14-0036(L)

14-0037(XAP)

United States Court of Appeals for the Second Circuit

WILLIAM NOJAY,

Plaintiffs-Appellants-Cross-Appellees,

v.

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

Defendants-Appellees-Cross-Appellants,

(caption continued on inside front cover)

On Appeal from the United States District Court
for the Western District of New York

BRIEF FOR THE STATE DEFENDANTS AS APPELLEES AND AS CROSS-APPELLANTS

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Plaintiffs-Appellants-Cross-Appellees,

v.

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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PRELIMINARY STATEMENT

To reduce gun injuries and fatalities, federal, state, and local governments have at various times restricted the possession of military-style semiautomatic weapons, and of all ammunition magazines capable of holding more than ten rounds of ammunition, whether or not these are used with assault weapons. New York first adopted such prohibitions in 2000. In 2013, after several incidents of gun violence confirmed the existence of potential loopholes in New York's restrictions on assault weapons and large-capacity magazines, the State's legislature enacted the Secure Ammunition and Firearms Enforcement Act of 2013 (SAFE Act), which, *inter alia*, sought to close those loopholes and make the State's firearm restrictions easier to enforce.

Two months after the SAFE Act's enactment, a collection of advocacy groups, businesses, and individuals commenced this pre-enforcement challenge to the SAFE Act's regulation of assault weapons and large-capacity magazines, and its restriction on loading a magazine with more than seven rounds, alleging that these provisions violated the Second Amendment and other constitutional provisions, and were also impermissibly vague. On the parties' cross-motions for summary

judgment, the U.S. District Court for the Western District of New York (Skretny, C.J.), substantially rejected plaintiffs' challenges.

The district court correctly held that the challenged restrictions on assault weapons and large-capacity magazines are consistent with the Second Amendment. But the court improperly second-guessed the line-drawing determinations of New York's Legislature when it invalidated the SAFE Act's seven-round load limit, concluding that the Legislature's chosen number was not clearly preferable to a lower or higher load limit. The court also correctly rejected most of plaintiffs' challenges to the statute's provisions as unconstitutionally vague. However, it misapplied the legal standard applicable to vagueness challenges when it facially invalidated the SAFE Act's prohibitions on pistols that are a "semiautomatic version of an automatic rifle, shotgun, or firearm," and semiautomatic rifles with a detachable magazine and "muzzle break," despite plaintiffs' failure to show that those prohibitions were unconstitutionally vague in all or even most of their applications.

This Court should affirm the district court's judgment sustaining the SAFE Act's restrictions on assault weapons and large-capacity magazines against plaintiffs' Second Amendment challenge. It should

also affirm the district court's rejection of the majority of plaintiffs' facial vagueness challenges. And it should reverse the court's judgment invalidating the Act's seven-round load limit and upholding plaintiffs' vagueness challenges to two of the Act's provisions.

ISSUES PRESENTED

New York's SAFE Act generally restricts the transfer and possession of "assault weapons"—defined, as a general matter, as rifles, shotguns, and pistols that are (1) semiautomatic, (2) in the case of a pistol or rifle, able to accept a detachable ammunition magazine, and (3) equipped with at least one feature on an enumerated list of military-style features. Penal Law § 265.00(22). The Act also and separately restricts the sale, purchase, and possession of an ammunition magazine that can accept more than ten rounds of ammunition. *Id.* § 265.00(23). And the Act prohibits the possession of an ammunition magazine loaded with more than seven rounds of ammunition. *Id.* § 265.37. The ammunition provisions apply to all magazines, not just those used with assault weapons.

The questions presented are as follows:

1. Whether the SAFE Act's regulation of assault weapons and ammunition magazines is consistent with the Second Amendment.

2. Whether the provisions of the statute that plaintiffs challenge on vagueness grounds provide constitutionally sufficient notice of the conduct that they proscribe.

STATEMENT OF THE CASE

A. Statutory Background

1. The Federal Government's regulation of semiautomatic assault weapons and large-capacity magazines

Starting in the late 1980s, the federal Bureau of Alcohol, Tobacco and Firearms (ATF) began to receive requests to authorize the importation of "a new breed" of firearms, which ATF denominated "semiautomatic versions of true selective fire military assault rifles" (Joint Appendix (A.) 1632, 1633 (1989 ATF report).) ATF concluded that these firearms "represent[ed] a distinctive type of rifle distinguished by certain general characteristics which are common to the modern military assault rifle[,] . . . a weapon designed for killing or disabling the

enemy." (A.1634.) The military-style features of these firearms included the *ability to accept a detachable magazine*, which provides a fairly large ammunition supply and the ability to rapidly reload; a *folding or telescoping stock*, for portability; a *pistol grip* to "aid in one-handed firing of the weapon in a combat situation"; a *flash suppressor*, which helps to conceal a shooter's position by dispersing the "muzzle flash" when the firearm is fired and also helps to steady the firearm through repeated fire by controlling its "muzzle climb"; a *bayonet mount*; and a *grenade launcher*. (A.1634-1635.) Other features "serv[ing] a combat-functional purpose" include a *barrel shroud*, which helps to prevent the barrel from overheating when multiple rounds are fired quickly and provides "a convenient grip especially suitable for spray firing." (A.733 (H.R. Rep. No. 103-489, at 19).)

Congress held five years of hearings on the subject of what, adopting ATF's description, it termed "semiautomatic assault weapons." The evidence demonstrated that these firearms were "a growing menace to our society," and "the weapons of choice among drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder." (A.727 (H.R. Rep. No. 103-489, at 13).) Law-enforcement

officials testified about the use of these weapons in mass shootings and killings of law-enforcement officers, and "the rising level of lethality they face[d] from assault weapons on the street." (A.727-729 (H.R. Rep. No. 103-489, at 13-15).) Expert evidence showed that "the features that characterize a semiautomatic weapon as an assault weapon are not merely cosmetic, but do serve specific, combat-functional ends." (A.732 (H.R. Rep. No. 103-489, at 18).) This evidence demonstrated that "[t]he net effect of these military combat features is a capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns." (A.733-734 (H.R. Rep. No. 103-489, at 19-20).)

Congress's investigation further revealed "[n]umerous other notorious incidents" of mass killing perpetrated with assault weapons and large-capacity magazines—including a school shooting in Stockton, California, in which the shooter used an AK-47 assault rifle with a seventy-five-round magazine to fire 106 rounds in less than two minutes, killing five children and wounding twenty-nine others. (A.729 (H.R. Rep. No. 113-489, at 15).) Assault weapons and large-capacity magazines were also used in 1993 shootings on the Long Island Rail Road and in a San

Francisco office building that together left fourteen people dead and numerous others wounded. (A.729 (H.R. Rep. No. 113-489, at 15).)

The director of ATF testified to Congress that assault weapons were disproportionately used in other forms of crime: although in 1993 assault weapons comprised just one percent of all firearms, they accounted for 8.1 percent of weapons "traced because of their use in crime." (A.727 (H.R. Rep. No. 113-489, at 13).) And the Secretary of Housing and Urban Development testified that criminal gangs in Chicago routinely used semiautomatic assault weapons to intimidate residents and security guards in public-housing projects. (A.728 (H.R. Rep. No. 113-489, at 14).) Congress also received evidence that assault weapons and large-capacity magazines posed a significant threat to police. Law-enforcement officials described the "rising level of lethality" they faced from assault weapons such as the TEC-9, a pistol derived from a military submachine gun that came with a thirty-six-round magazine and could be fitted with a silencer. (A. 727-728 (H.R. Rep. No. 103-489, at 13-14 (quoting statement of John Pitts, executive vice president, Federal Law Enforcement Officers Association)).)

In response to this evidence, Congress enacted legislation restricting the manufacture, transfer and possession of "semiautomatic assault weapons." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XI, subtit. A (Violent Crime Act) § 110102(b), 108 Stat. 1796, 1996-97 (1994). (A.699-701.) In addition to prohibiting eighteen specific firearms (including the Colt AR-15) and their "copies or duplicates," the federal statute prohibited any semiautomatic firearm with a detachable ammunition magazine (except in the case of shotguns) and at least two of the following military-style features: a folding or telescoping stock, a conspicuously protruding pistol grip, a bayonet mount, a flash suppressor or a threaded barrel designed to accommodate a flash suppressor, and a grenade launcher. *Id.* § 110102(b), 108 Stat. 1997-98. (A.700-701.) The federal statute also prohibited magazines with "a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition." *Id.* § 110103(b), 108 Stat. at 1998-99. (A.702-703.) These restrictions did not apply to assault weapons and large-capacity magazines that were lawfully possessed on the date of the statute's enactment, to any large-capacity magazine manufactured before that date, or to certain

expressly excluded models of firearm. *Id.* §§ 110102(a), 110103(a), 108 Stat. 1997, 1999-2010.

By operation of the statute's sunset provision, the federal restrictions expired in 2004. *Id.* § 110105(2), 108 Stat. 2000. (A.703.) They have not been renewed.

2. New York State's 2000 enactment of legislation mirroring the existing federal restrictions on assault weapons and large-capacity magazines

In 2000, to "improv[e] the safety of all New Yorkers," New York independently restricted the possession and sale of assault-weapons and large-capacity magazines, enabling the separate prosecution of these offenses in New York's courts. (A.952-953 (N.Y. State Senate Introducer's Mem. in Support).) New York's law substantially mirrored the existing federal restrictions on these items. *See* Ch. 189, § 10, 2000 N.Y. Laws 2788, 2792. (A.923, 928-930.) Like the federal statute, New York's law contained exceptions for large-capacity magazines manufactured prior to the enactment of the federal ban in 1994, and for assault weapons that a person already lawfully possessed. (A.929-930.) Unlike the federal law, however, the New York law contained no sunset

provision, and thus remained in effect after the federal law expired in 2004, and until it was superseded in relevant part by the SAFE Act in 2013. (*See* A.962.)

B. In 2013, the SAFE Act Strengthens New York's Regulation of Assault Weapons and Large-Capacity Magazines

In 2012, there were at least seven mass shootings in which a gunman killed four or more people in a public place (A.583), including two incidents in or near New York. On December 14, 2012, a gunman rampaged through the Sandy Hook Elementary School in Newtown, Connecticut, killing twenty-seven people, most of them children, using an AR-15-type rifle equipped with ten thirty-round magazines, which he used to fire 154 rounds at his victims during a five-minute killing spree. *See* N.R. Kleinfield, Ray Rivera & Serge F. Kovaleski, "Newtown Killer's Obsession, in Chilling Detail," N.Y. Times (Mar. 29, 2013).[1] On December 24, 2012, a shooter equipped with a stockpile of ammunition used an AR-15-style rifle with a flash suppressor to ambush and kill

[1] *Available at* http://www.nytimes.com/2013/03/29/nyregion/search-warrants-reveal-items-seized-at-adam-lanzas-home.html?smid=pl-share.

two first responders in Webster, New York. (A.632-633 (declaration of Rochester Chief of Police James M. Sheppard).) Because the Webster shooter's firearm had only one military-style feature, there was doubt as to whether it fell within New York's existing restrictions on sales and transfers of assault weapons. (*See* A.633.)

In January 2013, in response to these incidents, New York State sought to close gaps and resolve ambiguities in the State's regulation of, *inter alia*, assault weapons, ammunition, gun licensing, and background checks. (*See* A.663-671 (Governor's Mem.), 672-679 (Assembly Mem.), 680-687 (Sen. Mem.), 1063-1064 (press release).) The State accordingly enacted the SAFE Act, Ch. 1, 2013 McKinney's N.Y. Laws 1, *amended by*, Ch. 57, pt. FF, 2013 McKinney's N.Y. Laws 290, 389.[2]

1. The SAFE Act's restrictions on assault weapons

To close loopholes in New York's existing regulation of assault weapons and make those laws "easier to enforce," the SAFE Act replaces the "'two-feature' test adopted from the now-expired federal

[2] Relevant provisions of the SAFE Act are reproduced in an addendum to this brief.

assault weapons ban with a clearer 'one-feature' test." (A.664 (Governor's Mem.), 673 (Assembly Mem.), 681 (Sen. Mem.).) Under the two-feature test, New York's restrictions could potentially be circumvented through "changes in weapon design" that omitted one banned feature while otherwise preserving the weapon's particularly lethal capabilities. (A.668.)

The SAFE Act thus classifies a firearm as an assault weapon if it (1) is semiautomatic, (2) in the case of a pistol or rifle, has a detachable ammunition magazine, and (3) possesses at least one enumerated military-style feature. Penal Law § 265.00(22). The SAFE Act's prohibited military-style features include: a *folding or telescoping stock*, which increases the weapon's concealability (A.272 (declaration of New York State Police Counsel Kevin Bruen), 1133 (report of Brady Center to Prevent Gun Violence); *see* A.1574-1575, 1584-1585, 1594 (photographs)); a *flash suppressor*, which obscures the shooter's position in nighttime combat or an ambush by limiting the flash of light given off when the weapon fires (A.274, 1133; *see* A.1580 (photograph)); a *barrel shroud*, which allows the shooter to steady the weapon without being burned while firing rapidly (A.275-276, 1133); a *protruding pistol*

grip, thumbhole stock, or second handgrip, which allow a shooter to stay on target while firing rapidly and also allow a shooter to retain control of the weapon while firing from the hip, which facilitates rapid fire (A.273, 1133; *see also* A.1576-1578, 1587, 1595 (photographs)); a *muzzle brake or muzzle compensator*, which are attached to the end of a rifle barrel to limit recoil by channeling the gases released when the weapon is fired, making it easier to fire multiple rounds rapidly, particularly when using powerful ammunition that produces greater recoil (A.273; *see also* A.1580 (photographs)); and a *threaded barrel*, which permits the firearm to accommodate a muzzle brake, flash suppressor, or silencer (A.274, 1133; *see also* A.1581, 1598 (photographs)).

The SAFE Act's definition of assault weapon was designed to "focus[] on the lethality of the weapon, amplified by the particular features." (A.668 (Governor's Mem.), 676 (Assembly Mem.), 684 (Sen. Mem.).) It unambiguously covers weapons like the AR-15-style assault rifles used in the Newtown and Webster shootings. (*See* A.1064 (press release).) Like the earlier federal legislation on which it is substantially modeled, the SAFE Act excludes all firearms manually operated by bolt, pump, level, or slide action, as well as 660 rifles and shotguns "most

commonly used in hunting and recreational sports." (A.734 (H.R. Rep. No. 103-489, at 20).) New York maintains a website identifying at least 145 pistols, 150 rifles, and 40 shotguns that are permitted under the Act. (A.270.) The Act also does not prohibit possession of any firearm that was lawfully possessed before the law's effective date of January 15, 2013. *See* Penal Law § 265.00(22)(g)(v). Persons who lawfully possessed a banned assault weapon at that time may continue to do so, but must register the weapon with the Superintendent of the State Police.[3] *Id.* § 400.00(16-a).

2. The SAFE Act's magazine-capacity restriction and seven-round load limit

The SAFE Act continues New York's existing prohibition on magazines with the capacity to contain more than ten rounds, and eliminates the exception for magazines manufactured before September 13, 1994. That exception existed because the federal statute had

[3] Failing to register an assault weapon that a person previously owned is punishable as a Class A misdemeanor, except that, if the failure is unknowing, the offending gun owner must receive a warning, and will be liable only for failing to register the firearm within thirty days of the warning. Penal Law §§ 265.20(a)(3), 400.00(16-a)(c).

grandfathered weapons manufactured before its effective date, and New York in 2000 had incorporated a similar grandfather clause. *See* Penal Law § 265.00(23). The 2013 legislation eliminated the grandfather clause in light of law-enforcement experiences showing that it was difficult to distinguish between magazines manufactured before and after the effective date of the ban. (A.669 (Governor's Mem.), 677 (Assembly Mem.), 685 (Sen. Mem.).) The SAFE Act accordingly prohibited possession of all magazines with the capacity to contain more than ten rounds, regardless of the date of manufacture. Penal Law § 265.00(23).

In addition to limiting the capacity of a magazine to ten rounds, the SAFE Act also added an additional restriction on *effective* capacity by prohibiting possession of a magazine loaded with more than seven rounds, Penal Law § 265.37. The Legislature had initially determined that magazine capacity should be restricted to seven rounds. *Id.* § 265.00(23)(b)-(c). But because few seven-round magazines are manufactured, the Legislature replaced the seven-round magazine restriction with a ten-round magazine restriction and a seven-round load

limit.[4] Ch. 57, pt. FF, 2013 McKinney's N.Y. Laws 290, 384. (A.277 n.12.) Consistent with its choice of seven rounds as the appropriate maximum for effective magazine capacity, the Legislature also defined as a restricted assault weapon any semiautomatic shotgun that, although not capable of accepting a detachable magazine, has a "fixed magazine capacity in excess of seven rounds." Penal Law § 265.00(22)(b)(iv).

Under the Act, possession of a prohibited assault weapon or a magazine with a capacity larger than ten rounds constitutes the Class D felony of Criminal Possession of a Weapon in the Third Degree. *Id.* § 265.02(7)-(8). Possession of a magazine loaded with more than seven rounds of ammunition constitutes a violation or a class A or class B misdemeanor. *Id.* § 265.37.

C. Plaintiffs' Challenge to the SAFE Act and the District Court's Decision Substantially Affirming the Act's Constitutionality

Shortly after the SAFE Act was passed, plaintiffs brought this challenge to its constitutionality. (A.20.) Plaintiffs alleged that (1) the

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[4] The load limit does not apply in the controlled and secure environments of the firing range and shooting competitions. Penal Law § 265.20(a)(7-f).

SAFE Act's restrictions on assault weapons and large-capacity magazines and the seven-round load limit violated the Second Amendment; (2) provisions of the Act regulating ammunition sales violated the Dormant Commerce Clause; and (3) certain provisions of the Act were unconstitutionally vague. (A.112-131.) Plaintiffs sought a preliminary injunction against enforcement of these provisions. The parties subsequently cross-moved for summary judgment. (A.29-30, 36.)

The district court upheld the SAFE Act in substantial part against plaintiffs' challenges. Assuming for purposes of the analysis that assault weapons and large-capacity magazines receive Second Amendment protection (Special Appendix (SPA) 25), the court determined that the SAFE Act's restrictions on these items were at least substantially related to New York's compelling interest in public safety, and therefore satisfied intermediate scrutiny (SPA36). The court invalidated the Act's seven-round load limit, however, characterizing it as an "arbitrary" limitation that could "disproportionately affect[] law-abiding citizens." (SPA39.)

The court rejected seven of plaintiffs' ten vagueness challenges to the Act. As relevant to this appeal, the court found that the Act's

magazine-capacity limit was not unconstitutionally vague when applied to "tubular" shotgun magazines or magazines that "can be readily restored or converted" to hold more than ten rounds of ammunition.[5] (SPA42-46, 49.) But the court invalidated for vagueness the Act's misspelled reference to a muzzle "break" rather than "brake," and its restrictions on semiautomatic "versions" of automatic weapons.[6] (SPA47-49.)

STANDARD OF REVIEW

This Court reviews de novo the district court's grant in part and denial in part of the parties' cross-motions for summary judgment, "evaluat[ing] each party's motion on its own merits." *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 88 (2d Cir. 2003) (quotation marks omitted).

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[5] The court also rejected plaintiffs' vagueness challenges to the Act's restrictions on firearms with a "conspicuously protruding" pistol grip and "threaded barrel," and its references to the "manufactured weight" of a firearm and "commercial transfer" of a firearm. (SPA42-49.) The court also rejected plaintiffs' challenge under the Dormant Commerce Clause. (SPA49-55.) Plaintiffs appear to have abandoned these challenges on appeal.

[6] The court also held that the typographically erroneous "and if" clause in Penal Law § 265.36 was "unintelligible" and therefore unconstitutionally vague. (SPA47.) Defendants do not challenge that ruling in this cross-appeal.

SUMMARY OF ARGUMENT

Plaintiffs' Appeal

1. New York's SAFE Act builds on laws that federal, state, and local governments have used, for two decades, to limit the public-safety risks posed by assault weapons and large-capacity magazines. The Act restricts assault weapons and large-capacity magazines, which are not within the core protections of the Second Amendment right, and plaintiffs also have not shown that those restrictions substantially burden a person's ability to use a handgun for self-defense in the home. Thus, on both grounds, heightened scrutiny is not warranted as a matter of law or fact.

As the district court correctly observed, even if the Act's restrictions burdened Second Amendment rights, and heightened scrutiny were therefore appropriate, the challenged provisions would satisfy constitutional requirements. New York's legislature enacted the SAFE Act after several incidents of gun violence confirmed the existence of potential loopholes in New York's existing regulation of assault weapons and large-capacity magazines, which New York had substantially modeled on restrictions in the federal government's

Violent Crime Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994). The body of evidence before the Legislature thus included the legislative records of the 1994 federal statute and of New York's law adopting the federal restrictions, *see* Ch. 189, § 10, 2000 N.Y. Laws 2788, 2792. Those materials, the other evidence before the Legislature, and the expert declarations and "studies and data" submitted by the State here, establish that the SAFE Act's assault-weapon and ammunition restrictions are at least "substantially related" to New York's "compelling[] governmental interests in public safety and crime prevention," *Kachalsky v. County of Westchester*, 701 F.3d 81, 96-97, 99 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013).

2. The district court correctly rejected plaintiffs' facial vagueness challenges to the SAFE Act's prohibition of magazines that "can be *readily restored or converted* to accept[] more than ten rounds of ammunition," Penal Law § 265.00(23)(a) (emphasis added); its prohibition on semiautomatic shotguns with "a fixed magazine *capacity in excess of seven rounds*," *id.* § 265.00(22)(b)(iv) (emphasis added); and its allowance of semiautomatic shotguns that "that cannot hold more than *five rounds of ammunition in a fixed . . . magazine*,"

id. § 265.00(22)(g)(iii) (emphasis added). Plaintiffs cannot show that this statutory language is "unconstitutionally vague 'as applied' to all circumstances," *United States v. Rybicki*, 354 F.3d 124, 130-31 (2d Cir. 2003) (en banc). Moreover, even under a more relaxed standard for vagueness, the challenges fail because the challenged terms have been in use for decades, in both the federal 1994 statute and New York's 2000 statute, without problems of compliance or enforcement that would support a claim of vagueness.

Defendants' Cross-Appeal

1. The district court erred by invalidating the SAFE Act's prohibition on possession of a magazine loaded with more than seven bullets. Like the limit on large-capacity magazines that the district court upheld, the seven-round load limit does not substantially burden a person's ability to use a handgun for self-defense in the home or elsewhere, and thus heightened scrutiny is unwarranted. But even if heightened scrutiny were to apply, the seven-round load limit is not arbitrary and is substantially related to New York's compelling interest in public safety.

2. The district court also erred by striking two provisions of the SAFE Act as unconstitutionally vague on their face. There is nothing impermissibly vague about a prohibition on pistols that have a detachable magazine and are a "*semiautomatic version* of an automatic rifle, shotgun or firearm," Penal Law § 265.00(22)(c)(viii) (emphasis added). The district court erroneously discounted the use of this term in prior federal and state assault-weapon statutes and in numerous judicial decisions construing those and similar statutes—all of which establishes that the language at issue is not unconstitutionally vague. Nor is there any vagueness in the prohibition on use of a "muzzle break" in view of the fact—undisputed by plaintiffs—that "muzzle brake" is a commonly used term for an item that is attached to the end of a firearm to limit recoil, and "muzzle break" has "no accepted meaning" (SPA48). The statutory term is an unambiguous, albeit misspelled, reference to a "muzzle brake."

ARGUMENT

POINT I

THE SAFE ACT'S RESTRICTIONS OF ASSAULT-WEAPONS AND LARGE-CAPACITY MAGAZINES DO NOT VIOLATE THE SECOND AMENDMENT

A. The Assault Weapons and Large-Capacity Magazines Regulated by the SAFE Act Are Not Within the Core Protections of the Second Amendment.

1. *Heller* recognized that firearms with military-style features may be prohibited.

The Supreme Court has recognized that while the Second Amendment confers an individual right, that right "is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The Second Amendment does not create "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *id.* at 626, and "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns," *id.* at 625. Rather, the Second Amendment's "core" guarantee is the "'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Kachalsky*, 701 F.3d at 93 (quoting *Heller*, 554 U.S. at 634-35).

In *Heller*, the Court relied on an analogy between the "small[] arms" commonly used for home self-defense at the time of the framing,

554 U.S. at 625-26 (brackets omitted), and the handguns banned by the District of Columbia, *id.* at 628-30, when holding that the Second Amendment foreclosed the District's "absolute prohibition of handguns held and used for self-defense in the home," *id.* at 636. But the Court explained that the same analogy could not be made between protected "small arms" and modern "weapons that are most useful in military service—M-16 rifles and the like," *id.* at 627. These, the Court noted, "may be banned."[7] *Id.*

The assault weapons and large-capacity magazines regulated by the SAFE Act are precisely the kinds of weapons that can be banned, or restricted, under *Heller*. As the Supreme Court has recognized, "[t]he AR-15 is the civilian version of the military's M-16 rifle," and "[m]any M-16 parts are interchangeable with those in the AR-15 and can be used to convert the AR-15 into an automatic weapon." *Staples v. United States*, 511 U.S. 600, 603 (1994). Although "virtually any semiautomatic

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[7] Indeed, as amici note, large-capacity magazines may be outside Second Amendment protection for the additional reason that historical sources suggest that they are properly understood as firearm "accessories" or "accoutrements" rather than as "arms" of any sort. *See* Br. of Law Center to Prevent Gun Violence and New Yorkers Against Gun Violence, at Point I.B.

weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun," *id.* at 615, it is the presence of additional "military combat features" serving "specific, combat-functional ends" (A.732-734 (H.R. Rep. No. 103-489, at 18-20)) that defines the sub-class of *semiautomatic assault weapons* regulated by the Safe Act, *see* Penal Law § 265.00(22), and before that by the federal assault-weapons law.[8]

That the assault weapons and large-capacity magazines restricted by the SAFE Act are outside the core protections of the Second Amendment is also "fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons." *Heller*, 554 U.S. at 627 (quotation marks omitted). Assault weapons and large-capacity magazines have many of the hallmarks of such weapons.

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[8] Plaintiffs are incorrect in suggesting (Br. for Pls. (Br.) 19) that *Staples* identified the AR-15 as a constitutionally protected firearm. In that case, the Court held not that a semiautomatic AR-15 was constitutionally protected, but rather that, in a prosecution for possession of a fully automatic weapon, it was necessary to prove not only that a semiautomatic AR-15 had been modified to become fully automatic, but that the defendant knew it had been so modified, in light of the background rule of the common law favoring *mens rea*. *Staples*, 511 U.S. at 602, 619.

Although the weapons regulated by the Act are semiautomatic rather than fully automatic, semiautomatics "fire almost as rapidly as automatics," *Heller v. District of Columbia*, 670 F.3d 1244, 1263 (D.C. Cir. 2011) (*Heller II*), making them "virtually indistinguishable in practical effect from machineguns" (A.732 (H.R. Rep. No. 103-489 at 18)). Indeed, the U.S. Army training manual relied upon by plaintiffs (Br. 18) shows that, under certain circumstances, a fully automatic firearm such as an M-16 can be *more* dangerous when used in semiautomatic mode like an AR-15. The Army manual instructs soldiers to "normally . . . employ[]" M-16 rifles in semiautomatic mode in combat settings because "semiautomatic fire is superior to automatic fire in all measures: shots per target, trigger pulls per hit, and time to hit." U.S. Dep't of the Army, *Rifle Marksmanship M-16/M-4-Series Weapons* at 7-9, 7-13 (2008).[9] The manual describes semiautomatic fire as the "most accurate technique" in "fast-moving, modern combat," *id.* at 7-8, and advises sparing use of automatic fire, which is "rarely effective," *id.* at 7-12, 7-47.

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[9] *Available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_22x9.pdf.

The military-style features that are necessary to make a semiautomatic weapon an assault weapon under the SAFE Act "serve specific, combat-functional ends." (A.732 (H.R. Rep. No. 103-489 at 18)). For example, secondary grip features such as a "conspicuously" protruding pistol grip make "spray firing from the hip particularly easy." *Richmond Boro Gun Club, Inc. v. City of N.Y.*, 97 F.3d 681, 685 (2d Cir. 1996) (upholding New York City's assault-weapons ban). A muzzle brake facilitates rapid fire by reducing recoil, allowing the shooter to fire multiple shots without having to pause to re-aim the weapon at the intended target. (A.273 (Bruen declaration).) A barrel shroud cools the barrel so that it will not overheat as a result of firing multiple rounds of ammunition and "provides the shooter with a convenient grip especially suitable for spray-firing." (A.733 (H.R. Rep. No. 103-489, at 19).) A folding stock makes a rifle or shotgun substantially shorter, increasing "its portability . . . in combat" and also "the ability to conceal the gun in civilian life." (A.733); *see Richmond Boro Gun Club*, 97 F.3d at 684 (stating that use of a folding stock is "characteristic of military and not sporting weapons"). A flash suppressor obscures the shooter's position by limiting the flash of light

given off when the weapon fires. (A.274, 733 (H.R. Rep. No 113-489, at 19), 1635.) And a threaded barrel permits the firearm to accommodate a muzzle brake, flash suppressor, or silencer. (A.274 (Bruen declaration), 1133 (Brady Center report).)

Many of these military-style features "facilitat[e] the deadly 'spray fire' of the weapon" (A.732-733 (H.R. Rep. No. 103-489, at 18-19)) and enhance its "'capacity to shoot multiple human targets very rapidly," *Heller II*, 670 F.3d at 1262 (quoting congressional testimony of Brian Siebel of the Brady Center to Prevent Gun Violence). The large-capacity magazines regulated by the SAFE Act are also principally useful in combat rather than civilian situations. Indeed, they were designed to afford soldiers an ample supply of ammunition for combat. (A.1634 (1989 ATF study).) Particularly when used in an assault weapon with the ability to accept a detachable magazine, large-capacity magazines "make it possible to fire a large number of rounds without re-loading, then to reload quickly when those rounds are spent," such that "a single person with a single assault weapon can easily fire literally hundreds of rounds within minutes." (A.733 (H.R. Rep. No. 103-489, at 19).) "The net effect of these military combat features is a capability for lethality—

more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns." (A.733-734 (H.R. Rep. No. 103-489, at 19-20).)

In light of these considerations, other courts considering assault-weapons restrictions similar to the SAFE Act's have concluded that an assault weapon is most appropriately treated as a "weapon[] of war" for Second Amendment constitutional purposes, because it "has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." *People v. James*, 174 Cal. App. 4th 662, 676-77 (3d Dist. 2009) (quotation marks omitted) (concluding "that *Heller* does not extend Second Amendment protection to assault weapons"); *People v. Zondorak*, 220 Cal. App. 4th 829, 837 (4th Dist. 2013) (same). In other words, those courts have concluded that assault weapons are akin to the M-16-type weapons that *Heller* stated were outside the scope of the Second Amendment right.

2. Large-scale manufacture and distribution of a weapon alone does not alter that analysis.

Plaintiffs do not dispute that the military-style features characterizing assault weapons "are not merely cosmetic, but do serve specific, combat-functional ends." (A.732-733 (H.R. Rep. No. 103-489, at 18-19).) Instead, plaintiffs assert (Br. 22) that if such weapons are being manufactured domestically in sufficiently large numbers, then they must be categorically protected by the Second Amendment. But large-scale manufacture and distribution of a weapon alone does not qualify it for Second Amendment protection. *Heller* emphasized that the Constitution's protection of the right to access a handgun for self-defense is rooted in the tradition of using "small arms . . . in defense of person and home" since the founding era. 554 U.S. at 625 (quotation marks omitted). *Heller* did not suggest that a firearm whose defining characteristics lack such a long-standing pedigree can gain constitutional protection simply by being manufactured in large numbers.

As the Third Circuit has observed, in light of the Supreme Court's recognition that the Second Amendment codified a pre-existing individual right, "[i]t would make little sense to categorically protect a class of weapons bearing a certain characteristic when, at the time of

ratification, citizens had no concept of that characteristic or how it fit within the right to bear arms." *United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010); *see also Heller*, 554 U.S. at 592 ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."). This is especially true when the novel characteristic has the effect of making a firearm "unusually dangerous," as the district court here found with respect to the features regulated by the SAFE Act. (SPA32.)

In any event, plaintiffs have not demonstrated that the SAFE Act's restrictions on assault weapons and large-capacity magazines "amount[] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [self-defense in the home]," *Heller*, 554 U.S. at 628. Indeed, the record evidence shows that of approximately 310 million firearms in the United States, only about seven million (two percent) are assault weapons. (A.1091 (using the National Rifle Association's (NRA) estimates of assault weapons owned in the United States, and the Congressional Research Service's estimate of all firearms owned in the United States).) Moreover, plaintiffs make no showing that even the figure of seven million fairly represents the

number of assault weapons in use by civilians for self-defense in the home. As plaintiffs' amici recognize, assault weapons are also used by federal, state, and local law-enforcement agencies. *See* Br. for N.Y. State Sheriffs' Ass'n *et al.* 18. And some number of the assault weapons in the United States plainly are not "possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, including those possessed by criminals.

Finally, even the number of assault weapons in use by law-abiding civilians likely overstates the number of individual civilians using assault weapons for self-defense in the home. First, individuals in many states cannot lawfully possess such weapons because states and municipalities representing over one fourth of the Nation's population ban semiautomatic rifles or assault weapons. *Heller II*, 670 F.3d at 1268 n.** (citing laws of New York, Connecticut, California, Hawaii, Massachusetts, Maryland, and New Jersey). And second, individuals who do lawfully possess assault weapons often possess more than one. According to a market-research report that plaintiffs submitted in the proceedings below, sixty percent of respondents in a 2010 survey owned multiple AR-15-style rifles, with thirty-four percent owning three or more. (A.155, 158, 164.) Courts concluding that assault weapons are in

"common use" have mistakenly relied on the number of those firearms being manufactured domestically, rather than on the number of civilians using the firearms for self-defense in the home—the issue that featured in *Heller*'s analysis. *See Heller II*, 670 F.3d at 1261; *Shew v. Malloy*, — F. Supp. 2d —, Civil No. 3:13CV739, 2014 WL 346859, at *5 (D. Ct. Jan. 30, 2014).

Many of these same shortcomings undercut plaintiffs' efforts to argue that the Second Amendment categorically protects large-capacity magazines. Plaintiffs make no showing that large-capacity magazines are "overwhelmingly chosen by American society" for self-defense in the home, *Heller*, 554 U.S. at 628. First, although they estimate that there are "at least" tens of millions of large-capacity magazines in the United States (Br. 25), they do not even estimate—much less prove—the total number of magazines, thus providing no basis for the conclusion that large-capacity magazines are more numerous than magazines with a capacity of ten rounds or fewer. Indeed, contrary to plaintiffs' assertion that such magazines are overwhelmingly preferred by civilians, one court has estimated that only "18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten

rounds." *Heller II*, 670 F.3d at 1261. Second, the number of large-capacity magazines in existence overstates the number possessed by civilians for self-defense, because many large-capacity magazines are possessed by law enforcement officers, as plaintiffs acknowledge (*id.*). Third, the number of large-capacity magazines in use by civilians does not indicate the number of civilians who use them for lawful purposes such as self-defense in the home because an individual person may own more than one magazine. *Cf. San Francisco Veteran Police Officers Ass'n v. City & County of San Francisco*, — F. Supp. 2d —, No. C 13-05351 WHA, 2014 WL 644395, at *5 (N.D. Cal. Feb. 19, 2014) (stating that the number of large-capacity magazines that "have been made and sold" does not indicate whether they "are common or prevalent among law-abiding citizens").

In sum, there is no basis for plaintiffs' claim that civilians have overwhelmingly chosen to use assault weapons and large-capacity magazines for self-defense. Thus, their assertion that these weapons are protected by the Second Amendment because of their common use—which the district court assumed for purposes of the argument (SPA25)—fails on its own terms.

B. In Any Event, Heightened Scrutiny Is Not Warranted Because the Challenged Provisions of the SAFE Act Do Not Substantially Burden the Ability to Use a Handgun for Self-Defense.

Because plaintiffs have not demonstrated that assault weapons and high-capacity magazines are categorically protected by the Second Amendment, the Court may stop at this "threshold inquiry," *Marzzarella*, 614 F.3d at 89, and reject plaintiffs' Second Amendment challenge to the SAFE Act on that basis alone. But even if assault weapons and magazine-capacity were within the core protections of the Second Amendment, heightened scrutiny would not be warranted. As a practical matter, the SAFE Act's assault-weapons and magazine-size restrictions, as well as its seven-round load limit (discussed in Point III.A., *infra*), do not substantially burden the Second Amendment right recognized in *Heller*.

This Court has recognized that "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 838 (2013). By

contrast, "where the burden imposed by a regulation on firearms is a 'marginal, incremental, or even appreciable restraint on the right to keep and bear arms,' it will not be subject to heightened scrutiny." *Kwong v. Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013) (quoting *DeCastro*, 682 F.3d at 166), *cert. denied sub. nom. Kwong v. de Blasio*, 134 S. Ct. 2696 (2014).

A "law that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense." *Decastro*, 682 F.3d at 168. The SAFE Act's regulation of assault weapons leaves ample alternatives, and thus does not impose a substantial burden on the Second Amendment right. A firearm falls within the SAFE Act's assault-weapons restriction only if it (1) is semiautomatic, (2) in the case of a pistol or rifle, has a detachable ammunition magazine, and (3) possesses at least one enumerated military-style feature. Penal Law § 265.00(22). As the district court correctly recognized, "New Yorkers can still purchase, own, and sell all manner of semiautomatic weapons," including handguns, "that lack the features outlawed by the SAFE Act." (SPA29.) The same is true of manual-action firearms and the hundreds of rifles and shotguns that

Congress excluded from the now-expired federal assault-weapons restrictions. Penal Law § 265.00(22)(g). (A.743-753.) Thus, the SAFE Act plainly does not "ban[] handgun possession in the home"—the type of firearm restriction invalidated in *Heller*, *see* 554 U.S. at 628. And, as the district court determined, the Act "does not totally disarm New York's citizens" or otherwise "meaningfully jeopardize their right to self-defense." (SPA29). *See also Kampfer v. Cuomo*, — F. Supp. 2d —, No. 6:13-CV-82, 2014 WL 49961, at *6 (N.D.N.Y. Jan. 7, 2014) (upholding the SAFE Act's assault-weapon restrictions because "ample firearms remain available" for self-defense).

So, too, the SAFE Act's magazine-size and load-limit restrictions leave ample alternative opportunities for the possession and use of a handgun in self-defense. Like the 1994 federal law on which it was largely modeled, the SAFE Act prohibits only magazines with "a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition." Penal Law § 265.00(23). The SAFE Act permits possession of magazines with a ten-round capacity, providing these are not loaded with "more than seven rounds of

ammunition." *Id.* § 265.37; *see also id.* § 265.20(a)(7-f) (exception to the seven-round limit when at a firing range and or shooting competition).

Plaintiffs make no showing that those provisions "substantially affect their ability to defend themselves," *Heller II*, 670 F.3d at 1262, and indeed acknowledge that "[t]he average gun owner often will not need to fire a *single* round in self-defense" (Br. 25). As a trial court recently found when upholding Colorado's magazine-capacity restriction, the defensive purpose of firearms is often achieved without the firing of any shots whatsoever, because the defensive display of a firearm is often sufficient to dispel the threat. *Colorado Outfitters Ass'n v. Hickenlooper*, — F. Supp. 2d. —, Civ. A. No. 13–cv–01300, 2014 WL 3058518, at *15 (D. Colo. June 26, 2014). The *Colorado Outfitters* court further found that, even when firing shots is necessary, the use of one or two warning rounds is often sufficient. *Id.* As that court also found, instances in which a civilian uses a firearm to disable an attacker are "comparatively rare," and in any event involve firing "only as many shots as necessary," not "as many shots as possible." *Id.*

The *Colorado Outfitters* court thus concluded that a magazine-capacity restriction does not impede effective self-defense. *Id.* The court

found this to be the case even for a firearm user who is "less competent or confident," or who faces conditions that make accurate fire difficult, such as "poor lines of sight, or darkness," because the ability to fire large numbers of rounds under those circumstances may be not only unnecessary but "ill-advised." *Id.* & n.25.

The record evidence in this case is consistent with the trial court's findings in the Colorado case. For example, the NRA Institute for Legislative Action, which is the "lobbying arm of the National Rifle Association of America,"[10] publishes what it describes as "self-selected stories [of defensive gun use] that are sent to the NRA and are then distilled into those that represent stories [the NRA] believes its members will be interested in reading." Br. for NRA (NRA Br.) 24. Of the 298 such stories published between June 2010 and May 2013, only one story (0.3 percent of the total) reported the firing of more than seven shots, and forty-one stories (13.9 percent for the total), reported no shots being fired.[11] (A.615 (declaration of Lucy P. Allen).)

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[10] *See* http://www.nraila.org/about-nra-ila.aspx.

[11] The NRA objects to this use of its own compilation of incidents of defensive gun use, asserting that those incidents "do not constitute a

(*continued on the next page*)

The rarity of defensive firearm uses involving more than seven shots is further demonstrated by the New York City Police Department's *Annual Firearms Discharge Report 2011* (2012),[12] on which plaintiffs rely (Br. 26). According to the report, in 2011, New York City police officers fired only one round in thirty-one percent of officer-involved shooting incidents, and fired seven rounds or fewer in sixty-five percent of incidents. N.Y. City Police Dep't, *Annual Firearms Discharge Report 2011*, *supra*, at 23. These figures, moreover, reflect shots fired by all the officers involved in an incident, not by each individual officer. *Id.*

Plaintiffs have thus made no showing that the SAFE Act's ten-round magazine-capacity limit and seven-round load-limit provisions are a substantial burden, rather than the type of "marginal" restraint to which this Court has declined to apply heightened scrutiny, *see Kwong*, 723 F.3d at 167 (quoting *DeCastro*, 682 F.3d at 166). A magazine-

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reliable sample from which to draw conclusions." NRA Br. 24. The NRA does not, however, offer any reason to believe that its stories understate the number of shots fired in defensive incidents.

[12] *See* http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/nypd_annual_firearms_discharge_report_2011. pdf.

capacity restriction limits the number of rounds that can be fired before a reload is necessary. (*See* A.278-279 (Bruen declaration).) *See also Colorado Outfitters Ass'n*, 2014 WL 3058518, at *15. As the *Colorado Outfitters* court found, to the extent that the right of self-defense is affected, it is only "in the relatively rare circumstances in which sustained defensive fire is appropriate," where the restriction "forces a brief pause to reload or access another weapon." *Id.* The record evidence here supports the same conclusion, and in any event does not show that incidents of sustained defensive fire occur frequently or that the pause to reload adversely affects one's success in self-defense.[13] *Id.*

In sum, the challenged provisions of the SAFE Act leave open ample alternative channels for self-defense with a handgun in the home. *See Heller II*, 670 F.3d at 1262 (making the same observation with respect to the District of Columbia's restriction on assault weapons and large-capacity magazines). The SAFE Act's restrictions thus do not

[13] Indeed, many of plaintiffs' arguments appear to rest on an erroneous conflation of civilian self-defense needs with the very different needs of law enforcement. Plaintiffs' observation that police officers often carry large-capacity magazines in the performance of their particularly dangerous law-enforcement duties (Br. 25) is not indicative of the self-defense needs of civilians.

impose a substantial restraint on self-defense, but are "more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights." *Id.* (quoting *Marzzarella*, 614 F.3d at 97).

The district court mistakenly concluded that heightened scrutiny was required because it asked whether the SAFE Act burdened the ability *to acquire assault weapons* or to load a weapon with whatever amount of ammunition a person wishes. (SPA25-26.) But *Heller* did not hold that the Second Amendment guarantees access to every possible subclass of handgun or rifle. *Heller II*, 670 F.3d at 1268. The Supreme Court held only that the Second Amendment does not permit the "prohibition of all handguns." *Id.* at 1267.

C. Even If the Challenged Provisions of the SAFE Act Warrant Heightened Scrutiny, the Restrictions Are Constitutional.

If heightened scrutiny of the SAFE Act is required, the Act nevertheless passes constitutional muster because its regulation of assault weapons and ammunition magazines is at least substantially related to New York's compelling interests in public safety and crime prevention.

For the same reasons that these provisions do not impose a substantial burden, *see supra* I.B, they also do not trigger strict scrutiny. [14]

1. At most, intermediate scrutiny applies.

As this Court has noted, it is not the case "that heightened scrutiny must always be akin to strict scrutiny when a law burdens the Second Amendment." *Kachalsky*, 701 F.3d at 93. "[T]he appropriate level of scrutiny under which a court reviews a statute or regulation in the Second Amendment context is determined by how substantially that statute or regulation burdens the exercise of one's Second Amendment rights." *Kwong*, 723 F.3d at 167. Strict scrutiny is inappropriate for firearm restrictions that "only impose[] a burden on the right," rather than "ban[ning] the right to keep and bear arms" like the District of Columbia statute invalidated in *Heller*. *Id.* at 168 n.16. When applying

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[14] As plaintiffs acknowledge (Br. 12-13), this Court's precedent forecloses their argument that if the Second Amendment is implicated in any way whatsoever, this Court must necessarily rule for them. As this Court has noted, *Heller*'s "conclusion that the [District of Columbia's] law would be unconstitutional '[u]nder any of the standards of scrutiny' applicable to other rights implies, if anything, that one of the conventional levels of scrutiny would be applicable to regulations alleged to infringe Second Amendment rights." *Kachalsky*, 701 F.3d at 89 n.9 (quoting *Heller*, 554 U.S. at 628).

these principles to New York City's $340 fee for obtaining a license to possess a handgun in the home, this Court noted that "heightened scrutiny [might be] unwarranted," but it was unnecessary to decide the issue because the challenged regulation "would, in any event, survive under the so-called 'intermediate' form of heightened scrutiny." *Id.* at 168.

The D.C. Circuit similarly applied intermediate scrutiny rather than strict scrutiny to the District of Columbia's prohibition of military-style semiautomatic rifles and large-capacity magazines, noting that the prohibitions likely "do not impose a substantial burden" and certainly do "not effectively disarm individuals or substantially affect their ability to defend themselves." *Heller II*, 670 F.3d at 1262. Likewise, the Third Circuit has held that only intermediate scrutiny applied to a federal statute prohibiting possession of a firearm with an obliterated serial number, observing that such a restriction "does not severely limit the possession of firearms" because it "leaves a person free to possess any otherwise lawful firearm he chooses." *Marzzarella*, 614 F.3d at 97. And the Seventh Circuit, when evaluating a Chicago ordinance that required residents to engage in firing-range training as a condition of firearm possession, but prohibited firing ranges within the

city limits, applied more than intermediate scrutiny, although "not quite 'strict scrutiny,'" in view of the ordinance's "serious encroachment" on the Second Amendment right. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

Although each of these cases concerned a law that to some extent restricted firearm possession in the home, where Second Amendment protections are at their zenith, *Kachalsky*, 701 F.3d at 89, in none of them did a court of appeals apply strict scrutiny. Plaintiffs are thus mistaken in asserting (Br. 36) that strict scrutiny must apply anytime a firearm regulation happens to apply in the home as well in public places.[15] No court of appeals has applied strict scrutiny when reviewing such a law. Plaintiffs are also mistaken in their claim that First

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[15] Plaintiffs assert (Br. 35-36) that when the *Heller* majority rejected Justice Breyer's "interest-balancing" approach the Court necessarily also rejected intermediate scrutiny of firearm restrictions applying both outside and within the home. They are mistaken. To be sure, Justice Breyer based his proposal on First Amendment cases applying intermediate scrutiny, *Heller*, 554 U.S. at 704 (Breyer, J., dissenting), but he departed from conventional means-ends scrutiny by calling for an explicit assessment of the costs and benefits of government regulations, *see id.* at 689-90. Thus, in rejecting his view the Court did not also reject ordinary means-ends scrutiny, including intermediate scrutiny. *See Heller II*, 670 F.3d at 1265 (rejecting this same argument).

Amendment jurisprudence precludes the application of intermediate scrutiny to firearm restrictions prohibiting the possession of firearms with particular specified features "*at all times* and *in all places*." Br. 39-41. Such restrictions have been sustained under intermediate scrutiny by at least the D.C. Circuit in *Heller II* and the Third Circuit in *Marzzarella*. And in each of those cases, the court of appeals held that First Amendment principles supported the application of intermediate scrutiny. *See Heller II*, 670 F.3d at 1262 (District of Columbia's restriction on assault rifles and high-capacity magazines); *Marzzarella*, 614 F.3d at 97 (federal prohibition on possession of firearms without a serial number). As the D.C. Circuit has explained, a prohibition of weapons with particularly dangerous features is akin to a restriction on the time, place, or manner of expression under the First Amendment—which receives intermediate scrutiny—because it merely channels the expression of the Second Amendment right toward firearms that are less risky to the public, but equally appropriate for self-defense. *See Heller II*, 670 F.3d at 1262; *Decastro*, 682 F.3d at 167-68 (likening a "law that regulates the availability of firearms" to a time, place, and manner regulation in First Amendment doctrine).

2. The challenged provisions satisfy intermediate scrutiny.

Under intermediate scrutiny, a regulation will be upheld if it is "substantially related to the achievement of an important government interest." *Kachalsky*, 701 F.3d at 96. Applying intermediate scrutiny here, plaintiffs' challenge fails because the SAFE Act's assault-weapons and ammunition restrictions are at least "substantially related," *id.*, to New York's "substantial, indeed compelling, governmental interests in public safety and crime prevention," *id.* at 97. The restrictions are important but incremental improvements on two decades of federal and state legislative determinations that assault weapons and large-capacity magazines pose particular risks to public safety. New York's Legislature acted against the background of the earlier federal and state attempts to regulate assault weapons and large-capacity magazines, and was informed by the shortcomings of those prior approaches. (*See* A.668-669 (Governor's Mem.), 676-677 (Assembly Mem.), 684-685 (Sen. Mem.).)

a. The Federal Government has found that assault weapons and large-capacity magazines pose risks to public safety.

The 1994 Violent Crime Act was the culmination of Congress's five-year inquiry into the dangers posed by assault-weapons and large-capacity magazines. That investigation revealed that assault weapons held a "capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns." (A.733-734 (H.R. Rep. No. 113-489, at 19-20); *see* A.727.) The evidence before Congress showed that the military features that distinguish an assault weapon facilitate "deadly spray fire" and enhanced the weapon's capacity for concealment. (A.732-733 (H.R. Rep. No. 103-489, at 18-19 (quotation marks omitted)).) And the evidence further showed that large-capacity magazines allowed "a single person with a single assault weapon [to] easily fire literally hundreds of rounds within minutes." (A.733 (H.R. Rep. No 103-489, at 19).) Congress heard testimony that these features made assault weapons "the weapons of choice among drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder." (A.727 (H.R. Rep. No. 103-489, at 13).) *See also Smith v. United States*, 508 U.S. 223, 225 (1993) (noting

that the MAC-10 assault pistol is "apparently is a favorite among criminals" because "[i]t is small and compact, lightweight, and can be equipped with a silencer").

Congress's investigations identified numerous incidents of mass killing perpetuated with assault weapons and large-capacity magazines—including shootings at a school in Stockton, California, on the Long Island Rail Road, and in a San Francisco office building. (A.729 (H.R. Rep. No. 113-489, at 15).) See *supra* ___. Indeed, in the nine-year period prior to passage of the federal statute, assault weapons and large-capacity magazines were used in forty percent of the fifteen mass shootings involving at least six persons killed or twelve persons killed or wounded. (A.565 (analysis by Christopher A. Koper).)

The evidence before Congress also revealed that assault weapons were disproportionately used in other forms of crime. Records 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. (A.727 (H.R. Rep. No. 113-489, at 13).) Congress heard evidence regarding the use of these weapons by criminal gangs to intimidate the residents and security

guards of public-housing projects. (A.728 (H.R. Rep. No. 113-489, at 14).) *See Richmond Boro Gun Club*, 896 F. Supp. 2d at 283 (noting that ATF banned importation of certain semiautomatic assault rifles in 1989 because of "their use in crime," particularly in "the illicit drug trade" (quotation marks omitted)). And Congress received evidence regarding the "rising level of lethality" faced by law-enforcement officers as a result of the proliferation of assault weapons and large-capacity magazines on the streets. (A.727-728 (H.R. Rep. No. 103-489, at 13-14).) Indeed, before the federal government took action to restrict large-capacity magazines, 31 to 41 percent of shootings of police officers involved guns equipped with these items. (A.291 (Koper declaration).)

To address these distinct dangers of assault weapons and large-capacity magazines, Congress enacted a ten-year prohibition on the possession of nineteen specific assault weapons and any semiautomatic rifle, pistol, or shotgun with two or more "combat style" features and (in the case of a rifle or pistol) the capability to accept a detachable magazine. (A.734 (H.R. Rep. No. 113-489, at 20); *see* A.700-701.) Congress also prohibited magazines capable of holding more than ten rounds of ammunition. (A.734 (H.R. Rep. No. 113-489, at 20); *see* A.701-

702.) But it excluded from these prohibitions any assault weapon or large-capacity magazine that was "lawfully possessed on the date of enactment." (A.734 (H.R. Rep. No. 113-489, at 20).) The effect of these grandfathering provisions was to exempt as many as 1.5 million assault weapons and 25-50 million large-capacity magazines from regulation. (A.295 (Koper declaration).) The legislation also permitted the importation of 4.8 million additional large-capacity magazines while it was in effect. (A.295.)

b. New York has determined that assault weapons and large-capacity magazines should be regulated by the State.

In 2000, nearly six years after the enactment of the federal legislation, New York incorporated the federal government's approach to regulating assault weapons and large-capacity magazines into state law, enacting restrictions that substantially mirrored the federal provisions. Ch. 189, § 10, 2000 N.Y. Laws 2788, 2792. (A.923, 928-930.). The principal purpose of the New York legislation was to strengthen enforcement of these restrictions by enabling state law-enforcement officials to prosecute violations without the need for federal assistance. (*See* A.952-953 (Sen. Mem.).) The New York legislation was also

designed to persist after any expiration of the federal restrictions by continuing indefinitely without a sunset provision. (A.962.) As several legislators noted prior to passage, however, the legislation did not address certain shortcomings of the federal legislation, such as the proliferation of dangerous "post-ban" weapons that circumvented the federal definition of assault weapons. (A.971 (statement of Sen. Schneiderman); *see* A.975 (statement of Sen. Dollinger).)

Mass shootings involving assault weapons and large-capacity magazines continued—with particularly lethal results. Between 2009 and 2013, at least fifty-six shooting incidents occurred in which four our more people were killed. (A.1288 (analysis by Mayors Against Illegal Guns).) Mass shooters using assault weapons or large-capacity magazines shot more than twice as many people, and killed 57 percent more people, as compared with mass shooters who were not using these items. (A.1288.) In one infamous example, the gunman who shot Congresswoman Gabrielle Giffords and eighteen others in Tucson, Arizona in 2011 used a semiautomatic pistol with a thirty-three-round magazine that he emptied "in about 19 seconds." Sarah Garrecht Gassen & Timothy Williams, "Before Attack, Parents of Tucson

Gunman Tried to Address Son's Strange Behavior," N.Y. Times (Mar. 27, 2013).[16] And in 2012 alone, there were at least seven mass shootings in which a gunman killed four or more people in a public place. (A.583 (declaration of Franklin E. Zimring).) Two of those incidents occurred in or near New York—at the Sandy Hook Elementary School in Newtown, Connecticut, and in Webster, New York—and involved AR-15-style weapons with large-capacity magazines. (A.632-633.) *See* Kleinfield, Rivera & Kovaleski, N.Y. Times, *supra*. Because the Webster shooter's firearm had only one military-style feature, there was doubt as to whether it fell within New York's existing restrictions on sales and transfers of assault weapons. (A.633.)

c. The challenged provisions of the SAFE Act are a constitutionally permitted response to shortcomings of prior federal and state legislation.

New York enacted the SAFE Act to address these shortcomings in the prior federal and state approaches to firearm violence, particularly to "mass shootings [that] shatter our sense of safety in public places."

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[16] *Available at* http://www.nytimes.com/2013/03/28/us/documents-2011-tucson-shooting-case-gabrielle-giffords.html?smid=pl-share.

(A.668.) One of the SAFE Act's principal improvements to New York's existing firearm laws was to replace the "'two-feature' test adopted from the now-expired federal assault weapons restriction with a clearer 'one-feature' test." (A.664 (Governor's Mem.); 673 (Assembly Mem.), 681 (Sen. Mem.).) By "focusing on the lethality of the weapon, amplified by the particular features" (A.668), the Act reduces possibilities for circumventing New York's firearm restrictions through the development of compliant variant weapons, and makes those restrictions easier to enforce.[17] (A.305 (Koper declaration).) Although the Act continues to grandfather existing assault weapons, it requires that all such weapons be registered with the State. This requirement reduces the prospect of misuse by someone other than the proper owner and facilitates firearm tracing in the event that such misuse has taken place. *See, e.g., J&G Sales, Ltd. v. Truscott*, 473 F.3d 1043, 1044-46 (9th Cir. 2007).

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[17] The Newtown shooting also prompted efforts to renew and strengthen the federal restriction on assault weapons and large-capacity magazines. The proposed federal legislation included a one-feature test for assault weapons akin to the SAFE Act's. *See* S.150, § 2 (113th Cong., 1st Sess.).

The SAFE Act also removed the previous legislation's grandfathering of existing large-capacity magazines—instead prohibiting *all* such magazines in the State—thereby addressing one of the most serious shortcomings of the federal and prior state law. (*See* A.304.) This change responded to law-enforcement experiences showing the difficulty of distinguishing between magazines manufactured before or after the prior state restriction's effective date. (*See* A.669 (Governor's Mem.), 677 (Assembly Mem.), 685 (Sen. Mem.).) By imposing a more straightforward restriction that is more readily enforceable, the Legislature thus intended the SAFE Act to be more effective than the prior federal and state legislation at reducing the number of large-capacity magazines in circulation. Moreover, as discussed below (see Part III.A., *infra*), the Legislature also determined that a seven-round load limit would address mass injuries and fatalities caused by indiscriminate and excessive fire.

Unlike the federal government's assault weapons and magazine-capacity restrictions (*see* A.962), the SAFE Act has no sunset provision, giving it more time than existed under the federal law to halt the proliferation of assault weapons and large-capacity magazines in the

State and, ultimately, reduce their numbers (*see* A.2234-2235 (Koper declaration)). The effect of the federal restrictions was only beginning to be felt when the federal statute expired in 2004 (A.301, 2234-2235 (Koper declarations), but it was sufficiently pronounced that law-enforcement officials in States without analogous restrictions observed an increase in the severity of gun violence after the federal statute's expiration (*see* A.1564 (congressional testimony of Baltimore County chief of police)). Although plaintiffs assert (Br. 47) that the federal restrictions had no significant effect on *gun crime*, assault-weapons restrictions advance public safety primarily by reducing the number and severity of *gun victimizations*, by forcing criminals to substitute less lethal firearms. (*See* A.2236.) Plaintiffs offer no empirical basis to dispute the proposition that forcing criminals to substitute less dangerous weapons would advance public safety. Certainly, New York's Legislature could reasonably conclude that it would.

Indeed, under intermediate scrutiny, courts afford "'substantial deference'" to a legislature's "'predictive judgments'" regarding the measures necessary to respond to threats to public safety. *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180,

195 (1997)). That deference is particularly apt "[i]n the context of firearm regulation," where "the legislature is far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Id.* (quotation marks omitted). A court's role is "only to assure that, in formulating its judgments, New York has drawn reasonable inferences based on substantial evidence." *Id.* (quotation marks and brackets omitted). The 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, provides a substantial basis for the New York Legislature's judgments in enacting the SAFE Act.

Moreover, the record evidence in this case confirms the Legislature's judgments regarding the disproportionate risks to public safety posed by assault weapons and large-capacity magazines.[18] The

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[18] Plaintiffs incorrectly contend that a court reviewing legislation under intermediate scrutiny may consider only evidence that was expressly before the legislature prior to enactment. Br. 44. The single decision that they cite in support, however, which involved a First Amendment challenge to a ban on nude dancing, required only that the

(*continued on the next page*)

evidence shows that, since 1982, at least half of all mass shooters who killed four or more people were using large-capacity magazines. (A.617 (Allen declaration), 1284-1285 (analysis by Mother Jones magazine).) The evidence also shows that, between 1998 and 2001, at least twenty percent of law-enforcement officers killed in the line of duty were killed with assault weapons. (A.1261 (analysis by Violence Policy Center).) Since 2007, assault weapons or large-capacity magazines have been used in at least eleven shootings in which eight or more people were wounded or killed. (A.561-562 (analysis by Professor Koper).) And mass-shooters using large-capacity magazines have caused significantly greater numbers of injuries and fatalities than shooters who were not using large-capacity

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legislative body have "relied on some evidence reasonably believed to be relevant to the problem" before it, *White River Amusement Pub., Inc. v. Town of Hartford*, 481 F.3d 163, 171 (2d Cir. 2007) (quotation marks omitted). As discussed above, that standard is readily satisfied here. In any event, the decision on which plaintiffs rely has limited relevance because intermediate scrutiny "carries different connotations depending on the area of law," *Ernst J. v. Stone*, 452 F.3d 186, 200 n.10 (2d Cir. 2006), and it is clear that in Second Amendment challenges this Court has not limited its analysis to pre-enactment evidence, *see, e.g.*, *Kachalsky*, 701 F.3d at 99 (considering "studies and data" submitted by the parties in applying intermediate scrutiny).

magazines—an average of 22.58 victims killed or injured, as compared with 9.9 victims killed or injured. (A.2239-2240 (Koper declaration).)

The record here also contains evidence of the connection between large-capacity magazines and other types of firearm crimes and violence. A study of gun violence in Jersey City found that gunfire incidents involving more than ten rounds fired had a 100 percent rate of injury, causing a disproportionate share of total gun victimizations in the city. (A.292, 2237 (Koper declarations).) And a study of firearms recovered by police in Baltimore found that guns linked to murders are more likely to have large-capacity magazines than guns involved in non-fatal shootings. (A.293.) Indeed, the police chief of Baltimore County recently testified before Congress that it is "common to find many shell casings at crime scenes these days, as victims are being riddled with multiple gunshots." (A.1564.) The record evidence thus confirms that assault weapons and other weapons equipped with large-capacity magazines "result in more shots fired, persons wounded, and wounds per victim." *Heller II*, 670 F.3d at 1263. Based on substantially similar evidence, every court considering a post-*Heller* challenge to a restriction on assault weapons or large-capacity magazines, or both, has

concluded that even if heightened scrutiny is warranted, such restrictions nonetheless do not violate the Second Amendment.[19]

3. Plaintiffs' challenges to the efficacy of the SAFE Act's restrictions are unavailing.

Plaintiffs assert that the SAFE Act's restrictions on assault weapons and large-capacity magazines will be ineffective in reducing harm from gun violence for a variety of reasons, but their claims are unfounded as a matter of fact, and unpersuasive as a matter of law.

a. The SAFE Act is constitutional even if it will not eliminate assault weapons and large-capacity magazines in New York.

Plaintiffs incorrectly assert that the possibility that the SAFE Act will fail to completely eliminate assault weapons and large-capacity

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[19] *Heller II*, 670 F.3d 1244 (assault rifles and large-capacity magazines); *Shew*, 2014 WL 346859 (assault weapons and large-capacity magazines); *Colorado Outfitters Ass'n*, 2014 WL 3058518 (magazines capable of holding more than fifteen rounds); *Fyock v. City of Sunnyvale*, — F. Supp. 2d —, No. C-13-5807-RMW, 2014 WL 984162 (N.D. Cal. Mar. 5, 2014) (large-capacity magazines); *San Francisco Veteran Police Officers Ass'n*, 2014 WL 644395 (large-capacity magazines); *see also Kampfer*, 2014 WL 49961 (rejecting challenge to SAFE Act's assault weapons restrictions on the basis that these do not substantially burden the Second Amendment right).

magazines from the State renders the Act's restrictions unconstitutional. First, they claim that the SAFE Act will be ineffective because not all other States have imposed similar restrictions. Br. 47. But it cannot be a valid objection to state legislation that other States have adopted different policies—if it were, federalism would be a dead letter. Moreover, intermediate scrutiny does not require New York to establish that the restrictions will rid the State of all assault weapons or large-capacity magazines: the fit between the means and ends of the legislation "need only be substantial, not perfect," *Kachalsky*, 701 F.3d at 97 (quotation marks omitted). Finally, the inherent limitations of state-level bans are ameliorated by laws restricting the transportation of firearms across state lines.[20] *See, e.g.*, 18 U.S.C. § 922(a)(3), (b)(3).

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[20] Plaintiffs' amici wrongly assert that New York's expert witness, Professor Christopher S. Koper, has found that state-level restrictions of assault-weapons would be ineffective at reducing gun victimizations. NRA Br. 18. In fact, Professor Koper has noted that the limited evidence available resists "definitive conclusions" for a variety of reasons, including that the state restrictions that have been studied were in place for only a few months or years before the imposition of the federal ban obscured their impact, and that many of those restrictions, unlike the SAFE Act, did not prohibit any or most large-capacity magazines. (A.530 n.95, 2236-2237.) *See* NRA Br. Add 3-4.

Second, plaintiffs claim (Br. 45-46) that the SAFE Act's restrictions must be invalidated because criminals will not comply with them, and thus the law will not succeed in preventing many of the harms it is designed to prevent. But a regulation is not invalid simply because it may be violated. The premise of plaintiffs' objection appears to be that law-abiding citizens should have a constitutional right to possess any weapon that is used by criminals, no matter how destructive, in order that they may respond to criminals' ever-increasing firepower in kind. *Heller* does not suggest, however, that the Second Amendment protects particular types of weapons "merely because such weapons may have utility in leveling the playing field." *Zondorak*, 220 Cal. App. 4th at 838. To the contrary, *Heller* makes clear that "weapons that are most useful in military service . . . may be banned" even though these weapons may be obtainable by criminals. 554 U.S. at 627. The Second Amendment does not guarantee the right to possess the most lethal weapons that might be available.

b. Possession of assault weapons and large-capacity magazines even in the home poses risks to public safety.

Plaintiffs claim (Br. 43) that "[t]he problem of violence that takes place in public is not remedied by targeting possession of arms in the home." There, too, they are mistaken. There is substantial evidence that, with respect to the dangerous weapons regulated by the SAFE Act, a restriction only of public possession would be ineffective because the line between the home and the public sphere is porous at best. Dangerous weapons kept in the home may not remain there because firearms are frequently stolen during burglaries. The federal Bureau of Justice Statistics has reported, based on victim-survey results, an estimated "341,000 incidents of firearm theft from private citizens annually from 1987 to 1992." (A.1620.) The agency has further noted that "[b]ecause the survey does not ask how many guns were stolen, the number of guns stolen probably exceeds the number of incidents of gun theft." (A.1620.) Thus, without a ban on home possession, some number of assault weapons and large-capacity magazines kept in the home likely would find their way into the hands of criminals. Some mass shooters, moreover, have obtained their weapons from family members,

as in the case of the Newtown shooter, who used an AR-15-style assault weapon and other weapons taken from his mother's gun collection. *See* Office of the State's Attorney, *Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School*, at 2 (Nov. 25, 2013).[21]

Moreover, guns that remain at home and are used for lawful self-defense can nonetheless harm persons beyond the confines of the home. Bullets that miss their intended target—particularly high-powered rounds fired by some assault weapons—may pass through windows or even walls, causing harm to the shooter's family or to bystanders. (*See* A.270 (Bruen declaration)), 628 (declaration of Nassau County district attorney Kathleen M. Rice), 635-636 (Sheppard declaration).) Indeed, one of plaintiffs' experts opined that "a homeowner under the extreme duress of an armed and advancing attacker is *likely to fire at, but miss*, his or her target." (A.240 (emphasis added).) This risk is heightened with large-capacity magazines because evidence shows that "the tendency is for defenders to keep firing until all bullets have been

[21] *Available at* http://www.ct.gov/csao/lib/csao/Sandy_Hook_Final_Report.pdf.

expended, which poses grave risks to others in the household, passersby, and bystanders." *Heller II*, 670 F.3d at 1263-64 (quotation marks omitted); *see also Colorado Outfitters Ass'n*, 2014 WL 3058518, at *16 (finding that "the number of rounds that are fired in both an offensive and defensive capacity" correlates to "the size of a magazine"). New York has an interest in ensuring that law-abiding citizens do not endanger innocent persons by firing rounds far in excess of what is necessary for self-defense.

c. The SAFE Act's restrictions address the risks to the public from mass shootings.

Finally, plaintiffs assert that the SAFE Act's restrictions will be ineffective because mass shooters deprived of assault weapons and large-capacity magazines may find other means to harm large numbers of people, such as carrying multiple smaller magazines. (*See* Br. 49-51.) There is no basis, however, to suppose that those alternatives would enable mass shooters to as effectively cause mass injury and fatality. As the district court noted, "quite simply, more people die when a [mass] shooter has a large-capacity magazine." (SPA36.) If mass shooters are deprived of twenty, thirty, or one-hundred round magazines, they will

be forced to reload more often, creating an opening for law enforcement or bystanders to intervene and prevent further killing. *See, e.g., Heller II*, 670 F.3d at 1264 (noting D.C. chief of police's testimony that "the '2 or 3 second pause' during which a criminal reloads his firearm 'can be of critical benefit to law enforcement'"). For example, Jared Loughner, who shot Representative Giffords and numerous others in 2011, was tackled when he stopped to reload his pistol. (A.584; *see* A.1082; *see also* A.1551-1562 (accounts of foiled shootings).) The pause while a shooter reloads also may give potential victims time to hide or flee. *Colorado Outfitters Ass'n*, 2014 WL 3058518, at *17.

For these reasons, as the State's expert in this litigation has opined, the SAFE Act's restrictions on assault weapons and large-capacity magazines "are likely to advance New York's interest in protecting law enforcement personnel from being overwhelmed and murdered in criminal confrontations and in reducing the number and severity of shootings involving high numbers of shots and victims, including mass shootings." (A.2243.) In any event, deference is due to the legislature's determination that thwarting even a small number of

mass shootings, or saving even a few more intended victims, is a worthwhile object of legislation.

Restricting the possession of weapons disproportionately used by violent criminals has long been a feature of legislative efforts to protect the public from firearm violence. The Second Amendment does not require that any single approach provide a complete solution. If even a relatively small number of killings or injuries can be prevented by prohibiting a narrowly defined and unusually dangerous subcategory of weapons, the Second Amendment does not preclude New York from taking that step.

POINT II

THE DISTRICT COURT CORRECTLY REJECTED MOST OF PLAINTIFFS' VAGUENESS CHALLENGES

Plaintiffs assert that the district court erred by rejecting their vagueness challenge to (1) the SAFE Act's prohibition of magazines that "can be readily restored or converted to accept[] more than ten rounds of ammunition," Penal Law § 265.00(23)(a), and (2) the Act's restriction of semiautomatic shotguns with "a fixed magazine capacity in excess of seven rounds," *id.* § 265.00(22)(b)(iv), and allowance of semiautomatic shotguns "that cannot hold more than five rounds of ammunition in a fixed . . . magazine," *id.* § 265.00(22)(g)(iii). (SPA44-45.) But as the court correctly observed, these provisions provide constitutionally sufficient notice of the conduct that they proscribe.

A. To Prevail in Their Facial Vagueness Challenges, Plaintiffs Must Show that the Challenged Provisions Are Impermissibly Vague in All or Most Circumstances.

Due process requires a penal statute to state the criminal offense "(1) 'with sufficient definiteness that ordinary people can understand what conduct is prohibited,' and (2) 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" *United States v. Farhane*, 634

F.3d 127, 136 (2d Cir. 2011) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). This test does not require a statute to define the proscribed conduct with "meticulous specificity," but only to provide "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* at 139 (quotation marks omitted).

Where the statute at issue does not implicate conduct protected by the First Amendment, as is the case here, a plaintiff asserting a pre-enforcement facial challenge bears the exceedingly heavy burden of establishing that the statute is "'impermissibly vague in all of its applications.'" *Id.* at 138-39 (quoting *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982)); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987) (plaintiff bringing facial challenge "must establish that no set of circumstances exists under which the Act would be valid"). "In other words, where First Amendment overbreadth analysis is not available, a statute will be held unconstitutionally vague 'on its face' only if it is unconstitutionally vague 'as applied' to all circumstances." *Rybicki*, 543 F.3d at 130-31.

Plaintiffs do not attempt to show that the challenged provisions of the SAFE Act are "unconstitutionally vague 'as applied' to all

circumstances," *id.*, nor could such a showing be made. Instead, plaintiffs urge this Court (Br. 53-57) to depart from established precedent and adopt a laxer approach derived from the three-justice plurality opinion in *City of Chicago v. Morales*, under which a facial challenge may be maintained if "vagueness permeates the text" of a statute. 527 U.S. 41, 55 (1999) (Stevens, J.). "The approach of the *Morales* plurality has not been adopted by the Supreme Court as a whole," and this Court, sitting en banc, declined to adopt that approach also. *Rybicki*, 354 F.3d at 131.

This case presents no reason to revisit the issue because plaintiffs cannot show that the challenged provisions are unconstitutional even under the *Morales* plurality's approach. The challenged provisions clearly have valid application "to a wide swath" of the conduct that they cover, and are thus constitutional "under either *Salerno* or *Morales*." *Id.* at 144. Whether plaintiffs must show vagueness in all of the provisions' applications or merely vagueness "in the vast majority" of the intended applications, their facial challenge fails. *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1157 n.5 (10th Cir. 2006).

B. Plaintiffs Cannot Meet Their Required Legal Burden.

1. The SAFE Act's reference to magazines that "can be readily restored or converted" has a long-standing, established meaning in variety of statutory contexts.

The SAFE Act prohibits magazines capable of holding more than ten rounds and magazines that "can be readily restored or converted to accept[] more than ten rounds of ammunition." Penal Law § 265.00(23)(a). Plaintiffs assert (Br. at 58) that the Act's use of the phrase "readily restored or converted" fails to provide sufficient specificity regarding which magazines capable of restoration or conversion are restricted. The district court correctly rejected that claim.

The language that plaintiffs challenge is far from novel. It served an analogous function in the federal government's 1994 Violent Crime Act, which prohibited certain "large capacity ammunition feeding devices" with "a capacity of, or *that can be readily restored or converted* to accept, more than 10 rounds of ammunition." 108 Stat. at 1998-99 (emphasis added). (A.701-702.) And it is also used in a District of Columbia law that the D.C. Circuit has upheld. *See* D.C. Code § 7-2506.01(b) (enacted in 2008); *Heller II*, 670 F.3d at 1264. New York law

has prohibited at least certain "large capacity ammunition feeding devices" with "a capacity of, or *that can be readily restored or converted* to accept, more than 10 rounds of ammunition" since, in 2000, it substantially adopted the federal restrictions. *See* Ch. 189, § 10, 2000 N.Y. Laws 2788, 2792. (A.923, 928-930.) As the district court noted (SPA46), "[p]laintiffs have presented no evidence that there has been any confusion on this issue in the many years" that this statutory language has been used at the federal level and beyond.

Moreover, other firearms regulations also use some version of this phrase, and this Court has rejected vagueness challenges to those provisions. This Court rejected a vagueness challenge to the longstanding federal definition of a firearm as including any weapon that "may *readily be converted* to[] expel a projectile by the action of an explosive," 18 U.S.C. § 921(a)(4)(B) (emphasis added), explaining that this "language clearly warns that 'any weapon (including a starter gun)' which can be converted by a relatively simple operation taking only a few minutes is a 'firearm'" for purposes of the federal statute, *United States v. 16,179 Molso Italian .22 Caliber Winler Derringer Convertible Starter Guns*, 443 F.2d 463, 465 (2d Cir. 1971); *see also United States v.*

Quiroz, 449 F.2d 583, 585 (9th Cir. 1971) (rejecting vagueness challenge to 18 U.S.C. § 921(a)(3)'s use of the phrase "readily be converted"). And this Court likewise rejected a vagueness challenge to a provision of New York City's assault-weapons statute prohibiting "any part or combination of parts, designed or redesigned or intended to *readily convert* a rifle or shotgun into an assault weapon." *Richmond Boro Gun Club, Inc. v. City of N.Y.*, 97 F.3d 681, 685 (2d Cir. 1996) (emphasis added).

As the Sixth Circuit has explained when 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 more than one shot, without manual reloading, by a single function of the trigger," 26 U.S.C. § 5845(b) (emphasis added), common dictionary definitions "make[] clear that 'readily' is a relative term, one that describes a process that is *fairly* or *reasonably* efficient, quick, and easy." *U.S. v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 421-22 (6th Cir. 2006). Courts construing the term "readily restored" have thus almost universally recognized that when "use[d] as a modifier describing the manner of firearm restoration," the term "readily" calls for inquiry into the *time* needed for restoration; the *ease*

or difficulty with which the weapon can be restored; the *expertise (knowledge and skills), equipment, and additional parts* required for the work; the *expense and scope* of the work; and the *feasibility* of the work, that is "whether the restoration would damage or destroy the weapon or cause it to malfunction."[22] *Id.*

The language of the SAFE Act's magazine-capacity restriction is "marked by flexibility and reasonable breadth, rather than meticulous specificity, but . . . it is clear what the [restriction] as a whole prohibits." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (quotation marks and citations omitted). The statute clearly "delineates its reach in words of common understanding." *Id.* at 112 (quotation marks omitted).

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[22] *See, e.g.*, *S.W. Daniel, Inc. v. United States,* 831 F.2d 253, 254–55 (11th Cir. 1987) (ease and scope); *United States v. Alverson,* 666 F.2d 341, 345 (9th Cir. 1982) (expertise, ease, and scope); *United States v. Smith,* 477 F.2d 399, 400 (8th Cir. 1973) (time and equipment).

Plaintiffs' reliance (Br. 58) on *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998) is unavailing for the reasons discussed above and because the analysis cited by plaintiffs concerns a statutory phrase, "may be restored," that is broader than the equivalent language in the SAFE Act.

2. The SAFE Act's reference to semiautomatic shotguns with a specified "fixed magazine capacity" is unambiguous in the overwhelming majority of its applications.

Plaintiffs challenge the SAFE Act's prohibition of any semiautomatic shotgun with "a fixed magazine capacity in excess of seven rounds," Penal Law § 265.00(22)(b)(iv), and the Act's allowance of "a semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed . . . magazine," *id.* § 265.00(22)(g)(iii), as those provisions apply to the tubular magazines found in certain semiautomatic shotguns. *See* Br. 59-60. They contend (Br. 60) that these provisions are made impermissibly vague by the possibility that a person could use shells smaller than the standard rounds the manufacturer designed the weapon to accommodate, and thereby fit more shells into any particular shotgun. (*See also* A.277-278 (Bruen declaration).) The district court correctly rejected this claim.

Because plaintiffs effectively concede that the provision's reference to magazine capacity is not vague as applied to other types of magazines, their facial challenge fails as a threshold matter. *Farhane*, 634 F.3d at 138-39; *see also Coal. of N.J. Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666, 680 n.21 (D.N.J. 1999) (rejecting facial vagueness

challenge to New Jersey's restriction of "rifles with fixed magazine capacities over 15 rounds" on the ground that the provision was not vague in all of its applications), *aff'd*, 263 F.3d 257 (3d Cir. 2001). Their argument fails for other reasons as well. The federal government's 1994 Violent Crime Act included a similar prohibition on semiautomatic shotguns with "a fixed magazine capacity in excess of 5 rounds," § 110102(b), 108 Stat. 1999 (A.701), as did New York's 2000 firearms law, Ch. 189, § 10, 2000 N.Y. Laws 2788, 2792. (A.929.) And Connecticut had the same prohibition in place from 2001 to 2013. *See* Conn. Gen. Stat. § 53-202a. Plaintiffs have made no showing of difficulties with compliance or enforcement of this statutory language at the federal or state levels.

POINT III

THE DISTRICT COURT ERRED BY STRIKING DOWN THREE PROVISIONS OF THE SAFE ACT

A. The Seven-Round Load Limit Does Not Substantially Burden Conduct Protected by the Second Amendment, and In Any Event Would Satisfy Intermediate Scrutiny.

Although the district court upheld the SAFE Act's restrictions of assault weapons and large-capacity magazines against Second Amendment challenge, it invalidated the Act's seven-round load limit under the Second Amendment. (SPA37-40.) The court's ruling was erroneous because the reasons supporting the SAFE Act's restriction on large-capacity magazines, which the district court upheld, apply equally to the seven-round load limit.

First, the district court incorrectly held that the seven-round load limit substantially burdens the Second Amendment right. (SPA26.) As already noted, it is unnecessary to fire any rounds at all in the majority of self-defense uses of firearms, and almost never necessary to fire more than seven rounds in self-defense. See *supra* ___. Like the restriction on large-capacity magazines, the seven-round load limit does not prevent a person from reloading or from using a second firearm in the exceedingly rare instances where that might be necessary.

Second, the district court erred by concluding that the SAFE Act's seven-round load limit cannot satisfy intermediate scrutiny. (*See* SPA37-40.) The seven-round load limit is an extension of the Act's restrictions on magazine capacity and is intended to further limit mass injuries and fatalities caused by indiscriminate and excessive fire. In establishing the load limit, the Legislature borrowed an approach that was already employed in other areas of New York law. (A.1659 (statement of Assemblyman Lentol).) For example, state environmental laws already imposed a six-round load limit for most semiautomatic firearms "in the fields or forests or on the waters of the state." Envtl. Conserv. Law § 11-0931(1)(c).

The seven-round load limit is an important complement to the SAFE Act's restrictions on large-capacity magazines. Like the magazine-size restriction, the load limit aims to reduce gun victimizations by limiting the number of rounds that an individual may fire without reloading. See *supra* ___. The Legislature's judgment that the load limit would advance public safety by mitigating the risks posed to bystanders, even by lawful defensive gun use, is entitled to substantial deference. *Kachalsky*, 701 F.3d at 97. Indeed, New York's

prior experience with load limits in the hunting context recommended the SAFE Act's seven-round limit as one approach to limiting the threat of excessive ammunition to bystanders. Plaintiffs do not identify any problem of compliance or enforcement concerning that earlier load limit.

The district court concluded that the seven-round load limit would "disproportionately affect[] law-abiding citizens" because criminals would disregard the restriction. (SPA39.) But the possibility that some criminals will ignore the limit despite the risk of criminal punishment is not a concern unique to this provision, and does not warrant invalidating the provision any more than it would justify invalidating numerous other criminal laws. *See Baude v. Heath*, 538 F.3d 608, 614 (7th Cir. 2008) (noting that "a legal system need not be foolproof in order to have benefits" and that "no law is or need be fully effective"). And, even without perfect compliance by criminals, the load limit does not put law-abiding citizens at a disadvantage. As explained above, seven rounds is more than enough ammunition to handle the overwhelming majority of incidents that any civilian will ever face, and other means are available to respond in the exceedingly rare circumstances in which more than seven rounds might be required. See *supra* ___.

The district court also concluded that the load limit was invalid because the Legislature's choice of seven rounds was "largely arbitrary." (SPA39.) That choice, however, is "precisely the type of discretionary judgment that officials in the legislative and executive branches of state government regularly make." *Kachalsky*, 701 F.3d at 99. Seven rounds ensures that New York citizens will have more than enough ammunition available without reloading to engage in self-defense, while limiting the risk posed by weapons capable of firing large numbers of rounds. Although there may have been other numbers that could strike this balance, the Legislature had to settle on one particular number, and its judgment as to how to "maximize the competing public-policy objectives" should not lightly be dismissed as arbitrary. *Id.* The SAFE Act's seven-round load limit, like the restrictions on assault weapons and large-capacity magazines, satisfies intermediate scrutiny and should be upheld.

B. The District Court Erred by Invalidating Two Provisions of the SAFE Act as Unconstitutionally Vague.

1. The SAFE Act's reference to semiautomatic firearms that are a "version" of an automatic weapon is a long-standing and well-understood component of the definition of an assault weapon.

The SAFE Act prohibits, *inter alia*, pistols with a detachable magazine that are a "semiautomatic version of an automatic rifle, shotgun, or firearm." Penal Law § 265.00(22)(c)(viii). (SPA48.) Like a number of the other SAFE Act provisions challenged by plaintiffs, this provision uses language that is similar to the language appearing in other state and federal firearms laws, and plaintiffs have made no showing that those laws were too vague to be followed and enforced. Plaintiffs' vagueness challenge to this provision thus fails.

ATF's testing of firearms for importability under 18 U.S.C. § 925(d)(3)'s "sporting use" provision revealed the existence of certain firearms that were a "semiautomatic version[] of . . . selective fire military assault [weapons]." (A.1633.) ATF noted that these firearms were distinguished by "military features and characteristics (other than selective fire) [that] are carried over to the semiautomatic versions."

(A.732 (H.R. Rep. No. 103-489, at 18), 807 (Treasury Report), 1634.) As ATF observed, "[s]ince machineguns are prohibited from importation (except for law enforcement use) the manufacturers of such weapons have developed semiautomatic versions of these firearms." (A.1635 (citing Edward Clinton Ezell, *Small Arms of the World* 844 (12th rev. ed. 1983); Pete Dickey, "The Military Look-Alikes," Am. Rifleman 31 (April 1980)).)

Congress incorporated ATF's findings into the 1994 Violent Crime Act, which included a prohibition on pistols with a detachable magazine that are "a semiautomatic version of an automatic firearm." § 110102(b), 108 Stat. 1998. (A.701.) New York's 2000 firearms law similarly prohibited firearms that were "a semiautomatic version of an automatic rifle, shotgun or firearm." Ch. 189, § 10, 2000 N.Y. Laws 2788, 2792. (A.929.) And Hawaii and Puerto Rico both prohibit pistols with a detachable magazine that are "a semiautomatic version of an automatic firearm." Hawaii Rev. Stat. § 134-1(6); *see also* 25 Laws of Puerto Rico Ann. § 456m(c)(2)(E). Indeed, the concept of a firearm being a semiautomatic version of an automatic firearm is familiar and well-understood. The Supreme Court used exactly this formulation in describing the AR-15 as the "civilian version of the military's M-16

rifle." *Staples*, 511 U.S. at 603; *see also United States v. Wonschik*, 353 F.3d 1192, 1194 (10th Cir. 2004) (referring to the "Colt AR-15 rifle, which is the civilian, semiautomatic version of the military's M-16 automatic rifle"); *Kasler v. Lungren*, 72 Cal. Rptr. 2d 260, 265 (3d Dist. 1998) (noting that although "the Israeli 'Uzi' was designed as selective fire machine gun . . . . there is a semiautomatic version for consumption in the United States"), *rev'd on other grounds*, 23 Cal. 4th 472 (2000). Thus, there can be no valid argument that the prohibition of semiautomatic "versions" of automatic weapons is vague in all or even most of its applications.[23]

2. The SAFE Act's misspelling of the term "muzzle brake" does not leave the term's meaning in doubt.

The SAFE Act's list of prohibited military-style features includes muzzle attachments such as "a flash suppressor, muzzle break [sic], muzzle compensator, or threaded barrel designed to accommodate a

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[23] Although the district court asserted that this provision was impermissibly vague because it "not only fails to provide fair warning, but also encourages arbitrary and discriminatory enforcement" (SPA49 (brackets and quotation marks omitted)), the court identified no record evidence supporting that conclusion.

flash suppressor, muzzle break, or muzzle compensator." Penal Law § 265.00(22)(a)(vi). A "muzzle brake" is a commonly used term for an item that is attached to the end of a firearm to limit recoil. (A.273.) It is a synonym for a muzzle compensator, which is the adjacent term in the statute. The district court held that the Legislature's typographical error in referring to a "muzzle brake" as a "muzzle break," Penal Law § 265.00(22)(a)(vi), made it impossible to discern what the statute intended to prohibit (SPA47-48). But the list in which the term appears—"a flash suppressor, muzzle break, muzzle compensator or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator"—leaves no doubt that the term describes an item meant to attach to the end of a rifle's barrel. Given the district court's correct observation that the term "muzzle break" has "no accepted meaning" (SPA48), there is no possibility of confusion as to the Legislature's intent, and thus no basis to conclude that this provision fails to provide constitutionally sufficient notice of the conduct it proscribes.

CONCLUSION

The Court should affirm the district court's judgment insofar as it rejected plaintiffs' constitutional challenges to the SAFE Act, and reverse the district court's judgment insofar as it struck down the three provisions of the Act discussed above.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Claude S. Platton, an attorney in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 15,946 words and complies with the type-volume limitations of Rule 28.1(e)(2)(B).

/s/ Claude S. Platton
Claude S. Platton

APPENDIX—RELEVANT STATUTORY PROVISIONS

Penal Law § 265.00:

22. Assault weapon" means:

(a) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least one of the following characteristics:
(i) a folding or telescoping stock;
(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
(iii) a thumbhole stock;
(iv) a second handgrip or a protruding grip that can be held by the non-trigger hand;
(v) a bayonet mount;
(vi) a flash suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator;
(vii) a grenade launcher; or

(b) a semiautomatic shotgun that has at least one of the following characteristics:
(i) a folding or telescoping stock;
(ii) a thumbhole stock;
(iii) a second handgrip or a protruding grip that can be held by the non-trigger hand;
(iv) a fixed magazine capacity in excess of seven rounds;
(v) an ability to accept a detachable magazine; or

(c) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least one of the following characteristics:
(i) a folding or telescoping stock;
(ii) a thumbhole stock;
(iii) a second handgrip or a protruding grip that can be held by the non-trigger hand;
(iv) capacity to accept an ammunition magazine that attaches to the pistol outside of the pistol grip;

(v) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;

(vi) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the non-trigger hand without being burned;

(vii) a manufactured weight of fifty ounces or more when the pistol is unloaded; or

(viii) a semiautomatic version of an automatic rifle, shotgun or firearm;

(d) a revolving cylinder shotgun;

(e) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or weapon defined in subparagraph (v) of paragraph (e) of subdivision twenty-two of section 265.00 of this chapter as added by chapter one hundred eighty-nine of the laws of two thousand and otherwise lawfully possessed pursuant to such chapter of the laws of two thousand prior to September fourteenth, nineteen hundred ninety-four;

(f) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or weapon defined in paragraph (a), (b) or (c) of this subdivision, possessed prior to the date of enactment of the chapter of the laws of two thousand thirteen which added this paragraph;

(g) provided, however, that such term does not include:

(i) any rifle, shotgun or pistol that (A) is manually operated by bolt, pump, lever or slide action; (B) has been rendered permanently inoperable; or (C) is an antique firearm as defined in 18 U.S.C. 921(a)(16);

(ii) a semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition;

(iii) a semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine; or

(iv) a rifle, shotgun or pistol, or a replica or a duplicate thereof, specified in Appendix A to 18 U.S.C. 922 as such weapon was manufactured on October first, nineteen hundred ninety-three. The

mere fact that a weapon is not listed in Appendix A shall not be construed to mean that such weapon is an assault weapon;

(v) any weapon validly registered pursuant to subdivision sixteen-a of section 400.00 of this chapter. Such weapons shall be subject to the provisions of paragraph (h) of this subdivision;

(vi) any firearm, rifle, or shotgun that was manufactured at least fifty years prior to the current date, but not including replicas thereof that is validly registered pursuant to subdivision sixteen-a of section 400.00 of this chapter;

(h) Any weapon defined in paragraph (e) or (f) of this subdivision and any large capacity ammunition feeding device that was legally possessed by an individual prior to the enactment of the chapter of the laws of two thousand thirteen which added this paragraph, may only be sold to, exchanged with or disposed of to a purchaser authorized to possess such weapons or to an individual or entity outside of the state provided that any such transfer to an individual or entity outside of the state must be reported to the entity wherein the weapon is registered within seventy-two hours of such transfer. An individual who transfers any such weapon or large capacity ammunition device to an individual inside New York state or without complying with the provisions of this paragraph shall be guilty of a class A misdemeanor unless such large capacity ammunition feeding device, the possession of which is made illegal by the chapter of the laws of two thousand thirteen which added this paragraph, is transferred within one year of the effective date of the chapter of the laws of two thousand thirteen which added this paragraph.

23. "Large capacity ammunition feeding device" means a magazine, belt, drum, feed strip, or similar device, that (a) has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition, or (b) [Suspended and not effective, pursuant to L.2013, c. 57, pt. FF, § 4, eff. March 29, 2013, deemed eff. Jan. 15, 2013.] contains more than seven rounds of ammunition, or (c) [Suspended and not effective, pursuant to L.2013, c. 57, pt. FF, § 4, eff. March 29, 2013, deemed eff. Jan. 15, 2013.] is obtained after the effective date of the chapter of the laws of two thousand thirteen which amended this subdivision and has a capacity of, or that can be readily

restored or converted to accept, more than seven rounds of ammunition; provided, however, that such term does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition or a feeding device that is a curio or relic. A feeding device that is a curio or relic is defined as a device that (i) was manufactured at least fifty years prior to the current date, (ii) is only capable of being used exclusively in a firearm, rifle, or shotgun that was manufactured at least fifty years prior to the current date, but not including replicas thereof, (iii) is possessed by an individual who is not prohibited by state or federal law from possessing a firearm and (iv) is registered with the division of state police pursuant to subdivision sixteen-a of section 400.00 of this chapter, except such feeding devices transferred into the state may be registered at any time, provided they are registered within thirty days of their transfer into the state. Notwithstanding paragraph (h) of subdivision twenty-two of this section, such feeding devices may be transferred provided that such transfer shall be subject to the provisions of section 400.03 of this chapter including the check required to be conducted pursuant to such section.

Penal Law § 265.02:

A person is guilty of criminal possession of a weapon in the third degree when: . . .

(7) Such person possesses an assault weapon; or

(8) Such person possesses a large capacity ammunition feeding device. For purposes of this subdivision, a large capacity ammunition feeding device shall not include an ammunition feeding device lawfully possessed by such person before the effective date of the chapter of the laws of two thousand thirteen which amended this subdivision, that has a capacity of, or that can be readily restored or converted to accept more than seven but less than eleven rounds of ammunition, or that was manufactured before September thirteenth, nineteen hundred ninety-four, that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition; . . .

Penal Law § 265.20:

a. Paragraph (h) of subdivision twenty-two of section 265.00 and sections 265.01, 265.01-a, subdivision one of section 265.01-b, 265.02, 265.03, 265.04, 265.05, 265.10, 265.11, 265.12, 265.13, 265.15, 265.36, 265.37 and 270.05 shall not apply to:

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3. Possession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00 or 400.01 of this chapter or possession of a weapon as defined in paragraph (e) or (f) of subdivision twenty-two of section 265.00 of this article which is registered pursuant to paragraph (a) of subdivision sixteen-a of section 400.00 of this chapter or is included on an amended license issued pursuant to section 400.00 of this chapter. In the event such license is revoked, other than because such licensee is no longer permitted to possess a firearm, rifle or shotgun under federal or state law, information sufficient to satisfy the requirements of subdivision sixteen-a of section 400.00 of this chapter, shall be transmitted by the licensing officer to the state police, in a form as determined by the superintendent of state police. Such transmission shall constitute a valid registration under such section. Further provided, notwithstanding any other section of this title, a failure to register such weapon by an individual who possesses such weapon before the enactment of the chapter of the laws of two thousand thirteen which amended this paragraph and may so lawfully possess it thereafter upon registration, shall only be subject to punishment pursuant to paragraph (c) of subdivision sixteen-a of section 400.00 of this chapter; provided, that such a license or registration shall not preclude a conviction for the offense defined in subdivision three of section 265.01 of this article or section 265.01-a of this article.

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7-f. Possession and use of a magazine, belt, feed strip or similar device, that contains more than seven rounds of ammunition, but that does not have a capacity of or can readily be restored or converted to

accept more than ten rounds of ammunition, at an indoor or outdoor firing range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in arms; at an indoor or outdoor firing range for the purpose of firing a rifle or shotgun; at a collegiate, olympic or target shooting competition under the auspices of or approved by the national rifle association; or at an organized match sanctioned by the International Handgun Metallic Silhouette Association. . . .

Penal Law § 265.36:

It shall be unlawful for a person to knowingly possess a large capacity ammunition feeding device manufactured before September thirteenth, nineteen hundred ninety-four, and if such person lawfully possessed such large capacity feeding device before the effective date of the chapter of the laws of two thousand thirteen which added this section, that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition.

An individual who has a reasonable belief that such device is of such a character that it may lawfully be possessed and who surrenders or lawfully disposes of such device within thirty days of being notified by law enforcement or county licensing officials that such possession is unlawful shall not be guilty of this offense. It shall be a rebuttable presumption that such person knows that such large capacity ammunition feeding device may not be lawfully possessed if he or she has been contacted by law enforcement or county licensing officials and informed that such device may not be lawfully possessed.

Unlawful possession of a large capacity ammunition feeding device is a class A misdemeanor.

Penal Law § 265.37:

It shall be unlawful for a person to knowingly possess an ammunition feeding device where such device contains more than seven rounds of ammunition.

If such device containing more than seven rounds of ammunition is possessed within the home of the possessor, the person so possessing the device shall, for a first offense, be guilty of a violation and subject to a fine of two hundred dollars, and for each subsequent offense, be guilty of a class B misdemeanor and subject to a fine of two hundred dollars and a term of up to three months imprisonment.

If such device containing more than seven rounds of ammunition is possessed in any location other than the home of the possessor, the person so possessing the device shall, for a first offense, be guilty of a class B misdemeanor and subject to a fine of two hundred dollars and a term of up to six months imprisonment, and for each subsequent offense, be guilty of a class A misdemeanor.

Penal Law § 400.00:

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16-a. Registration.

(a) An owner of a weapon defined in paragraph (e) or (f) of subdivision twenty-two of section 265.00 of this chapter, possessed before the date of the effective date of the chapter of the laws of two thousand thirteen which added this paragraph, must make an application to register such weapon with the superintendent of state police, in the manner provided by the superintendent, or by amending a license issued pursuant to this section within one year of the effective date of this subdivision except any weapon defined under subparagraph (vi) of paragraph (g) of subdivision twenty-two of section 265.00 of this chapter transferred into the state may be registered at any time, provided such weapons are registered within thirty days of their transfer into the state. Registration information shall include the registrant's name, date of birth, gender, race, residential address, social security number and a description of each weapon being registered. A registration of any weapon defined under subparagraph (vi) of paragraph (g) of subdivision twenty-two of section 265.00 or a feeding device as defined under subdivision twenty-three of section 265.00 of this chapter shall be transferable, provided that the seller notifies the

state police within seventy-two hours of the transfer and the buyer provides the state police with information sufficient to constitute a registration under this section. Such registration shall not be valid if such registrant is prohibited or becomes prohibited from possessing a firearm pursuant to state or federal law. The superintendent shall determine whether such registrant is prohibited from possessing a firearm under state or federal law. Such check shall be limited to determining whether the factors in 18 USC 922 (g) apply or whether a registrant has been convicted of a serious offense as defined in subdivision sixteen-b of section 265.00 of this chapter, so as to prohibit such registrant from possessing a firearm, and whether a report has been issued pursuant to section 9.46 of the mental hygiene law. All registrants shall recertify to the division of state police every five years thereafter. Failure to recertify shall result in a revocation of such registration.

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(c) A person who knowingly fails to apply to register such weapon, as required by this section, within one year of the effective date of the chapter of the laws of two thousand thirteen which added this paragraph shall be guilty of a class A misdemeanor and such person who unknowingly fails to validly register such weapon within such one year period shall be given a warning by an appropriate law enforcement authority about such failure and given thirty days in which to apply to register such weapon or to surrender it. A failure to apply or surrender such weapon within such thirty-day period shall result in such weapon being removed by an appropriate law enforcement authority and declared a nuisance.