14-36-cv(L)

14-37-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-Appellee,

v.

ANDREW M. CUOMO, GOVERNOR OF THE STATE OF NEW YORK,
ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK,
JOSEPH A. D'AMICO, SUPERINTENDENT OF THE NEW YORK STATE POLICE,

Defendants-Appellees-Cross-Appellants,

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.

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

BRIEF FOR *AMICI CURIAE* NEW YORK STATE SHERIFFS' ASSOCIATION, THE LAW ENFORCEMENT LEGAL DEFENSE FUND, THE LAW ENFORCEMENT ACTION NETWORK, AND THE INTERNATIONAL LAW ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION

MCMAHON MARTINE & GALLAGHER
Attorneys for Amici Curiae
55 Washington Street, Suite 720
Brooklyn, New York 11201
212-747-1230

CORPORATE DISCLOSURE STATEMENT

Amicus New York State Sheriffs' Association states that it has no parent corporation and that no publicly held corporation owns more than 10% of its stock.

Amicus International Law Enforcement Educators and Trainers Association states that it has no parent corporation and that no publicly held corporation owns more than 10% of its stock.

Amicus Law Enforcement Legal Defense Fund states that it has no parent corporation and that no publicly held corporation owns more than 10% of its stock.

Amicus Law Enforcement Action Network states that it has no parent corporation and that no publicly held corporation owns more than 10% of its stock.

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INTEREST OF AMICI CURIAE[1]

Amici Curiae New York State Sheriffs' Association ("NYSSA"), the International Law Enforcement Educators and Trainers Association ("ILEETA"), the Law Enforcement Action Network ("LEAN"), and the Law Enforcement Legal Defense Fund ("LELDF")(collectively, "*Amici*"), are member organizations representing the interests of law enforcement officers throughout the country and in the state of New York.[2] This *amicus* brief will provide the Court with the perspective of major law enforcement groups and organizations that aid law enforcement in legal matters and support law enforcement activities and issues in the courts, before the legislature, and among the public.

Because *Amici*'s members are charged with the enforcement of state and federal firearms laws, *Amici* are well suited to provide insight about the lawful use of the arms at issue in this litigation, which may impact the Court's framework for reviewing Plaintiffs-Appellants' Second Amendment claims. And because law enforcement officers are the front-line responders to violent crimes, *Amici* are well positioned to shed light for the Court on the practical impact the challenged provisions will have on public safety. *Amici* are also able to provide important

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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. The National Rifle Association contributed money toward the preparation and filing of this *amicus* brief.

[2] All Parties have consented to the filing of this Brief.

insight regarding the negative impact the challenged provisions will have on the ability of law-abiding citizens to defend themselves.

Amici will also explain, based upon their collective knowledge and experience with officers who are tasked with enforcing the law, that the challenged laws are unduly vague and fail to provide sufficient guidelines for officers to fairly administer the laws. Because *Amici* support officers who are not only responsible for enforcing the challenged provisions, but are also responsible for keeping the peace, *Amici* have a strong interest in ensuring that the laws officers are tasked with enforcing have sufficient guidelines, not only for the sake of the public, but also to protect officers and ensure against the diversion of limited resources from crucial law enforcement functions.

SUMMARY OF ARGUMENT

The challenged laws ban commonly owned firearms that are widely chosen by law-abiding citizens for lawful purposes, including self-defense. Like other law-abiding citizens, law enforcement officers frequently choose the banned firearms. Because the challenged provisions impose a blanket ban on arms protected by the Second Amendment, they are unconstitutional *per se*. At the very minimum, this Court should apply strict scrutiny to determine if the challenged laws are consistent with the Second Amendment, despite the district court's application of intermediate scrutiny. The challenged provisions cannot survive such review

because they do not serve to increase the safety of New York residents. Instead, the laws operate to decrease the ability of law-abiding citizens to effectively protect themselves in their homes, thus jeopardizing the public's safety.

Further, the vagueness of the challenged provisions precludes fair enforcement. Inevitably, the lack of guidelines will require officers to rely on their subjective interpretations, unnecessarily restricting the freedom of law-abiding individuals attempting to comply with the laws. While the laws are difficult for citizens to comprehend, they are worse for law enforcement. Officers are not only expected to enforce the laws against those seeking to exercise fundamental rights, they are likely to face suits for wrongful arrests and motions to dismiss criminal charges based on claimed violations of constitutional rights.

Members of *Amici* are entrusted with the critical responsibility of ensuring law and order. In very real and direct ways, the challenged laws increase disorder. Law enforcement's work is made more difficult attempting to enforce unclear laws that harm, rather than promote, public safety. The laws appear willfully blind to legitimate safety interests and instead are tailored to negatively impact law-abiding firearm owners.

Ultimately, the challenged provisions impose unnecessary, time-consuming, and costly burdens on law enforcement. Law enforcement officers have enough responsibilities already without being asked to enforce technically complex and

controversial laws, the enforcement of which will stretch already scarce law enforcement resources and reduce police support among the citizenry. Because the laws are opaque and unclear, and are contrary to the United States Constitution and Supreme Court precedent, *Amici* respectfully ask that they be held unconstitutional by this Court.

ARGUMENT

I. The Challenged Provisions Violate the Second Amendment.

A. The Challenged Laws Require Heightened Scrutiny Because They Prohibit Firearms That Are Typically Used By Law-Abiding Citizens.

The items prohibited by the challenged laws are "typically possessed by law-abiding citizens for lawful purposes."[3] In addition to the items directly prohibited – certain semi-automatic firearms and magazines with a capacity of more than ten rounds – the challenged provisions also effectively ban countless handguns and long-guns that come equipped from the factory with ammunition feeding devices capable of accepting more than ten rounds. Due to the popularity of each of the banned firearms and magazines, and because of their effectiveness for personal defense, these items are also widely used (and often preferred) by countless off-duty officers, and countless more retired law enforcement officers, in their homes.

[3] One of the firearms targeted by the challenged provisions is America's 'most popular semi-automatic rifle.' *Heller v. District of Columbia*, 670 F.3d 1244, 1287 (D.C. Cir. 2011)("*Heller II* ")(Kavanaugh J., dissenting).

Accordingly, law-abiding citizens, including members of the law enforcement community, are guaranteed the right to acquire, possess, and use them for lawful purposes, including self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008).[4]

The Court need not go any further to rule on the challenged provisions. Without resort to any means-end level of scrutiny, *Heller* categorically invalidated the D.C. handgun ban because it prohibited a class of arms overwhelmingly chosen by Americans for lawful purposes. 554 U.S. at 628-29. Here too, the challenged laws serve as a flat prohibition on protected arms, and, in light of *Heller*, they are necessarily unconstitutional. As this Court recognized, "where a state regulation is entirely inconsistent with the protections afforded by an enumerated right – as understood through that right's text, history, and tradition – it is an exercise in futility to apply means-end scrutiny." *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 n.9 (2d Cir. 2012).

[4] A ban on the acquisition, sale, transport, or manufacture of protected arms is the functional equivalent of a ban on possession and requires equally exacting review. Fundamental rights protect the purchase of items protected by that right, regardless of whether that corollary appears directly in the text of the right itself. *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980). It is well settled that individuals have an inherent right to access constitutionally protected items. *See, e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687-89 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

If a balancing test is to be applied, the district court surely was correct that heightened review was appropriate. Where the court erred, however, was in interpreting this Court's prior precedent. In *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012), this Court applied rational-basis review to a law that it held did not substantially burden Second Amendment rights. 682 F.3d at 164. In *Kachalsky*, this Court was confronted with a law that presented a substantial burden on rights protected by the Second Amendment – necessitating heightened review – but applied only intermediate scrutiny because "applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home" is appropriate. *Kachalsky*, 701 F.3d at 93-94. Here, the Court is faced with the most intrusive of laws: a complete prohibition on firearms that are commonly possessed that extends into the home where "Second Amendment guarantees are at their zenith."[5] *Id.* at 89.

The district court ignored the path signaled by this Court and applied intermediate scrutiny for three reasons, none of which withstand examination. First, the court stated that "courts throughout the country have nearly universally applied some form of intermediate scrutiny in the Second Amendment context."

[5] It is irrelevant that the challenged laws permit the possession of other firearms in the home for self-defense. Indeed, this exact argument was rejected by the Supreme Court. *Heller*, 554 U.S. at 629 ("It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns because the possession of other firearms (*i.e.* long guns) is allowed.").

New York State Rifle & Pistol Ass'n v. Cuomo, No. 13-CV-291S, 2013 U.S. Dist LEXIS 182307 at *39 (W.D.N.Y Dec. 31, 2013). Clearly, this statement is not consistent with this Court's holdings in *DeCastro* and *Kachalsky*, both of which state that the level of scrutiny to be applied depends on the type and extent of the intrusion onto Second Amendment rights.

Second, the district court attempted to rationalize the application of intermediate scrutiny by asserting "application of strict scrutiny would appear to be inconsistent with the Supreme Court's holdings in *Heller* and *McDonald*" because those cases referred to presumptively lawful regulatory measures. *Id.* This statement is incorrect for two reasons. First, the standard applied in *Heller* involved an analysis of the text and history of the challenged regulations. *See Heller II*, 670 F.3d at 1271-74 (Kavanaugh, J., dissenting). Thus, the presumptively lawful regulatory measures about which the Court was speaking were those that were sufficiently grounded in text and history. If there is any incompatibility between strict scrutiny and the Supreme Court's decision in *Heller*, it is because interest balancing tests, as a category of constitutional review, are not applicable to Second Amendment issues.

Second, there is no presumption of constitutionality under either strict scrutiny or intermediate scrutiny. *See Fisher v. University of Texas,* 133 S.Ct 2411, 2418 (2013)(stating that the government bears the burden of demonstrating that a

law meets the strict scrutiny test); *Turner Broadcasting Systems v. FCC*, 512 U.S. 622, 664 (1994)(stating that the government must demonstrate that the challenged laws satisfied intermediate scrutiny). Indeed, only laws analyzed under rational-basis review are presumptively constitutional under an interest balancing test. *Heller v. Doe*, 509 U.S. 312, 320 (1993)(stating that a law is "presumed constitutional" when reviewed under the rational-basis test). Thus, the reasoning applied by the district court is inconsistent with the standard of review it employed. Clearly, this is not a coherent theory of constitutional law.

The district court's last attempt to justify using intermediate scrutiny was by likening the challenged laws to "time, place, and manner restriction[s]." *New York State Rifle & Pistol Ass'n*, 2013 U.S. Dist LEXIS 182307 at *42. The challenged laws, however, prohibit the possession of banned firearms and magazines at all times, in all places, and in all manners of using them. In this regard, the challenged laws are more akin to prohibiting an entire modality of speech than limiting the time, place, or manner in which First Amendment activities can be engaged.

Under this Court's precedent, strict scrutiny can be the only level of interest-balancing test that can be applied to a law that reaches into the homes of law-abiding citizens and prevents them from exercising their fundamental right to possess a firearm that is commonly owned. As *Amici* explain, however, the

challenged laws are not sufficiently linked to any purported public safety concerns to satisfy any level of heightened review.

B. The Challenged Laws Do Not Assist Law Enforcement In Combating Violent Crime, And Serve To Decrease Public Safety.

Members of *Amici* take very seriously their duties to protect the citizenry and defend American liberties. New York Sheriffs have sworn an oath to uphold the United States Constitution, and thus cannot be expected to enforce unconstitutional laws. N.Y. Const. art. 13, § 1. To this end, *Amici* are compelled to express their concerns over the justification for the challenged provisions' curtailment of constitutional rights, and their observations should be afforded significant weight.

Of course, it is not just *Amici* who have taken exception with the challenged provisions. Local opposition to the new laws has been overwhelming. Over 50 New York counties and 160 New York cities and towns formally expressed their opposition to the challenged provisions, as well as 13 sheriffs and 4 law enforcement organizations. In fact, a large majority of counties went so far as to adopt resolutions opposing the legislation, while not a single county passed a resolution supporting the measures. NY Safe Resolutions, www.nysaferesolutions.com (compiling resolutions and opposition letters against the Act from local government and law enforcement)(last visited May 2, 2014).

The widespread opposition to the laws is not surprising. The Legislature failed to consider relevant testimony and evidence before adopting the challenged provisions – evidence that decisively shows the laws do not advance any public safety interests. The challenged provisions cannot survive meaningful judicial review.

Under heightened scrutiny, whether intermediate or strict, the presumption of validity is reversed, with the challenged law presumed unconstitutional and the burden on the government to justify the law. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)(content-based speech regulations are presumptively invalid); *see also United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)(explaining that "unless the conduct at issue is not protected by the Second Amendment at all, the Government bears the burden of justifying the constitutional validity of the law"). To prevail under strict scrutiny, Defendant-Appellee's must establish that the challenged provisions are "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). And intermediate scrutiny requires the government to prove the challenged provisions are "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). As *Amici* are uniquely positioned to inform the Court, the challenged provisions are unwarranted under either standard.

While the government has a compelling interest in preventing crime, *United States v. Salerno*, 481 U.S. 739, 749 (1987), the Legislature "must have had a strong basis *in evidence* to support that justification." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996)(emphasis added). Even under intermediate scrutiny, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664; *see also Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012)(quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)("The justification must be genuine, not hypothesized or invented post hoc in response to litigation."). The government cannot "get away with shoddy data or reasoning" in doing so; the "evidence must fairly support [its] rationale . . . ." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002).

Here, the bills creating the challenged provisions were introduced into the New York Legislature on January 14, 2013, and by January 15 – the very next day – the firearm and magazine bans had been voted on, passed, and delivered to Governor Cuomo for signature as an "emergency measure." S. 2230, 2013 Reg. Sess. (N.Y. 2013). There is no legislative history suggesting the Legislature considered a scintilla of evidence as to whether limiting the capacity of ammunition feeding devices to ten rounds (loaded with seven rounds when kept for

self-defense) or prohibiting firearms with features unrelated to their lethality actually furthers public safety.[6]

It appears that the decision of the district court relied upon anecdotal accounts of a singular event rather than facts. The court cited the mass murder in Newtown, Connecticut as "illustrative" of the fact that the firearms banned by the challenged laws were "unusually dangerous." *New York State Rifle & Pistol Ass'n*, 2013 U.S. Dist LEXIS 182307 at *47-48. This was unquestionably a tragic event, but the criminal act of a mentally disturbed person cannot provide a sufficient basis to restrict the fundamental rights of every law-abiding citizen in New York. Were there to be a doubt of this, the Supreme Court dispelled it in *Heller*, when it noted that even though D.C. had a significant problem with handgun violence, the prohibition of owning a handgun was a policy choice that was "off the table." 554 U.S. at 636. Instead of relying on tragic, rare events, this Court is called upon to review the evidence that was actually before the legislature to ensure that it was substantial. *Kachalsky*, 701 F.3d at 97 ("Thus, our only role is to assure that, in

[6] The challenged provisions do not define "assault weapon" based on a firearm's operation (e.g., rate of fire, velocity, etc.), concealability, or, for the most part, any other measure of lethality or safety concern. Rather, the definition bans firearms based on characteristics that are either cosmetic or are intended to make a firearm more ergonomic to handle. There are a few exceptions, which the Plaintiffs did not challenged, such as a bayonet mount and a grenade launcher. But either feature can be restricted itself, apart from the type of firearm it is attached to, which is already the case with grenade launchers under the laws of some states. See, e.g., Cal. Penal Code § 16460(a)(2).

formulating its judgments, [New York] has drawn reasonable inferences based on substantial evidence." (internal quotations omitted)(alterations in original)).

As noted above, there was *no* evidence before the New York State Legislature. There was no discussion concerning the impact on law enforcement, *e.g.*, whether law enforcement officers consider the prohibited items a significant threat, or whether they believe depriving law-abiding people of the prohibited items would promote or harm public safety. Nor was there any discussion of whether the funding of this large expansion of firearms regulation would result in diverting resources from other more crucial law enforcement functions, thereby decreasing public safety. And, while the Legislature appears to suggest the costs of enforcing the challenged provisions will fall on the state and "will be paid out of the Division of State Police capital budget," S. 2230, 2013 Reg. Sess. (N.Y. 2013), local agencies expect to nevertheless incur additional costs in enforcing the challenged provisions – at least indirect ones – as there is no explanation of what costs the state will cover.

Had the Legislature considered the relevant evidence, it would have found that prohibiting magazine capacity and so-called "assault weapons" is not even significantly, let alone *substantially*, related to furthering either public or officer safety. As a former firearms examiner for the Los Angeles County Sheriff's Department, Dwight Van Horn, once stated:

> [T]he claim that AK-47s or something called an "assault weapon" – which is simply a fabricated political and media term meant to vilify firearms that look like military arms but actually means whatever someone wants it to mean – is widely used by criminals, isn't true and never has been true.[7]

The evidence supports Mr. Horn's assessment. In fact, so-called "assault weapons" "were used in only a small fraction of gun crimes prior to the [1994 federal Assault Weapon] ban: about 2% according to most studies and no more than 8%."[8] From 1975 through 1992, only about one percent of law enforcement officers murdered in the United States were killed with what could be described as an "assault weapon." Kopel, *Threat to Police Officers* (citing March 1997 report from the Urban Institute, under contract from the U.S. Department of Justice, concluding that "police officers are rarely murdered with 'assault weapons' "). Those numbers remain essentially unchanged today. According to the Federal Bureau of Investigation, all types of rifles combined comprised only two percent of all homicide weapons in 2011, for civilians and law enforcement officers. Uniform

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[7] David B. Kopel, *Are So-Called "Assault Weapons" A Threat to Police Officers?*, The Law Enforcement Trainer (Sept./Oct. 1997), *available at* http://davekopel.org/2A/OpEds /Are_Assault_Weapons_a_Threat_to_Police.htm [hereinafter Kopel, *Threat to Police Officers*].

[8] Christopher S. Koper, Daniel J. Woods & Jeffrey A. Roth, "An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003: Report to the National Institute of Justice, United States Department of Justice," University of Pennsylvania, July 2004, at 2, *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf [hereinafter Koper, et al., "Impacts on Gun Markets and Gun Violence"].

Crime Reports, Murder Victims by Weapon, 2007-2011, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-8. Thus, those rifles considered "assault weapons" under the challenged provisions or that have magazine capacities over ten rounds account for, at most, two percent of deaths by any weapon, but likely only a fraction of that.

Moreover, a report funded by the U.S. Department of Justice explains that the data on shots fired in attacks involving firearms suggest that relatively few such attacks involve more than 10 shots fired. Koper, et al., "Impacts on Gun Markets and Gun Violence" at 3. This supports *Amici*'s observation that such limits on magazine capacity are generally not a concern of law enforcement officers – unless, of course, it is their own magazines that are being limited. It is hard to imagine that any officer would intentionally limit himself or herself to magazines loaded with ten rounds in a self-defense situation, whether in the field or at home, where an officer's self-defense needs are equal to those of law-abiding citizens. It is likewise doubtful that any officer would suggest that a law-abiding person do so, and *Amici* certainly would not suggest it. For, while firearm attacks generally consist of few shots fired (since the attacker has the element of surprise on his side), self-defense shootings are more likely to require more rounds, due to the

surprise and stress of a sudden criminal attack or the presence of multiple assailants.

In 1994, the federal government implemented laws similar to the challenged provisions. H.R. 3355, 103rd Cong. §§ 110101-110106 (1994). They were so ineffective in promoting public safety that they were allowed to expire in 2004. *See* H.R. 3355, 103rd Cong. § 110106. "There was no evidence that lives were saved, no evidence that criminals fired fewer shots during gun fights, no evidence of any good accomplished. Given the evidence from the researchers selected by the Clinton-Reno Department of Justice, it was not surprising that Congress chose not to renew the 1994 ban."[9]

This is generally the prevailing view among law enforcement officers. In March of last year, PoliceOne[10] conducted a comprehensive survey of American law enforcement officers' attitudes on the topic of gun control. *Gun Policy & Law*

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[9] *What Should America Do About Gun Violence? Full Committee Hearing Before United States Senate Judiciary Committee*, 113th Cong. at 11 (2013)(written testimony of David B. Kopel, Research Director, Independence Institute) [hereinafter Senate Judiciary Committee Testimony of David Kopel]; *see also* Koper, et al., Impacts on Gun Markets and Gun Violence at 96.

[10] PoliceOne is an organization whose mission "is to provide officers with information and resources that make them better able to protect their communities and stay safer on the streets. . . . With more than 1.5 million unique visitors [to its website] per month and more than 450,000 registered members, PoliceOne is becoming the leading destination for Law Enforcement professionals." PoliceOne.com, www.policeone.com/about (last visited May 2, 2014).

Enforcement: Where Police Stand on America's Hottest Issue, Policeone.com, http://www.policeone.com/Gun-Legislation-Law-Enforcement/articles/6183787-PoliceOnes-Gun-Control-Survey-11-key-findings-on-officers-thoughts/(last accessed May 2, 2014). More than 15,000 verified law enforcement professionals took part in the survey. *Id.* "Virtually all respondents (95 percent) say that a federal ban on the manufacture and sale of ammunition magazines that hold more than 10 rounds would not reduce violent crime." *Id.* Likewise, 71 percent acknowledged that a federal ban on the manufacture and sale of some semi-automatic firearms, i.e., "assault weapons" would have no effect on reducing violent crime. *Id.*

New York law enforcement officers are no exception to this prevailing view. The Albany Police Officers Union, not given the opportunity to weigh in *before* the law's passage, wrote a scathing letter to Governor Cuomo and the Legislature demanding the repeal of the challenged provisions, specifically because they have observed that limitations on magazine capacity and so-called "assault weapons" do nothing to further public safety. Letter from Thomas Maher, President, Albany Police Officers Union (Apr. 15, 2013), *available at* http://www.nysrpa.org/files/SAFE/AlbanyPoliceUnionLetter.pdf.

Amicus New York State Sheriffs' Association similarly criticized the challenged provisions, releasing a statement that:

> Classifying firearms as assault weapons because of one arbitrary feature effectively deprives people the right to possess firearms which

> have never before been designated as assault weapons. We are convinced that only law abiding gun owners will be affected by these new provisions, while criminals will still have and use whatever weapons they want. . . . It bears repeating that it is our belief that the reduction of magazine capacity will not make New Yorkers or our communities safer.

Sheriffs' Response to NYSAFE Act, http://www.nysheriffs.org/articles/sheriffs%E2%80%99-response-ny-safe-act (last accessed May 2, 2014).

The Police Benevolent Association of the New York State Troopers, Inc. went so far as to contend that the challenged provisions may in fact *decrease* officer safety, stating that they "believe that actual enforcement of these new regulations will significantly increase the hazards of an already dangerous job." Press Release, New York State Troopers PBA (Apr. 15, 2013), *available at* http://www.syracuse.com/news/index.ssf/2013/04/nys_troopers_have_widely_share.html. This is a valid concern, for demonizing the items being prohibited by the challenged provisions as useful solely for evil is "a mean-spirited insult to the many police officers who have chosen these very same guns and magazines as the best tools for the most noble purpose of all: the defense of innocent life." Senate Judiciary Committee Testimony of David Kopel at 3. It causes those officers to lose esteem among the otherwise supportive law-abiding citizens, for it engenders hostility and mistrust toward officers among those who own firearms and fear among those who do not. So not only is the essential resource of community cooperation with law enforcement squandered, but the ranks of "criminals" – who

were not such before – have effectively been increased at the expense of the numbers of the law-abiding.

To the extent the district court relied upon information from the Bureau of Alcohol, Tobacco, Firearms, and Explosives, *New York State Rifle & Pistol Ass'n*, 2013 U.S. Dist LEXIS 182307 at *51-52, these studies are over fifteen years old. The other data upon which the district court relied were declarations of "experts" that are unsupported by the prior research. *Compare* Decl. of Christopher Koper at ¶ 65 (the challenged laws are "likely to advance New York's interest in protecting its populace from the dangers of shootings") *with* Koper, et al., "Impacts on Gun Markets and Gun Violence" at 2 (finding no reduction in the use of large capacity magazines or of assault rifles as a result of the federal ban).

For some reason, this wealth of evidence and perspective was ignored by the Legislature in passing the challenged provisions, and by the district court in upholding the bans. But the Legislature's reasons for ignoring the evidence surrounding these provisions are ultimately irrelevant. The mere fact that it did so precludes the provisions from surviving *any* heightened standard of review. Regardless, as shown by *Amici*, the evidence strongly contradicts the value of the challenged provisions as public safety measures.

II. THE CHALLENGED PROVISIONS ARE FATALLY VAGUE.

Under the due process clause, a law must fail for vagueness unless it "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *United States v. Strauss*, 999 F.2d 692, 697 (2d Cir.1993). Additionally, the law must provide "explicit standards" for the application of the law to prevent "arbitrary and discriminatory enforcement." *Grayned*, 408 U.S. at 108. The Supreme Court has recognized that "the requirement that a legislature establish minimal guidelines to govern law enforcement" is the "more important aspect of [the] vagueness doctrine." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

Further, the rigor with which the vagueness standard is applied must increase if the challenged law limits the exercise of fundamental rights or imposes criminal sanctions. *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982). Because the laws at issue here restrict the fundamental right to keep and bear arms and levy criminal penalties, they trigger an elevated standard of vagueness review.[11]

[11] There is some tension as to whether the courts will apply the *Salerno* "void in all applications" test often referenced in general facial challenges, in the specific context of a facial *vagueness* claim. While courts often simply review a law for vagueness under the tests outlined in *Grayned*, in some instances, courts require vagueness in "all applications." *Vill. of Hoffman Estates*, 455 U.S. at 494 n.5. In

Under any standard, *Amici* are unable to objectively determine which items are prohibited, and law enforcement resources will inevitably be wasted on the enforcement and prosecution of violations of the laws that will ultimately be dismissed or overturned.

A. Laws Infringing Upon Fundamental Rights Must Provide The Highest Levels of Clarity To Ensure Equitable Enforcement.

Because law enforcement officers are tasked with enforcing the challenged laws against individuals attempting to exercise their constitutional rights, *Amici* champion laws providing clear standards to guide law enforcement to protect against arbitrary enforcement and oppose laws that do not. Although the district court declined to resolve what standard of vagueness review should apply, *Amici* ask this Court to resolve the issue and recognize that laws that implicate fundamental rights are subject to a heightened threshold to satisfy the Due Process clause.[12]

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others, courts have found laws unconstitutionally vague even in the face of clearly valid applications or when vagueness was found to "permeate" the challenged law. *Chicago v. Morales*, 527 U.S. 41, 55 (1999); *Kolender*, 461 U.S. at 358 n.8. Regardless of whether the Court applies one of these tests, the challenged laws must provide the heightened level of clarity required of laws that restrict constitutionally protected freedoms and are criminal in nature.

[12] *Amici* recognize that the lower court did declare both the 7-round limitation on ammunition loaded in a firearm, N.Y. Penal Law § 265.37, and the "version" language in N.Y. Penal Law § 265.00(22)(c)(viii) to be unconstitutional. The Defendants below, however, have cross-appealed on these issues. Thus, *Amici* have included these laws in their discussion of the SAFE Act as well.

It has long been held that laws infringing upon constitutionally protected freedoms demand the greatest clarity. "[T]he vice of unconstitutional vagueness is further aggravated where . . . the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Bagget v. Bullitt*, 377 U.S. 360, 372 (1964). And this Court has confirmed that regulations limiting the exercise of constitutionally protected rights are subject to an "enhanced vagueness test," requiring more rigorous review than cases not touching upon constitutional rights. *Hayes v. N.Y. Atty. Grievance Comm. of the Eighth Judicial Dist.*, 672 F.3d 158, 168 (2d Cir. 2012)(citing *Vill. of Hoffman Estates*, 455 U.S. at 499).

In 2006, this Court took note of the potential application of the "sternest application" of vagueness review whenever fundamental rights are at stake, not merely those involving First Amendment conduct. *Farrell v. Burke*, 449 F.3d 470, 495 n.12 (2d Cir. 2006). Ultimately, however, the Court declined to resolve the issue because, it found, the petitioner had not shown that the challenged law implicated other fundamental rights. *Id*. (citing *Vill. of Hoffman Estates*, 455 U.S. at 499).

Amici respectfully urge this Court to apply a stricter vagueness analysis in the present case to ensure greater clarity of laws that will inevitably require

enforcement, via confiscation, incarceration, or both, against otherwise law-abiding individuals attempting to exercise fundamental rights.

Here, New York Penal Law sections 265.02(7) and 265.10(2) effectively ban the purchase, transportation, and possession of the most popular rifle in the United States. *See supra* Part I.A. Sections 265.02(8) and 265.37 operate to limit the number of rounds law-abiding citizens may have at their ready for self-defense. The Supreme Court has confirmed that the Second Amendment protects arms typically possessed by law-abiding citizens, and identified that the right of self-defense is "core" protected conduct that is at its zenith in the home. *Heller*, 554 U.S. at 635. The confusion fomented by the challenged provisions will inevitably lead citizens to "steer far wider of the unlawful zone" of conduct "than if the boundaries of the forbidden areas were clearly marked," *Grayned*, 408 U.S. at 109, thus further inhibiting Second Amendment rights.

In sum, because the challenged provisions restrict constitutionally protected freedoms, the highest levels of clarity are required to guide law enforcement.

B. The Court Should Apply a Heightened Vagueness Standard Because the Challenged Provisions Impose Criminal Sanctions and Lack a Scienter Requirement.

Even where fundamental rights are not at issue, a strict vagueness test is warranted. As this Court has confirmed, the degree of vagueness tolerated in a statute also varies according to the nature of its penalties. Economic regulations are

subject to a relaxed vagueness test, while laws with criminal penalties are subject to more stringent review. *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010)(internal citation omitted); *see also Vill. of Hoffman Estates*, 455 U.S. at 498-99. In accord with this notion, a scienter requirement may mitigate a law's vagueness. *Vill. of Hoffman*, 455 U.S. at 498-99.

Here, law enforcement officers are asked to enforce laws that impose felony and misdemeanor criminal sanctions. N.Y. Pen. Law §§ 265.02(7),(8), 265.10(2),(3), 265.37. Nothing in the law requires one to know that he or she is in possession of a magazine or a rifle that falls within the proscriptions of the challenged provisions. Because the laws levy criminal penalties and lack a scienter requirement, the Court should uphold them only if they meet appropriately strict standards of clarity, regardless of any impact on Second Amendment rights.[13]

C. The Challenged Provisions Fail To Provide Sufficient Guidance To Law Enforcement.

The challenged laws are brimming with vague terms that prevent equitable administration by law enforcement, as each provision incorporates confusing, undefined terms. Examples of particularly problematic provisions include: N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.36 (criminalizing magazines having a

[13] In *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 534 (6th Cir. 1998), the Sixth Circuit applied a "relatively stringent review" of an "assault weapons" ban. It did so without reference to the Second Amendment, which was not yet confirmed as an individual right.

capacity of more than ten rounds of ammunition); §§ 265.36, 265.37 (criminalizing possession of magazines that can be "readily restored or converted" to accept additional rounds of ammunition); §§ 265.00(22)(a) - (c), 265.02(7), 265.10(2),(3) (criminalizing certain firearms according to whether they have a "detachable" rather than a "fixed" magazine); and §§ 265.00(c)(viii), 265.02(7), 265.10(2), (3)(criminalizing semi-automatic "versions" of firearms restricted under federal law).

The vagueness doctrine primarily requires that these provisions "establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 357-58. The challenged provisions impermissibly "entrust lawmaking to the moment-to-moment judgment of the policeman on his beat." *Chicago v. Morales*, 527 U.S. at 60. Numerous provisions fail to establish minimal guidelines to govern law enforcement. And further guidelines are essential,[14] because officers do not have specialized knowledge concerning the firearms, magazine modifications and features the challenged provisions attempt to proscribe.

[14] *Amici* are aware that the New York State Police, Office of Division Counsel, has prepared a "Revised Guide to the New York Safe[*sic*] Act for Members of the Division of State Police." This "Guide" merely restates the provisions of the SAFE Act and does not provide law enforcement officers with any more guidance than the vague law itself.

As an initial matter, some firearms have magazines that hold ten rounds if loaded with .357 magnum, but eleven rounds if loaded with .38 special.[15] Members of *Amici* are left to guess as to whether liability should be triggered where the capacity of tubular magazines for rifles and shotguns varies with the length of the cartridges used. If an officer encounters one of these firearms, is the officer to seize the firearm and arrest the individual, pursuant to sections 265.00(23), 265.02(8), and 265.36, because it is capable of holding more than ten rounds of one type of ammunition? What if it is loaded with the ammunition that only holds ten rounds? What if the firearm is unloaded, or if the individual is unaware it can hold eleven rounds of a different type of ammunition? Inevitably, officers will be forced to decide on a case by case which firearms trigger confiscation and arrest, according to their own interpretation of the laws, and according to their varying knowledge of firearms and ammunition. The district court's curt dismissal of this concern belies a misunderstanding of the importance of the issues. Because an arrest could occur based solely on a particular officer's level of familiarity with a particular firearm, this provision will lead to uneven and arbitrary enforcement. This is precisely what the Due Process clause was designed to prevent.

[15] One such example is the popular model 1873 lever action rifle, a firearm so common it was a candidate for "the gun that won the west." Are all such firearms to be seized?

Of particular concern is the prohibition of magazines that "can be readily restored or converted" to accept additional rounds of ammunition. N.Y. Penal Law §§ 265.36, 265.37. This language already created problems for law enforcement officers attempting to enforce former Penal Law section 265.02. Under that statute, retailers were investigated, arrested, and had licenses suspended after modifying magazines pursuant to suggestions by law enforcement, who later interpreted the statute differently due to the vagueness of the "readily restored or converted" standard incorporated by that section. Here too, *Amici* are at a loss as to what factory-supplied magazines can be "*readily* restored or converted" to accept additional rounds of ammunition. *See People Rights Org*., 152 F.3d at 538 (phrase "may be *readily* assembled" in a firearms restriction is "unduly vague")(emphasis added). Clearly, the district court did not give this concern appropriate consideration, as it did not even attempt to distinguish the Sixth Circuit case that held identical language unconstitutionally vague, as applied to firearms. A citizen of ordinary intelligence has no way of determining what constitutes "readily restored or converted," such that citizens will be caught in the trap of an unconstitutionally vague law.

Similarly, the challenged provisions provide no guidance to law enforcement officials tasked with determining whether a firearm has a "fixed" versus a "detachable" magazine. N.Y. Penal Law §§ 265.00(22)(a) - (c), 265.02(7),

265.10(2), (3). If tools are required to remove the magazine, is the magazine fixed or detachable? If the firearm must be disassembled (in part or entirely) to remove the magazine, will that trigger liability? Tellingly, California's "assault weapon" law (after which the challenged provisions were modeled in part) included clarifying regulations instructing that if a tool is required to remove the magazine, it is not considered detachable. Cal. Penal Code § 30515; Cal. Code Regs. tit. 11 § 5469(a).

Ultimately, law enforcement are left to guess as to which items the challenged provisions were meant to prohibit. The lack of guidelines in these provisions will inevitably lead to "erratic arrests and convictions" that the due process clause was meant to prevent. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

CONCLUSION

The challenged provisions criminalize the possession of protected arms – without demonstrating any reduction in firearm violence or criminal activity – in derogation of fundamental Second Amendment rights. Further, the laws fail to provide sufficient clarity to promote fair enforcement, in violation of due process guarantees. For these reasons, *Amici* respectfully request this Court declare the challenged portions of the SAFE Act unconstitutional.

Dated: Brooklyn, New York
May 6, 2014

McMAHON, MARTINE & GALLAGHER, LLP

By: */s/ Patrick W. Brophy*
Patrick W. Brophy (PWB 5320)

Attorneys for Amici Curiae NEW YORK STATE SHERIFFS' ASSOCIATION, THE INTERNATIONAL LAW ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION, THE LAW ENFORCEMENT ACTION NETWORK, and THE LAW ENFORCEMENT LEGAL DEFENSE FUND
55 Washington Street, Suite 720
Brooklyn, New York 10004
Tel. (212) 747-1230
Fax (212) 747-1239

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28(e)(2)(a) because this brief contains 6,634 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(viii).

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/s/ Patrick W. Brophy
Patrick W. Brophy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May, 2014, this brief of *amicus curiae* was served, via electronic delivery to all parties' counsel via CM/ECF system which will forward copies to Counsel of Record.

/s/ Patrick W. Brophy
Patrick W. Brophy