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-Appellees,

v.

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

Defendants-Appellees-Cross-Appellants,

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 *AMICUS CURIAE* REMINGTON ARMS CO., INC.

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CORPORATE DISCLOSURE STATEMENT

Remington is part of the Remington Outdoor Company, Inc., which is a holding company of various American firearms manufacturers. Remington Outdoor Company, Inc., is controlled by Cerberus Capital Management, L.P.

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IDENTITY AND INTERESTS OF AMICUS[1]

Amicus Curiae Remington Arms Company, LLC ("Remington" or "*Amicus*") is a manufacturer of firearms, ammunition, and related accessories with a continuous manufacturing presence in Ilion, New York, since 1828.[2] Remington was founded by Eliphalet Remington II in Ilion Gulch, New York, in 1816. In addition to its manufacturing pursuits, Remington focuses on assisting conservation and youth organizations, and educating the public on our nation's rich cultural heritage of hunting. The laws challenged by Appellants in this case severely restrict Remington's ability to provide the products it makes in New York, with New York workers, to the responsible, law-abiding citizens of New York. Remington, one of America's oldest and most respected firearms manufacturers, has an interest in ensuring that the Second Amendment rights of all citizens are respected and that laws that infringe on the Second Amendment are analyzed appropriately. Remington seeks to show to this Court with argument and authority the proper universe of evidence that a court may consider when determining the constitutionality of a law that is indisputably subject to a heightened level of

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

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

judicial scrutiny. This issue has not been addressed by the parties but it is critical to a proper resolution of the claims in this case.

INTRODUCTION

On January 15, 2013, the Governor of New York, Andrew M. Cuomo, signed into law the New York Secure Ammunition and Firearms Enforcement Act of 2013 (the "SAFE Act"). Among other things, the SAFE Act banned the purchase, transfer, or receipt within the state of New York of so-called "assault weapons," namely semi-automatic rifles with a detachable box magazine and one enumerated "feature," and the purchase, transfer, receipt or possession of so-called "large-capacity" magazines, namely detachable box magazines capable of holding more than ten rounds. Remington manufactures both "assault weapons" and "large-capacity" magazines as defined by the SAFE Act, and vigorously contests the *ipse dixit* statements of the New York legislature and governor's office that either of these categories of products has any negative relationship to public safety.

The proper role of a federal court reviewing the constitutionality of a challenged law under any heightened standard of review is to determine whether the evidence that was before the legislature at the time of enactment was sufficient and substantial. This is not to say that the court is to weigh the competing evidence for and against a particular policy choice. Rather, a court must ensure that the predictive judgments of the legislature are the result of "reasonable inferences

based on substantial evidence." *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2nd Cir. 2012)(*quoting Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994)).

Simply from a perspective of pure logic, it is clear that a legislature cannot have drawn "reasonable inferences" from evidence that it never considered (and could not have considered) because that evidence was never put before it. Accordingly, in terms of supplying the trial court with evidence in support of legislation, the state must be limited to that evidence which was actually before the legislature at the time of enactment. This Court should decline to permit *post hoc* rationalizations in support of the SAFE Act, or the consideration of new evidence supplied by creative attorneys in response to litigation.

In the context of reviewing a law under strict scrutiny, the United States Court of Appeals for the Federal Circuit has held explicitly that this limitation on *post hoc* evidence was absolutely necessary. Even under the more relaxed analysis of intermediate scrutiny, the United States Supreme Court has indicated that the proper approach is to review only that which was actually presented to the legislature. Given that the laws challenged by Appellees in this case plainly implicate the Second Amendment, heightened scrutiny is required, as the Trial Court found below. *District of Columbia v. Heller*, 554 U.S. 570, 629 n.27 (2008); *see also* the December 31, 2013 Decision and Order of the Trial Court, applying

intermediate scrutiny. Thus, regardless of the standard of review employed, the only evidence that should have been considered by the Trial Court is that which was actually presented to the New York legislature at the time the New York Secure Ammunition and Firearms Enforcement Act of 2013 was enacted.

ARGUMENT

I. Logic and Precedent Mandate That the State Is Limited to Evidence That Was Before the Legislature at the Time of Enactment.

The role of a court conducting a review of a challenged law under a heightened level of scrutiny was established by the United States Supreme Court in *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994). The Supreme Court applied intermediate scrutiny to analyze whether a federal law requiring broadcasters to carry certain enumerated channels violated the First Amendment. The Supreme Court noted that it was not the role of a federal court to replace the considered judgment of the legislature with its own. The Supreme Court was clear that its ruling did not mean, however, that predictive judgments of the legislature are insulated from review; rather, a court must "assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting*, 512 U.S. at 666.

The legislature could not possibly have drawn a reasonable inference based on evidence that it never considered. Thus, a court cannot "assure" the reasonableness of any inferences by resorting to evidence marshaled by counsel

after the fact in response to, and in creative defense of, litigation. This is especially true with respect to a law with as questionable a procedural and legislative history as the SAFE Act that, under the rushed and anti-democratic circumstances in which it was passed, was not accompanied by any true legislative findings. *See* New York Secure Ammunition and Firearms Enforcement Act of 2013, Bill No. S02230, 2013-14 Reg. Sess. (N.Y. 2013). Without any legislative findings, it would be pure speculation for a court to accept any evidence produced after the passage of the challenged legislation, because there is no way to ensure that the *post hoc* evidence adduced by counsel in response to litigation is even related to the judgments made by the legislature. Indeed, without any legislative findings, the evidence produced by Appellees in this case could be completely unrelated to any decision actually made by the New York State legislature. In instances such as here, where there is no record of any legislative findings or determinations, evidence that was not before the legislature cannot properly be considered, as there is no logical way to determine if the legislature's "predictive judgments" are actually reasonable inferences based upon substantial evidence.

II. Under Strict Scrutiny Review, Only Evidence Considered By a Legislature May Be Introduced to Support a Law.

To satisfy the demanding strict scrutiny standard, Defendants must establish that the challenged laws are "narrowly tailored to promote a compelling Government interest." *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 246

(2nd Cir. 2014). When conducting a strict scrutiny analysis, "'the court must review the government's evidentiary support to determine whether the legislative body had a 'strong basis in evidence'" to justify its intrusion onto constitutionally protected rights. *Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008)("*Rothe III*") (applying strict scrutiny to a race-based classification that was intended to remedy prior discrimination)(*quoting Rothe Dev. Corp. v. Department of Defense*, 262 F.3d 1306, 1317 (Fed. Cir. 2001)("*Rothe I*")).

The *Rothe* opinions set forth the proper scope of a court's review in a strict scrutiny analysis. In these cases, Rothe challenged an Air Force contract award to a competing company. Rothe contended that a federal statute, 10 U.S.C. § 2323, which was designed to make socially and economically disadvantaged businesses more able to compete with other businesses, was a violation of its rights to equal protection under the law as incorporated under the Fifth Amendment. Specifically, Rothe argued that, because the law presumed businesses run by certain racial and ethnic minorities to be part of the protected class of business, the law was facially discriminatory and there was not sufficient evidence to support its discriminatory provisions.

Most relevant to the issue raised by Appellants in this case is the Federal Circuit's earlier opinion in *Rothe Dev. Corp v. Department of Defense*, 413 F.3d 1327 (Fed. Cir. 2005)("*Rothe II*"), in which it directly addressed Rothe's

contention that evidence that was not presented to Congress should either be stricken from the record or given no weight. Agreeing with Rothe, the Federal Circuit clearly expressed the evidentiary standard in this regard:

> Thus, to be relevant in the strict scrutiny analysis, the evidence must be proven to have been before Congress prior to enactment of the racial classification. Although these statistical studies predate the present reauthorization of section 1207 in 2002, their relevance is unclear because it is uncertain whether they were ever before Congress in relation to section 1207. Without a finding that these studies were put before Congress prior to the date of the present reauthorization in relation to section 1207 and to ground its enactment, it was error for the district court to rely on the studies.

Id. at 1338. Thus, at least one federal court has been explicit in its requirement that the evidence used to support a law that infringes on constitutionally protected rights must have actually been presented to the legislature. This Court should follow the lead of the Federal Circuit and adopt its reasoning in refusing to consider any evidence that was not presented to, or considered by, the New York state legislature when it passed the SAFE Act.

III. Even Under Intermediate Scrutiny, the Court Should Disregard Any Evidence Not Before the New York State Legislature at the Time the SAFE Act was Enacted.

The United States Supreme Court established the standard for the scope of a court's review of a legislative enactment in *Turner Broadcasting*, 512 U.S. at 666 (a court must "assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence"). This language was

explicitly adopted by this Court when analyzing Second Amendment challenges. *See Kachalsky*, 701 F.3d at 97 ("Thus, our role is only 'to assure that, in formulating its judgments, [New York] has drawn reasonable inferences based on substantial evidence.'"). This Court in *Kachalsky* considered the legislative record of the law at issue in that case, which required a person seeking a permit to carry a concealed firearm to demonstrate a particularized need to do so. *Id*. at 97-98. It also considered the legislative record of proposed laws that would have amended the challenged law. *Id*. at 98. This Court did note that both sides had submitted studies supporting their respective positions, *id.* at 99, but explicitly held that the New York legislature had weighed the policy issues and it would not be proper to usurp the role of the legislature by weighing the evidence itself. *Id*. Clearly, this Court based its determination on whether the legislative record was sufficient to support the predictive judgments of the New York state legislature. This was unquestionably the correct method of analysis and it should be followed in this case. *Accord Shew v. Malloy,* No. 3:13CV739(AVC), 2014 U.S. Dist. LEXIS 11339 at *35 (D. Conn. Jan. 30, 2014)("Accordingly, the court must only 'assure that, in formulating its judgments, [Connecticut] has drawn reasonable inferences based on substantial evidence.'").[3]

[3] It is worth noting that two district courts in this Circuit, the Western District of New York and the District of Connecticut in *Shew*, *supra*, have relied upon both *Kachalsky* and *Turner Broadcasting* in support of their findings that substantial evidence exists which would justify the banning of certain firearms and magazines

At least one other Circuit Court of Appeals has expressly adopted this particular application and interpretation of *Turner Broadcasting*. In *Hutchins v. District of Columbia*, 188 F.3d 531, 567 (D.C. Cir. 1999), the District of Columbia Circuit Court of Appeals relied upon *Turner Broadcasting* for the principle that "for a legislative judgment to warrant judicial deference, there must be a contemporaneous factual foundation from which the court can conclude that there is a close nexus between the burden on fundamental rights and the important state interest." *Id*. As the D.C. Circuit so aptly put it, "[t]he Supreme Court has repeatedly demonstrated that, under intermediate scrutiny, it will not tolerate a severe burden on a fundamental right simply because a legislature has concluded that the law is necessary. Rather, the Court has independently examined *the evidence before the legislature to determine whether an adequate foundation justified the challenged burdens*." *Id*. Emphasis added.

The D.C. Circuit's application of *Turner Broadcasting* is unassailable because, implicit in the concept of "draw[ing] reasonable inferences based on substantial evidence," of course, is the requirement that the evidence from which such inferences are drawn is actually presented to the legislature for its

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in each respective court's state. This Court is faced with not one isolated instance of the Trial Court misapplying *Turner Broadcasting*, but a systemic misapprehension or misapplication of that line of cases to prop up legislative enactments that have no evidentiary basis at the time they were passed. Accordingly, it is all the more critical that this Court correct this inappropriate deference to predictive judgments which are not the result of reasonable inferences drawn from substantial evidence.

consideration. It would not make sense for the Supreme Court to mandate that a federal court limit its review to whether the judgment of a legislature was "based on substantial evidence" but permit the court to consider evidence upon which the judgment of the legislature could not have been predicated.

This is especially true in the present case where the New York state legislature had full knowledge that the Second Amendment protects an individual, fundamental right to bear arms when it enacted the challenged laws. *See* Legislative Memorandum[4] ("[T]he Second Amendment protects the right to keep and bear arms….")(*citing Heller*, 554 U.S. at 595). Notably, in a recent Second Amendment case, the Third Circuit Court of Appeals excused the State of New Jersey from presenting evidence upon which its legislature actually relied when crafting a firearm law *only* because the law was enacted long before the Supreme Court's decision in *Heller*, and the "legislature could not have foreseen that restrictions on carrying a firearm outside the home could run afoul of a Second Amendment that had not yet been held to protect an *individual* right to bear arms." *Drake v. Filko*, 724 F.3d 426, 438 (3rd Cir. 2013)(emphasis in original). The New

[4] A copy of the Legislative Memorandum in Support of the SAFE Act can be found at the following web address:

http://www.assembly.state.ny.us/leg/?default_fld=&bn=A02388&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y

The text of the Memorandum in Support appears to be taken directly from Appellee Cuomo's January 14, 2013, Message of Necessity to the state legislature. Furthermore, it contains no findings, no statistics, and no reference to evidence of any kind which the legislature could have considered.

York state legislature has no such excuse, as both *Heller* and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010)(incorporating the Second Amendment to be applicable to the States), were decided long before the enactment of the challenged laws, and *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"), which would have put the New York State legislature on notice that laws prohibiting certain long guns and magazines are subject to Second Amendment scrutiny, also was decided before the enactment of the SAFE Act.

Thus, the only evidence that should be considered by this Court is that which was actually before the New York State legislature at the time the SAFE Act was passed; nothing produced subsequent to the Act's passage could possibly have formed the basis for the government's interests or how appropriately tailored the laws are, and is thus irrelevant.

Such credulous deference to the "predictive judgments" of the New York State legislature is inappropriate, as illustrated by the Ninth Circuit Court of Appeals' recent holding in *Peruta v. County of San Diego*, No. 10-56971, 2014 U.S. App. LEXIS 2786 (9th Cir. Feb. 13, 2014). In *Peruta*, the Ninth Circuit struck down a municipal ordinance forbidding the concealed carry of firearms without the proper permit, which could be obtained only upon a demonstration of "good cause." The court provided a principled criticism of the approach recently taken in the Second, Third and Fourth Circuits with respect to deference to legislative

findings in the Second Amendment context. The *Peruta* court first took the other Circuits to task for abdicating their responsibility to ensure that the legislative judgments underlying the laws challenged in those cases were based on substantial evidence, but, instead engaging in a balancing test that directly contradicted the Supreme Court's ruling in *Heller*, as the *Heller* majority expressly rejected the interest-balancing approach advanced by Justice Breyer in his dissent.[5] *Id*. at *91-93. The *Peruta* Court next noted that these other Circuit Courts had failed to ensure that the challenged laws "did not burden the right substantially more than is necessary to further [the government's legitimate] interests." *Id.* at *94 (internal quotations omitted). The Ninth Circuit quoted at length former Maryland District Judge Legg's well reasoned analysis in his opinion in *Woollard v. Sheridan*, 863 F. Supp. 2d 462 (D. Md. 2012) (*rev'd sub nom Woollard*, 712 F.3d at 865). The most relevant to this Court's analysis of the quotations used by the Ninth Circuit is the standard to which Judge Legg held the government: "The Maryland statute's failure lies in the overly broad means by which it seeks to advance this undoubtedly legitimate end. . . . The solution, then, is not tailored to the problem it is intended to solve." *Woollard*, 863 F. Supp. 2d at 474-75. The *Peruta* court

[5] *See* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 706-707 (2012)("[Lower courts] have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld."). Professor Rostron was a staff attorney for the Brady Center to Prevent Gun Violence from 1999 to 2003.

concluded that the Fourth, Second, and Third Circuits had erred in striking down the restrictive carry-permit laws because the government had failed to carry its burden of proof. *Id.* at *95-97.

Whenever heightened scrutiny is implicated, therefore, an act cannot be defended "by advancing hypothetical rationales, independent of the legislative record; rather, the government is limited to 'invoking [the legislature's] *actual* justification for the law.'" *In re Balas*, 449 B.R. 567, 574 (Bkr. C.D. Cal. 2011)(quoting and incorporating the February 23, 2011 Letter from Attorney General Eric Holder to Speaker of the House of Representatives John Boehner, regarding the constitutional infirmity of the Defense of Marriage Act)(emphasis added). Furthermore, any such "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

IV. The Trial Court Fundamentally Misapplied *Turner Broadcasting* and *Kachalsky*.

As discussed *supra*, a rational application of *Turner Broadcasting* and its progeny, including *Kachalsky*, requires that, under heightened scrutiny, a court must ensure that the legislature makes reasonable inferences from substantial evidence before it at the time of enactment to support its predictive judgments. However, in its Order, the Trial Court held that *Kachalsky* and *Turner Broadcasting* actually mandated its ultimate holding because it must give

"substantial deference to the predictive judgments of the legislature" and "substantial evidence supports [the New York state legislature's] judgment that the banned features are unusually dangerous, commonly associated with military combat situations, and are commonly found on weapons used in mass shootings." Order, at pp. 28-29. The Trial Court then went on to rely on evidence that was never before the state legislature, including the 2008 testimony of Brian J. Siebel, a paid lobbyist for Brady Center to Prevent Gun Violence, before Congress, which was not subject to cross-examination and can hardly be called "evidence" of any kind. The Trial Court also considered evidence that was over fifteen years old which supported its holding that semi-automatic rifles are not suitable for lawful purposes, such as sporting use or self-defense. This is manifestly false. Remington alone produces an entire line of firearms (now banned in New York) exclusively designed for, and marketed to, hunters of both large and medium-sized game.[6] If people were not purchasing these firearms for sporting and other lawful purposes, Remington would no longer continue to make them. If the New York state legislature had notified the public of a pending act banning the sale of these firearms and holding hearings to determine if they are commonly owned for lawful purposes by responsible, law-abiding citizens, Remington could have provided

[6] See http://www.remington.com/product-families/firearms/centerfire-families/autoloading-model-r-15.aspx and http://www.remington.com/product-families/firearms/centerfire-families/autoloading-model-r-25.aspx

actual substantial evidence in real time which would have demonstrated to any reasonable mind that the firearms banned by the SAFE Act are among the most popular in production today.[7]

The Trial Court's blind deference to the predictive judgments of the legislature was both unwarranted and manifest error. Under the analytical framework advance by the Trial Court, the legislature can never lose. The Trial Court simply confirmed that the counsel for the Defendants provided it with some evidence (no matter the substantiality in terms of probative value, reliability, or actual volume), and the SAFE Act was given a safe harbor from judicial scrutiny of any kind. This simply shifts the burden from the government to justify its intrusion into a fundamental right to the citizen of demonstrating the constitutional limits that would foreclose such legislation. And, since the legislature need not actually rely on evidence to justify its predictive judgments at the time of

[7] The Trial Court also assumed for purposes of its analysis that the firearms and magazines banned by the SAFE Act were commonly used for lawful purposes by responsible, law-abiding citizens. Order, at p. 22. This should have ended the Trial Court's inquiry, as *Heller* stands for the clear proposition that arms which are commonly used for lawful purposes by responsible, law-abiding citizens cannot be banned. As this issue is well-addressed by Appellants in their Brief before this Court, Remington will not undertake to advance that argument in this brief, except to note that the firearms banned by the SAFE Act cannot simultaneously be both "commonly owned for lawful purposes" and "dangerous and unusual," as those terms are mutually exclusive. A firearm is either "commonly owned for lawful purposes" *or* "dangerous and unusual." Inexplicably, for purposes of its decision, the Trial Court created an entirely new classification of firearms: those that are neither "commonly owned for lawful purposes" nor "dangerous and unusual," but, rather, are "unusually dangerous." Order, at p. 28. Presumably, this category was created to avoid the second element of the conjunctive "dangerous and unusual," as it is clear that these firearms and magazines are exceedingly popular and increasingly common.

enactment, it can simply wait until litigation ensues and rationalize a defense of its pronouncements. Most amazingly, after listing and analyzing evidence upon which the legislature presumably could have relied, but never had the opportunity to consider, the Trial Court held that "it is the legislature's job, not [this Court's], to weigh conflicting evidence…." Order, at p. 32 (quoting *Kachalsky*, 701 F.3d at 99. The irony of this statement, of course, is that the legislature weighed no evidence whatsoever.

V. The Procedural History of the Passage and Litigation of the SAFE Act Militates Against Any Judicial Deference to the Predictive Judgments of the Legislature.

On January 14, 2013, Appellee-Defendant Governor Andrew M. Cuomo issued to the legislature a Message of Necessity which included a proposed copy of what would become the SAFE Act and a memorandum in support[8] ostensibly setting out the exigent need for the SAFE Act to be passed in derogation of the usual three-day reading period for new legislation required by the New York state

[8] The memorandum in support attached to the Message of Necessity is the same document as the Legislative Memorandum appended to the SAFE Act. Even sixteen months after the passage of the SAFE Act, there still exists no Bill Jacket for this Act, so the only available legislative history is the Legislative Memorandum. However, since that document is the result of exactly no weighing of competing evidence or any other meaningful deliberation (much less public deliberation and input), a court would be in manifest error to defer to that document as the legislature's predictive judgment, or elevate its language to the status of legislative findings. This is especially the case as there are no findings, no statistical or social science data or analysis, and no reference to evidence of any kind in the memorandum.

constitution.[9] The legislature held no hearings, and provided no notice to the public that a bill was even being considered, much less was subject to passage. The SAFE Act passed the New York senate that evening and the house the next day, January 15, 2013. Predictably, the SAFE Act was signed into law by Appellee Cuomo that same day. In short, the citizens of New York (and Remington), had no notice that such a bill was pending, and no opportunity to be heard or attend a hearing.

In repetition of this theme, the Trial Court, on December 23, 2013, entered a docket order stating in pertinent part:

> On November 22, 2013, Plaintiffs requested a hearing on the pending motions.[10]
>
> But given the breadth and thoroughness of the briefing by the parties and amici already submitted to this Court, it is prepared to resolve the pending motions without a hearing.

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[9] Article III, § 14 of the Constitution of the State of New York provides in pertinent part:

> No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon, in which case it must nevertheless be upon the desks of the members in final form, not necessarily printed, before its final passage….

The use of a message of necessity by Governor Cuomo does not appear to be unconstitutional, but opponents of the SAFE Act would certainly question whether the circumstances surrounding the enactment of the SAFE Act were so exigent that the public could not be afforded the opportunity to weigh in on its contents, application, and policies.

[10] Including the Appellant-Plaintiffs' motion for preliminary injunction, the denial of which forms the basis of this appeal.

Docket 139. During the entirety of the litigation of the matter before the Trial Court, no hearing was had and no live witnesses presented.

Amazingly, if this Court grants oral argument, it will be the first and only time, since Appellee Cuomo issued his January 14, 2013, Message of Necessity to the legislature, that there has been a public hearing of any kind with respect to the SAFE Act. This is a manifest frustration not only of the separation of powers, which would require the Trial Court to actually test the substantiality of the evidence before the legislature at the time the SAFE Act was enacted, and not simply defer to that branch's "predictive judgments," but also the transparency required by good government.

The absence of transparency and government accountability permeating the legislative adoption and litigation of the SAFE Act is an especially poignant concern for Remington, a corporation with a long and storied history in New York state. Remington's only opportunity to influence the decision of the New York state legislature would have been to introduce evidence of the deleterious effect of the SAFE Act to the legislature itself in an attempt to persuade its members. As there were no hearings prior to the enactment of the SAFE Act, this was impossible. Had Remington joined suit with the parties below, it would have been denied a hearing there as well. Considering evidence that was not before the legislature at the time of enactment reduces Remington's voice in the democratic

process to a mere murmur. Indeed, failing to hold legislatures to the evidence on which their predictive judgments are supposedly based would give them carte blanche to enact any law they wish without a shred of supporting evidence that the law will have the claimed effect, with the hope that it will be able to find supporting evidence in the event someone mounts a legal challenge. In this case, the New York state legislature did not undertake to weigh competing evidence so that it could make predictive judgments based on reasonable inferences from substantial evidence, even though the SAFE Act has a substantial impact on Second Amendment rights (as the Trial Court acknowledged), and is entitled to no judicial deference. Such lassitude cannot be the proper way to effect a democratic process and is certainly not what the Supreme Court envisioned when it decided *Turner Broadcasting*.

CONCLUSION

The abundance of authority demonstrates that it was inappropriate for the United States District Court for the Western District of New York to have relied on any evidence that was not actually before the New York state legislature at the time the SAFE Act was enacted. This Court should rectify that mistake and decline to endorse the illogical and legally incorrect approach of allowing counsel to add supplemental evidence never considered by the legislature, never debated by its members, and never subjected to legislative scrutiny, as a matter of litigation

strategy in response to a lawsuit. To do so would conflate legislation and litigation in a way that cannot be reconciled with our representative democracy. This is especially true in the case of the SAFE Act, as there were no public hearings prior to its passage, and there was no hearing on this matter in the Trial Court, so neither the parties in this case, nor Remington, nor any other opponent of the Act, have ever had the opportunity to be heard on the SAFE Act, its effect on the Second Amendment rights of the citizens of the state of New York, its effects on Remington, or its ineffectiveness at limiting the frequency or injuriousness of violent crime in New York.

Under heightened scrutiny review, the burden rests on the government to establish its interest and that the subject legislation is appropriately tailored to advance that interest without unnecessarily impinging on fundamental rights. This burden must be shouldered at the time of enactment, and not deferred until litigation ensues. Accordingly, Remington respectfully urges this Court that it should reverse the decision of the Trial Court, as the SAFE Act has no evidentiary basis in support of its enactment. At a minimum, this Court should remand this case for further proceedings so that it may be determined what evidence was properly before the New York state legislature at the time the SAFE Act was enacted.

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CERTIFICATE OF COMPLAINCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(a) because this brief contains 5,243 excluding the parts of the brief not counted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: May 5, 2014

/s/ John Parker Sweeney
John Parker Sweeney
Attorney for Amicus Curiae
Remington Arms Company, LLC

CERTIFICATE OF SERVICE

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

/s/ John Parker Sweeney
John Parker Sweeney