14-0036-cv

14-0037-cv(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants-Cross-Appellees,

—against—

(*Caption continued on inside cover*)

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

BRIEF FOR *AMICI CURIAE* LAW CENTER TO PREVENT GUN VIOLENCE AND NEW YORKERS AGAINST GUN VIOLENCE

JONATHAN K. BAUM
MARK T. CIANI
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, New York 10022
(212) 940-8800

Counsel for Amici Curiae Law Center to Prevent Gun Violence and New Yorkers Against Gun Violence

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,

—and—

FRANK A. SEDITA, III, District Attorney for Erie County, GERALD J. GILL,
Chief of Police for the Town of Lancaster, New York, LAWRENCE FRIEDMAN,

Defendants-Appellees.

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Law Center to Prevent Gun Violence ("the Law Center") does not have any parent company. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

Amicus curiae New Yorkers Against Gun Violence ("NYAGV") does not have any parent company. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Law Center to Prevent Gun Violence ("the Law Center") is a non-profit, national law center dedicated to reducing gun violence and the devastating impact it has on communities. The Law Center focuses on providing comprehensive legal expertise to promote smart gun laws. These efforts include tracking all Second Amendment litigation nationwide and providing support to jurisdictions facing legal challenges. As an *amicus*, the Law Center has provided informed analysis in a variety of firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

The Law Center has a particular interest in this litigation because it was formed in the wake of an assault weapon massacre at a San Francisco law firm in 1993. The shooter in that rampage was armed with two assault weapons and multiple large capacity ammunition magazines, some capable of holding up to 50 rounds of ammunition.

Amicus curiae New Yorkers Against Gun Violence (NYAGV), a non-profit, tax-exempt organization, is New York State's leading anti-gun violence

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[1] *Amici* make the following disclosure pursuant to Fed. R. App. P. 29(c)(5): no party's counsel authored this brief in whole or in part. No party, party's counsel, nor any other person contributed any money to fund the preparation or submission of this brief, other than Amici. All parties have consented to the filing of this brief.

organization. Established in 1993 by a group of Brooklyn, New York mothers galvanized by the shooting death of a teacher in Prospect Park, Brooklyn, NYAGV has grown to include members in 27 counties throughout New York. NYAGV partners with community groups, local officials, law enforcement and individual citizens across New York to advocate against gun violence.

The Law Center and NYAGV both filed an amicus brief in this case before the District Court.

SUMMARY OF ARGUMENT

On December 14, 2012, a man walked into Sandy Hook Elementary School carrying an assault weapon with large capacity ammunition magazines and hundreds of rounds of ammunition. He shot 20 children and six adults before turning the gun on himself – all *within five minutes*. In that very short time, the gunman fired 155 bullets and shot each of his victims multiple times, including one six-year-old who was shot 11 times. In response to this horrific incident and the many others preceding it, New York strengthened its longstanding ban on assault weapons and large capacity ammunition magazines, enacting the New York Secure Ammunition and Firearms Enforcement Act ("SAFE Act") to help prevent such tragedies from happening again.

The District Court upheld key components of the SAFE Act, holding that the Act's principal regulations are "substantially related to the achievement of an

important governmental interest." SPA-5. This Court should affirm that ruling. The SAFE Act is completely consistent with the Second Amendment.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court held that the Second Amendment protects the right of law-abiding, responsible citizens to possess an operable handgun in the home for self-defense. The SAFE Act does not conflict with this right, as residents may lawfully purchase and possess numerous handguns and ammunition magazines for use in self-defense. Appellants, however, demand that this Court radically extend *Heller* to protect the possession of assault weapons and large capacity ammunition magazines, devices of military origin designed to kill large numbers of people quickly and efficiently. *Heller* does not support such an extension and, as courts elsewhere have ruled, the Second Amendment does not guarantee the right to possess these devices, which are frequently employed in mass shootings and attacks on law enforcement and are not suitable for self-defense.

Appellants' challenge to the SAFE Act fails because the Act does not burden the Second Amendment. However, even if it does implicate the Second Amendment, the Act clearly passes constitutional muster under the applicable standard of review.

ARGUMENT

I. THE SAFE ACT REGULATES CONDUCT WHICH FALLS OUTSIDE THE SCOPE OF THE SECOND AMENDMENT RIGHT RECOGNIZED IN *HELLER*.

A. Background of the SAFE Act.

Since 2000, the State of New York, like many other state and local governments nationwide, has prohibited assault weapons and large capacity ammunition feeding devices. N.Y. Penal Law §§ 265.02(7)-(8), 265.37. The SAFE Act expands the definition of "assault weapon" under New York law. Semiautomatic rifles, shotguns, and pistols now qualify as prohibited assault weapons if they have any of a number of specifically enumerated characteristics that enable the firing of hundreds of bullets per minute, aid in the commission of mass murders and assaults, or facilitate the weapon's concealment, purposes that are inconsistent with responsible self-defense in the home. N.Y. Penal Law § 265.00(22). Plaintiffs' challenge to the SAFE Act focuses on three of these characteristics:

- A folding or telescoping stock. This feature promotes concealment and mobility.
- A pistol grip that protrudes conspicuously beneath the action of the weapon. This allows a shooter to hold the firearm with two hands for greater control during rapid fire (when the muzzle of the gun can quickly get too hot to hold).
- A thumbhole stock. This feature helps a shooter retain control of a firearm while holding it at the hip, facilitating the spraying of rapidly-fired ammunition.

These features have nothing to do with lawful self-defense in the home and everything to do with enabling the shooter to unleash maximum carnage as quickly as possible.

New York law defines large capacity ammunition magazines (hereafter "LCMs") as any "magazine, belt, drum, feed strip, or similar device, . . . that . . . has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition." N.Y. Penal Law § 265.00(23). The SAFE Act strengthened this prohibition by eliminating a "grandfather" provision in prior law that allowed individuals under certain circumstances to continue to possess these magazines if they were manufactured before September 14, 1994. The SAFE Act requires that persons possessing such magazines must either lawfully dispose of them or permanently alter them to limit the device's capacity to no more than ten rounds of ammunition. N.Y. Penal Law § 265.36.

State and local governments across the country have adopted laws restricting civilian access to assault weapons and large capacity ammunition feeding devices because of the devastating role they repeatedly play in mass shootings.[2] The

[2] *See* Conn. Gen. Stat. § 53-202a *et seq.*; H.B. 13-1224, 69th Gen. Assemb., Reg. Sess. (Colo. 2013); Cal. Penal Code §§ 12275-12290 (2013); Haw. Rev. Stat. Ann. §§134-1, 134-4, 134-8 (2013); Md. Code Ann., Crim. Law §§ 4-301-306 (2013); Mass. Gen. Laws ch. 140, §§ 121-123, 131, 131M (2013); N.J. Stat. Ann. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13 (2013); D.C. Code Ann. §§ 7-2551.01 – 7-2551.03; Cook Cnty. Code of Ordinances §§ 54-211 –

shooting rampage at Sandy Hook is one of the more recent examples of the enormous public safety threat posed by assault weapons and large capacity ammunition magazines. This threat is not new, however. For example:

- In July 1993, a shooter armed with assault weapons and LCMs killed nine people and injured six others at a law firm in San Francisco.[3]
- In December 1993, a shooter armed with LCMs killed six people and wounded 19 others, on a Long Island Rail Road train.[4]
- In April 1999, the gunmen in the Columbine High School massacre killed 15 people and wounded 23 others using assault weapons and LCMs.[5]
- In April 2007, the shooter responsible for the Virginia Tech massacre armed himself with numerous 15-round magazines in an attack that left 33 dead and 17 injured.[6]
- In April 2009, a shooter armed with two semiautomatic pistols, two 30-round and two 15-round LCMs killed 13 people and wounded four others in Binghamton, New York.[7]

54-213; New York City Admin. Code § 10-301-303; San Francisco Police Code § 619; Sunnyvale Municipal Code § 9.44.030-60.

[3] Karyn Hunt, *Gunman Said to Have List of 50 Names*, Charlotte Observer, July 3, 1993, at 2A. This tragedy led to the formation of *amicus* Law Center to Prevent Gun Violence.

[4] Wikipedia page, *available at* http://en.wikipedia.org/wiki/Colin_Ferguson_(mass_murderer).

[5] David Olinger, *Gun Dealer Surrenders Firearms License*, Denver Post, Oct. 14, 1999, at B07.

[6] Violence Policy Ctr., Mass Shootings in the United States Involving High Capacity Ammunition Magazines (Jan. 2011), http://www.vpc.org/fact_sht/VPCshootinglist.pdf.

[7] Citizens Crime Commission of New York City, Mass Shooting Incidents in America (1984-2012), http://www.nycrimecommission.org/mass-shooting-incidents-america.php.

- In January 2011, a shooter killed six people and wounded 13 others, including Congresswoman Gabrielle Giffords, in a parking lot in Tucson using a LCM holding 31 rounds.[8]

- In July 2012, a gunman killed 12 people and wounded 58 others in a movie theater in Aurora, Colorado, armed with, among other firearms, an AR-15 assault rifle with a 100-round ammunition magazine.[9]

Criminals disproportionately use both assault weapons and LCMs in two categories of crimes: those with multiple victims and those that target law enforcement. As the District Court here found, "assault weapons are often used to devastating effect in mass shootings." SPA-32. On average, shooters who use assault weapons or LCMs in mass shootings shoot 151% more people, and kill 63% more people than shooters who do not.[10] In light of these alarming facts, the New York Legislature enacted the SAFE Act to strengthen prohibitions on the possession of assault weapons and LCMs.

B. The Second Amendment Does Not Protect a Right to Possess LCMs.

In *Heller*, the Supreme Court held that the Second Amendment right to bear "arms" protects the right of responsible, law-abiding citizens to possess a handgun

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[8] Violence Policy Ctr., Mass Shootings in the United States Involving High Capacity Ammunition Magazines.

[9] Dan Frosch and Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. Times, July 21, 2012, at A1.

[10] Mayors Against Illegal Guns, Analysis of Recent Mass Shootings, s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/analysis-of-recent-mass-shootings.pdf.

in the home for self-defense. 554 U.S. at 635. However, the Court cautioned that the Second Amendment right is "not unlimited" and should not be understood as conferring a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. at 626. Furthermore, the Court explicitly excluded certain classes of weapons from the scope of the Second Amendment, endorsing the "historical tradition of prohibiting the carrying of dangerous and unusual weapons." *Id*. at 627. For the reasons explained below, LCMs are not protected by the Second Amendment right to bear "arms" and portions of the SAFE Act regulating such magazines are constitutional.

1. LCMs Are Not "Arms."

As a threshold matter, the right protected under the Second Amendment applies only to "arms." *See Heller*, 554 U.S. at 581. The *Heller* Court undertook to define "arms," looking first to the 1773 edition of Samuel Johnson's dictionary, which defined "arms" as "weapons of offence, or armour of defence." 554 U.S. at 581 (*citing* 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). A LCM is not a "weapon of offence" or "armour." Instead, it is a special type of ammunition storage device, which merely enhances a firearm's ability to fire more

rounds without reloading; it is neither an integral nor necessary component of the vast majority of firearms.[11]

While a magazine necessary to supply a firearm with *some* number of bullets may be considered integral to its core functionality, the same cannot be said of a magazine that expands that supply beyond 10 rounds. This principle is grounded in America's historical experience with handguns. Prior to the 1980s, the most common type of handgun was the revolver, which typically holds five or six rounds of ammunition. It was only during the 1980s that the firearms industry began focusing on the production and aggressive marketing of semiautomatic pistols, which can accept larger ammunition magazines.[12] As a result, for the majority of the last century and a half, an American using a handgun in the home for self-defense could fire a maximum of six rounds before needing to reload.[13]

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[11] The *Heller* majority also relied on a historical legal definition of the term "arms:" "Servants and labourers shall use bows and arrows on Sundays, . . . and not bear other arms." *Heller*, 554 U.S. at 581 (citing Timothy Cunningham, *A New and Complete Law Dictionary* (2d ed. 1771)). The definition is instructive here: guns are like bows and bullets are like arrows, but the analog to a LCM – the quiver – is conspicuously *not* an "arm."

[12] Violence Policy Center, *Backgrounder on Glock 19 Pistol and Ammunition Magazines Used in Attack on Representative Gabrielle Giffords and Others* (Jan. 2011), *available at* http://www.vpc.org/fact_sht/AZbackgrounder.pdf.

[13] The revolver was first mass produced in the mid-19th century. It replaced the pepperbox pistol, which could hold four to six rounds. Prior to that, the Deringer was the handgun of choice and fired a single shot. *See* Peter Francis, *A History of Guns* (2014) 50-52.

There is no evidence to suggest this was inadequate for self-defense purposes and there is good reason to believe that access to more rounds per magazine may only create a significant threat to public safety.[14]

As non-essential items that merely enhance a feature beyond what was traditionally available, LCMs are not "arms," but, rather, firearm *accessories*. Historical sources support the conclusion that firearm accessories are separate and distinct from "arms." In Justice Stevens' *Heller* dissent, he cited The Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2, stating: "The Virginia military law, for example, ordered that 'every one of the said officers . . . shall constantly *keep* the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for. . . .'" *Heller*, 554 U.S. at 650 (Stevens, J., dissenting). This source specifically differentiates between "arms," "ammunition," and "accoutrements." LCMs are not arms, *nor are they ammunition*. They fall most readily into the category of accoutrements—i.e., accessories, akin to today's detachable scopes or silencers. Accessories that do not

[14] The typical self-defense scenario in a home does not require the number of bullets a large capacity magazine provides. "In fact, because of potential harm to others in the household, passerby, and bystanders, too much firepower is a hazard." *See* Brian J. Siebel, Brady Ctr. To Prevent Gun Violence, Assault Weapons: Mass Produced Mayhem 16 (2008), http://www.bradycampaign.org/sites/default/files/mass-produced-mayhem.pdf (quotation omitted).

affect the weapon's core functionality are not "arms" and their use falls outside of the Second Amendment.

As one court recently found after a full trial, prohibitions on LCMs do not deprive gun owners of the magazines they need for their weapons to function. *See Colorado Outfitters Assoc'n v. Hickenlooper*, Civ. Action No. 13-cv-01300, 2014 WL 3058518, at *14 (D. Col. June 26, 2014) ("The parties agree that semiautomatic weapons that use large-capacity magazines will also accept compliant magazines . . . and that compliant magazines can be obtained from manufacturers of large-capacity magazines. Thus, this statute does not prevent the people of Colorado from possessing semiautomatic weapons for self-defense, or from using those weapons as they are designed to function.").

The firearm industry itself categorizes magazines as accessories, not as firearms. A search of online firearm retailers shows that businesses intimately involved in the firearm industry classify magazines as accessories. For instance, Mississippi Auto Arms, Inc., organizes its online store by item type, differentiating between items such as "firearms" and "ammunition," offering magazines for sale under an entirely separate category: "accessories."[15] Atlantic Firearms, Guns America, and Palmetto State Armory similarly categorize magazines as accessories

[15] *See id.* at http://www.mississippiautoarms.com/sort-by-item-magazines-c-169_177.html.

or otherwise, but not as firearms.[16] Where the firearm industry itself defines a magazine as an accessory rather than an "arm," it bends credulity to assume otherwise.[17]

Amici do not contend that ammunition is not within the category of "arms," nor that compliant magazines are not "arms." Rather, Amici's assertion is that LCMs, accessories which enhance ammunition storage above and beyond traditional functionality, are not arms. Unlike ammunition, most firearms are completely operable without LCMs and function perfectly well with compliant magazines. The Ninth Circuit observed that without the ability to obtain *ammunition* "the right to bear arms would be meaningless" by "mak[ing] it impossible to use firearms for their core purpose." *Jackson v. San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (citation omitted) (emphasis added). However, a prohibition on LCMs does not make "meaningless" the right to bear arms because

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[16] *See* Atlantic Firearms, *available at* http://www.atlanticfirearms.com/accessories.html; Guns America, *available at* http://www.gunsamerica.com/BrowseSpecificCategory/Parent/Non-Guns/ViewAll.htm; Palmetto State Armory, *available at* http://palmettostatearmory.com/index.php/accessories.html.

[17] The State of Kansas recently defined "firearms accessories" as "items that are used in conjunction with or mounted upon a firearm but *are not essential to the basic function of a firearm*, including, but not limited to, telescopic or laser sights, *magazines*,…collapsible or adjustable stocks and grips, pistol grips, thumbhole stocks, speedloaders, [and] ammunition carries." K.S.A. § 50-1203(b) (emphasis added).

prohibiting LCMs has no impact whatsoever on the core functionality of the vast majority of firearms.

Just as the Second Amendment does not protect a person's right to possess other non-essential accessories, such as silencers, it does not protect a right to possess LCMs. *See United States v. McCartney*, 357 Fed. Appx. 73, 76 (9th Cir. 2009) (silencers are "not protected by the Second Amendment.").

2. Even If LCMs Are "Arms," They Are Still "Dangerous and Unusual" And Not Protected By The Second Amendment.

Even if LCMs are "arms," they are still not protected by the Second Amendment because they are "dangerous and unusual" weapons not typically possessed for lawful purposes. The *Heller* Court explicitly endorsed the "historical tradition of prohibiting the carrying of dangerous and unusual weapons" and held that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens *for lawful purposes*." *Heller*, 554 U.S. at 625, *aff'g United States v. Miller*, 307 U.S. 174, 178 (1939) (short-barreled shotguns not protected by the Second Amendment, because they are dangerous and unusual) (internal quotation omitted).

This Court has confirmed the limited nature of the Second Amendment right recognized in *Heller*: "[T]he Second Amendment right does not encompass all weapons, but only those 'typically possessed by law-abiding citizens for lawful purposes' and thus does not include the right to possess 'dangerous and unusual

weapons.'" *United States v. Decastro*, 682 F.3d 160, 165 n.4 (2d Cir. 2012) (quoting *Heller*, 544 U.S. at 627). Courts outside the Second Circuit are also in accord. *See, e.g.*, *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) (machine guns not protected by the Second Amendment as those firearms fall "within the category of dangerous and unusual weapons").

LCMs, which enable a shooter to fire high numbers of rounds without having to reload, are "dangerous and unusual" and inappropriate for lawful self-defense purposes. After hearing evidence at a full trial, one district court recently found that "large capacity magazines are frequently used in gun violence and mass shootings . . . [and] there is a positive correlation between the firearm ammunition capacity and the average number of shots fired during criminal aggression." *Colorado Outfitters*, 2014 WL 3058518, at *16. That LCMs are more suitable for illegal, offensive purposes is evidenced by the fact that criminals disproportionately use such magazines in two categories of crimes: those with multiple victims and those that target law enforcement.

Their exceedingly dangerous nature makes LCMs a popular choice for criminals and inappropriate for self-defense in the home. *See, e.g.*, *Hightower v. City of Boston*, 693 F.3d 61, 66, 71-72 & n.7 (1st Cir. 2012) (noting that "large capacity weapons" are not "of the type characteristically used to protect the home."). According to a former Baltimore Police Colonel, "[t]he typical self-

defense scenario in a home does not require more ammunition than is available in a standard 6-shot revolver or 6-10 round semiautomatic pistol. In fact, because of potential harm to others in the household, passerby, and bystanders, too much firepower is a hazard." *See, supra* n.14. LCMs exacerbate the threat of stray bullets, because "the tendency for defenders [is] to keep firing until all bullets have been expended." *See id*.

Responsible, lawful self-defense does not require the ability to spray dozens of bullets in the home without reloading. The *Colorado Outfitters* court held that a limitation on magazine capacity did not meaningfully impact "a person's ability to keep and bear (use) firearms for the *purpose of self-defense*," explaining that "[e]ven in the relatively rare scenario where the conditions are 'ideal' for defensive firing, there is no showing of a severe effect [of the magazine capacity limitation] on the defensive shooter." *Colorado Outfitters*, 2014 WL 3058518, at *14, *15. LCMs are "dangerous and unusual" weapons, ill-suited for self-defense and not "typically possessed for lawful purposes," which fall outside of the protection of the Second Amendment.

C. The Second Amendment Does Not Protect a Right to Possess Assault Weapons.

The SAFE Act also restricts the possession of assault weapons. As discussed above, the Second Amendment right is "not unlimited" and should not be understood to confer a "right to keep and carry any weapon whatsoever in any

manner whatsoever and for whatever purpose." *Heller*, 554 at 626. Moreover, the Second Amendment only protects those weapons "in common use at the time for lawful purposes" and does not protect "dangerous and unusual" weapons. *Id*. at 625, 627 (quotations omitted). Assault weapons are a category of dangerous and unusual firearms totally different from the handguns at issue in *Heller*. Assault weapons are generally semiautomatic versions of fully automatic weapons designed for combat. For example, the AR-15 rifle, some versions of which are prohibited by the SAFE Act, was originally designed as a military weapon and issued primarily to combat troops. *See* ArmaLite, *A Historical Review of ArmaLite* 3, 12 (Jan. 4, 2010). For the reasons discussed below, assault weapons fall outside of the protection of the Second Amendment.

1. Assault Weapons Are Not in "Common Use."

The *Heller* Court held that the Second Amendment only protects those weapons "in common use at the time for lawful purposes like self-defense." 554 U.S. at 624 (quotations omitted). Noting the "inherent ambiguities in making such a determination," the lower court assumed that assault weapons are commonly used for lawful purposes. SPA-25. That assumption, however, is not supported by the evidence. Assault weapons are not commonly used or purchased by the public. While Appellants and their *amici* offer a lot of bluster about how supposedly common these weapons are, the numbers tell a different story. These weapons

have historically only comprised a small percentage of the total firearms in circulation. *See* Marianne W. Zawitz, U.S. Dep't of Justice, *Guns Used in Crime* 6 (1995) (assault weapons constituted about 1% of guns in circulation prior to the federal assault weapons ban). As the District Court here noted, according to the testimony of Professor Lawrence Tribe, as of February, 2013, the rough numbers show that "assault weapons account for only about 2% of the guns owned in this country." SPA-23. Furthermore, while gun sales in America have risen in recent years, the percentage of households owning guns has sharply dropped, reflecting that more firearms are being sold to an ever-smaller group of enthusiasts, concentrating gun ownership substantially.[18] Thus, assault weapon ownership is likely even less common than is suggested by the already meager raw figures.

2. Even If They Are In "Common Use," Assault Weapons Are "Dangerous and Unusual" And Not Protected By The Second Amendment.

Even if assault weapons are "in common use," their exceedingly dangerous nature makes them better suited for committing violent crime than for self-defense purposes. As the District Court here stated, "ownership statistics alone are not enough. The firearm must also be possessed for lawful purposes, like self-defense." SPA-24. Just like fully automatic weapons, assault weapons are "designed to enhance [the] capacity to shoot multiple human targets very rapidly."

[18] *See* Hepburn et al., "The US Gun Stock: Results from the 2004 National Firearms Survey," Injury Prevention 2007.

Heller v. District of Columbia ("Heller II"), 670 F.3d 1244, 1262 (D.C. Cir. 2011) (quoting *Firearms Registration Amendment Act of 2008: Hearing on Bill 17-0843 Before the Comm. on Public Safety and the Judiciary of the Council of the District of Columbia* (Oct. 1, 2008) (statement of Brian J. Siebel, Brady Ctr. To Prevent Gun Violence) ("Siebel Statement")). "You will not find these guns in a duck blind or at the Olympics. They are mass produced mayhem." A-1316, ATF, *Assault Weapons Profile* 19 (1994). The District Court noted that "assault weapons are often used to devastating effect in mass shootings," (SPA-32) and are "designed for rapid fire, close quarter shooting at human beings." SPA-33 (*citing* A-1316, The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), *Assault Weapons Profile* 19 (1994)).

The only significant difference between civilian and military assault rifles is the manner in which they fire multiple bullets (i.e., whether they are "semiautomatic" or "automatic"). "A semiautomatic weapon fires one bullet for each squeeze of the trigger." A-453, Christopher S. Koper, U.S. Dep't of Justice, *An Updated Assessment of the Federal Assault Weapons Ban* 4 n.1 (2004). In contrast, a fully automatic assault weapon "fires continuously as long as the trigger is held back - until it runs out of ammunition." *See* Violence Policy Ctr., *Bullet Hoses: Semiautomatic Assault Weapons – What Are They? What's So Bad About Them*? Sec. 2 (May 2003), *available at* http://www.vpc.org/studies/hosetwo.htm.

The differences between firing a semiautomatic assault weapon and a fully automatic are minimal, and fully automatic firearms are unquestionably "dangerous and unusual" weapons. *See, Fincher*, 538 F.3d at 874 (machine guns are "within the category of dangerous and unusual weapons"). Most notably, both can fire hundreds of bullets in a single minute. In a police department test, an automatic UZI with a 30-round magazine "emptied in slightly less than two seconds…while the same magazine was emptied in just five seconds on semiautomatic" mode. Siebel Statement. The already fine line between these dangerous weapons only narrows when one considers the firepower of semiautomatic assault weapons.[19]

Ammunition shot from semiautomatic assault weapons is powerful enough to penetrate walls, increasing the already significant threat of stray bullets harming innocent family members, neighbors, and passersby. The Executive Director of the Fraternal Order of Police explained that "[i]n a conventional home with dry-

[19] Any argument that the SAFE Act arbitrarily prohibits assault weapons merely because they *resemble* military-style fully automatic assault weapons is disingenuous. Their characteristics are so similar that a semi-automatic assault weapon can readily be converted into a fully automatic weapon. *See, e.g.*, *Full Auto Conversion*, Weapons Combat, http://www.weaponscombat.com/full-auto-conversion (last visited June 7, 2013) (providing for purchase, instructions, blueprints, and schematics detailing the conversion of numerous semiautomatic weapons into fully automatic weapons); *Lightning Link*, The Home Gunsmith, http://thehomegunsmith.com/pdf/fast_bunny.pdf (last visited June 7, 2013) (device allows conversion AR-15 into fully automatic weapon in matter of ten seconds).

wall walls, I wouldn't be surprised if [an AK-47 round] went through six of them." *See* Brian J. Siebel, Brady Ctr. To Prevent Gun Violence, *Assault Weapons: Mass Produced Mayhem* 16 (2008), http://www.gs2ac.com/flyers/2008/200810_mass-produced-mayhem.pdf.[20] With such a fine line between civilian assault weapons and their fully automatic military equivalents, it is plain that assault weapons are "dangerous and unusual" weapons outside of the Second Amendment's scope. *See People v. James*, 94 Cal. Rptr. 3d 576, 586, 09 Cal. Daily Op. Serv. 6769 (Cal. Ct. App. 2009) (upholding California's assault weapon prohibition because assault weapons fall within the category of "dangerous and unusual" weapons).

That assault weapons are often used to commit violent crimes where greater firepower is needed underscores how ill-suited these weapons are to lawful, defensive purposes. Assault weapons like the AR-15, AK-47, and UZI models that are prohibited by the SAFE Act are frequently chosen by criminals for assaults and homicides. *See Heller II*, 670 F.3d at 1263 (citing Dep't of Treasury, *Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles* 34-35, 38 (1998)) ("assault weapons are preferred by criminals . . . because of their high firepower.").

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[20] The risk of errant bullets striking innocent household members or bystanders is very real in New York. In September 2010, a 15-year-old girl was killed in Buffalo by stray bullets from an AK-47 assault rifle while she was in her house typing on her computer. Lou Michel, *Dead girl was not target of shooting; Police say her brother may have been the one*, Oct. 2, 2010, *available at* http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20101002/CITYANDREGION/310029895.

Assault weapons "account for a larger share of guns used in mass murders and murders of police, crimes for which weapons with greater firepower would seem particularly useful." Koper, *supra*, at 87. A study analyzing FBI data found that almost 20% of the law enforcement officers killed in the line of duty were killed with an assault weapon.[21] Assault weapons are 20 times more likely to be used in the commission of a crime than other kinds of weapons.[22]

The District Court concluded that "the contested features, like a pistol grip and thumbhole stock,…aid shooters when 'spray firing' from the hip." SPA-34. As discussed above, responsible self-defense does not require the ability to indiscriminately spray bullets in close quarters, as assault weapons are designed to do. Unlike the handguns at issue in *Heller*, assault weapons simply do not have a tradition of use for lawful self-defense. *See* SPA-34 (*citing* Dep't of Treasury, *Study on the Sporting Suitability of Modified Semi-automatic Assault Rifles*, 38 (1998) and Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150, 185 (1995).

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[21] *See* Violence Policy Ctr., *"Officer Down" — Assault Weapons and the War on Law Enforcement, Section One: Assault Weapons, the Gun Industry, and Law Enforcement* (May 2003), *available at* http://www.vpc.org/studies/officeone.htm.

[22] *See* Jim Stewart & Andrew Alexander, *Assault Guns Muscling in on Front Lines of Crime*, Atlanta Journal-Atlanta Constitution, May 21, 1989, at A1, A8.

For all the reasons discussed above, a prohibition on assault weapons and LCMs does not implicate the Second Amendment, much less substantially burden that right.

II. EVEN IF THE SAFE ACT DOES IMPLICATE THE SECOND AMENDMENT, IT REMAINS CONSTITUTIONAL.

The fact that the SAFE Act does not burden the Second Amendment should end this Court's inquiry. *See, e.g., United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). But even if this Court were to radically expand the limited holding of *Heller* and conclude that the SAFE Act implicates the Second Amendment right to possess a handgun in the home for self-defense, the Act would still pass constitutional muster. As the District Court correctly held, intermediate scrutiny is the most appropriate level of Second Amendment review and the SAFE Act easily meets this standard. SPA-26.

A. If Heightened Scrutiny Is Necessary In Evaluating This Challenge, Strict Scrutiny Is Not Appropriate.

1. The Application of Strict Scrutiny to Firearm Regulations Is Generally Inappropriate.

Appellants and their *amici* argue that the SAFE Act must be subject to a strict scrutiny standard because the Second Amendment protects a fundamental right. However, not all restrictions on constitutional rights—even those that are fundamental—trigger strict scrutiny. *See Marzzarella*, 614 F.3d at 96-97 (noting that even the right to free speech, a fundamental right essential to democratic

governance, "is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue," and finding that there is "no reason why the Second Amendment would be any different") (internal citations omitted).

The application of strict scrutiny is inappropriate in the evaluation of firearm regulations. Protecting public safety is the bedrock function of government, and guns have a "unique potential to facilitate death and destruction and thereby to destabilize ordered liberty." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3108 (2010) (Stevens, J., dissenting). Accordingly, state and local governments have a profound interest in safeguarding the public and law enforcement personnel from gun violence. *See Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("promotion of safety of persons and property is unquestionably at the core of the State's police power").

Indeed, most courts that have chosen a level of scrutiny for evaluating Second Amendment claims, including this Court have rejected strict scrutiny. *See, e.g.*, *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); *Heller II*, 670 F.3d at 1256-1257; *Jackson*, 746 F.3d at 964-65; *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *United States v. Williams*, 616 F.3d 685, 691-93 (7th Cir.

2010); *Marzzarella*, 614 F.3d at 96-97; *United States v. Walker*, 709 F. Supp. 2d 460, 466 (E.D. Va. 2010).

2. Strict Scrutiny is Inconsistent with *Heller* and *McDonald*.

The District Court properly found that the application of strict scrutiny was inappropriate here because "strict scrutiny would appear to be inconsistent with the Supreme Court's holdings in *Heller* and *McDonald*, where the Court recognized 'presumptively lawful regulatory measures.'" SPA-27. As "numerous other courts and legal scholars have pointed out, a strict scrutiny standard of review" does "not square with the majority's references to 'presumptively lawful regulatory measures.'" *Heller v. Dist. of Columbia*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010) (citing *United States v. Skoien*, 587 F.3d 803, 811 (7th Cir. 2009) (noting that the court did "not see how the listed laws could be 'presumptively' constitutional if they were subject to strict scrutiny"); *United States v. Marzzarella*, 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009) (observing that "the Court's willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of a strict scrutiny standard of review"); Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. Rev. 1171, 1197-98 (2009) (stating "the *Heller* majority . . . implicitly rejected strict scrutiny").

Indeed, this Court has expressly rejected the indiscriminate application of heightened scrutiny to firearms laws, unless they "substantially burden" the Second

Amendment right. This Court previously held that "[r]eserving heightened scrutiny for regulations that burden the Second Amendment right substantially is not inconsistent with the classification of that right as fundamental to our scheme of ordered liberty. . ." *United States v. Decastro*, 682 F.3d 160, 166-67 (2d Cir. 2012). "In deciding whether a law substantially burdens Second Amendment rights," the *Decastro* Court explained, "it is . . . appropriate to consult principles from other areas of constitutional law, including the First Amendment":

> Regulation may "reduce to some degree the potential audience for [one's] speech" so long as "the remaining avenues of communication are [ ]adequate." . . . By analogy, [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.

Id. at 167-168 (citations omitted).[23] As demonstrated above, the SAFE Act's prohibition on a limited class of weapons that are particularly dangerous and ill-suited for self-defense leaves citizens free to possess a vast array of firearms and magazines with which to defend themselves. Accordingly, the application of strict scrutiny to the SAFE Act's prohibition on assault weapons and LCMs is unwarranted.

[23] *Compare Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding content-neutral regulations on the time, place, and manner of speech, aimed at limiting the volume of amplified music and speeches)

B. If Heightened Scrutiny Applies, Intermediate Scrutiny is the Appropriate Level of Review.

Because the SAFE Act does not substantially burden the Second Amendment, intermediate scrutiny is the appropriate level of review, assuming that any heighted scrutiny is required. Courts have reached the same conclusion in cases involving similar prohibitions on certain classes of weapons.

The U.S. Court of Appeals for the D.C. Circuit applied intermediate scrutiny to the District of Columbia's ban on assault weapons and LCMs. *Heller II*, 670 F.3d at 1261. The court stated that the prohibition of assault weapons and LCMs was "more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights," since the prohibition did not "prevent a person from keeping a suitable and commonly used weapon for protection in the home." *Id*. at 1262. The court also summarized a fundamental distinction from the absolute handgun ban in *Heller*: "Unlike the law held unconstitutional in *Heller*, [bans on assault weapons and LCMs] do not prohibit the possession of the 'quintessential self-defense weapon,' to wit, the handgun." *Id.* at 1261-62 (quoting *Heller*, 544 U.S. at 629).

In its opinion, the District Court similarly applied intermediate scrutiny to New York's ban on assault weapons and LCMs. The court noted that "courts throughout the country have nearly universally applied some form of intermediate scrutiny in the Second Amendment context." SPA-26. Like the laws at issue in

Heller II, the SAFE Act does not impose a substantial burden on an individual's ability to exercise his or her Second Amendment right since it does not "prevent a person from keeping a suitable and commonly used weapon for protection in the home." *Heller II*, 670 F.3d at 1262. Indeed, the District Court specifically found that "the SAFE Act applies only to a subset of firearms with characteristics New York State has determined to be particularly dangerous and unnecessary for self-defense; it does not totally disarm New York's citizens; and it does not meaningfully jeopardize their right to self-defense." SPA-29.

C. The Assault Weapons and LCM Bans Satisfy Intermediate Scrutiny.

Intermediate scrutiny requires a showing that the asserted governmental end is "significant," "substantial," or "important." *See, e.g., Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010). It requires that the fit between the challenged regulation and the stated objective be reasonable, not perfect, and does not require that the regulation be the least restrictive means of serving the interest. *See, e.g., Lorrilard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001); *Marzzarella*, 614 F.3d at 98; *Jackson*, 746 F.3d at 965. The SAFE ACT easily satisfies intermediate scrutiny.

1. Preservation of Public Safety and Prevention of Crime Are Paramount Government Interests.

In enacting the SAFE Act, the New York Legislature was concerned by the threat to public safety posed by assault weapons and LCMs. *See* A-663, Governor's Program Bill No. 1, Memorandum in Support, 2013 ("This legislation will protect New Yorkers by reducing the availability of assault weapons and deterring the criminal use of firearms"); A-680, New York State Senate Introducer's Memorandum in Support, Bill No. S2230, Sen. Klein (same). The District Court noted that "[t]he Second Circuit recently observed and reaffirmed that New York has substantial, indeed compelling, government interests in public safety and crime prevention." SPA-30 (*quoting Kachalsky*, 701 F.3d at 97).

2. Assault Weapons and LCMs Jeopardize Public Safety.

As demonstrated above, assault weapons and LCMs are particularly dangerous, military-style weapons designed for combat use, making them a significant threat to public safety. New York has an interest in preventing devastating attacks committed with these weapons, such as the mass shootings at Sandy Hook Elementary School.

Finally, New York has a substantial interest in protecting its law enforcement officers from harm. The prohibition on LCMs protects these officers because gun users limited to ten-round magazines must reload more frequently. For law enforcement confronting dangerous shootouts, "the 2 or 3 second pause to

reload [ammunition] can be of critical benefit." *Heller*, 698 F. Supp. 2d at 194. Indeed, the *Colorado Outiftters* court recently found that "[a] pause, of any duration, imposed on the offensive shooter can only be beneficial, allowing some period of time for victims to escape, victims to attack, or law enforcement to intervene."[24] *Colorado Outfitters*, 2014 WL 3058518, at *17.

3. The SAFE Act is Substantially Related to the Government's Significant Interests.

This Court should affirm the District Court's ruling that "New York has satisfied its burden to demonstrate a substantial link, based on reasonably relevant evidence, between the SAFE Act's regulation of assault weapons and the compelling interest of public safety that it seeks to advance." SPA-36. Given the real and immediate threats to public safety and law enforcement personnel posed by assault weapons and large capacity ammunition magazines, New York has made the reasonable choice to prohibit access to these dangerous instruments of mass mayhem, while preserving access to handguns and other firearms. Since the most effective way to eliminate the danger and destruction caused by assault weapons and LCMs is to prohibit their use, possession, and sale, a substantial relationship clearly exists between the SAFE Act and the government's significant interests. The SAFE Act places no burden on an individual's ability to possess a

[24] Indeed, in the 1993 Long Island Rail Road massacre, Colin Ferguson was only prevented from continuing his rampage because he was subdued while attempting to reload.

firearm in the home for self-defense. The Act prohibits only a fraction of available firearms—those with military-style features which facilitate rapid devastation of human life—which the New York Legislature deemed to be exceedingly dangerous. *See* A-1316, ATF, *supra*, at 19. The Act leaves common handguns, the weapons "overwhelmingly chosen" by the American people for self-defense in the home, untouched. *See Heller*, 554 U.S. at 628.

As a result, the SAFE Act is a reasonable means of serving vital government interests that is neither overly broad nor arbitrary. *See, e.g.*, *Turner Broad. Sys.*, 512 U.S. at 662; *Heller II*, 670 F.3d at 1262; *Marzzarella*, 614 F.3d at 98.

CONCLUSION

For all of the reasons set forth above, this Court should affirm the District Court's Order.

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Respectfully submitted,

KATTEN MUCHIN ROSENMAN LLP

By: /s/Jonathan K. Baum

JONATHAN K. BAUM
MARK T. CIANI
575 Madison Avenue
New York, New York 10022-2585
Tel: (212) 940-8800

Counsel for Amici Curiae Law Center to Prevent Gun Violence and New Yorkers Against Gun Violence

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28(e)(2)(a) because this brief contains 6,925 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(viii).

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/s/Jonathan K. Baum
Jonathan K. Baum, Esq.

Counsel for Amici Curiae Law Center to Prevent Gun Violence, New Yorkers Against Gun Violence, and Moms Demand Action for Gun Sense in America

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