UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
Buffalo Division

NEW YORK STATE RIFLE AND PISTOL ASSOCIATION, INC., et al., **Plaintiffs.** **v.** **ANDREW M. CUOMO, et al.,** **Defendants.**	**Case No.: 13-cv-00291-WMS**

NOTICE OF MOTION FOR LEAVE TO FILE [PROPOSED] AMICUS CURIAE BRIEF OF NEW YORK STATE SENATOR KATHLEEN A. MARCHIONE

PLEASE TAKE NOTICE that New York State Senator Kathleen A. Marchione, (hereafter, "Amicus"), through her undersigned counsel, hereby move the Court to grant an Order allowing Amicus to file an amicus curiae brief in support of Plaintiffs' motion for a preliminary injunction. Amicus submits herewith a motion providing reasons why this Court may choose to accept the brief, as well as a copy of the proposed amicus curiae brief she requests leave to file.

MOTION FOR LEAVE TO FILE PROPOSED BRIEF OF AMICUS CURIAE ON BEHALF OF PLAINTIFFS

Amicus respectfully moves this Court, pursuant to its broad discretion to allow for the appearance of amicus curiae in a district court case, for leave to file the concurrently submitted amicus brief in support of Plaintiffs' motion for a preliminary injunction. Amicus certifies that this brief was not written in whole or in part by the counsel for any party, and that no person or entity other than the Amicus and her counsel made a monetary contribution to the preparation and submission of this brief.

I. Interests of the Amicus

New York State Senator Kathleen A. Marchione is a resident of the County of Saratoga, State of New York and a gun owner. She was elected in November 2012 to represent the 43rd Senate District (Columbia County and parts of Saratoga, Rensselaer and Washington counties) in the New York State Senate. Senator Marchione has a strong interest in this case as she was one of eighteen state senators (out of 62[1]) to vote against the New York Secure Ammunition and Firearms Enforcement Act of 2013 ("the Act"), she was one of only two state senators to explain her opposition vote and is the prime sponsor of t three bills: two (S.5591, S.5648) to fully repeal the Act and another (S.3948) to repeal certain sections of the Act and to amend others. In addition, Senator Marchione led an on-line petition drive to repeal the Act which was signed by 130,000 New Yorkers.

[1] While the New York State Senate had been expanded to 63 members for the 2012 election, the Senator for the 46th Senate District had yet to be seated due to prolonged ballot recount litigation.

II. Reasons for Filing

Amicus has reviewed the documents filed to date by the parties and other amici to this proceeding and are familiar with the issues before this Court in the instant case. The accompanying proposed brief will assist this Court by providing additional analysis of the current standard for application of the Second Amendment and the standard of review for restrictions on the possession of firearms, applying this analysis to the challenged SAFE Act provisions. These issues will not be addressed in similar detail and scope by Plaintiffs. Accordingly, a separate brief is necessary to permit Senator Marchione to address these issues.

The Amicus's request to file an amicus curiae brief follows from her substantial interest and continuing work to help ensure that New York's laws do not violate the Second Amendment and that the rights of law-abiding New Yorkers to keep and bear arms is not infringed. While this is the Senator's first amicus brief filing, she has been an outspoken proponent of Second Amendment rights in the New York State Senate and in the media.

Accordingly, the Amicus respectfully moves that this Court grant leave to file the brief submitted concurrently with this motion.

Dated: August 16, 2013

s/Matthew J. Kelly

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UNITED STATES DISTRICT COURT
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NEW YORK STATE RIFLE AND
PISTOL ASSOCIATION, INC., et. al.,
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Case No.: 13-cv-00291-WMS

v.

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Defendants.

NEW YORK STATE SENATOR KATHLEEN A. MARCHIONE'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Authorities

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

New York State Senator Kathleen A. Marchione is a resident of the County of Saratoga, State of New York and a gun owner. She was elected in November 2012 to represent the 43rd Senate District (Columbia County and parts of Saratoga, Rensselaer and Washington counties) in the New York State Senate. Senator Marchione has a strong interest in this case as she was one of eighteen state senators (out of 62[1]) to vote against the New York Secure Ammunition and Firearms Enforcement Act of 2013 ("the Act"), she was one of only two state senators to explain her opposition vote and is the prime sponsor of t three bills: two (S.5591, S.5648) to fully repeal the Act and another (S.3948) to repeal certain sections of the Act and to amend others. In addition, Senator Marchione led an on-line petition drive to repeal the Act which was signed by 130,000 New Yorkers.

BACKGROUND AND SUMMARY OF THE ARGUMENT

The New York Secure Ammunition and Firearms Enforcement Act of 2013 (S.2230/A2388) was what is known as a "Governor's Program Bill"; that is, a bill introduced by the leaders of the two houses of the New York State Legislature at the request of the Governor.

The bill was introduced, read twice and ordered printed, committed to the Committee on Rules and ordered to a third reading for final passage in the New York State Senate, all in one day, January 14, 2013. The bill advanced in this unusual manner due to a "message of necessity" from the Governor which dispenses with the usual bill aging and committee consideration processes.

Upon passage in both houses of the legislature, the Act was signed into law by Governor Cuomo on the day following its introduction, January 15, 2013,

The Act amends eleven areas of New York law by amending two sections of the Criminal Procedure Law; adding one new section to the Corrections Law; amending two sections of the

[1] While the New York State Senate had been expanded to 63 members for the 2012 election, the Senator for the 46th Senate District had yet to be seated due to prolonged ballot recount litigation.

Family Court Act and adding five new ones; amending one section of the Domestic Relations Law; adding one section to the Executive Law; adding a new article to the General Business Law; amending one section of the Judiciary law; amending four sections of the Mental Hygiene Law and adding three others; amending eleven sections of the Penal law and adding seventeen others; adding one new section to the Surrogates Court Procedure Act and amending two sections and adding one to the Education Law.

The particular provisions of the Act that most deserve the Court's attention are: (1) §37 which amended subdivision 22 of section 265.00 of the penal law to redefine "assault weapon" to include: (a) a semiautomatic rifle that has the ability to accept a detachable magazine and any has any one or more of seven other features; (b) a semiautomatic shotgun which has the ability to accept a detachable magazine or any one of four other listed features; (c) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least one of seven listed features and (d) a semiautomatic version of an automatic rifle, shotgun or firearm.

(2) §38 which amended subdivision 23 of section 265.00 of the penal law to redefine "large capacity ammunition feeding device" as one that can accept more than ten rounds of ammunition or contains more than seven rounds of ammunition.

(3) §41-a which amended the penal law to add a new section 265.01 which makes it a class E felony to possess any "firearm" or to fail to register a "firearm", even those lawfully possessed by law abiding citizens prior to the enactment of the Act and even if such possession is confined to the home. A "firearm" is defined by section 265.00 (3)(e) of the penal law to include an "assault weapon". Section 265.02 of the penal makes possession of an assault weapon a crime[2]

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§ 265.02 Criminal possession of a weapon in the third degree.

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

(1) Such person commits the crime of criminal possession of a weapon in the fourth degree as defined in subdivision one, two, three or five of section 265.01, and has been previously convicted of any crime; or

(2) Such person possesses any explosive or incendiary bomb, bombshell, firearm silencer, machine-gun or any other firearm or weapon simulating a machine-gun and which is adaptable for such use; or

(3) Such person knowingly possesses a machine-gun, firearm, rifle or shotgun which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such machine-gun, firearm, rifle or shotgun; or

(5) (i) Such person possesses three or more firearms; or (ii) such person possesses a firearm and has been previously convicted of a felony

unless such possession is covered by an exemption under section 265.20 (3) of the penal law by registration.[3] (4) §46-a which amended the penal law to add two new sections criminalizing the possession of ammunition feeding devices.

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or a class A misdemeanor defined in this chapter within the five years immediately preceding the commission of the offense and such possession did not take place in the person's home or place of business; or

(6) Such person knowingly possesses any disguised gun; or

(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; or

(9) Such person possesses an unloaded firearm and also commits a drug trafficking felony as defined in subdivision twenty-one of section 10.00 of this chapter as part of the same criminal transaction; or

(10) Such person possesses an unloaded firearm and also commits any violent felony offense as defined in subdivision one of section 70.02 of this chapter as part of the same criminal transaction.

Criminal possession of a weapon in the third degree is a class D felony.

§ 265.20 Exemptions.

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:

1. Possession of any of the weapons, instruments, appliances or substances specified in sections 265.01, 265.02, 265.03, 265.04, 265.05 and 270.05 by the following:

(a) Persons in the military service of the state of New York when duly authorized by regulations issued by the adjutant general to possess the same.

(b) Police officers as defined in subdivision thirty-four of section 1.20 of the criminal procedure law.

(c) Peace officers as defined by section 2.10 of the criminal procedure law.

(d) Persons in the military or other service of the United States, in pursuit of official duty or when duly authorized by federal law, regulation or order to possess the same.

(e) Persons employed in fulfilling defense contracts with the government of the United States or agencies thereof when possession of the same is necessary for manufacture, transport, installation and testing under the requirements of such contract.

(f) A person voluntarily surrendering such weapon, instrument, appliance or substance, provided that such surrender shall be made to the superintendent of the division of state police or a member thereof

designated by such superintendent, or to the sheriff of the county in which such person resides, or in the county of Nassau or in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown in the county of Suffolk to the commissioner of police or a member of the police department thereof designated by such commissioner, or if such person resides in a city, town other than one named in this subparagraph, or village to the police commissioner or head of the police force or department thereof or to a member of the force or department designated by such commissioner or head; and provided, further, that the same shall be surrendered by such person in accordance with such terms and conditions as may be established by such superintendent, sheriff, police force or department. Nothing in this paragraph shall be construed as granting immunity from prosecution for any crime or offense except that of unlawful possession of such weapons, instruments, appliances or substances surrendered as herein provided. A person who possesses any such weapon, instrument, appliance or substance as an executor or administrator or any other lawful possessor of such property of a decedent may continue to possess such property for a period not over fifteen days. If such property is not lawfully disposed of within such period the possessor shall deliver it to an appropriate official described in this paragraph or such property may be delivered to the superintendent of state police. Such officer shall hold it and shall thereafter deliver it on the written request of such executor, administrator or other lawful possessor of such property to a named person, provided such named person is licensed to or is otherwise lawfully permitted to possess the same. If no request to deliver the property is received by such official within one year of the delivery of such property, such official shall dispose of it in accordance with the provisions of section 400.05 of this chapter.

2. Possession of a machine-gun, large capacity ammunition feeding device, firearm, switchblade knife, gravity knife, pilum ballistic knife, billy or blackjack by a warden, superintendent, headkeeper or deputy of a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or detained as witnesses in criminal cases, in pursuit of official duty or when duly authorized by regulation or order to possess the same.

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.

4. Possession of a rifle, shotgun or longbow for use while hunting, trapping or fishing, by a person, not a citizen of the United States, carrying a valid license issued pursuant to section 11-0713 of the environmental conservation law.

5. Possession of a rifle or shotgun by a person other than a person who has been convicted of a class A-I felony or a violent felony offense, as defined in subdivision one of section 70.02 of this chapter, who has been convicted as specified in subdivision four of section 265.01 to whom a certificate of good conduct has been issued pursuant to section seven hundred three-b of the correction law.

6. Possession of a switchblade or gravity knife for use while hunting, trapping or fishing by a person carrying a valid license issued to him pursuant to section 11-0713 of the environmental conservation law.

7. Possession, at an indoor or outdoor shooting range for the purpose of loading and firing, of a rifle or shotgun, the propelling force of which is gunpowder by a person under sixteen years of age but not under twelve, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, air force, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy, air force or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in responsible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation; or (d) an agent of the department of environmental conservation appointed to conduct courses in responsible hunting practices pursuant to article eleven of the environmental conservation law.

7-a. Possession and use, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by the national rifle association for the purpose of loading and firing the same, by a person duly licensed to possess a pistol or revolver pursuant to section 400.00 or 400.01 of this chapter of a pistol or revolver duly so licensed to another person who is present at the time.

7-b. Possession and use, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by the national rifle association for the purpose of loading and firing the same, by a person who has applied for a license to possess a pistol or revolver and pre-license possession of same pursuant to section 400.00 or 400.01 of this chapter, who has not been previously denied a license, been previously convicted of a felony or serious offense, and who does not appear to be, or pose a threat to be, a danger to himself or to others, and who has been approved for possession and use herein in accordance with section 400.00 or 400.01 of this chapter;

provided however, that such possession shall be of a pistol or revolver duly licensed to and shall be used under the supervision, guidance and instruction of, a person specified in paragraph seven of this subdivision and provided further that such possession and use be within the jurisdiction of the licensing officer with whom the person has made application therefor or within the jurisdiction of the superintendent of state police in the case of a retired sworn member of the division of state police who has made an application pursuant to section 400.01 of this chapter.

7-c. Possession for the purpose of loading and firing, of a rifle, pistol or shotgun, the propelling force of which may be either air, compressed gas or springs, by a person under sixteen years of age but not under twelve, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in responsible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation.

7-d. Possession, at an indoor or outdoor shooting range for the purpose of loading and firing, of a rifle, pistol or shotgun, the propelling force of which may be either air, compressed gas or springs, by a person under twelve years of age, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in responsible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation.

7-e. Possession and use of a pistol or revolver, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by an association or organization described in paragraph 7-a of this subdivision for the purpose of loading and firing the same by a person at least fourteen years of age but under the age of twenty-one who has not been previously convicted of a felony or serious offense, and who does not appear to be, or pose a threat to be, a danger to himself or to others; provided however, that such possession shall be of a pistol or revolver duly licensed to and shall be used under the immediate supervision, guidance and instruction of, a person specified in paragraph seven of this subdivision.

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.

8. The manufacturer of machine-guns, firearm silencers, assault weapons, large capacity ammunition feeding devices, disguised guns, pilum ballistic knives, switchblade or gravity knives, billies or blackjacks as merchandise, or as a transferee recipient of the same for repair, lawful distribution or research and development, and the disposal and shipment thereof direct to a regularly constituted or appointed state or municipal police department, sheriff, policeman or other peace officer, or to a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, or to the military service of this state or of the United States; or for the repair and return of the same to the lawful possessor or for research and development.

9. The regular and ordinary transport of firearms as merchandise, provided that the person transporting such firearms, where he knows or has reasonable means of ascertaining what he is transporting, notifies in writing the police commissioner, police chief or other law enforcement officer performing such functions at the place of delivery, of the name and address of the consignee and the place of delivery, and withholds delivery to the consignee for such reasonable period of time designated in writing by such police commissioner, police chief or other law enforcement officer as such official may deem necessary for investigation as to whether the consignee may lawfully receive and possess such firearms.

9-a. a. Except as provided in subdivision b hereof, the regular and ordinary transport of pistols or revolvers by a manufacturer of firearms to whom a license as a dealer in firearms has been issued pursuant to section 400.00 of this chapter, or by an agent or employee of such manufacturer of firearms who is otherwise duly licensed to carry a pistol or revolver and who is duly authorized in writing by such manufacturer of firearms to transport pistols or revolvers on the date or dates specified, directly between places where the manufacturer of firearms regularly conducts business provided such pistols or revolvers are transported unloaded, in a locked opaque container. For purposes of this subdivision, places where the manufacturer of firearms regularly conducts business includes, but is not limited to places where the manufacturer of firearms regularly or customarily conducts development or design of pistols or revolvers, or regularly or customarily conducts tests on pistols or revolvers, or regularly or customarily participates in the exposition of firearms to the public.

b. The transportation of such pistols or revolvers into, out of or within the city of New York may be done only with the consent of the police commissioner of the city of New York. To obtain such consent, the manufacturer must notify the police commissioner in writing of the name and address of the transporting manufacturer, or agent or employee of

the manufacturer who is authorized in writing by such manufacturer to transport pistols or revolvers, the number, make and model number of the firearms to be transported and the place where the manufacturer regularly conducts business within the city of New York and such other information as the commissioner may deem necessary. The manufacturer must not transport such pistols and revolvers between the designated places of business for such reasonable period of time designated in writing by the police commissioner as such official may deem necessary for investigation and to give consent. The police commissioner may not unreasonably withhold his consent.

10. Engaging in the business of gunsmith or dealer in firearms by a person to whom a valid license therefor has been issued pursuant to section 400.00.

11. Possession of a firearm or large capacity ammunition feeding device by a police officer or sworn peace officer of another state while conducting official business within the state of New York.

12. Possession of a pistol or revolver by a person who is a member or coach of an accredited college or university target pistol team while transporting the pistol or revolver into or through New York state to participate in a collegiate, olympic or target pistol shooting competition under the auspices of or approved by the national rifle association, provided such pistol or revolver is unloaded and carried in a locked carrying case and the ammunition therefor is carried in a separate locked container.

12-a. Possession and use of a pistol or revolver, at an indoor or outdoor shooting range, by a registered student of a higher education institution chartered by the state of New York, who is participating in a course in gun safety and proficiency offered by such institution, under the immediate supervision, guidance, and instruction of a person specified in paragraph seven of this subdivision.

13. Possession of pistols and revolvers by a person who is a nonresident of this state while attending or traveling to or from, an organized competitive pistol match or league competition under auspices of, or approved by, the National Rifle Association and in which he is a competitor, within forty-eight hours of such event or by a person who is a non-resident of the state while attending or traveling to or from an organized match sanctioned by the International Handgun Metallic Silhouette Association and in which he is a competitor, within forty-eight hours of such event, provided that he has not been previously convicted of a felony or a crime which, if committed in New York, would constitute a felony, and further provided that the pistols or revolvers are transported unloaded in a locked opaque container together with a copy of the match program, match schedule or match registration card. Such documentation shall constitute prima facie evidence of exemption, providing that such person also has in his possession a pistol license or firearms registration card issued in accordance with the laws of his place of residence. For purposes of this subdivision, a person licensed in a jurisdiction which does not authorize such license by a person who has been previously convicted of a felony shall be presumed to have no prior conviction. The superintendent of state police shall annually review the laws of jurisdictions within the United States and Canada with respect to the applicable requirements for licensing or registration of firearms and shall publish a list of those jurisdictions which prohibit possession of a firearm by a person previously convicted of a felony or crimes which if committed in New York state would constitute a felony.

13-a. Except in cities not wholly contained within a single county of the state, possession of pistols and revolvers by a person who is a nonresident of this state while attending or traveling to or from, an organized convention or exhibition for the display of or education about firearms, which is conducted under auspices of, or approved by, the National Rifle Association and in which he is a registered participant, within forty-eight hours of such event, provided that he has not been previously convicted of a felony or a crime which, if committed in New York, would constitute a felony, and further provided that the pistols or revolvers are transported unloaded in a locked opaque container together with a copy of the convention or exhibition program, convention or exhibition schedule or convention or exhibition registration card. Such documentation shall constitute prima facie evidence of exemption, providing that such person also has in his possession a pistol license or firearms registration card issued in accordance with the laws of his place of residence. For purposes of this paragraph, a person licensed in a jurisdiction which does not authorize such license by a person who has been previously convicted of a felony shall be presumed to have no prior conviction. The superintendent of state police shall annually review the laws of jurisdictions within the United States and Canada with respect to the applicable requirements for licensing or registration of firearms and shall publish a list of those jurisdictions which prohibit possession of a firearm by a person previously convicted of a felony or crimes which if committed in New York state would constitute a felony.

14. Possession in accordance with the provisions of this paragraph of a self-defense spray device as defined herein for the protection of a person or property and use of such self-defense spray device under circumstances which would justify the use of physical force pursuant to article thirty-five of this chapter.

(a) As used in this section "self-defense spray device" shall mean a pocket sized spray device which contains and releases a chemical or organic substance which is intended to produce temporary physical discomfort or disability through being vaporized or otherwise dispensed in the air or any like device containing tear gas, pepper or similar disabling agent.

(b) The exemption under this paragraph shall not apply to a person who:

(i) is less than eighteen years of age; or

(ii) has been previously convicted in this state of a felony or any assault; or

(iii) has been convicted of a crime outside the state of New York which if committed in New York would constitute a felony or any assault crime.

(c) The department of health, with the cooperation of the division of criminal justice services and the superintendent of state police, shall develop standards and promulgate regulations regarding the type of self-defense spray device which may lawfully be purchased, possessed and used pursuant to this paragraph. The regulations shall include a requirement that every self-defense spray device which may be lawfully purchased, possessed or used pursuant to this paragraph have a label which states: "WARNING: The use of this substance or device for any purpose other than self-defense is a criminal offense under the law. The contents are dangerous - use with care. This device shall not be sold by anyone other than a licensed or authorized dealer. Possession of this device by any person under the age of eighteen or by anyone who has been convicted of a felony or assault is illegal. Violators may be prosecuted

under the law."

15. Possession and sale of a self-defense spray device as defined in paragraph fourteen of this subdivision by a dealer in firearms licensed pursuant to section 400.00 of this chapter, a pharmacist licensed pursuant to article one hundred thirty-seven of the education law or by such other vendor as may be authorized and approved by the superintendent of state police.

(a) Every self-defense spray device shall be accompanied by an insert or inserts which include directions for use, first aid information, safety and storage information and which shall also contain a toll free telephone number for the purpose of allowing any purchaser to call and receive additional information regarding the availability of local courses in self-defense training and safety in the use of a self-defense spray device.

(b) Before delivering a self-defense spray device to any person, the licensed or authorized dealer shall require proof of age and a sworn statement on a form approved by the superintendent of state police that such person has not been convicted of a felony or any crime involving an assault. Such forms shall be forwarded to the division of state police at such intervals as directed by the superintendent of state police. Absent any such direction the forms shall be maintained on the premises of the vendor and shall be open at all reasonable hours for inspection by any peace officer or police officer, acting pursuant to his or her special duties. No more than two self-defense spray devices may be sold at any one time to a single purchaser.

16. The terms "rifle," "shotgun," "pistol," "revolver," and "firearm" as used in paragraphs three, four, five, seven, seven-a, seven-b, nine, nine-a, ten, twelve, thirteen and thirteen-a of this subdivision shall not include a disguised gun or an assault weapon.

b. Section 265.01 shall not apply to possession of that type of billy commonly known as a "police baton" which is twenty-four to twenty-six inches in length and no more than one and one-quarter inches in thickness by members of an auxiliary police force of a city with a population in excess of one million persons or the county of Suffolk when duly authorized by regulation or order issued by the police commissioner of such city or such county respectively. Such regulations shall require training in the use of the police baton including but not limited to the defensive use of the baton and instruction in the legal use of deadly physical force pursuant to article thirty-five of this chapter. Notwithstanding the provisions of this section or any other provision of law, possession of such baton shall not be authorized when used intentionally to strike another person except in those situations when the use of deadly physical force is authorized by such article thirty-five.

c. Sections 265.01, 265.10 and 265.15 shall not apply to possession of billies or blackjacks by persons:

1. while employed in fulfilling contracts with New York state, its agencies or political subdivisions for the purchase of billies or blackjacks; or

2. while employed in fulfilling contracts with sister states, their agencies or political subdivisions for the purchase of billies or blackjacks; or

3. while employed in fulfilling contracts with foreign countries, their agencies or political subdivisions for the purchase of billies or blackjacks as permitted under federal law.

d. Subdivision one of section 265.01 and subdivision four of section

(5) §48 which, among other things, amended section 400.00 of the penal law to add a new subdivision 16-a which requires the registration of semiautomatic handguns, rifles and shotguns that are defined as "assault weapons".

The Governor's "Memorandum in Support" of the Act states, in its opening sentence,

> "This legislation will protect New Yorkers by reducing the availability of assault weapons and deterring the criminal use of firearms while promoting a fair, consistent and efficient method of ensuring that *sportsmen and other legal gun owners* have *full enjoyment* of the guns to which they are entitled."

The memorandum claims the Act comports with the U.S. Supreme Court decision in *District of Columbia v. Heller,* 554 U.S. 570 (2008) with respect to the Act's new definition of "assault weapon" and its ban on most current ammunition feeding devices by stating,

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265.15 of this article shall not apply to possession or ownership of automatic knives by any cutlery and knife museum established pursuant to section two hundred sixteen-c of the education law or by any director, officer, employee, or agent thereof when he or she is in possession of an automatic knife and acting in furtherance of the business of such museum.

e. Subdivision eight of section 265.02 and sections 265.36 and 265.37 of this chapter shall not apply to a qualified retired New York or federal law enforcement officer as defined in subdivision twenty-five of section 265.00 of this article, with respect to large capacity ammunition feeding devices issued to such officer or purchased by such officer in the course of his or her official duties and owned by such officer at the time of his or her retirement or comparable replacements for such devices, if: (i) the agency that employed the officer qualified such officer in the use of the weapon which accepts such device in accordance with applicable state or federal standards for active duty law enforcement officers within twelve months prior to his or her retirement; and (ii) such retired officer meets, at his or her own expense, such applicable standards for such weapon at least once within three years after his or her retirement date and at least once every three years thereafter, provided, however, that any such qualified officer who has been retired for eighteen months or more on the effective date of this subdivision shall have eighteen months from such effective date to qualify in the use of the weapon which accepts such large capacity ammunition feeding device according to the provisions of this subdivision, notwithstanding that such officer did not qualify within three years after his or her retirement date, provided that such officer is otherwise qualified and maintains compliance with the provisions of this subdivision.

> "Some weapons are so dangerous and some ammunition devices so lethal that we simply cannot afford to continue to sell them in our state. Assault weapons that have *military-style* features *unnecessary for hunting and sporting purposes* are this kind of weapon."

The Act's authors failed to recognize that the Supreme Court held that the Second Amendment to the U.S. Constitution protects an "individual right" that "belongs to all Americans". *Heller,* 554 U.S. at 581, 595 (emphasis added) and that the right of self defense is the "core" and *"the central component* of the [Second Amendment] right itself." *Id.* At 592, 599, 628, 630; accord *McDonald v City of Chicago,* 130 S.Ct. 3020, at 3036; *id* at 3047 (controlling opinion of Alito, J.) That misunderstanding of the law is illustrated by the Act's criminalizing the possession in the home of the newly defined "assault weapons" unless they are registered.

Further evidencing this fundamental misunderstanding, the Act bans a whole new class of firearms as "assault weapons" by reason of a single *military style* feature and bans standard ammunition magazines, both *"of the kind in common use...for lawful purposes," District of Columbia v. Heller,* 554 U.S. 570, 624 (2008).

The aforementioned provisions of the Act cannot be reconciled with the Second Amendment.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT THAT BELONGS TO ALL AMERICANS

The Second Amendment to the Constitution of the United States reads: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

While some may have interpreted the amendment to condition the right to service in a militia, in *Heller*, the Supreme Court parsed each phrase in the language of the amendment and analyzed the meaning of those phrases at the time the framers wrote them through the use of historical original sources and determined:

1. That the preamble or prefatory clause announces a purpose, but does not limit the scope of the operative clause. Id at 577.

2. That with respect to the "right of the people", 'Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right". Id at 580. Thus, the right must be an individual and private right, just as the First and Fourth Amendment rights.

3. That the most natural meaning of "keep Arms" is to "have weapons". Id at 582. Further, the term to "keep and bear arms" was frequently used in a nonmilitary sense so that the operative clause does not imply that the right is confined to a military purpose. Moreover, the right to keep and bear arms was well established before the Bill of Rights was adopted and had never been restricted to military contexts.

4. That the elements of the operative clause, taken together, "guarantee the individual right to possess and carry weapons in the case of confrontation." Id at 592.

5. That the language "shall not be infringed" evidences a pre-existing right, rooted in English law based on the natural right to use arms for self-preservation and defense. Id at 594.

II. THE RIGHT TO KEEP AND BEAR ARMS IS A FUNDAMENTAL RIGHT APPLICABLE EQUALLY TO THE FEDERAL GOVERNMENT AND THE STATES

In *McDonald v. City of Chicago,* 130 S.Ct. 3020 (2010), the Supreme Court considered whether the Second Amendment right to keep and bear arms, as clarified by *Heller,* applied to the states.

While the Court declined to hold that the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution protects all of the rights set out in the Bill of Rights, it determined that prior Court precedent did not preclude it from determining whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment binding on the States as the Court had never before addressed the question whether the right to keep and bear arms applies to the states. Id at 3031.

Reviewing the prevalence of the right in state constitutions at the time of the adoption of the Fourteenth Amendment, the Court found, "A clear majority of the States in 1868, therefore recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government Id at 3042.

The court found that "Self defense is a basic right, recognized by many legal systems from ancient times to the present day and in *Heller,* we held that individual self-defense is "the central component of the Second Amendment right." Id at 3037.

Referring to the exhaustive historical analysis in *Heller,* the Court stated, "Heller makes it clear that this right is "deeply rooted in this Nation's history and tradition." Id at 3037.

The Court undertook an examination of the history and bases for the selective incorporation of portions of the Bill of Rights and concluded, "Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. (*citation omitted*) We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller."Id* at 3050..

III. BOTH *HELLER* AND *MCDONALD* HOLD THAT THE RIGHT TO KEEP AND BEAR ARMS IS NOT UNLIMITED

The Court in *Heller* pointed out that "Like most rights, the right secured by the Second Amendment is not unlimited... commentators and courts routinely explained that the right secured by the Second Amendment is not... a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Supra at 626.

The Court noted, as an example, that the majority of 19th century courts considering the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment and state analogues. Supra at 626.

The Court also commented that, "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." In a footnote, the Court explained, "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." Supra at 627.

The *Heller* Court also recognized another limitation on the right to keep and bear arms – "that the sorts of weapons protected were those in common use at the time (citing to *United States v. Miller*, 307 U.S. 174, 179 (1939)"; that limitation being supported in our "historical tradition" of prohibiting the carrying of "dangerous and unusual weapons" 554 U.S. at 627. Thus, the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns" or automatic "M-16 rifles and the like." *Id.* at 625, 627. That interpretation, the Court explained, "accords with the historical understanding of the scope of the right." *Id.* at 625.

In *McDonald*, the Court reiterated that "longstanding regulatory measures" are permissible. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (controlling opinion of Alito, J.). Importantly, the *Heller* Court listed several examples of such longstanding (and therefore constitutionally permissible) regulations, such as laws against concealed carry and laws prohibiting possession of guns by felons. 554 U.S. at 626. The Court stated that analysis of whether other gun regulations are permissible must be based on their "historical justifications." *Id.* at 635.

IV. APPLYING THE COURT'S METHODOLOGY IN *HELLER* TO NEW YORK'S S.A.F.E ACT

In *Heller*, the Court made clear that its means of ascertaining the meaning of the Second Amendment was to look to germane historical sources contemporary to the amendment's adoption. The Court further held that the personal right to keep and bear arms stands on equal footing with those rights guaranteed by the First Amendment:

> The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them...We would not apply an "interest balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. The Second Amendment is no different...And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Id. At 635, 128 S.Ct. at 2821 (citation omitted)

By equating the rights guaranteed by the Second Amendment with those guaranteed by the First Amendment and by demonstrating through example how historical sources have been and should be used to shape the scope of a fundamental right, the Court provides a path for considering the case before this Court.

Just as free speech, in the classic sense, is never subject to interest-balancing in order for an attempt to curtail to be found violative of the right, so too, the Court instructs us, the fundamental right to keep and bear arms is not subject to interest-balancing. Just as "speech" is protected categorically unless it

fits within specifically defined classes that received no legal protection at the time of the ratification of the Bill of Rights, such as obscenity, fraud, libel and states secrets, so too, the right to keep and bear arms exists, subject to such limitation as existed at the time of the Second Amendment's ratification. According to the *Heller* Court, those specifically defined classes were bans on "dangerous and unusual weapons", bans on possession by felons and the mentally ill, laws forbidding carrying weapons in sensitive places, and laws imposing conditions and qualifications on the commercial sale of arms. Id. At 626-7, 128 S.Ct. at 2816-17.

Consequently, a government entity that seeks to significantly interfere with the Second Amendment rights of all of its citizens by banning the possession of a large class of firearms commonly used by law abiding citizens for a lawful purpose bears a heavy burden to demonstrate, with relevant historical materials, that those firearms were originally outside the scope of the amendment. It is not enough to contend that the existence of some founding-era firearms regulations shields all future regulations no matter how onerous; the historical record must bear on the issue at hand. Moreover, post-Civil War laws, enacted 75 years after the amendment's ratification, "do not provide as much insight into its original meaning as earlier sources." Id at 614, 128 S.Ct. at 2810.

History and tradition clearly demonstrate that militia members (in New York, as one of the original thirteen colonies) were required to furnish their own weapons; therefore, they must have been able to "keep" firearms for personal use, self-defense and other lawful purposes, such as hunting. The right to keep and bear arms was not limited to militia service, but it was related. Gun ownership was necessary for militia service; militia service was not necessary for gun ownership. In *Heller*, the court noted, "But as we have said, the conception of militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, *who would bring the sorts of lawful weapons*

that they possessed at home to militia duty. Id at 627 (emphasis supplied). Undoubtedly, these weapons included pistols, rifles and shotguns.

While the District of Columbia law at issue in *Heller* involved a total ban on the possession of handguns in the home and the New York S.A.F.E. purportedly bans only those semiautomatic handguns and rifles as can accept a detachable magazine and have at least one other additional feature or a semiautomatic shotgun as has at least one other of the listed features or is a semiautomatic version of an automatic rifle, shotgun or firearm, the New York Act still seeks to define a "class" of "arms" that it seeks to ban. In the New York Act, this prohibition on possession of these "arms" extends "to the home, where the need for defense of self, family, and property is most acute." Id at 628. By reason of this total ban on possession, including a ban from possession in the home, the New York Act must fail as D.C. law did in *Heller.*

To faithfully follow the Court's ruling in *Heller*, this Court would have to conclude, as the Supreme Court did, that "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home" these types of weapons "to 'keep' and use for protection of one's home and family," "would fail constitutional muster." Id at 628-9 (citation omitted). Admittedly, the Supreme Court found in *Heller* that the handgun was the most preferred firearm in the nation for self defense. Id at 628. This fact should not change this Court's analysis as among the now banned weapons in New York are a class of semiautomatic handguns. *Heller* made no distinction as to the type of handgun that falls under the Second Amendment's protection.

As in *Heller*, some laws which flatly ban that which the Second Amendment protects will be categorically unconstitutional. At least as to semiautomatic handguns, New York's Act would clearly seem categorically unconstitutional.

In addressing a somewhat similar ban on semiautomatic rifles, the D.C. Circuit in *Heller II*, stated, "We are not aware of evidence that prohibitions on either semi-automatic rifles or large-capacity magazines are longstanding and thereby deserving of a presumption of validity." Id at 28. Indeed, New York only first sought to prohibit possession of some semiautomatic handguns, rifles and shotguns and large capacity magazines in 2000. N.Y. Laws of 2000, Chapter 189 available at www.archives.nysed.gov/. Certainly, thirteen years is not what the *Heller* Court would consider longstanding as the D.C. handgun law it overturned had been in existence for thirty years. Instead, *Heller* advises us to look to prohibitions that existed at the time of the adoption of the Second Amendment. While semiautomatic weapons might not have existed then, their precursors – pistols, rifles and shotguns did and their possession in the home was largely, if not entirely unregulated, except as noted by the *Heller* Court.

Addressing the question of whether semiautomatic rifles were "arms" in common use, the *Heller II* Court[4] found,

> "We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in "common use," as the plaintiffs contend. Approximately 1.6 million AR-15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market. As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000." Supra at 30.

Being an "arm" in "common use" precludes a finding that a semiautomatic rifle is a "dangerous or unusual" weapon or a weapon restricted for military use, such as the automatic M-1 rifle. Nonetheless, New York's Act bans certain semiautomatic rifles, including the above-referenced AR-15. NYSAFE, Rifles that are Classified as Assault Weapons,

[4] *Heller v. District of Columbia,* 670 F.3d 1244 (D.C. Cir. 2011)

http://www.governor.ny.gov/assets/documents/RiflesthatAREclassifiedasassaultweapons.pdf.

It its attempt to justify the semiautomatic weapons ban, the Act's Memorandum in Support, New York State Senate, states:

> "The [Heller] Court also recognized there is a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' This piece of legislation heeds the guidance of the Supreme Court by refining and improving the assault weapon ban and increasing the safety of New Yorkers while observing the protections of the Second Amendment." McKinney's Session Law News of New York, April 2013, No.1 at page A-21.

This statement clearly demonstrates that the Act's sponsor did not understand the Supreme Court's definition of "dangerous and unusual weapons" and was under the mistaken belief that because it labeled the at-issue weapons as "assault weapons" that the state could establish, based on history and legal tradition, that the category of weapons sought to be banned were unprotected by the Second Amendment.

To summarize, as to bans on categories of arms, the *Heller* Court stated that the government may ban classes of weapons that have been banned in our "historical tradition", but not "the sorts of lawful weapons that" citizens typically "possess at home." 554 U.S. at 627. The Court said that "dangerous and unusual weapons" are equivalent to those weapons not "in common use," as the latter phrase was used in *United States v. Miller*, 307 U.S. 174, 179 (1939). *Heller*, 554 U.S. at 627. Thus, the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns" or automatic "M-16 rifles and the like." *Id.* at 625, 627. That interpretation, the Court explained, "accords with the historical understanding of the scope of the right." *Id.* at 625. "Constitutional rights," the Court said, "are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that

scope too broad." *Id.* at 634-35. The scope of the right is thus determined by "historical justifications." *Id.* at 635.

As semiautomatic handguns, rifles and shotguns and ammunitions magazines capable of holding ten rounds or more are weapons typically possessed by law abiding citizens in New York for lawful purposes, they are not "dangerous or unusual weapons" and do not fall under any recognizable historical or traditional exemption to Second Amendment protection of any longstanding; therefore, New York's Act is unconstitutional.

V. AS SUGGESTED BY THE SECOND CIRCUIT IN *KACHALSKY,* NEW YORK'S S.A.F.E ACT SHOULD BE SUBJECT TO STRICT SCRUTINY AS IT BURDENS THE CORE SECOND AMENDMENT PROTECTION OF SELF-DEFENSE IN THE HOME.

In *Kachalsky v. County of Westchester*, 701 F.3d 81, the Second Circuit had the opportunity to review a New York State Law that restricted carrying of firearms to only those who had a license to do so based upon an application and proof of "proper cause".

In discussing the level of scrutiny to be applied, that court stated:

> Although we have no occasion to decide what level of scrutiny should apply to laws that burden the "core" Second Amendment protection identified in *Heller*, we believe that applying less than strict scrutiny when the regulation does not burden the "core" protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits. Id at 28. *Kachalsky* therefore implies that a regulation which does burden the core protection of self-defense in the home, like the Act at issue here, should be subject to strict scrutiny.

Unlike the regulation at issue in *Kachalsky*, the blanket ban on the possession of so-called "assault weapons" in the case at bar does burden the "core" protection of self-defense in the home since New York's Penal law §265.01-b makes it a felony crime to possess an assault weapon, regardless of whether such possession is in the home.

As discussed above, at least one other court found semiautomatic rifles to be weapons "in common use" and the Supreme Court in *Heller* found handguns the "quintessential weapon of

choice" for self-defense in the home where the vast majority of handguns are now semiautomatic weapons.

Applying strict scrutiny would be in accord with the treatment given laws that interfere with other "fundamental constitutional rights". *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). See also, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("Classifications affecting fundamental rights...are given most exacting scrutiny.")

In addition, *Heller* ruled that the right to possess guns is a core enumerated constitutional right and in doing so rejected Justice Breyer's suggested *Turner Broadcasting*[5] intermediate scrutiny approach. And *McDonald* later held that "the right to keep and bear arms" is "among those fundamental rights necessary to our system of ordered liberty." 130 S. Ct. at 3042.

It would be especially inappropriate here to apply intermediate scrutiny, rather than strict scrutiny to New York's ban on semi-automatic weapons, as a ban on a class of arms is not an "incidental" regulation. It is equivalent to a ban on a category of speech. Such restrictions on core enumerated constitutional protections are *not* subjected to mere intermediate scrutiny review.

The Supreme Court has generally employed strict scrutiny to assess direct infringements on fundamental substantive constitutional rights that it has subjected to a balancing test and analyzed under one of the levels of scrutiny – for example, the First Amendment freedom of speech and the rights protected by substantive due process –. *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (First Amendment strict scrutiny in context of infringement on "political speech"); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (First Amendment strict scrutiny in context of infringement on freedom of association); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (First Amendment strict scrutiny in context of content-based speech regulation); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (substantive due process doctrine "forbids the government to infringe fundamental liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest")

[5] *Turner Broad. Sys., Inc. v FCC,* 512 U.S. 622 (1994)

(internal quotation marks and alteration omitted); *see generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271 (2007) ("the Supreme Court adopted the strict scrutiny formula as its generic test for the protection of fundamental rights").

In applying strict scrutiny, a Court must find that the government has shown that a law is narrowly tailored to serve a compelling state interest. *See Citizens United*, 130 S. Ct. at 898 (strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest") (internal quotation marks omitted). This test strongly favors the individual right in question. *See Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (strict scrutiny "is a demanding standard"); *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004) (plurality opinion) (strict scrutiny imposes "a strong presumption of invalidity" with a "thumb on the scales" in favor of the individual right); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (under strict scrutiny, "a heavy burden of justification is on the State").

New York has not shown either a compelling state interest or that its Act is narrowly tailored to serve such an interest. Instead, New York has taken a blunt approach, classifying, and thereby banning, as "assault weapons" those "that have military-style features unnecessary for hunting and sporting purposes" on the unsupported and generalized government purpose stated as "Some weapons are so dangerous and some ammunition devices so lethal that we simply cannot afford to continue *selling* them in our state." McKinney's Session Law News of New York, April 2013, No.1 at page A-21. The Memorandum in Support also states, "The 'one-feature' test would ban semi-automatic guns with detachable magazines that possess one feature commonly associated with military weapons." Id at A-18. The memorandum does not explain how these single features make the semi-automatic weapons any more dangerous than other, non-banned semi-automatic weapons defeating any "compelling government interest" New York may claim to have. While the new ban will likely have the effect of "reducing the availability of assault weapons" to law abiding citizens in the state, a sufficient causal link to "deterring the criminal use of firearms" is not established. Id at A-17 (PURPOSE).

In order to deter the criminal use of firearms, some suggest that federal laws to help prevent the flow of illegal guns into New York are necessary. In, New York Gun Laws: An Advocate's View, New York State Bar Association Government, Law and Policy Journal, Summer 2012, Vol.14, No.1 at page 17, written prior to the passage of the Act, author Jackie Hilly states:

> New York has strong laws governing the sale and licensing of guns, which help prevent guns from getting into the hands of criminals...In 2009, 85% of guns traced[6] after being used in crimes in New York City were found to have come from other states with weak gun laws...The first problem New York faces is that despite its careful regulation of licensees and sales of weapons, far too many guns end up in New York from state sales to people who do not undergo any kind of background check.

This statement and the cited statistics undercut the argument that the Act's restrictions on the possession of certain semiautomatic weapons by law abiding citizens in New York are necessary, much less "compelling".

VI. THE REGISTRATION PROVISIONS OF THE ACT ARE NOVEL, NOT HISTORIC AND SIGNIFICANTLY IMPINGE UPON THE CORE RIGHT PROTECTED BY THE SECOND AMENDMENT

Under the new subdivision 16-a added to section 400.00 of the penal law by the Act, a law abiding New York resident who prior to the Act owned a weapon that the Act newly defines as an "assault" weapon, must register that weapon within one year of the effective date of the Act or be subject to the criminal penalties described above. While in 1911 New York passed the "Sullivan Law" requiring a permit to keep a pistol or other concealable firearm in the home that law was upheld in *People v. Warden of City Prison*, 154 AD 413, 139 N.Y.S. 277 (1st Dep't 1913) by finding that the federal Bill of Rights did not apply to the states. Id at page 419.

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[6] Citing to U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, ATF New York City 2 (2009), available at http://www.atf.gov/statistics/download/trace-data/2009/2009-trace-data-new-york-nyc.pdf.

It is undisputed, that until the enactment of the Act, New York has never required the registration of long guns (rifles and shotguns), even semi-automatic ones. In *Heller v District of Coumbia,* 670 F. 3d 1244 (D.C. Cir. 2011)(hereafter *Heller II),* the D.C. Circuit Court of appeals found when confronted with a regulation requiring the registration of rifles,

> "These early registration requirements, however, applied with only a few exceptions solely to handguns — that is, pistols and revolvers — and not to long guns. Consequently, we hold the basic registration requirements are constitutional only as applied to handguns. With respect to long guns they are novel, not historic." Supra at 19.

The *Heller II* Court continued,

> All of these requirements...make it considerably more difficult for a person lawfully to acquire and keep a firearm, including a handgun, for the purpose of self-defense in the home – the 'core lawful purpose' protected by the Second Amendment. Heller, 554 U.S. at 630. Because they impinge upon that right, we must determine whether these requirements are constitutional.

Even applying just intermediate scrutiny, where the government need only show that the regulations are "substantially related to an important governmental objective" (See, Clark, 486 U.S. at 461), the *Heller II* Court found,

> We cannot conclude, however, that the novel registration requirements – or any registration requirement as applied to long guns – survive intermediate scrutiny based upon the record as it stands because the District has not demonstrated a close fit between those requirements and its governmental interests. Supra at 25

The *Heller II* Court went on to state:

> Although we do "accord substantial deference to the predictive judgments" of the legislature, *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180, 195 (1997) (quoting *Turner I*, 512 U.S. at 665) (internal quotation marks omitted), the District is not thereby "insulated from meaningful judicial review," *Turner I*, 512 U.S. at 666 (controlling opinion of Kennedy, J.); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality opinion) (citing *Turner I* and "acknowledg[ing] that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems"). Rather, we must "assure that, in formulating its judgments, [the legislature] has

> drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 195 (quoting *Turner I*, 512 U.S. at 666) (internal quotation marks omitted). Therefore, the District needs to present some meaningful evidence, not mere assertions, to justify its predictive judgments.

The District of Columbia legislature relied upon the Committee Report on its Act, along with testimony and written statements at public hearings. New York had no committee review the Act and conducted no public hearings to demonstrate any fit between its governmental interests and the new and novel registration requirements. Therefore, the New York State legislature could not possibly have drawn reasonable inferences based upon substantial evidence and must fail the *Turner II* test so that no deference should be given to the judgment of the Legislature. The Act must, therefore, fail even intermediate scrutiny as to its registration requirements and must be found unconstitutional.

CONCLUSION

The New York S.A.F.E. Act violates the principles established by the Supreme Court in *Heller* and *McDonald* by banning and criminalizing the possession of so-called "assault weapons", weapons that are in common use by ordinary New Yorkers for self-defense and other lawful purposes, even if possessed in their homes. Further, the Act imposes new and novel registration requirements on certain semiautomatic rifles and shotguns that cannot withstand strict, or even intermediate, scrutiny.

August 12, 2013
Albany, New York

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2013, I electronically filed a copy of the foregoing **Notice Of Motion For Leave To File [Proposed] Amicus Curiae Brief Of New York State Senator Kathleen A. Marchione**, with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the CM/ECF participants in this case.

s/Matthew J. Kelly

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