993." JA466 (emphasis added). Thus, Professor Koper concluded that "**it is *not* clear that AWs are used disproportionately in most crimes**, though AWs still seem to account for a somewhat disproportionate share of guns used in murders and other serious crimes." *Id*. (emphasis added). He also noted that "assault" *rifles*, like the AR-15, were use in crime much less frequently than "assault" *pistols*: "Among AWs reported by police to ATF during 1992 and 1993, for example, APs outnumbered ARs by a ratio of 3 to 1." JA465. In each of those two years, less than 1.5% of guns traced by ATF were "assault" rifles, JA492, a number that, again, likely overstates their use in crime. Congress heard similar information when considering the 1994 Federal Ban: "[M]ore than 99 percent of killers eschew assault rifles and use more prosaic devices. According to statistics from the Justice Department and reports from local law enforcement, five times as many people are kicked or beaten to death than are killed with assault rifles." JA757 (Dissenting Views of Hon. James Sensenbrenner et al.).

At any rate, *Heller* establishes that disproportionate use in crime does not rid a firearm of constitutional protection. According to the Congressional Research Service, various estimates from 1994 to 2009 found that approximately 30% to

37% of civilian firearms in the United States were handguns. WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL32842, GUN CONTROL LEGISLATION 8 (2012), http://goo.gl/OmyT3Q. But during those same years, handguns accounted for approximately 71% to 83% of firearms used in murders and 84% to 90% of firearms used in other violent crimes. JA1911; *see also Heller*, 554 U.S. at 697-98 (Breyer, J., dissenting) (discussing similar statistics). This disproportionate use of handguns in crime was a centerpiece of the District of Columbia's arguments to the Supreme Court in defense of its ban, but it was not a factor in the Court's analysis. *See, e.g.*, Brief for Petitioners at 51-52, *Heller*, No. 07-290 (S. Ct. Jan. 4, 2008) ("Although only a third of the Nation's firearms are handguns, they are responsible for far more killings, woundings, and crimes than all other types of firearms combined. Eighty-seven percent of all guns used in crime are handguns. . . . Of the 55 police officers killed in felonies in 2005, 42 deaths were from handguns." (citation omitted)).

Finally, the relative "novel[ty]" of any particular common civilian firearm does not weigh against it qualifying for Second Amendment protection. State Br. 31. *Heller* rejected as "bordering on the frivolous" the argument "that only those arms in existence in the 18th century are protected by the Second Amendment," and held that "the Second Amendment extends, prima facie, to *all* instruments that constitute bearable arms, even those that were not in existence at the time of the

founding." 554 U.S. at 582 (emphasis added). And semiautomatic firearms are not novel—they have been commercially available for over a century. *See Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting). AR-15s themselves have been commercially available for over 50 years. *See* JA140 (Overstreet Declaration).

5. New York devotes relatively little attention to arguing that the magazines it bans are not protected by the Second Amendment, and for good reason: Americans own tens of millions of magazines with a capacity in excess of ten rounds. *See* Plaintiffs' Br. 25; *see also, e.g.*, *Fyock v. City of Sunnyvale*, 2014 WL 984162, at *4 (N.D. Cal. Mar. 5, 2014) ("[I]t is safe to say that whatever the actual number of such magazines in United States consumers' hands is, it is in the tens-of-millions, even under the most conservative estimates.").

In the face of this evidence, New York makes arguments similar to those it made with respect to "assault weapons." Those arguments are no more convincing in this context. First, New York asserts that the magazines it bans "were designed to afford soldiers an ample supply of ammunition for combat." State Br. 28. For support, the State cites the 1989 ATF Report, which states that "[v]irtually all modern military firearms are designed to accept large, detachable magazines." JA1634. This does not distinguish military firearms from civilian firearms, for most modern semiautomatic civilian firearms also are designed to accept

detachable magazines capable of holding more than ten rounds of ammunition. *See* Plaintiffs' Br. 24.

Second, New York asserts that Plaintiffs have provided "no basis for the conclusion that large-capacity magazines are more numerous than magazines with a capacity of ten rounds or fewer." State Br. 33. But that is irrelevant—again, the State bears the burden, and the standard is whether the banned magazines are typically possessed for lawful purposes, not whether they are more numerous than non-banned magazines. As noted above, only about one-third of firearms owned by Americans are handguns, yet *Heller* emphatically found them to be constitutionally protected.

Third, and relatedly, the State cites *Heller II*'s statement that "18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds." State Br. 33-34 (quoting *Heller II*, 670 F.3d at 1261). But even if this 20-year-old data remained accurate, it demonstrates that while "[t]here may well be some capacity above which magazines are not in common use, . . . *that capacity surely is not ten*." *Heller II*, 670 F.3d at 1261 (emphasis added). And much has changed in the 20 years since 1994. For example, "[i]n recent decades, the trend in semiautomatic pistols has been away from those designed to hold 10 rounds or fewer, to those designed to hold more than 10 rounds." JA143 (Overstreet Declaration). The AR-15, which has become America's most popular

rifle, typically is equipped with a 20- or 30-round magazine. Consistent with these trends, more recent data indicate that an increasing share of magazines are capable of holding more than ten rounds. Indeed, that data demonstrates that "the magazines which the New York SAFE Act bans account for almost half of all magazines possessed by private citizens in the United States." NSSF Amicus Br. 10. *See also, e.g.*, *Fyock*, 2014 WL 984162, at *4 ("Plaintiffs cite statistics showing that magazines having a capacity to accept more than ten rounds make up approximately 47 percent of all magazines owned."). The State also argues that many law-enforcement officials own standard magazines capable of holding more than ten rounds and that many citizens own more than one. While this surely is true, it is entirely consistent with tens of millions of private citizens owning such magazines for lawful purposes. And the State cites no data that suggests otherwise.

Finally, in a footnote the State suggests that the magazines it bans "may" not be protected by the Second Amendment because "they are properly understood as firearm 'accessories' or 'accoutrements' rather than as 'arms.' " State Br. 24 n.7. By confining this argument to a footnote, the State has waived it. *See Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 154 n.3 (2d Cir. 2006) ("Appellees mention an absolute immunity defense in passing, but that defense is considered waived since it only appears in a footnote.").

Furthermore, the State's argument is meritless. Focusing on the magazine rather than the firearm equipped with it is a matter of semantics, for a magazine has no function when not attached to a firearm. And many firearms have a magazine disconnect design that causes them not to function without a magazine. *See, e.g.*, *Browning Arms Co. v. United States*, 56 Fed. Cl. 123, 130 (2003). The effect of New York's magazine ban is to outlaw firearms capable of firing more than ten rounds without reloading, and to sustain its ban New York must show that such firearms are not typically possessed for lawful purposes. Because New York cannot make such a showing, its ban is unconstitutional.

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

The Supreme Court's decisions addressing restrictions on certain types of firearms have turned on whether the firearms in question were constitutionally protected. In *Heller*, the Supreme Court found that the Second Amendment right "applies to handguns" and thus concluded that "citizens must be permitted to use [them] for the core lawful purpose of self-defense." *McDonald*, 130 S. Ct. at 3036 (quotation marks omitted). In *United States v. Miller*, 307 U.S. 174 (1939), by contrast, the Court found that "the type of weapon at issue [a short-barreled shotgun] was not eligible for Second Amendment protection," *Heller*, 554 U.S. at 622 (emphasis omitted), and thus affirmed an indictment for transporting such a

weapon in interstate commerce without registering it with the federal government. *Heller* and *Miller* thus establish that "the Second Amendment protect[s] those weapons . . . typically possessed by law-abiding citizens for lawful purposes," *id.* at 625, and that such "arms" protected by the Second Amendment cannot be banned: "whatever else it leaves to future evaluation, [the Second Amendment] surely elevates *above all other interests* the right of law-abiding, responsible citizens to use *arms* in defense of hearth and home," *id.* at 635 (emphases added).

Under these binding decisions, New York's argument that its flat ban on keeping and bearing protected arms does not even substantially burden Second Amendment rights cannot possibly be right—it is difficult to conceive of a more substantial burden on constitutionally protected behavior than a flat ban. New York insists that its ban does not impose a substantial burden because "ample firearms remain available for self-defense." State Br. 37 (quotation marks omitted). But the same was true in *Heller*, as around two-thirds of the firearms in this country are long guns, not handguns. And there, the Supreme Court expressly rejected the District of Columbia's argument "that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller*, 554 U.S. at 629.

New York's reasoning betrays a fundamental misunderstanding of the right protected by the Second Amendment, the right to keep and bear *arms*. The State

essentially argues that its ban on protected arms is valid because it does not prevent citizens from accomplishing the core purpose of the right, self-defense, through alternative means. *See, e.g.*, State Br. 37 (arguing that the SAFE "Act does not totally disarm New York's citizens or otherwise meaningfully jeopardize their right to self-defense" (quotation marks omitted)). But *Heller*'s discussion of the Second Amendment's "prefatory" clause establishes that the purposes underlying the Second Amendment are not to be used to contract the scope of the right itself. "Logic demands that there be a *link* between the stated purpose and the command," the Court explained, but "[t]he former does not *limit* the latter grammatically . . . ." *Heller*, 554 U.S. at 577 (emphases added). The State's argument thus ignores the *means* through which the Second Amendment advances the purposes it seeks to achieve—the codification of a right to possess protected arms for self-defense and other lawful purposes. That right is violated by a ban on protected arms, whether or not citizens can still defend themselves through other means.

For these reasons, the State's argument that law-abiding citizens do not really *need* the firearms and magazines it bans is irrelevant. The Second Amendment guarantees to *law-abiding citizens*, not to legislatures or courts, the right to select the protected arms they deem best suited for their self-defense: "The very enumeration of the right takes out of the hands of government—even the

Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634.

And there are *many* reasons millions of citizens have chosen to arm themselves with the firearms and magazines New York bans, most notably a desire to use accurate firearms with standard ammunition capacity. *See* Plaintiffs' Br. 20-22, 25-27. Indeed, many of these reasons are apparent from testimony recounted in the 1994 House Judiciary Committee report that the State cites repeatedly in its briefing. One woman who witnessed the murder of her parents strenuously opposed the notion that

> so-called assault weapons . . . don't have any defense use. You tell that to the guy that I saw on a videotape of the Los Angeles riots standing on his rooftop protecting his property and his life from an entire mob with one of these so-called assault weapons. Tell me that he didn't have a legitimate self-defense use.

JA730. Another woman who was permanently disabled after being shot at work by a fellow employee testified:

> It completely enrages me that my tragedy is being used against me to deny me and all the law abiding citizens of this country to the right of the firearm of our choosing. . . . Let's not sell [our Constitution and Bill of Rights] down the river or we could one day find ourselves in a boat without a paddle against the criminals who think we are easy pickings.

Id. Congress also heard from a man who "used his lawfully-possessed Colt AR-15 H-BAR Sporter semiautomatic rifle . . . to capture one of Tucson, Arizona's most wanted criminals who was attempting to burglarize the home of [his] parents." *Id.*

The man "urge[d] th[e] Committee and the Congress of the United States to restrain themselves from forcing tens of millions of law-abiding Americans like me to choose between the law and their lives." JA731. And a law-enforcement representative testified that "[t]he six-shot .38 caliber service revolver, standard law enforcement issue for years," was no longer an adequate service weapon "as a matter of self-defense and preservation." JA727-728.

The State argues that "sustained defensive fire is appropriate" in only "relatively rare circumstances," State Br. 41, but the Second Amendment is designed precisely for those relatively rare circumstances when citizens are compelled to use deadly force to protect themselves and their families. It is meant, in other words, for the worst-case scenario, whether it be one involving criminal attack, civil unrest, or a tyrannical government. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *140 (1765) ("[T]o vindicate these rights [to the free enjoyment of personal security, of personal liberty, and of personal property], when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using arms for self-preservation and defence."); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *145-46 n.42 (St. George Tucker ed.,

1803) (An individual in civil society "retains the right of repelling force by force; because that may be absolutely necessary for self-preservation, and the intervention of the society in his behalf, may be too late to prevent an injury."); *Heller*, 554 U.S. at 594 (The right to arms "was by the time of the founding understood to be an individual right protecting against both public and private violence."). The fact that the police often fire more than ten rounds to defend themselves shows that a law-abiding citizen may reasonably expect to do so as well, particularly in a worst-case type scenario. *See* Plaintiffs' Br. 26; *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) (holding that police officers acted reasonably "in firing a total of 15 shots" because threat persisted during the time in which the shots were fired). And it makes perfect sense that a citizen preparing for such a scenario is entitled to possess the arms commonly possessed in the society at large, *because those are the arms the citizen may potentially expect to face*. *See, e.g.*, State Br. 63 ("[F]irearms are frequently stolen during burglaries."). Depriving the citizen of those arms is a substantial burden on the citizen's Second Amendment rights.

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

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

may be excused when other protected arms are not barred, and *Heller* forecloses any such conclusion.

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

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

If a levels-of-scrutiny analysis were to apply, it would mandate application of strict scrutiny because New York's ban prohibits law-abiding citizens from possessing protected arms in the home. This Court has established "that Second Amendment guarantees are at their zenith within the home . . . ." *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012). Because "the home [is] special and subject to limited state regulation, . . . the state's ability to regulate firearms is circumscribed in the home." *Id.* at 94. For these reasons, a flat ban on law-abiding citizens possessing protected arms in the home merits at least strict scrutiny. The point is not "that strict scrutiny must apply anytime a firearm regulation happens to apply in the home as well [as] in public places," State Br. 45; rather, it is that strict scrutiny must apply anytime a firearm regulation amounts to a *flat ban* on the possession of protected arms by law-abiding citizens in the home.

Relying on *Heller II*, the State argues that intermediate scrutiny should apply because its ban is akin to a time, place, and manner restriction under the First Amendment. But New York's ban is the antithesis of a time, place, and manner restriction: it prohibits the possession of the protected arms at *any* time, in *any* place, and in *any* manner. While citizens may possess *other* protected arms, *Heller* rejected the notion that this has any significance in the constitutional analysis. And the Supreme Court has applied similar reasoning in the First Amendment context: time, place, and manner restrictions must "leave open ample alternative channels for communication of *the information*" in question. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (emphasis added). "Additional restrictions *such as an absolute prohibition on a particular type of expression*" trigger strict scrutiny. *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added). Here, New York seeks to enforce an absolute prohibition on several particular types of arms protected by the Second Amendment.

The State also argues that *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), supports application of intermediate scrutiny here, but it does not. *Marzzarella* addressed a Second Amendment challenge to a conviction "for possession of a handgun with an obliterated serial number." *Id.* at 87; *see* 18 U.S.C. § 922(k). Like restrictions on sawed-off shotguns, bans on obliterating serial numbers prohibit individuals from adulterating firearms in ways that "have

value primarily for persons seeking to use them for illicit purposes." *Marzzarella*, 614 F.3d at 95. Unlike New York's ban, they leave law abiding citizens free to possess *unadulterated* firearms of any make and model. Thus, application of intermediate scrutiny in *Marzzarella* in no way supports application of intermediate scrutiny here. Indeed, the Third Circuit's acknowledgment that its application of intermediate rather than strict scrutiny was "not free from doubt," *id.* at 97, fairly compels the conclusion that strict scrutiny should apply here.

2. Ultimately, this Court need not decide whether strict or intermediate scrutiny applies because New York's ban fails even intermediate scrutiny. (The State does not even argue that it could satisfy strict scrutiny.) The State, following this Court's lead in *Kachalsky*, points to *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997), as a lodestar for intermediate scrutiny analysis. *See* State Br. 56-57. This approach cannot be squared with *Heller*, for *Turner* is the case repeatedly promoted by Justice Breyer in his *Heller dissent*. *See* 554 U.S. at 690, 696, 704, 705 (Breyer, J., dissenting). Indeed, Justice Breyer expressly tethered his analysis to the case, insisting that "[t]here is no cause here to depart from the standard set forth in *Turner*." *Id*. at 705. The majority, of course, did not follow Justice Breyer's lead. While this Court applied *Turner* in *Kachalsky*, its decision was predicated on the fact that "New York's licensing scheme affects the ability to carry handguns only ***in public***, while the District of Columbia ban

applied ***in the home*** . . . ." 701 F.3d at 94 (emphasis in original). That distinction, of course, is absent here.

Further, the *Heller* majority determined that the District of Columbia's ban on possessing protected arms in the home would *fail Turner*'s intermediate scrutiny test, concluding that the ban could not satisfy "*any* of the standards of scrutiny that we have applied to enumerated constitutional rights." 554 U.S. at 628 (emphasis added). New York's ban on protected arms in the home likewise fails under *Turner*.

The State bears the burden to demonstrate that its ban was "designed to address a real harm" and that it "will alleviate [that harm] in a material way." *Turner*, 520 U.S. at 195. In determining whether the State has carried this burden, *Turner* instructs the Court to "accord substantial deference to the predictive judgments" of the legislature. *Id*. But judicial deference does not mean judicial abdication. To the contrary, the Court must ensure that the legislature "grounded" its judgment on "reasonable factual findings supported by evidence that is substantial for a legislative determination." *Id*. at 224. "[T]he question is whether the legislative conclusion was reasonable and supported by substantial evidence *in the record before* [*the legislature*]." *Id*. at 211 (emphasis added). Thus, the State's burden is to show that its legislature had before it evidence substantial to support a

determination that its ban will advance public safety in a material way. The State cannot meet this burden.

As an initial matter, the State has not shown that the legislature had before it *any* evidence, much less substantial evidence, to support its policy judgment. Governor Cuomo proposed the SAFE Act to the legislature on January 14, 2013. It passed the Senate that day and the Assembly the next, and Governor Cuomo signed it into law on January 15, 2013. The legislature did not hold any hearings or otherwise receive testimony or other evidence regarding the law's potential effects. *See* Remington Arms Amicus Br. at 16-19. The memoranda supporting the bill did not cite any evidence to substantiate assertions that the challenged provisions would advance public safety. *See* JA663-64, 668-69; JA672-73, 677-78; JA680-81, 684-85.

The State points to "[t]he long history of legislative findings and determinations regarding the lethality of assault weapons and large-capacity magazines, and the lessons learned from the shortcomings of prior approaches" as providing "a substantial basis of the New York Legislature's judgments in enacting the SAFE Act." State Br. 57. But New York has identified no evidence that the legislature considered any testimony, empirical data, or other analyses regarding these subjects. It is not enough that members of the legislature may have "believed there was a potential for negative . . . effects" from the banned firearms nor that

they may have been "aware of the fact that other [jurisdictions] had analyzed the issue." *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 172 (2d Cir. 2007). Rather, the legislature is required to "actually review [the] evidence" itself, *id*., and there is no evidence that the New York legislature did so here.

The State attempts to distinguish *White River Amusement Pub*, which held that the government must prove that it "relied on relevant evidence . . . *before* enacting the" challenged law, *id.* at 173 (emphasis added), on the ground that the case "involved a First Amendment challenge to a ban on nude dancing" and "intermediate scrutiny carries different connotations depending on the area of the law." State Br. 57-58 n.18 (quotation marks omitted). But the State itself relies on *Turner*, a First Amendment intermediate scrutiny case, and *Turner* expressly requires a showing that "the legislative conclusion was reasonable and supported by substantial evidence in the record before [the legislature]." 520 U.S. at 211. And *Turner* and *White River Amusement Pub* both applied the same underlying test. *See Turner*, 520 U.S. at 189 ("applying the standards for intermediate scrutiny enunciated in [*United States v.*] *O'Brien*," 391 U.S. 367 (1968)); *White River Amusement Pub*, 481 F.3d at 169 (applying the "test for expressive conduct set forth in *United States v. O'Brien*").

Kachalsky does not announce a different standard for Second Amendment cases. To the contrary, it makes clear that the court must " 'assure that, in formulating its judgments [New York] has drawn reasonable inferences based on substantial evidence.' " *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (alteration in original)). *Kachalsky*, to be sure, considered " 'studies and data' submitted by the parties" that were not before the legislature. State Br. 58 n.18 (quoting *Kachalsky*, 701 F.3d at 99). But regardless of whether the Court may *consider* evidence that was not before the legislature, the fact remains that the underlying question to be answered is whether the legislature "*had before it* substantial evidence to support its conclusion." *Turner*, 520 U.S. at 208 (emphasis added). And here, the answer to that question is no.

Furthermore, the purported "long history of legislative findings and determinations regarding the lethality of assault weapons and large-capacity magazines," State Br. 57, does not provide a substantial basis for New York's ban. The vast majority of States have determined that the banned semiautomatic firearms and magazines *do not* pose a threat to public safety sufficient to justify banning them. *See* Plaintiffs' Br. 18-19, 28-29; *see generally* State of Alabama et al. Amicus Br. And the federal government has now made the same determination, as Congress allowed the 1994 Federal Ban to expire on its own terms after ten

years and has not reenacted any similar ban. Indeed, even in New York "over 50" of the State's "62 counties . . . [have] publicly opposed" the law. JA1741. And more than a dozen sheriffs and several other law enforcement organizations have announced their opposition to it. *See* NY State Sheriffs' Ass'n Amicus Br. 9.

In the absence of evidence before its legislature, New York relies heavily on its expert, Professor Christopher Koper. But neither Professor Koper's published work nor the reports he prepared for this case provide a substantial basis for believing that New York's ban will materially advance public safety. *See generally* NRA Amicus Br. 11-20.

Professor Koper prepared two reports for the federal government regarding the effects of the 1994 Federal Ban. The first, published in 1997, was commissioned by the Department of Justice to meet the 1994 Federal Ban's requirement that the Attorney General study the effects of the law. JA327, 334. The second, published just before the ban was set to expire in 2004, was also commissioned by the Department of Justice, and it updated the findings of the first. JA445, 449. Professor Koper highlighted results from these studies in a piece published in 2013. JA561. According to Professor Koper, "these were the only published academic studies to have examined the efficacy of the" 1994 Federal Ban. JA284; *see also* JA2231.

Professor Koper's studies concluded that the 1994 Federal Ban "*did not* appear to affect gun crime during the time it was in effect . . . ." JA562 (emphasis added). He did find evidence that criminal use of the banned semiautomatic firearms relative to non-banned guns declined after the ban, although the same could not be said for criminal use of the banned magazines. JA451. (The decline in "assault weapon" use was "due primarily to a reduction in the use of assault pistols"; there was "not . . . a clear decline in the use of [assault rifles]." *Id.*) But despite the apparent relative decline in the use of "assault weapons," Professor Koper found "no discernible reduction in the lethality and injuriousness of gun violence, based on indicators like the percentage of gun crimes resulting in death or the share of gunfire incidents resulting in injury . . . ." JA545. Indeed, the data showed that, "[i]f anything, . . . gun attacks appear to have been more lethal and injurious since the ban." *Id.* Professor Koper therefore could not "clearly credit the ban with any of the nation's recent drop in gun violence." *Id.* Professor Koper concluded that, "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement." JA452.

New York insists that its ban addresses "shortcomings" in the 1994 Federal Ban by replacing the "two-feature" test for banned semiautomatic firearms with a "one-feature" test and by eliminating grandfathering of existing banned magazines. *See* State Br. 53-55. But there is no substantial basis for concluding that these

"fixes" will advance public safety in a material way. Professor Koper effectively has said so himself with respect to the "one-feature" test: "It is *unknown* whether further restrictions on the outward features of semi-automatic weapons, such as banning weapons having any military-style features, will produce measurable benefits beyond those of restricting magazine capacity." JA572 (emphasis added); *see also* JA550 (similar). In reports prepared for this litigation, Professor Koper similarly appears to deny any independent significance to New York's "assault weapons" ban, repeatedly stating that "it is my considered opinion that New York's bans on assault weapons and large-capacity magazines, *particularly its LCM ban*, have the potential to prevent and limit shootings in the State . . . ." JA285, 306 (emphasis added); *see also* JA2242-43 (similar).

That leaves the State's magazine ban. The theory is that by eliminating grandfathering (and by making the ban permanent), the State's ban will be more effective than the 1994 Federal Ban in reducing the supply of the banned magazines and thus in "forcing criminals to substitute" smaller magazines for them. *See* State Br. 55-56. But this ignores one significant way in which the State's ban will be *less* effective in reducing the supply of banned magazines than the 1994 Federal Ban: it does not apply in the 44 states that do not limit magazine capacity to ten rounds. Professor Koper highlighted this issue in his 2004 report, explaining:

> [T]here is little evidence on how state AW bans affect the availability and use of AWs (the impact of these laws is likely undermined to some degree by the influx of AWs from other states, a problem that was probably more pronounced prior to the federal ban when the state laws were most relevant).

JA530 n.95. This problem has again become "more pronounced" because the 1994 Federal Ban has expired, and there is no federal law restricting the transportation of magazines (as opposed to firearms) across state lines to "ameliorate[]" it. *See* State Br. 61. In a report prepared for this case, Professor Koper reiterates that "there is little evidence on how state assault weapon bans affect the availability and use of assault weapons . . . ." JA2236. Given this state of the evidence, it is sheer speculation whether or not New York's ban will reduce criminal use of the banned magazines (or firearms, for that matter). It does not make "federalism . . . a dead letter," State Br. 61, to require New York at a minimum to identify substantial evidence that its ban *will actually work* before allowing the State to trample on its law-abiding citizens' fundamental rights.

But even if one were to assume that the SAFE Act will result in New York's criminals using smaller magazines, there *still* would not be substantial evidence that the ban will advance public safety in a material way. Relatively few crimes involve the firing of more than ten rounds. As Professor Koper explained in his 2004 report, the available evidence "on shots fired show[s] that assailants fire less than four shots on average" and "suggest[s] that relatively few attacks

involve more than 10 shots fired." JA539. And he expressly recognized the need for "further research validating the dangers of . . . LCMs." JA549. No such further research has materialized. Just last year Professor Koper wrote that "**available evidence is too limited to make firm projections**" that shootings would have been reduced even "***slightly***" had the 1994 Federal Ban "remained in place long enough to *substantially* reduce crimes with both LCMs and AWs." JA570 (emphases added).

The State insists that mass shooters frequently use large-capacity magazines and that "more people die when a mass shooter has a large-capacity magazine." State Br. 65 (brackets omitted). But the data regarding mass shootings that the State relies on—from sources such as Mother Jones and Mayors Against Illegal Guns—is inherently unreliable. *See* State Br. 52, 58. As Professor Koper has explained:

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

JA570.

The shortcomings in the data are illustrated by the State's sources. To begin, different definitions of "mass shootings" can lead to significantly different data

sets. For example, Mayors Against Illegal Guns identified 56 mass shootings from January 2009 to January 2013 (about 14 per year). JA1288. Mother Jones, by contrast, employed a different definition and identified 62 mass shootings from October 1982 through December 2012 (about 2 per year). JA1286. *See* JAMES ALAN FOX & MONICA J. DELATEUR, MASS SHOOTINGS IN AMERICA: MOVING BEYOND NEWTOWN 4-6, HOMICIDE STUDIES (2013) (criticizing Mother Jones). And these different data sets can result in different conclusions. Mayors Against Illegal Guns found that "assault weapons" *or* "large-capacity" magazines were used in 23% of the mass shootings incidents it identified, JA1288, while Mother Jones found that "large-capacity" magazines alone were used in 50% of the incidents it identified, JA1285. (The Mayors Against Illegal Guns analysis has been extended through July 2014, and the percentage of "mass shootings" involving "assault weapons" or "high-capacity" magazines has fallen to 13%. *See* EVERYTOWN FOR GUN SAFETY, ANALYSIS OF RECENT MASS SHOOTINGS 4 (2014), http://goo.gl/FuhMXE.) The State's expert Lucy Allen found that "large-capacity" magazines were used in about 52% of mass shootings, but she supplemented the Mother Jones data with data from a source limited to incidents in which "the shooter had a magazine with capacity greater than ten," JA617, which obviously skews the results in favor of incidents involving such magazines. *See* NRA Amicus Br. 20-25 (further criticizing Ms. Allen's work).

Ms. Allen's analysis further highlights the difficulties in assessing how use of "large-capacity" magazines affects mass shootings. She found that "casualties were higher in the mass shootings that involved large-capacity magazine guns than in other mass shootings." JA618. But the Mother Jones data, on which she relied, "include[d] all guns recovered at the scene in each case, *though not all of them were used in the crimes*." JA1285 (emphasis added). Ms. Allen gives no indication that she sought to determine whether a firearm with a "large-capacity" magazine was actually *used* when determining how to categorize an incident.

Professor Koper's analysis suffers from similar shortcomings. A graduate student working under his direction used the Mother Jones data and "compared cases where an LCM was known to have been used (*or at least possessed by the shooter*) against cases where either an LCM was not used *or not known to have been used*." JA2239 (emphases added). This means that the first category may have included incidents in which a "large-capacity" magazine was *not* used, and the second category may have included incidents in which a "large-capacity" magazine *was* used, casting doubt on the validity of the results for assessing the impact of "large-capacity" magazines. Mayors Against Illegal Guns also effectively treated incidents in which the type of magazine used was unknown as not involving a "large-capacity" magazine. *See* JA1288.

Even if there were substantial evidence that use of a "large-capacity" magazine is *correlated* with more casualties in mass shooting incidents, that fact would not amount to substantial evidence that banning "large-capacity" magazines would *advance public safety* in a material way. Correlation, of course, does not equal causation, and confounding factors such as the deadly intentions of criminals play a significant role in their selection of firearms and the outcomes of their crimes. *See, e.g.*, JA437 (Professor Koper hypothesizing "that certain deranged killers might tend to select assault weapons to act out 'commando' fantasies"). Furthermore, as Professor Koper has explained, even if crimes with "large-capacity" magazines do result in more injuries, "this still begs the question of whether a 10-round limit on magazine capacity will affect the outcomes of enough gun attacks to measurably reduce gun injuries and deaths." JA538. There is no empirical evidence showing that forcing criminals to use multiple firearms or multiple ten-round magazines would make a material difference in the outcomes of crimes. *See* Plaintiffs' Br. 50-51; Pink Pistols' Amicus Br. 22-26.

The State identifies incidents in which a shooter may have been subdued when attempting to reload a firearm, but the evidence submitted by the State indicates that this may happen around two or three times a decade. *See, e.g.*, JA584-85 (Zimring Declaration). The State has no substantial evidence indicating that any lives saved from requiring criminals to stop to reload will outweigh lives

lost by requiring law-abiding citizens to stop to reload when defending themselves from criminals. Indeed, the effect will likely be much greater on law-abiding citizens because (a) they, unlike criminals, will obey the law and limit themselves to legal firearms, and (b) they, unlike criminals, will not have planned in advance the time and location of the encounter, making it less likely that they will have multiple ammunition magazines readily available when needed. And attempting to change magazines in the midst of a criminal attack may be particularly implausible for certain individuals with physical disabilities. *See* JA248 (Horvath Affidavit); JA251-52 (Galvin Affidavit); JA257 (Kleck Declaration).

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

3. New York's ban suffers an additional infirmity under *Turner*: the State must show now only that its ban "advances important government interests" but also that it "does not burden substantially more [protected activity] than necessary to further those interests." 520 U.S. at 189. As explained above,

Professor Koper's published work and his reports in this case demonstrate that there is no substantial evidence supporting any material benefit from the State's "assault weapons" ban over and above any provided by its "large-capacity" magazine ban. At a minimum, then, the State's "assault weapons" ban must fall.

Furthermore, the State's ban is overbroad because it prohibits *law-abiding citizens* from using the banned firearms and magazines in their *homes* in an attempt to prohibit *criminals* from using them *in public*. *See* Plaintiffs' Br. 43. The State responds that "the line between the home and the public sphere is porous at best." State Br. 63. Law-abiding citizens defending themselves in the home, the State says, may fire rounds that miss their targets and "pass through windows or even walls, causing harm to the shooter's family or to bystanders." *Id*. at 64. But none of the firearm features the State bans have anything to do with the ability to fire rounds that will penetrate windows or walls. As Professor Koper has explained in discussing the 1994 Federal Ban, "the banned AWs did not differ from other legal semi-automatic weapons" in respects such as "type of firing mechanism" and "ammunition fired." JA563. The same is true here. Indeed, law-abiding citizens may substitute *more powerful* firearms for the firearms the State bans. *See* JA2047 ("AR15's firing relatively weak .223/5.56 mm ammunition are quite anemic in penetration capability and pale in destructive capacity when compared to common civilian hunting rifles . . . .") (Roberts Declaration); MINITER, THE FUTURE OF THE

GUN 35 (The AR-15's ".223 caliber makes it safer to use as a home-defense gun because this lighter caliber is less likely to travel through walls.").

The State also argues that criminals (including family members) may take firearms from the homes of law-abiding citizens and use them to commit crimes in public. State Br. 63-64. But just as the Constitution does not allow "free speech [to] be stifled by the speaker's opponents mounting a riot," *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011), it should not be interpreted to allow the right to keep and bear arms to be stifled by criminals stealing law-abiding citizens' firearms.

IV. The District Court Properly Struck Down the State's Seven-Round Load Limit.

If it is unconstitutional to limit citizens to firearms that can fire only ten rounds of ammunition without reloading, it follows, a fortiori, that it also is unconstitutional to limit citizens to firearms that can fire only seven rounds without reloading. But even if New York's ban on magazines capable of holding more than ten rounds is constitutional, the State's seven-round load limit must be struck down.

New York's own experience with the SAFE Act demonstrates that firearms capable of firing more than seven rounds without reloading are commonly possessed for lawful purposes. The original version of the law banned new magazines with the capacity to accept more than seven rounds of ammunition. *See*

JA1043. But the State was forced to suspend this provision when it discovered that "few [magazines holding seven rounds] . . . are made by manufacturers." JA277 n.12 (Bruen Declaration); *see also* State Br. 15-16. Of course, the effect of the seven-round load limit on law-abiding citizens is the same as the seven-round magazine limit (at least for those who could find a seven-round magazine)—it limits them to firearms capable of firing seven rounds without reloading. The dearth of seven-round magazines demonstrates that law-abiding citizens typically possess firearms capable of firing a greater number of rounds. Because the seven-round load limit deprives law-abiding citizens of the right to use commonly-possessed firearms for self-defense in the home, it is flatly unconstitutional or, at a minimum, subject to strict scrutiny, which the State does not even argue it could satisfy.

The State argues that the seven-round load limit does not substantially burden Second Amendment rights and that it satisfies intermediate scrutiny, but these arguments fail for the same reasons the State's arguments in support of its magazine ban fail. And there is an additional reason why the State's intermediate scrutiny arguments fail here. As the district court put it, "[i]t stretches the bounds of [the] 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." SPA38. This is an

understatement. Surely *no* deranged criminal intent on perpetrating armed violence will stop to make sure that his entirely lawful ten-round magazines are loaded with only seven rounds of ammunition. New York's seven-round load limit thus "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." SPA35. New York implores the Court to defer to the legislature's judgment on this subject, but, under *Turner*, the legislature's judgment must be "grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." 520 U.S. at 224. Here, the legislature's decision to set the maximum number of rounds at seven "appears to be . . . largely arbitrary," SPA39, and it has no basis in common sense, much less substantial evidence.

Notably, "assault weapon" and "large-capacity" magazine bans are not premised on the implausible assumption that criminals will actually obey the law. Rather, the hope is that such bans will make it more difficult for criminals to obtain the banned items. This is clear in Professor Koper work. Writing in 1997 about the 1994 Federal Ban, Professor Koper "hypothesized that the ban would produce direct effects in the primary markets for these weapons, that related indirect effects in secondary markets would reduce the frequency of their criminal use, and that the

decrease would reduce such consequences as gun homicides . . . ." JA351. In 2004, Professor Koper similarly explained:

> 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. But by forcing AW and LCM offenders to substitute non-AWs with small magazines, the ban might reduce the number of shots fired per gun attack, thereby reducing both victims shot per gunfire incident and gunshot victims sustaining multiple wounds.

JA530 (footnote omitted). Professor Koper returned to this hoped-for substitution effect in discussing the SAFE Act: "bans on assault weapons and LCMs seem likely to reduce the number and lethality of gunshot victimizations by forcing criminals to substitute assault weapons and other weapons with LCMs with less destructive firearms." JA2236.

As explained above, there is no substantial evidence for the proposition that banning certain semiautomatic firearms and ammunition magazines will have the hoped-for positive effects on public safety. *But the seven-round load limit does not even fit into the theory about how these bans are supposed to work because it leaves criminals free to possess ten-round magazines*. As the district court correctly observed, "[t]he ban on the number of rounds a gun owner is permitted to load into his 10-round magazine . . . will obviously have no such effect [of reducing the prevalence and accessibility of banned items] because 10-round magazines remain legal." SPA39. New York argues that there is no evidence of

any "problem of compliance or enforcement concerning" the State's six-round limit for certain firearms while hunting, *see* State Br. 79, but the State's effort to compare the actions of law-abiding hunters with violent criminals is inapt and offensive. The notion that violent criminals will load their legal ten-round magazines with anything less than ten rounds of ammunition is absurd. New York's seven-round load limit cannot pass rational basis review, much less heightened scrutiny.

V. Several Provisions of the SAFE Act Are Unconstitutionally Vague.

The Due Process Clause does not tolerate a criminal statute that fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Several provisions of the SAFE Act fall short of this requirement.

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

In *United States v. Salerno*, 481 U.S. 739 (1987), the Supreme Court "not[ed] in dicta" that "the test for facial unconstitutionality" outside the First Amendment context is "whether any set of circumstances exists under which the statute in question would be valid." *United States v. Rybicki*, 354 F.3d 124, 130 (2d Cir. 2003) (en banc) (brackets and quotation marks omitted). In *City of Chicago v. Morales*, 527 U.S. 41 (1999), however, "even though First Amendment

rights were not implicated, the Court struck down an anti-loitering statute as facially unconstitutional without first considering whether . . . any set of circumstances existed in which the statute would be valid." *Rybicki*, 354 F.3d at 131. A three-justice plurality held that "[w]hen vagueness *permeates the text* of . . . a law" that "contains no *mens rea* requirement and infringes on constitutionally protected rights, . . . it is subject to facial attack," *Morales*, 527 U.S. at 55 (emphasis added) (citation omitted), and noted that "the *Salerno* formulation . . . has never been the decisive factor in any decision of the Court," *id*. at 55 n.22. In *Rybicki*, this Court noted the competing approaches of the *Salerno* dicta and the *Morales* plurality, but it declined to mandate or foreclose the application of either. 354 F.3d at 132 n.3. This Court should take the path that *Rybicki* deliberately left open and apply *Morales*'s standard here. *See* Plaintiffs' Br. 53-57.

The State's primary submission is that application of *Morales*'s approach would "depart from established precedent" on the basis of a "three-Justice plurality opinion." State Br. 70. But it is an open question in this Circuit whether *Morales* should apply to a case like this one, so applying it here would not amount to a departure from established precedent. Indeed, *Rybicki* expressly left the door open for future panels to follow *Morales*, noting that it did not mean to "adopt" or even to "suggest [a] preference for" either *Morales* or *Salerno*. 354 F.3d at 132 n.3.

Further, the State's attempt to downplay the import of the *Morales* plurality shortchanges the respect owing to that case. As this Court has noted, "*Morales* was a plurality opinion, but a majority of the Court concurred in the result, and no concurring justice suggested that First Amendment rights were implicated." *Farrell v. Burke*, 449 F.3d 470, 495 n.12 (2d Cir. 2006) (Sotomayor, J.). "Thus, it appears that the Supreme Court might decline to apply the 'impermissibly vague in all applications' standard for facial challenges *wherever* fundamental rights are at stake," as they are in this case, and not "merely in those cases where First Amendment rights are at stake." *Id*. (emphasis added).

B. Provisions of the Act Are Unconstitutionally Vague Under *Morales*'s Standard.

Under *Morales*, a "criminal law that contains no *mens rea* requirement" and that "impact[s] . . . constitutionally protected liberty," is unconstitutional on its face when "vagueness permeates [its] text." *Morales*, 527 U.S. at 55. The State attempts to show neither that the Act is a criminal law nor that it contains a *scienter* requirement and, as explained above, it substantially burdens Second Amendment rights. Whether *Morales*'s standard is met, then, depends on whether any provisions of the Act are permeated with vagueness. Four provisions are indeed suffused with vagueness in this way, and the State's attempts to show that these provisions are sufficiently clear fall short.

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

The Act bars possession of magazines that "can be readily restored or converted to accept, more than ten rounds of ammunition." N.Y. PENAL LAW § 265.00(23)(a). In *Peoples Rights Organization Inc. v. City of Columbus*, the Sixth Circuit held that a Columbus, Ohio ordinance similarly outlawing "any firearm which may be restored to an operable assault weapon" was unconstitutionally vague, since it "provides absolutely no guidance for interpreting the phrase '[may] be restored,' " leaving individuals to guess at whether that critical phrase meant, for example, "may be restored by the person in possession, or may be restored by a master gunsmith . . . ." 152 F.3d 522, 537 (6th Cir. 1998). The same lack of clarity infects the provision of the Act, here.

The State opines that the phrase at issue here is narrower than the one struck down in *Peoples Rights Organization*, since it prohibits only those magazines that can *readily* be converted to accept more than ten rounds. It may be narrower, but not in a way that sufficiently addresses the *reason* the Sixth Circuit found (and this Court should find) the provision unconstitutionally vague. The critical vagueness in both phrases has to do with the level of skill required for the conversion, not with the amount of time it would take a person of any given skill level to make the change. Until the former is known, even specifying the latter down to the hour,

minute, and second would do nothing to cabin the overall vagueness of the provision.

The State notes that language similar to the challenged provision is contained in other laws, including the "District of Columbia law that the D.C. Circuit has upheld." State Br. 71. But the State neglects to mention that the D.C. Circuit did not have before it, and thus did not purport to decide, any challenge based on vagueness. *Heller II*, 670 F.3d 1244. The same is true of the Sixth Circuit opinion the State cites as "rejecting a vagueness challenge to the National Firearm Act's definition of a machinegun as including any weapon that 'can be readily restored to shoot[] automatically.' " State Br. 73. The opinion cited by the State, *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416 (6th Cir. 2006), did no such thing. While that case did interpret the provision of the National Firearm Act in question, no question of vagueness was at issue in the case. *See id.* at 419-25.

Finally, while the State relies on three cases from this Court that rejected vagueness challenges to allegedly similar provisions, *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681 (1996); *United States v. Quiroz*, 449 F.2d 583 (9th Cir. 1971); and *United States v. 16,179 Moslo Italian .22 Caliber Winler Derringer Convertible Starter Guns*, 443 F.2d 463 (2d Cir. 1971), all three cases were decided before the Supreme Court first recognized an individual right to

possess a firearm in *Heller*. Further, *16,179 Moslo Italian Starter Guns* involved civil forfeiture, not criminal prohibition—a fact upon which the opinion explicitly relied. 443 F.2d at 466. These distinctions make a critical difference, given this Court's longstanding recognition that "[t]he degree of statutory imprecision that due process will tolerate 'varies with the nature of the enactment and the correlative needs for notice and protection from unequal enforcement.' " *Advance Pharms., Inc. v. United States*, 391 F.3d 377, 396 (2d Cir. 2004) (quoting *Association of Int'l Auto. Mfrs. v. Abrams*, 84 F.3d 602, 614 (2d Cir. 1996)).

2. Capacity of Tubular Magazines

The Act further bars possession of any semiautomatic shotgun with "a fixed magazine capacity in excess of seven rounds." N.Y. PENAL LAW § 265.00(22)(b)(iv). The Sixth Circuit's decision in *Peoples Rights Organization* also struck down a provision of Columbus's ordinance similar to this one, noting that though shotgun shells come in many different sizes, the ordinance "fails to define the length of the round to be used" in determining a magazine's capacity, leaving individuals to guess at whether any given magazine is legal or not. 152 F.3d at 536. New York's Act suffers from the same critical infirmity.

The State attempts to make Plaintiffs shoulder the burden of "showing . . . difficulties with compliance or enforcement of [similar] statutory language at the federal or state levels." State Br. 76. Vague criminal provisions like the one here

offend due process not because they are too hard to enforce, but because they are too easy. By failing to "establish minimal guidelines to govern law enforcement," a vague statute risks "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358. Indeed, such a standardless statute may never need to be enforced at all, since law-abiding citizens will likely voluntarily adjust their conduct to avoid any chance of prosecution, giving up their right—here, a right guaranteed by the Constitution—to engage in perfectly innocent conduct. *See Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (noting that "uncertain meanings" cause citizens "to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." (quotation marks and citation omitted)).

3. Semiautomatic "Versions" of Automatic Weapons

The Act criminalizes possession of any pistol which has a detachable magazine and is a "semiautomatic version of an automatic rifle, shotgun or firearm." N.Y. PENAL LAW § 265.00(22)(c)(viii). The district court rightly struck down this provision as unconstitutionally vague, since "an ordinary person cannot know whether any single semiautomatic pistol is a 'version' of an automatic one." SPA48. The State's arguments to the contrary do not avail. The State once again urges that this limitation "is familiar and well-understood." State Br. 82. But as just argued, simply because a restriction is familiar does not mean it is well-

understood. And that other states have enacted similarly worded prohibitions of course does not save this one from vagueness; "repetition of constitutional error does not produce constitutional truth." *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting); *see also Bouie v. City of Columbia*, 378 U.S. 347, 359-60 (1964) ("It would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said."). Finally, the State's argument that the phrase "semiautomatic version of an automatic rifle" cannot be vague because several courts, including the Supreme Court, have used similar expressions in their opinions is plainly without merit. Courts obviously do not formulate every clause of their opinions with the same precision expected of legislators when they draft provisions of law exposing the citizenry at large to criminal penalty.

4. Reference to "Muzzle Break"

Finally, the district court also invalidated as unconstitutionally vague the Act's inclusion, in its list of prohibited firearm features, of a "muzzle break." N.Y. PENAL LAW § 265.00(22)(a)(vi). While a "muzzle brake" is a recognized firearm accoutrement, it is unclear what the phrase "muzzle break" means. And while the State argued below, as it argues here, that this was a "simple oversight in drafting," it "provided no evidence" in support. SPA47-48. The State's response before this

Court is to argue, in effect, that because the phrase "muzzle brake" is clear, but the phrase "muzzle break" is not, most citizens will be able to guess that the law means to refer to the former rather than the latter. But vagueness doctrine is designed for the very purpose of protecting "men of common intelligence" from having to "guess at [a criminal prohibition's] meaning" in this way. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). The district court's conclusion that this opaque phrase is unconstitutional should accordingly be upheld, whether under *Morales* or *Salerno*.

CONCLUSION

For the foregoing reasons, this Court should hold that New York's ban on "assault weapons" and "large-capacity" magazines violates the Second Amendment, and it should hold that the SAFE Act's provisions regarding the restoration or conversion of magazines and the ammunition capacity of tubular shotgun magazines are void for vagueness. The district court's contrary rulings should be reversed. The Court should affirm the district court's holdings that New York's seven-round ammunition load limit violates the Second Amendment and that the SAFE Act's provisions regarding semiautomatic versions of automatic handguns and muzzle breaks are void for vagueness.

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Respectfully submitted,

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