

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
Buffalo Division

NEW YORK STATE RIFLE AND PISTOL)
ASSOCIATION, INC., *et al.*,)

Plaintiffs,)

v.)

ANDREW M. CUOMO, *et al.*,)

Defendants.)

Case No.: 1:13-cv-00291-WMS

**PLAINTIFFS’ RESPONSE TO THE STATE DEFENDANTS’
STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiffs, by and through counsel and pursuant to W.D.N.Y. L.R.Civ.P. 56(a)(2), hereby submit this response to the State Defendants’ “Statement of Undisputed Material Facts in Support of State Defendants’ Motion For Summary Judgment” dated 06/21/13 (Doc. # 73).

Par. # **Defendants’ Statement of “Material Fact”**

1. *The Second Amendment right to keep and bear arms is an enumerated right but is limited and subject to regulation.*

Plaintiffs’ Response:

Objection: This is an assessment of the law, not a statement of material fact. This legal assessment is not followed by a citation to admissible evidence that proves or disputes the existence of a material fact. Since this is neither a statement of material fact nor a citation to admissible evidence, its inclusion in defendants’ “Statement of Undisputed Material Facts” violates Rules 7, 56(a)(1) and 56(a)(3) of the Local Rules of Civil Procedure for the Western District of New York, as well as Rule 56(e) of the Federal Rules of Civil Procedure, which prohibit the

inclusion of legal arguments in the “fact specific” portion of the papers required to support or oppose a Motion for Summary Judgment.

L.R.Civ.P. Rule 7(a)(2) requires that summary judgment movants and opponents file a Memorandum of Law that is separate and distinct from the factual affidavit(s) required by L.R.Civ.P. 7(a)(3). L.R.Civ.P. 7(a)(3) prohibits the inclusion of legal arguments in the factual affidavits required to support or oppose summary judgment. Since the defendants have violated the rules regarding the intermingling of factual assertions and legal arguments in a single document, the Court should disregard this particular assertion in its entirety. *See, Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003); *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir. 2001) [where there are no citations of fact or where the cited materials do not support the factual assertions in the statements, the Court is free to disregard the assertion]. Since plaintiffs are prohibited from including legal arguments either here or in their Counter-Statement of Material Facts by L.R.Civ.P. 7(a)(3), the plaintiffs respectfully request that this particular assertion be deemed disputed for the purposes of resolving the defendants’ motion for summary judgment.

Par. # **Defendants’ Statement of “Material Fact”**

2. *In Heller*, the Supreme Court stated that “[l]ike most rights, the right secured by the Second Amendment is not unlimited [and] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”

Plaintiffs’ Response:

Objection #1: This is a recitation of a case holding, and not a statement of material fact. This case law recitation is not followed by a citation to admissible evidence that proves or disputes the existence of a material fact. Since this is neither a statement of material fact nor a citation to admissible evidence, its inclusion in defendants’ “Statement of Undisputed Material

Facts” violates Rules 7, 56(a)(1) and 56(a)(3) of the Local Rules of Civil Procedure for the Western District of New York, as well as Rule 56(e) of the Federal Rules of Civil Procedure, which prohibit the inclusion of legal arguments / case law citations in the “fact specific” portion of the papers required to support or oppose a Motion for Summary Judgment.

L.R.Civ.P. Rule 7(a)(2) requires that summary judgment movants and opponents file a Memorandum of Law that is separate and distinct from the factual affidavit(s) required by L.R.Civ.P. 7(a)(3). L.R.Civ.P. 7(a)(3) prohibits the inclusion of legal arguments / case law citations in the factual affidavits required to support or oppose summary judgment. Since the defendants have violated the rules regarding the intermingling of factual assertions and legal arguments / case law citations in a single document, the Court should disregard this particular assertion in its entirety. *See, Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003); *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir. 2001) [where there are no citations of fact or where the cited materials do not support the factual assertions in the statements, the Court is free to disregard the assertion]. Moreover, since plaintiffs are prohibited from including legal arguments or citations either here or in their Counter-Statement of Material Facts by L.R.Civ.P. 7(a)(3), the plaintiffs respectfully request that this particular assertion be deemed disputed for the purposes of resolving the defendants’ motion for summary judgment.

Objection #2: This is an isolated and selective citation to one of many findings made by the U.S. Supreme Court in *District of Columbia v Heller*, 554 U.S. 570 (2008), and is not the singular, decisive legal standard by which the legal issues presented by this case are to be decided. Competing discussions of the law governing the resolution of this case’s legal issues are properly included in the Memorandum of Law that is required of summary judgment movants and

opponents under L.R.Civ.P. Rule 7(a)(2). Plaintiffs are prohibited by L.R.Civ.P. 7(a)(3) from engaging in legal analysis / argument as part of their response to the defendants “Statement of Undisputed Material Facts,” and therefore respectfully refer the Court to their Omnibus Memorandum of Law (Doc. #114) for a detailed discussion of the law that requires that defendants’ Motion for Summary Judgment and/or Dismissal be denied.

Par. # **Defendants’ Statement of “Material Fact”**

3. *In Heller, the Supreme Court stated that “the Second Amendment right, whatever its nature, extends only to certain types of weapons”, [citations omitted] and that weapons “most useful in military service” may be restricted, even if that would leave citizens with access only to “small arms.”*

Plaintiffs’ Response:

See, Plaintiffs’ response to Defendants’ Paragraph #2, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants’ Paragraph #3 should be disregarded in its entirety and deemed disputed by the Court.

Par. # **Defendants’ Statement of “Material Fact”**

4. *The Supreme Court, in Heller, also recognized the long history of government prohibitions on the carrying of “dangerous and unusual weapons.”*

Plaintiffs’ Response:

See, Plaintiffs’ response to Defendants’ Paragraph #2, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except

to say that, for the same reasons stated in those objections, the Defendants' Paragraph #4 should be disregarded in its entirety and deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

5. *In McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010), the Supreme Court stated that the Second Amendment right is not "absolute" and that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment."*

Plaintiffs' Response:

See, Plaintiffs' response to Defendants' Paragraph #2, above. Objection # 1 as stated therein is hereby incorporated by reference and repeated with full force and effect as if fully restated here. In the interests of judicial economy, that objection will not be repeated except to say that, for the same reasons stated in that objection, the Defendants' Paragraph #5 should be disregarded in its entirety and deemed disputed by the Court.

Objection #2: This is an isolated and selective citation to one of many findings made by the U.S. Supreme Court in McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010), and is not the singular, decisive legal standard by which the legal issues presented by this case are to be decided. Competing discussions of the law governing the resolution of this case's legal issues are properly included in the Memorandum of Law that is required of summary judgment movants and opponents under L.R.Civ.P. Rule 7(a)(2). Plaintiffs are prohibited by L.R.Civ.P. 7(a)(3) from engaging in legal analysis / argument as part of their response to the defendants "Statement of Undisputed Material Facts," and therefore respectfully refer the Court to their Omnibus Memorandum of Law (Doc. #114) for a detailed discussion of the law that requires that defendants' Motion for Summary Judgment and/or Dismissal be denied.

Par. # **Defendants' Statement of "Material Fact"**

6. *Local and state governments, as well as the federal government, have long regulated firearms, including regulating the importation, possession and/or sale of weapons deemed dangerous or unusual.*

Plaintiffs' Response:

Plaintiffs respond to Defendants' Paragraph #6 as follows:

6.1 Admit that some, but not all, local and state governments have, beginning at different time periods, regulated firearms, including the possession and/or sale thereof, but not the importation thereof;

6.2 Admit that the federal government has regulated the importation of firearms, and the sale of firearms only with a nexus to interstate commerce, since enactment of the Gun Control Act of 1968; and

6.3 Admit that the federal government has regulated the possession of firearms only in regard to certain categories of persons since enactment of the Federal Firearms Act of 1938. Admit that some such regulations concern weapons deemed "dangerous and unusual" (not dangerous *or* unusual), and that some regulations are not so restricted.

Par. # **Defendants' Statement of "Material Fact"**

7. *In the 1980s and 1990s, following a number of highly publicized mass shooting incidents, many federal, state and local laws were enacted which restricted weapons characterized as "assault weapons" as well as large capacity magazines.*

Plaintiffs' Response:

Plaintiffs respond to Defendants' Paragraph #7 as follows:

7.1 Admit that a comparatively small number of such federal, state and local laws were enacted, but deny that "many" such federal, state and local laws were enacted.

Par. # **Defendants' Statement of "Material Fact"**

8. *On September 13, 1994, the federal government enacted, as part of the Violent Crime Control and Law Enforcement of 1994, the Public Safety and Recreational Firearms Use Protection Act. [citations omitted]. This legislation (the "federal assault weapons ban"), established a ten-year prohibition on (i) certain semiautomatic rifles, pistols, and shotguns which possessed two features from a list of enumerated features; and (ii) certain "large capacity ammunition feeding devices" ("LCMs") capable of holding more than ten rounds.*

Plaintiffs' Response:

Plaintiffs respond to the Defendants' Paragraph #8 as follows: the first sentence of Paragraph #8 is admitted.

The second sentence of Paragraph #8 is objected to as follows:

Objection #1: This is an analysis of a federal statute, not a statement of material fact. This statutory analysis is not followed by a citation to admissible evidence that proves or disputes the existence of a material fact. Since this is neither a statement of material fact nor a citation to admissible evidence, its inclusion in defendants' "Statement of Undisputed Material Facts" violates Rules 7, 56(a)(1) and 56(a)(3) of the Local Rules of Civil Procedure for the Western District of New York, as well as Rule 56(e) of the Federal Rules of Civil Procedure, which prohibit the inclusion of legal arguments / analysis in the "fact specific" portion of the papers required to support or oppose a Motion for Summary Judgment.

L.R.Civ.P. Rule 7(a)(2) requires that summary judgment movants and opponents file a Memorandum of Law that is separate and distinct from the factual affidavit(s) required by L.R.Civ.P. 7(a)(3). L.R.Civ.P. 7(a)(3) prohibits the inclusion of legal arguments / statutory analysis in the factual affidavits required to support or oppose summary judgment. Since the defendants have violated the rules regarding the intermingling of factual assertions and legal arguments / analysis in

a single document, the Court should disregard this particular assertion in its entirety. *See, Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003); *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir. 2001) [where there are no citations of fact or where the cited materials do not support the factual assertions in the statements, the Court is free to disregard the assertion].

Moreover, since plaintiffs are prohibited from including legal arguments or analysis either here or in their Counter-Statement of Material Facts by L.R.Civ.P. 7(a)(3), the plaintiffs respectfully request that this particular assertion be deemed disputed for the purposes of resolving the defendants' motion for summary judgment.

Objection #2: This is an isolated, inaccurate, and cursory analysis of but one aspect of the federal law in question, which did not "ban" any firearms lawfully possessed before its effective date or any magazines manufactured before its effective date.

Competing discussions of the law governing the resolution of this case's legal issues are properly included in the Memorandum of Law that is required of summary judgment movants and opponents under L.R.Civ.P. Rule 7(a)(2). Plaintiffs are prohibited by L.R.Civ.P. 7(a)(3) from engaging in legal analysis / argument as part of their response to the defendants "Statement of Undisputed Material Facts," and therefore respectfully refer the Court to their Omnibus Memorandum of Law (Doc. #114) for a detailed discussion of the law that requires that defendants' Motion for Summary Judgment and/or Dismissal be denied.

Subject to the foregoing objections, and without waiving the same, the plaintiffs respond as follows:

As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine triable issue:

8.1 The Federal Assault Weapons Law has produced no discernible reduction in the lethality and injuriousness of gun violence, based on indicators like the percentage of gun crimes resulting in death or the share of gunfire incidents resulting in injury. *See*, Christopher Koper, Daniel Woods and Jeffrey Roth, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003* (June 2004) (“Koper 2004”); Christopher Koper and Jeffrey Roth, *Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994 – Final Report* (March 1997) (“Koper 2007”). [The Koper 2004 report was submitted as “Exhibit 32” (Doc. #78-7) as part of the defendants’ Memorandum of Law in Support of Cross-Motion for Summary Judgment and/or Dismissal. The Koper 2007 was submitted by the defendants as “Exhibit 35” (Doc. #81-5)]. *See also*, Plaintiffs’ Counter-Statement of Undisputed Material Facts, ¶¶ 40-61; NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 97 (Charles F. Wellford *et al.* eds., 2005) (“[G]iven the nature of the [1994 assault weapons law], the maximum potential effect of the ban on gun violence outcomes would be very small and, if there were any observable effects, very difficult to disentangle from chance yearly variation and other state and local gun violence initiatives that took place simultaneously”); Centers for Disease Control, *Recommendations To Reduce Violence Through Early Childhood Home Visitation, Therapeutic Foster Care, and Firearms Laws*, 28 AM. J. PREV. MED. 6, 7 (2005) (With respect to “bans on specified firearms or ammunition,” the CDC Task Force found that “[e]vidence was insufficient to determine the effectiveness of bans . . . for the prevention of violence.”); *see also* Robert A. Hahn *et al.*, *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREV. MED. 40, 49 (2005) (“available evidence is insufficient to determine the effectiveness or

ineffectiveness on violent outcomes of banning the acquisition and possession of [particular] firearms”).

8.2 The Federal Assault Weapons law cannot clearly be credited with any of the nation’s recent drop in gun violence. Koper 2004 at 2, 96

8.3 If the federal AW law were to be renewed, its effects on gun violence would likely to be small at best and perhaps too small for reliable measurement. Koper 2004 at 3. AWs were rarely used in gun crimes even before the Law. *Id.* at 3, 97. LCMs are involved in a more substantial share of gun crimes, but it is not clear how often the outcomes of gun attacks depend on the ability of offenders to fire more than ten shots (the current magazine capacity limit) without reloading. Koper 2004 at 3, 19, 97.

Par. # **Defendants’ Statement of “Material Fact”**

9. *The federal assault weapons ban did not ban LCMs manufactured on or before the effective date of the law (i.e., on or before September 13, 1994). Such LCMs were “grandfathered” in and thus remained legal to possess and transfer.*

Plaintiffs’ Response:

See, Plaintiffs’ response to the second sentence of Defendants’ Statement of Material Fact, Paragraph #8, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants’ Paragraph #9 should be disregarded in its entirety and deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

10. *The Bureau of Alcohol, Tobacco, Firearms and Explosives (the "ATF") has long blocked the importation of certain models of firearms deemed not suitable for sporting purposes.*

Plaintiffs' Response:

Plaintiffs respond to the Defendants' Paragraph #10 as follows:

Denied. Since enactment of the Gun Control Act of 1968, ATF has been empowered to deny importation of firearms that it does not consider "particularly suitable for or readily adaptable to sporting purposes." ATF has been inconsistent in making such determinations.

Disputed. As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine triable issue:

10.1 The firearms characterized as "assault weapons" under the federal assault weapons law, as well as those characterized as "assault weapons" under the SAFE Act, have been widely and legally used for sporting purposes (as well as for self-defense and hunting) throughout New York and the United States for decades. *See* Affidavit of Tom King ("King Aff.") [attached as "**Exhibit E**" to the Plaintiffs' Counter-Statement of Undisputed Material Material Facts]; Affidavit of Scott Somavilla ("Somavilla Aff.") [attached as "**Exhibit F**" to the Plaintiffs' Counter-Statement of Material Facts]. *See also* Plaintiffs' Counter-Statement of Undisputed Material Facts (Doc. # 115), ¶¶ 131.1 through 131.3.

10.2 There are numerous shooting competitions for non-military personnel that have taken place throughout the State of New York for years that regularly and legally used the firearms now classified as "assault weapons" to compete. King Aff. at ¶¶ 16-18; Somavilla Aff. at ¶¶ 16-18. For example, multi-gun matches that include those competitions known as "2 Gun

Matches" and "3 Gun Matches" are regularly held at such places as the West Point U.S.M.A. (the Houghton Memorial Match), the Toga County Sportsmen's Association in Oswego, NY and the Genesee Conservation League in Rochester, NY. *Id.* These matches regularly use the rifles and pistols now classified as "assault weapons" in timed competitions that test accuracy and proficiency. *Id.* These matches were and are extremely popular, have been taking place throughout New York for years, and have been attended throughout the years by hundreds (and likely thousands) of individual and member plaintiffs. *Id.*

10.3 In addition, competitions known as "high power matches" have been held throughout New York for decades. *Id.* These matches legally used the rifles, pistols and shotguns now classified as "assault weapons," were and are extremely popular, and have been attended throughout the years by hundreds (and likely thousands) of individual and member plaintiffs. *Id.*

Par. # **Defendants' Statement of "Material Fact"**

11. *In 1998, after the passage of the federal assault weapons ban, the ability to accept a large-capacity magazine made for a military rifle was added to the list of disqualifying features, as the ATF determined that semiautomatic rifles with this feature "are attractive to certain criminals" and "cannot fairly be characterized as sporting rifles." [citations omitted]. These import bans remain in effect, even since the expiration of the federal assault weapons ban in 2004.*

Plaintiffs' Response:

See, Plaintiffs' response to the second sentence of Defendants' Statement of Material Fact, Paragraph #8, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants' Paragraph #11 should be disregarded in its entirety and deemed disputed by the Court.

Subject to the foregoing objections, and without waiving the same, the plaintiffs respond as follows:

Disputed. As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine triable issue:

11.1 Plaintiffs deny that the ability to accept a large-capacity magazine made for a military rifle was a disqualifying feature for any and all purposes, or that there was and is an import ban on all such rifles, in that such rifles deemed curios or relics were and are importable.

11.2 Numerous studies have examined the use of firearms characterized as “assault weapons” (“AWs”) both before and after the implementation of Title XI of the Violent Crime Control and Law Enforcement Act of 1994 (the federal assault weapons law) (“the Ban”). *See, e.g.,* Koper 2004, Koper 2007.

11.3 The “overwhelming weight” of evidence produced by these studies indicates that AWs are used in a only a very small percentage of gun crimes overall. Koper 2004 at 17. According to most studies, AWs are used in approximately 2% of all gun crimes, Koper 2004 at 2, 14, 19.

11.4 The inclusion of AWs among crime guns is “rare.” Koper 2007 at 69.

11.5 Prior to the Ban, LCMs accounted for 14% to 26% of guns used in crime. Koper 2004 at 2, 18. This range is consistent with the national survey estimates indicating approximately 18% of all civilian-owned guns and 21% of civilian-owned handguns were equipped with LCMs as of 1994. Koper 2004 at 18.

11.6 Overall, assault weapons accounted for about 1% of guns associated with homicides, aggravated assaults, and robberies. *Id.* at 75. *See also*, Plaintiffs’ Counter-Statement of Material Facts, ¶¶ 24-36.

See also Plaintiffs Supplemental Paragraphs 10.1 through 10.3, above, which are hereby incorporated by reference as if fully re-stated as Supplemental Paragraphs 11.7 through 11.9.

Par. # **Defendants’ Statement of “Material Fact”**

12. *The ATF has determined that “semiautomatic assault rifles...represent a distinctive type of rifle distinguished by certain general characteristics which are common to the modern military assault rifle.” Ex. 9 (H.R. Rep. No. 103-489) at 17. Those characteristics are often characterized as “military” because of their associated military applications, design intended for offensive or combat situations, or indeed because they are civilian copies of military weapons and can use, for example, magazines made for those military weapons. Bruen Decl. ¶ 15, 16, 17-23; Koper Decl. ¶ 31; Ex. 12 (1998 ATF Study) at 5; Richmond Boro, 97 F.3d at 684- 85; Heller II, 670 F.3d at 1262-63. For example, pistol grips and thumbhole stocks, which aid a shooter in retaining control of a firearm while holding it at his or her hip, have been found to facilitate the rapid and continuous fire of ammunition without precise aiming. (Bruen Decl. ¶ 19; Ex. 12 (1998 ATF Study) at ex. 5); see Richmond Boro, 97 F.3d at 685; Heller II, 670 F.3d at 1262-63. Such features have been recognized as “serv[ing] specific, combat-functional ends” and their “net effect . . . is a capability for lethality -- more wounds, more serious, in more victims - - far beyond that of firearms in general, including other semiautomatic guns.”*

Plaintiffs’ Response:

Objection. The quote contained in the first sentence of defendants’ Paragraph 12 is accurately re-stated, but is isolated and provided out of context. Examination of the text from which the quote is taken reveals a larger discussion about the “fully automatic” aspects military firearms such as U.S. M16s, Belgian FN/ALs, and Soviet AK-47s. These fully automatic capacity of these particular firearms is not at issue in this litigation, and the discussion of these firearms from which the quote is taken did not include any mention of thumbhole stocks or pistol grips. In this sense, the quote contained in the first sentence of Paragraph 12 is irrelevant and should be

disregarded in its entirety by the Court.

Subject to this objection, and without waiving the same, the plaintiffs reply as follows:

Disputed. As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine triable issue:

12.1 Telescoping stocks, pistol grips, and thumbhole stocks promote the safe and comfortable use of a firearm, and also promote firing accuracy. *See*, Declaration of Guy Rossi [attached to Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction as Exhibit C (Doc. #23-6) ("Rossi Decl.")]. *See also*, Plaintiffs' Counter-Statement of Undisputed Material Facts (Doc. # 115), ¶¶ 108-118. Features that promote the safe, comfortable, and accurate use of firearms are universal characteristics that apply to all firearm users, not just members of the military or law enforcement. *Id.*

12.2 A stock is that part of a firearm a person holds against the shoulder when shooting. *See*, diagram attached to Plaintiffs' Counter-Statement of Material Facts as "Exhibit N" It provides a means for the shooter to support the firearm and easily aim it. Rossi Decl. at 3-4. Rossi Decl. at 3-5.

12.3 A "telescoping stock" allows the length of the stock to be shortened or lengthened consistent with the length of the person's arms, so that the stock fits comfortably against the shoulder and the rear hand holds the grip and controls the trigger properly. Rossi Decl. at 3-4. It simply allows the gun to fit the person's physique correctly, in the same manner as one selects the right size of shoe to wear. *Id.* For example, a telescoping stock allows a hunter to change the length of the stock depending on the clothing appropriate for the weather encountered. *Id.*

Shooting outdoors in fall and winter require heavy clothing and a shooting vest, thus requiring shortening the stock so that the firearm can be fitted for proper access to the trigger. *Id.* The gun may be adjusted to fit the different sizes of several people in a family or home. *Id.*

12.4 The ATF has determined that telescoping stocks are meant to improve the overall fit of a firearm to a particular shooter. *See*, “Exhibit 10” attached in support of the Defendants’ Cross- Motion to Dismiss and/or For Summary Judgment (Doc. #74-10) at 9. As such, the ATF has determined that telescoping/adjustable stocks have a sporting purpose. *Id.*

12.5 A telescoping stock does not make a firearm more powerful or more deadly. Rossi Decl. at 3-4.

12.6 A pistol grip is a grip of a shotgun or rifle shaped like a pistol stock. Exhibit A. A pistol grip allows a rifle to be held at the shoulder with more comfort and stability. Rossi Decl. at 4-5. Many rifles have pistol grips rather than straight grips. *Id.*

12.7 Pistol grips serve two basic functions. The first is assisting sight aligned accurate fire. Rossi Decl. at 4. Positioning the rear of the stock into the pocket of the shoulder and maintaining it in that position is aided by the pistol grip, and is imperative for accurate sight alignment and thus accurate shooting with rifles of this design, due to the shoulder stock being in a straight line with the barrel. *Id.* With the forward hand holding the fore-end, the rearward hand holding the grip, and the butt securely against the shoulder, a rifle may be fired accurately. *Id.* The more consistent the shooter’s eye is in relation to the line of the stock and barrel, the more accurate the shot placement. *Id.*

12.8 The second function of the pistol grip is firearm retention, imperative for example during a home invasion when assailant(s) may attempt to disarm a citizen in close quarters. Rossi Decl. at 4.

12.9 A pistol grip does *not* function to allow a rifle to be fired from the hip. Rossi Decl. at 5. . (emphasis added). Sight alignment between the eye and firearm is not conducive to spray or hip fire. Rossi Decl. at 4. Conversely, a rifle with a straight grip and no pistol grip would be more conducive to firing from the hip. Rossi Decl. at 5. Firing from the hip would be highly inaccurate and is simply not a factor in crime. *Id.*

12.10 A pistol grip (“conspicuous” or otherwise) does not make a firearm more powerful or deadly. Rossi Decl. at 4.

12.11 A thumbhole stock is simply a hole carved into the stock of a rifle through which a user inserts his or her thumb. Rossi Decl. at 5. Thumbhole stocks allow the rifle to be held with more comfort and stability and, thus, fired more accurately. *Id.*

12.12 A thumbhole stock does not make a rifle more powerful or more lethal. *Id.*

Par. # **Defendants’ Statement of “Material Fact”**

13. *It has been reported that assault weapons fire almost as rapidly as fully automatic machine guns.*

Plaintiffs’ Response:

Objection: The 2008 Brady Report is neither objective, reliable, nor accurate, and amounts to nothing more than propaganda. For this reason, the 2008 Brady Report should be disregarded in its entirety by the Court.

Subject to these objections, and without waiving the same, plaintiffs respond as follows:

Disputed. While As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine triable issue:

13.1 Semiautomatic firearms are designed to fire only once when the trigger is pulled. *See* Declaration of Mark Overstreet (“Overstreet Decl.”) [attached to Plaintiffs’ Memorandum of Law in Support of Motion for Preliminary Injunction as Exhibit A] (Doc. #23-2)]. *See also*, Plaintiffs’ Counter-Statement of Material Facts, ¶ 122. Semiautomatic firearms are not fully automatic machine guns, which continue to fire so long as the trigger is pressed. *Id.* As such, a semiautomatic firearm can only fire as fast as the finger that pulls its trigger. *Id.*

13.2 The U.S. military has documented that the average rate of accurate semi-automatic fire from an AR15 type rifle is approximately 45-90 RPM, while select-fire M16 rifles or M4 carbines shoot at 700-970 RPM. *See*, declaration of Gary Roberts at 12, attached as Exhibit O to Plaintiffs’ Counter-Statement of Undisputed Material Facts.

Par. # **Defendants’ Statement of “Material Fact”**

14. *In 2000, New York enacted its own ban on assault weapons and LCMs which mirrored the federal assault weapons Law.*

Plaintiffs’ Response:

Disputed In Part: Denied to the extent the term “ban” suggests a total prohibition, in that firearms lawfully possessed on the dates of enactment of each law were not “banned,” and denied to the extent it suggests that the New York law “mirrored” the federal law, in that the New York law included a “frame or receiver” in its definition of “assault weapon,” but the federal law did not. Otherwise admitted.

Par. # **Defendants' Statement of "Material Fact"**

15. *The 2000 New York ban adopted a "two feature test" identical to the 1994 federal assault weapons law and also banned LCMs but grandfathered in those manufactured on or before the effective date of the federal law (i.e., on or before September 13, 1994).*

Plaintiffs' Response:

Objection #1: This is an analysis of a state statute, not a statement of material fact.

This statutory analysis is not followed by a citation to admissible evidence that proves or disputes the existence of a material fact. Since this is neither a statement of material fact nor a citation to admissible evidence, its inclusion in defendants' "Statement of Undisputed Material Facts" violates Rules 7, 56(a)(1) and 56(a)(3) of the Local Rules of Civil Procedure for the Western District of New York, as well as Rule 56(e) of the Federal Rules of Civil Procedure, which prohibit the inclusion of legal arguments / analysis in the "fact specific" portion of the papers required to support or oppose a Motion for Summary Judgment.

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Moreover, since plaintiffs are prohibited from including legal arguments or analysis either here or in

their Counter-Statement of Material Facts by L.R.Civ.P. 7(a)(3), the plaintiffs respectfully request that this particular assertion be deemed disputed for the purposes of resolving the defendants' motion for summary judgment.

Objection #2: This is an isolated, selective and cursory analysis of but one aspect of the 2000 New York assault weapons ban, a statute which is not at issue in this case and has no application to the legal issues presented at bar. Competing discussions of the law governing the resolution of this case's legal issues are properly included in the Memorandum of Law that is required of summary judgment movants and opponents under L.R.Civ.P. Rule 7(a)(2). Plaintiffs are prohibited by L.R.Civ.P. 7(a)(3) from engaging in legal analysis / argument as part of their response to the defendants "Statement of Undisputed Material Facts," and therefore respectfully refer the Court to their Omnibus Memorandum of Law (Doc. #114) for a detailed discussion of the law that requires that defendants' Motion for Summary Judgment and/or Dismissal be denied.

Par. # **Defendants' Statement of "Material Fact"**

16. *On January 15, 2013, the Secure Ammunition and Firearms Enforcement Act (the "SAFE Act") was signed into law in New York*

Plaintiffs' Response:

Admitted.

Par. # **Defendants' Statement of "Material Fact"**

17. *The SAFE Act amended New York's assault weapons ban by, among other things, amending the definition of "assault weapon" to include certain semiautomatic weapons with detachable magazines that possess one rather than two of the enumerated characteristics.*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Paragraph #15, above. Objection # 1 as

stated therein is hereby incorporated by reference and repeated with full force and effect as if fully

re-stated here. In the interests of judicial economy, that objection will not be repeated except to say that, for the same reasons stated in that objection, the Defendants' Paragraph #17 should be disregarded in its entirety and deemed disputed by the Court.

Objection #2: This is an isolated, selective and cursory analysis of but one aspect of the SAFE Act. Competing discussions of the law governing the resolution of this case's legal issues are properly included in the Memorandum of Law that is required of summary judgment movants and opponents under L.R.Civ.P. Rule 7(a)(2). Plaintiffs are prohibited by L.R.Civ.P. 7(a)(3) from engaging in legal analysis / argument as part of their response to the defendants "Statement of Undisputed Material Facts," and therefore respectfully refer the Court to their Omnibus Memorandum of Law (Doc. #114) for a detailed discussion of the law that requires that defendants' Motion for Summary Judgment and/or Dismissal be denied.

Par. # **Defendants' Statement of "Material Fact"**

18. *Under the SAFE Act, New York's assault weapons ban now applies to any gun that semiautomatic, has the ability to accept a detachable magazine (in the case of rifles and pistols), and possesses at least one of the enumerated features.*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Paragraph #17, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants' Paragraph #18 should be disregarded in its entirety and deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

19. *The SAFE Act also added to the list of military-style features that make a semiautomatic firearm an assault weapon.*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Paragraph #17, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants' Paragraph #19 should be disregarded in its entirety and deemed disputed by the Court.

Subject to these objections, and without waiving the same, plaintiffs respond as follows:

Disputed. Plaintiffs deny that the features which qualify a firearm as an assault weapon are "military-style" or the exclusive province of military or law enforcement personnel. *See, generally*, Ross Decl. Features that promote the safe, comfortable, and accurate use of firearms are universal characteristics that apply to all firearm users, not just members of the military or law enforcement. *Id.*

As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine triable issue:

See Plaintiffs Supplemental Paragraphs 12.1 through 12.12, above, which are hereby incorporated by reference as if fully restated here as Supplemental Paragraphs 19.1 through 19.12.

Par. # **Defendants' Statement of "Material Fact"**

20. *Under New York law, a rifle is an assault weapon if it is semiautomatic, able to accept a detachable magazine and has at least one of these seven military-style characteristics: (i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of a weapon; (iii) a thumbhole stock; (iv) a second handgrip or a protruding grip that can be held by the non-trigger hand; (v) a bayonet mount; (vi) a flash suppressor, muzzle brake, muzzle compensator, or a threaded barrel designed to accommodate the same; or (vii) a grenade launcher. Id. § 265.00(22)(a). Of these seven features, the third, fourth, and portions of the sixth (i.e., the muzzle brake and muzzle compensator) are new. The rest were a part of both the 1994 federal law and New York's own assault weapons ban prior to the SAFE Act.*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Paragraph #17, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants' Paragraph #20 should be disregarded in its entirety and deemed disputed by the Court.

Subject to these objections, and without waiving the same, plaintiffs respond as follows:

Disputed. Plaintiffs deny that the features which qualify a firearm as an assault weapon are "military-style" or the exclusive province of military or law enforcement personnel. *See, generally*, Ross Decl. Features that promote the safe, comfortable, and accurate use of firearms are universal characteristics that apply to all firearm users, not just members of the military or law enforcement. *Id.*

As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine triable issue:

See Plaintiffs Supplemental Paragraphs 12.1 through 12.12, above, which are hereby incorporated by reference as if fully restated here as Supplemental Paragraphs 20.1 through 20.12.

Par. # **Defendants' Statement of "Material Fact"**

21. *A shotgun is an assault weapon under New York law if it is semiautomatic and has at least one of the following five military-style characteristics: (i) a folding or telescoping stock; (ii) a thumbhole stock; (iii) a second handgrip or protruding grip that can be held by the non-trigger hand; (iv) a fixed magazine capacity in excess of seven rounds; or (v) an ability to accept a detachable magazine. Of these features, the second and third are new and the fourth was amended as New York law moved from a two-feature to a one-feature test (changing the maximum capacity in a fixed magazine to seven from five rounds to correspond to the new seven-round load limit for magazines). The SAFE Act also removed the pistol grip as a banned feature for shotguns as it moved from the two-feature to one-feature test. The first and fifth features were a part of both the 1994 federal law and New York's own assault weapons ban prior to the SAFE Act.*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Paragraph #17, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants' Paragraph #21 should be disregarded in its entirety and deemed disputed by the Court.

Subject to these objections, and without waiving the same, plaintiffs respond as follows:

Disputed. Plaintiffs deny that the features which qualify a firearm as an assault weapon are "military-style" or the exclusive province of military or law enforcement personnel. See, generally, Ross Decl. Features that promote the safe, comfortable, and accurate use of firearms are universal characteristics that apply to all firearm users, not just members of the military or law enforcement. *Id.*

As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine triable issue:

See Plaintiffs Supplemental Paragraphs 12.1 through 12.12, above, which are hereby incorporated by reference as if fully restated here as Supplemental Paragraphs 21.1 through 21.12.

Par. # **Defendants' Statement of "Material Fact"**

22. *Pistols are assault weapons prohibited by the SAFE Act if they are semiautomatic, able to accept a detachable magazine, and have at least one of the following eight military characteristics: (i) a folding or telescoping stock; (ii) a thumbhole stock; (iii) a second handgrip or a protruding grip that can be held by the non-trigger hand; (iv) capacity to accept an ammunition magazine that attaches to the pistol outside of the pistol grip; (v) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer; (vi) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the non-trigger hand without being burned; (vii) a manufactured weight of 50 ounces or more when the pistol is unloaded; or (viii) a semiautomatic version of an automatic rifle, shotgun or firearm. Of these eight features, the first, second, and third are new. The rest were a part of both the 1994 federal law and New York's own assault weapons ban prior to the SAFE Act.*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Paragraph #17, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants' Paragraph #22 should be disregarded in its entirety and deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

23. *The SAFE Act does not ban assault weapons that were lawfully possessed prior to its effective date of January 15, 2013. Those who lawfully possessed assault weapons at that time may continue to do so; they need only register their firearm within fifteen months (i.e., by April 15, 2004) with the State Police.*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Paragraph #17, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants' Paragraph #23 should be disregarded in its entirety and deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

24. *The SAFE Act also amended New York's existing ban on LCMs to ban all LCMs that have the capacity to hold more than ten rounds of ammunition, including those that were grandfathered in under the original assault weapons ban.*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Paragraph #17, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants' Paragraph #24 should be disregarded in its entirety and deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

25. *In addition, the SAFE Act limits to seven the number of rounds of ammunition that one may load into a magazine (unless at a gun range or recognized shooting competition, where ten-round magazines may be loaded to full capacity).*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Paragraph #17, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants' Paragraph #25 should be disregarded in its entirety and deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

26. *Under the SAFE Act, hundreds of different types and models of handguns, rifles and shotguns, remain available to New York citizens for self-defense, providing alternatives to assault weapons for those New Yorkers seeking "to acquire a firearm for self-defense" or other lawful purposes.*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Statement Paragraph ## 1 and 17, above. The objections stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants' Paragraph #26 should be disregarded in its entirety and deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

27. *Semiautomatic firearms without a banned feature, firearms with manual actions (i.e., bolt, pump, lever or slide action), and those hundreds of makes and models specifically exempted in "Appendix A" to the federal assault weapons law are all legal in New York. Additionally, the website maintained by the New York State Police pursuant to the SAFE Act, lists at least 145 specified pistols, more than 150 specified rifles, and at least 40 specified shotguns are explicitly not banned as assault weapons under New York law.*

Plaintiffs' Response:

The first sentence of Paragraph #27 is objected to as follows:

See, Plaintiffs' response to the Defendants' Paragraph #17, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the first sentence of Defendants' Paragraph #27 should be disregarded in its entirety and deemed disputed by the Court.

The second sentence of Defendants' Paragraph #27 is admitted.

Par. # **Defendants' Statement of "Material Fact"**

28. *The SAFE Act does not limit the number of guns or magazines which may be owned. People wishing to fire more than seven rounds at once have the option of switching magazines or reloading or using multiple firearms.*

Plaintiffs' Response:

Disputed. As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine issue of triable fact:

28.1 The SAFE Act's seven-round limitation assumes that all homeowners will never need to fire more than seven rounds to defend themselves, that they own multiple firearms and/or multiple magazines, or that they will be able to switch out their firearms' magazines while under criminal attack. Rossi Decl. at 5. *See also*, Plaintiffs' Counter-Statement of Material Facts,

¶¶ 151-173. However, a homeowner under the extreme duress of an armed and advancing attacker is likely to fire at, but miss, his or her target. *Id.* Nervousness and anxiety, lighting conditions, the presence of physical obstacles that obscure a “clean” line of sight to the target, and the mechanics of retreat are all factors which contribute to this likelihood. Rossi Decl. at 5.

28.2 Under such expected conditions and with such likely results, it is of paramount importance that a homeowner have quick and ready access to ammunition in quantities sufficient to provide a meaningful opportunity to defend herself and/or her loved ones. *Id.* It is equally important that the homeowner under attack have the capability to quickly and efficiently reload a firearm after all of the rounds it holds are fired. *Id.* However, many homeowners cannot reload quickly or efficiently due to such factors as age, physical limitations, and the stress/anxiety produced by a potentially life-threatening situation. *Id.*

28.3 Violent criminal attacks frequently occur suddenly and without warning, leaving the victim with very little time to fire the handgun to save herself. Rossi Decl. at 5. Reaction time under stress is complicated and can be attributed to many physiological, psychological and environmental factors. *Id.* The most basic premise breaks down into three factors: the ability for an individual to perceive a threat (Perceptual Processing), the ability to make a decision (Cognitive Processing), and lastly the ability of the brain to send messages to the muscles to react (Motor Processing). Rossi Decl. at 5-6.

28.4 This processing takes, minimally, several seconds without consideration to other factors such as distractions, noise, multiple assailants, lighting conditions, nervousness and fatigue. Rossi Decl. at 6.

28.5 Loading a firearm requires two hands, and is a far more difficult task when

someone is physically handicapped, or one hand is wounded during an attack. Rossi Decl. at 6-7. Having more rounds in a magazine allows the victim to better protect himself or herself without the need to reload especially if handicapped, disabled or injured. *Id.* at 7.

28.6 Plaintiff Thomas Galvin and Plaintiff Roger Horvath are but two examples.

28.7 Mr. Galvin is a left-hand amputee. *See* Declaration of Thomas Galvin (attached to Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction as Exhibit E) (Doc. #23-8) at 1.

28.8 In order to change a magazine in one of his pistols or rifles, Mr. Galvin has to pinch the pistol or rifle under his left arm and against his body without dropping the firearm or magazine. Galvin Decl. at 2. The seven-round limitation will require Mr. Galvin to switch out the magazines of his pistols and rifles more frequently if confronted with a sudden home invasion, robbery, or other attack. *Id.* Therefore, Mr. Galvin's ability to defend himself, his family and property with these pistols and rifles is substantially compromised by the seven-round limitation. *Id.*

28.9 Plaintiff Roger Horvath is similarly impacted by the limitation. *See* Declaration of Roger Horvath [attached to Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction as Exhibit D] (Doc. #23-7)]. Mr. Horvath is a paraplegic and wheelchair bound. Horvath Decl. at 1. He suffers from advanced Carpal Tunnel Syndrome and, as such, has extreme difficulty manipulating objects such as ammunition magazines. *Id.*

28.10 Because of his physical limitations, Mr. Horvath has a limited ability to retreat effectively and safely if faced with a home invasion. Horvath Decl. at 2.

28.11 Mr. Horvath is particularly vulnerable to a home invasion: he lives alone on approximately two acres of land with a large, wooded area behind his house. Horvath Decl. at 2. The nearest police precinct to his house is five miles away. *Id.* Mr. Horvath has an adopted nine-year-old son whom he cares for several days and nights during the week. *Id.*

28.12 In light of Mr. Horvath's physical limitations, the seven-round limitation deprives him of adequately protecting himself, his son, and his property and increases his vulnerability during a home invasion. Horvath Decl. at 2.

28.13 Mr. Horvath's physical limitations significantly compromise his ability to quickly or effectively reload a firearm. Horvath Decl. at 2. The extended time Mr. Horvath requires to switch out ammunition magazines represents a prolonged exposure to capture, injury and/or death at the hands of a home invader, robber, or other predator advancing upon him during the switch out. *Id.*

28.14 Under such conditions, Mr. Horvath's safety -- and the well-being of those who depend upon him for defense -- rest upon his ability to use a magazine that holds more than ten (10) rounds of ammunition. *Id.*

28.15 The physiological reaction to the "stress flood" produced by an armed attack, the time delay caused by loading/re-loading a firearm, the loss of defensive use of the non-dominant arm and hand during loading/re-loading, and the attention distraction caused by loading/re-loading a firearm are factors that effect able-bodied gun owners as well as those who are handicapped. Rossi Decl. at 8-10.

28.16 Under the "stress flood" of a life or death encounter the blood within one's body is re-routed to the larger muscles so as to allow a "flee or fight" response Rossi Decl. at 8.

This physiological reaction to extreme stress causes significant reloading difficulty during an attack due to loss of fine motor control in the fingers. *Id.* Trying to push a magazine release or align a magazine with the magazine well with fingers that are shaking and weakened due to blood loss is very difficult for a seasoned veteran soldier or police officer who expects this phenomena. Rossi Decl. at 8.

28.17 It is far more difficult for a civilian who has never been trained that such changes will occur, or trained during realistic scenario-based training, or who is experiencing a life-threatening attack for the first time. *Id.*

28.18 Police and civilians who train in defensive handgun use learn to draw a loaded handgun, quickly acquire a sight picture, and place two shots on the attacker's upper center of mass. Rossi Decl. at 8. Optimally, all this can be accomplished in a little over two seconds. *Id.* The process of loading the handgun will take at least a few extra seconds. *Id.* Extensive practice can reduce how long it takes a person to load a firearm under stress, but that time cannot be reduced to zero. *Id.* Accordingly, the simple time delay of loading a spent firearm may result in the success of a violent attacker who otherwise could have been thwarted. *Id.*

28.19 The delay in loading a firearm has additional deadly implications. Rossi Decl. at 9. While the left arm and hand are being used to load the handgun, they cannot be used for anything else. *Id.* The victim is more vulnerable because both hands are occupied. *Id.* The non-gun hand becomes useless to fend off the attacker or to deflect the attacker's knife, stick, or other weapon. *Id.*

28.20 Further, if the victim were to be grabbed during the loading of the firearm, the sympathetic nervous system reaction of clenching one hand to retain the magazine, or simply

tightening muscles under stress would further limit the victim's ability to complete the loading of the firearm. Rossi Decl. at 9.

Par. # **Defendants' Statement of "Material Fact"**

III. *NEW YORK HAS A COMPELLING INTEREST IN RESTRICTING ASSAULT WEAPONS AND LCMS WHICH POSE PARTICULAR PUBLIC SAFETY RISKS.*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Paragraph # 1, above. The objection stated therein is hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, that objection will not be repeated except to say that, for the same reasons stated in that objection, the Defendants' Paragraph "III" should be disregarded in its entirety and deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

29. *In Heller, the Supreme Court noted the problem of gun-related violence in the United States and held that the Constitution leaves government with a "variety of tools" for combating that problem.*

Plaintiffs' Response:

See, Plaintiffs' response to Defendants' Paragraph #2, above. Objection ## 1 and 2 as stated therein are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those objections will not be repeated except to say that, for the same reasons stated in those objections, the Defendants' Paragraph #29 should be disregarded in its entirety and deemed disputed by the Court.

Objection #3: Whether New York's Law will have a positive, negative, or inconsequential impact on public safety is irrelevant. The Supreme Court has established that Second Amendment rights are not to be subject to judicial interest balancing and, therefore, that

resolving Second Amendment cases will not entail judicial analysis of difficult empirical questions on the effects of laws regulating the possession and use of firearms.

Par. # **Defendants' Statement of "Material Fact"**

30. *The Second Circuit has held that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention."*

Plaintiffs' Response:

See, Plaintiffs' response to the Defendants' Paragraph #2, above. Objection # 1 as stated therein is hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, that objection will not be repeated except to say that, for the same reasons stated in that objection, the Defendants' Paragraph #30 should be disregarded in its entirety and deemed disputed by the Court.

Objection #2: This is an isolated and selective citation to one of many findings made by the U.S. Court of Appeals for the Second Circuit in *Kachalsky v County of Westchester*, 701 F.3d 81 (2d Cir. 2012), and is not the singular, decisive legal standard by which the legal issues presented by this case are to be decided. Competing discussions of the law governing the resolution of this case's legal issues are properly included in the Memorandum of Law that is required of summary judgment movants and opponents under L.R.Civ.P. Rule 7(a)(2). Plaintiffs are prohibited by L.R.Civ.P. 7(a)(3) from engaging in legal analysis / argument as part of their response to the defendants "Statement of Undisputed Material Facts," and therefore respectfully refer the Court to their Omnibus Memorandum of Law (Doc. #114) for a detailed discussion of the law that requires that defendants' Motion for Summary Judgment and/or Dismissal be denied.

Par. # **Defendants' Statement of "Material Fact"**

31. *Assault weapons and LCMs have frequently been employed in highly publicized mass shootings, and are disproportionately used in the murders of law enforcement officers, crimes for which weapons with greater firepower would seem particularly useful.*

Plaintiffs' Response:

Objection: Whether New York's Law will have a positive, negative, or inconsequential impact on public safety is irrelevant. The Supreme Court has established that Second Amendment rights are not to be subject to judicial interest balancing and, therefore, that resolving Second Amendment cases will not entail judicial analysis of difficult empirical questions on the effects of laws regulating the possession and use of firearms.

Subject to this objection, and without waiving the same, the Plaintiffs hereby respond as follows:

Disputed. As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine issue of triable fact:

31.1 Mass shootings, while a matter of great public interest and concern, account for only a very small share of shootings overall. *See*, Pew Research Center, *Gun Homicide Rate Down 49% Since 1993 Peak; Public Unaware* (May 2013) ("Pew Report"), at 4. [A copy of the Pew Report is attached to Plaintiffs' Counter-Statement of Undisputed Material Facts as "**Exhibit A**"]. *See also*, Plaintiffs' Counter-Statement of Undisputed Material Facts, ¶¶ 13-15, 24-39, 57-58, 61. Homicides that claimed the lives of three or more people accounted for less than 1% of all homicide deaths between 1980 and 2008. *Id.*

31.2 Most scholarly and expert sources conclude that mass shootings are rare violent crimes. *See*, Congressional Research Service, *Public Mass Shootings in the United States:*

Selected Implications for Federal Public Health and Safety Policy (March 2013) (“CRS Report”). [A copy of the CRS Report is attached to the plaintiffs Counter Statement of Undisputed Material Facts as “**Exhibit C**”].

31.3 One study has described mass shootings as “very low-frequency and high intensity events.” *Id.* [citing J. Reid Meloy, et al, “A Comparative Analysis of North American Adolescent and Adult Mass Murders,” *Behavioral Sciences and the Law*, vol. 22, no. 3 (2004) at 307].

31.4 Numerous studies have examined the use of firearms characterized as “assault weapons” (“AWs”) both before and after the implementation of the federal assault weapons law. *See, e.g.*, Koper 2004 and Koper 2007.

31.5 The “overwhelming weight” of evidence produced by these studies indicates that AWs are used in a only a very small percentage of gun crimes overall. Koper 2004 at 17. According to most studies, AWs are used in approximately 2% of all gun crimes, Koper 2004 at 2, 14, 19.

31.6 The inclusion of AWs among crime guns is “rare.” Koper 2007 at 69.

31.7 AWs (including so-called assault pistols (“APs”) and assault rifles (“ARs”)) and ammunition magazines that can accept more than ten rounds of ammunition (so-called “Large Capacity Magazines” or “LCMs”) are not used disproportionately in crimes. Koper 2004 at 17; Koper 2007 at 65, 70, 96.

31.8 Police officers are rarely murdered with assault weapons. Koper 2007 at 99.

31.9 The fraction of police gun murders perpetrated with AWs is only slightly higher than that for civilian gun murders. *Id.*

31.10 The argument that assault weapons pose a unique, disproportionate danger to police officers is contradicted by FBI data. See, Law Enforcement Officers Killed & Assaulted (“LEOKA”) [www.fbi.gov/about-us/cjis/ucr/leoka/2010]. The LEOKA data show that, in 2010, a law enforcement officer was eight times more likely to be murdered with a revolver than with an AW or LCM, eight times more likely to be killed with his own service pistol, three times as likely to be killed by a “firearms mishap” during police training (whether by his own hand or that of a fellow officer), and 72 times as likely to be killed in the line of duty accidentally—usually by being run over by another motorist while the officer was standing on a roadside to issue somebody a traffic ticket. The LEOKA statistics for 2011 are similar. See, www.fbi.gov/about-us/cjis/ucr/leoka/2011.

31.11 A study of mass shootings (defined therein as incidents in which six or more victims were killed with a gun, or twelve or more were wounded) from 1984 to 1993 found that “for those incidents where the number of rounds fired and the duration of the shooting were both reported, the rate of fire never was faster than about one round every two seconds, and was usually much slower than that.” See, Kleck, *Targeting Guns* at 124-25. Thus, “[n]one of the mass killers maintained a sustained rate of fire that could not also have been maintained—even taking reloading time into account—with either multiple guns or with an ordinary six-shot revolver and the common loading devices known as ‘speedloaders.’” *Id.* at 125.

31.12 There is no evidence comparing the fatality rate of attacks perpetrated with guns having large-capacity magazines to those involving guns without large-capacity magazines. Koper 2004 at 90. Indeed, there is no evidence comparing the fatality rate of attacks with semiautomatics to those with other firearms. *Id.*

31.13 LCMs have been involved in gun crimes, but it is not clear how often the outcomes of gun attacks depend on the ability of offenders to fire more than ten shots (the current magazine capacity limit) without reloading. Koper 2004 at 3, 19, 97.

Par. # **Defendants’ Statement of “Material Fact”**

32. *One recent study has determined that, out of 62 mass shootings in the United States over the past three decades, more than half involved assault weapons and/or large-capacity magazines -- with the great majority of these weapons obtained legally. (Koper Decl. ¶¶ 12, 13; see also Ex. 39 (2013 Mayors Against Illegal Guns study) (finding that, in mass shootings over the past four years, shooters who used assault weapons and/or high-capacity magazines shot over twice as many people and killed 57 percent more people than shooters who did not use these weapons).*

Plaintiffs’ Response:

Objection #1: Defendants’ paragraph #32 is, in essence, merely a repetition of Defendants’ paragraph #31. For this reason alone, Defendants’ paragraph #32 should be disregarded by the Court.

Objection #2: The 2013 Mayors Against Illegal Guns “study” (“MAIG 2013”) cited in support of this “material fact.” is neither objective, reliable, nor accurate, and amounts to nothing more than propaganda. For this reason, the MAIG 2013 Should be disregarded in its entirety by the Court.

Objection #3: Whether New York’s Law will have a positive, negative, or inconsequential impact on public safety is irrelevant. The Supreme Court has established that Second Amendment rights are not to be subject to judicial interest balancing and, therefore, that resolving Second Amendment cases will not entail judicial analysis of difficult empirical questions on the effects of laws regulating the possession and use of firearms.

Subject to these objections, and without waiving the same, the Plaintiffs respond as

follows:

Disputed. As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine issue of triable fact:

See, Plaintiffs' response to Defendants' paragraph #31, above. Plaintiffs' supplemental statements of material fact as contained in paragraphs ## 31.1 thru 31.13 are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those supplemental statements of material fact will not be repeated except to say that, for the same reasons stated in in paragraph ## 31.1 thru 31.13, the Defendants' paragraph #32 should be deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

33. *Studies have reported that when mass shootings involved assault weapons or high capacity magazines, the numbers of rounds fired, and the number of deaths and injuries was much higher.*

Plaintiffs' Response:

Objection #1: Defendants' paragraph #33 is, in essence, merely a repetition of Defendants' paragraph ## 31 and 32. For this reason alone, Defendants' paragraph #33 should be disregarded by the Court.

Objection #2: The 2013 Mayors Against Illegal Guns "study" ("MAIG 2013") cited in support of this "material fact." is neither objective, reliable, nor accurate, and amounts to nothing more than propaganda. For this reason, the MAIG 2013 Should be disregarded in its entirety by the Court.

Objection #3: Whether New York's Law will have a positive, negative, or inconsequential impact on public safety is irrelevant. The Supreme Court has established that

Second Amendment rights are not to be subject to judicial interest balancing and, therefore, that resolving Second Amendment cases will not entail judicial analysis of difficult empirical questions on the effects of laws regulating the possession and use of firearms.

Subject to these objections, and without waiving the same, the Plaintiffs respond as follows:

Disputed. As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine issue of triable fact:

See, Plaintiffs' response to Defendants' paragraph #31, above. Plaintiffs' supplemental statements of material fact as contained in paragraphs ## 31.1 thru 31.13 are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those supplemental statements of material fact will not be repeated except to say that, for the same reasons stated in paragraph ## 31.1 thru 31.13, the Defendants' paragraph #33 should be deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

34. *LCMs (those with a capacity to hold more than 10 rounds of ammunition), as well as guns loaded with more than seven rounds of ammunition, are often used in mass shootings; LCMs were used in more than half of the mass shootings since 1982 (at least 34 out of 66 mass shootings) and the presence of LCMs in mass shooting incidents is linked with an increased number of shots fired and an increased average number of fatalities and injuries.*

Plaintiffs' Response:

Objection #1: Defendants' paragraph #34 is, in essence, merely a repetition of Defendants' paragraph ## 31 thru 33. For this reason alone, Defendants' paragraph #34 should be disregarded by the Court.

Objection #2: Whether New York's Law will have a positive, negative, or

inconsequential impact on public safety is irrelevant. The Supreme Court has established that Second Amendment rights are not to be subject to judicial interest balancing and, therefore, that resolving Second Amendment cases will not entail judicial analysis of difficult empirical questions on the effects of laws regulating the possession and use of firearms.

Subject to this objection, and without waiving the same, the Plaintiffs respond as follows:

Disputed. As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine issue of triable fact:

See, Plaintiffs' response to Defendants' paragraph #31, above. Plaintiffs' supplemental statements of material fact as contained in paragraphs ## 31.1 thru 31.13 are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those supplemental statements of material fact will not be repeated except to say that, for the same reasons stated in paragraph ## 31.1 thru 31.13, the Defendants' paragraph #34 should be deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

35. *LCMs and assault weapons also implicate other law enforcement concerns, as well, including the ability to overpower or hold off law enforcement; they are disproportionately used in the murders of law enforcement officers; and they pose risk to unintended victims.*

Plaintiffs' Response:

Objection #1: Defendants' paragraph #35 is, in essence, merely a repetition of Defendants' paragraph ## 31 thru 34. For this reason alone, Defendants' paragraph #35 should be disregarded by the Court.

Objection #2: Whether New York's Law will have a positive, negative, or

inconsequential impact on public safety is irrelevant. The Supreme Court has established that Second Amendment rights are not to be subject to judicial interest balancing and, therefore, that resolving Second Amendment cases will not entail judicial analysis of difficult empirical questions on the effects of laws regulating the possession and use of firearms.

Subject to this objection, and without waiving the same, the Plaintiffs respond as follows:

Disputed. As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine issue of triable fact:

See, Plaintiffs' response to Defendants' paragraph #31, above. Plaintiffs' supplemental statements of material fact as contained in paragraphs ## 31.1 thru 31.13 are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those supplemental statements of material fact will not be repeated except to say that, for the same reasons stated in paragraph ## 31.1 thru 31.13, the Defendants' paragraph #35 should be deemed disputed by the Court.

In addition, plaintiffs offer the following additional material facts as to which there exists a genuine issue of triable fact:

35.1 To the extent that a police officer, civilian, or criminal shooting a firearm (either as an aggressor or in self-defense) might miss his or her intended target, all firearms pose a risk to an unintended victim, whether they are characterized as "assault weapons" or not. *See*, generally, declarations of Guy Rossi and Gary Kleck, attached as Exhibit C and Exhibit F, respectively, to the Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction. *See also*, declaration of Gary Roberts, attached as Exhibit O to Plaintiffs' Counter-

Statement of Undisputed Material Facts.

Par. # **Defendants' Statement of "Material Fact"**

36. *The FBI has determined that, in 2003, 20% of law enforcement officers killed in the line of duty were killed with an assault weapon.*

Plaintiffs' Response:

Objection #1: Defendants' paragraph #36 is, in essence, merely a repetition of Defendants' paragraph ## 31 thru 35. For this reason alone, Defendants' paragraph #36 should be disregarded by the Court.

Objection #2: Whether New York's Law will have a positive, negative, or inconsequential impact on public safety is irrelevant. The Supreme Court has established that Second Amendment rights are not to be subject to judicial interest balancing and, therefore, that resolving Second Amendment cases will not entail judicial analysis of difficult empirical questions on the effects of laws regulating the possession and use of firearms.

Subject to this objection, and without waiving the same, the Plaintiffs respond as follows:

Disputed. As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine issue of triable fact:

See, Plaintiffs' response to Defendants' paragraph #31, above. Plaintiffs' supplemental statements of material fact as contained in paragraphs ## 31.1 thru 31.13 are hereby incorporated by reference and repeated with full force and effect as if fully re-stated here. In the interests of judicial economy, those supplemental statements of material fact will not be repeated except to say that, for the same reasons stated in paragraph ## 31.1 thru 31.13, the Defendants' paragraph #36 should be deemed disputed by the Court.

Par. # **Defendants' Statement of "Material Fact"**

37. *Courts and legislative tribunals have cited evidence that shots fired from assault weapons may be powerful enough to penetrate walls, increasing the threat of stray bullets harming family members, neighbors, and passersby and other reports have indicated that they are inappropriate for home self-defense.*

Plaintiffs' Response:

Disputed. As per W.D.N.Y. L.R.Civ.P. 56(a)(2), plaintiffs offer the following additional material facts as to which there exists a genuine issue of triable fact:

37.1 Firearms that can be characterized as "assault weapons" encompass an extraordinarily wide range of pistols, rifles and shotguns that have extremely disparate sizes, lengths, and calibers. The "fire power" of these arms depends on numerous different factors, and it is extremely inaccurate to imply that all firearms that arguably fall within the definition of "assault weapon" can fire shots powerful enough to "penetrate walls," etc. *See, generally, the declaration of Gary Roberts, attached as Exhibit O to Plaintiffs' Counter-Statement of Undisputed Material Facts. *See also, plaintiffs' Counter-Statement of Undisputed Material Facts, ¶¶ 132-134.**

37.2 It is widely accepted that the AR15 chambered in a .223/5.56 mm caliber is the firearm best suited for home defense use. Roberts Decl. at 14-15. *See also, J. Guthrie, Versatile Defender: An Argument for Advanced AR Carbines in the Home, in BOOK OF THE AR-15 134 (Eric R. Poole, ed. 2013) ("If a system is good enough for the U.S. Army's Delta and the U.S. Navy SEALs, surely it should be my weapon of choice, should I be a police officer or Mr. John Q. Public looking to defend my home"); Eric Poole, Ready To Arm: It's Time to Rethink Home Security, in GUNS & AMMO, BOOK OF THE AR-15 15-22 (Eric R. Poole, ed. 2013) (discussing virtues of the AR-15 platform as a home defense weapon); Mark Kayser, AR-15 for Home & the Hunt, In PERSONAL & HOME DEFENSE 28-29, 30-31 (2013) (advising use of AR-15 for self-defense in the home and*

recommending customizing with accessories).

37.3 The AR15 .223/5.56 mm caliber carbine configuration is extremely common. Roberts Decl. at 14-15. In fact, it is the carbine configuration most commonly used by law enforcement officers today. *Id.* This configuration (i.e., 5.56 mm 55 grain cartridges fired from 20” barrel M16A1 rifles) was the U.S. military standard ammunition in the 1960s and 1970s. *Id.* The roots of the .223/5.56 mm cartridge commonly used in the AR15 come from a caliber designed for small game varmint hunting and used to eliminate small furry rodents and animals up to coyote size. *Id.*

37.4 During defensive shooting encounters, shots that inadvertently miss the intended target in close quarter battle and urban environments can place innocent citizens in danger. Roberts Decl. at 14-15. In general, .223/5.56 mm bullets demonstrate less penetration after passing through building structural materials than other common law enforcement and civilian calibers. *Id.* All of the .223/5.56 mm bullets recommended for law enforcement use offer reduced downrange penetration hazards, resulting in less potential risk of injuring innocent citizens and reduced risk of civil litigation in situations where bullets miss their intended target and enter or exit structures compared with common handgun bullets, traditional hunting rifle ammunition, and shotgun projectiles. *Id.*

Par. # **Defendants’ Statement of “Material Fact”**

38. *The press has reported several instances where, when a person shooting in a public venue stops to reload to continue his shooting, that pause provided the opportunity for bystanders to intervene.*

Plaintiffs’ Response:

Objection: “Press Reports” are inadmissible hearsay and cannot be used to support

a Motion for Summary Judgment. *See, Henderson v. Williams*, 2013 U.S. Dist. LEXIS 67570, 22-23 (D. Conn. May 13, 2013). *See also, Ladner v. City of New York*, 20 F. Supp. 2d 509, 519 (E.D.N.Y. 1998) (newspaper article “inadmissible hearsay and unusable to defeat summary judgment”), *aff’d*, 181 F.3d 83 (2d Cir.1999) (unpublished table decision); *Pooler v. Nassau Univ. Med. Ctr.*, 848 F. Supp. 2d 332, 351 n.14 (E.D.N.Y. 2012) (noting that plaintiff had submitted newspaper article, but no admissible evidence, in support of claim and concluding that claim cannot survive summary judgment). For this reason, Defendants’ paragraph # 38 should be disregarded in its entirety by the Court.

Par. # **Defendants’ Statement of “Material Fact”**

39. *Additionally, the pause necessitated when a mass shooter or other criminal has to reload or change guns, in addition to perhaps permitting a bystander to step in, may also allow potential victims the opportunity to reach safety or law enforcement an opportunity to intervene.*

Plaintiffs’ Response:

Objection: the assertions contained in Defendants’ paragraph 39 are inherently speculative and should be disregarded by the Court.

Subject to this objection, and without waiving the same, plaintiffs respond as follows:

39.1. A ban on LC magazines will have an inconsequential effect on reducing the number of killed or injured victims in mass shootings. Kleck Decl. at 4-5. See also, Plaintiffs’ Counter-Statement of Undisputed Material Facts, ¶ 140. The presumption is false that an offender lacking LC magazines would be forced to reload sooner or more often, thereby giving bystanders the opportunity to tackle him and stop his attacks. *Id.* Analysis of mass shootings in the United States shows it is exceedingly rare that victims and bystanders in mass shootings have tackled

shooters while they are reloading. *Id.* This is particularly true because most mass shooters bring multiple guns to the crimes and, therefore, can continue firing without reloading even after any one gun's ammunition is expended. *Id.* at 5. A study of every large-scale mass shooting committed in the United States in the 10-year period from 1984 through 1993 found that the killers in 13 of these 15 incidents possessed multiple guns. Kleck Decl. at 5.

Dated: August 19, 2013

Respectfully Submitted,

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CERTIFICATION

I hereby certify that on August 19, 2013, a copy of the foregoing RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS was filed electronically and served by mail upon anyone unable to accept electronic filing. Notice of this filing was will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

GOLDBERG SEGALLA, LLP

By: /s/ Brian T. Stapleton
Brian T. Stapleton, Esq.