NYSRPA v. CUOMO –
CRITIQUE OF JUDGE SKRETNY'S OPINION

The district court held that, while the banned firearms and magazines may be "in common use," their prohibition does not violate the Second Amendment. Decision & Order 2 (hereafter "Decs."). However, the seven-round loaded limit "is largely an arbitrary restriction that impermissibly infringes on the rights guaranteed by the Second Amendment." Moreover, three provisions are "unconstitutionally vague because an ordinary person must speculate as to what those provisions of the Act command or forbid." *Id*. at 3.

Plaintiffs Have Standing

The district court correctly held that plaintiffs have Article III standing to mount Second Amendment and vagueness challenges to the ban on firearms and magazines. Two plaintiffs own firearms and magazines that the Act restricts, and but for the Act, they would acquire firearms and magazines that the Act makes illegal. Decs. 10-11. Thus, they "'face a credible threat of prosecution' and 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705, 2717 (2010) (citation omitted). *See Ezell v. City of Chicago*, 651 F.3d 684, 695 (7th Cir. 2011) (standing for a Second Amendment challenge existed because "the very existence of a statute implies a threat to prosecute, so pre-enforcement challenges are proper").

***Heller*'s Common-Use Test Applies**

The district court correctly described the holding in *District of Columbia v. Heller,* 554 U.S. 570 (2008), that the Second Amendment guarantees the right to have firearms that are in common use. Decs. 13. The court explained:

> [T]he *Heller* Court found that because "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens . . . who would bring the sorts of lawful weapons that they possessed at home to militia duty," the prefatory clause informs and limits the right to those weapons in "common use at the time" – those weapons, that is, that a typical citizen would own and bring with him when called to service.

Id., quoting *Heller,* 554 U.S. at 627.

Obviously, having a feature that is useful for "militia" purposes does not preclude the same feature for other purposes such as self defense or sport, or even if it has no non-militia use, does not mean that a firearm with such feature would not be in common use by a typical citizen. At the founding, for instance, citizens were required to have muskets with bayonets.[1]

The district court further noted: "The salient question for the *Heller* Court, then, was . . . what weapons are in common use today. Weapons that meet that test – that are 'in common use at the time' – are protected, at least to some degree, by the Second Amendment." Decs. 13, quoting *Heller,* 554 U.S. at 625.

The court found "the archetypal AR-15" to be in common use. Decs. 19-20. "Generally, it is a semiautomatic rifle that has a detachable magazine, has a grip protruding roughly four inches below the action of the rifle, and is easily accessorized and adapted." *Id*. at 20. The court continued:

> It is also popular. According to Plaintiffs, since 1986 (when record-keeping began) "at least 3.97 million AR-15 type rifles have been manufactured in the United States for the commercial market." (Overstreet Decl., ¶ 5.) In 2011, AR-15s accounted for 7% of all firearms sold. (Id., ¶ 8.) Plaintiffs also assert that the AR-15 rifles are regularly used for self defense, hunting, and sporting competitions.

Id. See *Heller II*, 670 F.3d at 1261 (finding it "clear enough in the record that semi-automatic rifles . . . are indeed in 'common use.'").

Moreover, "there can be little dispute that tens of thousands of Americans own these guns and use them exclusively for lawful purposes such as hunting, target shooting, and even self-defense." Decs. 21-22.[2] Thus, "for purposes of this Decision, this Court will assume that the weapons at issue are

---

1 [1]The first federal Militia Act required citizens to provide for themselves a musket or firelock, bayonet, and ammunition. 1 *Statutes at Large* 271-72 (1792). If the bayonet made the musket "military style," that did not remove it from Second Amendment protection.

2 [2]The court cited See Christopher S. Koper *et al.*, U. Penn. Jerry Lee Ctr. of Criminology, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994–2003* at 1 (2004) (around 1990, "there were an estimated 1 million privately owned [assault weapons] in the U.S."); see also *Heller II*, 670 F.3d at 1287–88 (Kavanagh J., dissenting) (A "brief

commonly used for lawful purposes." *Id*. at 22. Finally, given that the Act makes acquisition of the subject firearms unlawful, "this Court finds that the restrictions at issue more than 'minimally affect' Plaintiffs' ability to acquire and use the firearms, and they therefore impose a substantial burden on Plaintiffs' Second Amendment rights." *Id*.

The court further found:

> Large-capacity magazines are also popular, and Defendants concede they are in common use nationally.[13] . . . Indeed, the "standard magazine" for an AR-15 holds 20 or 30 rounds. (Overstreet Decl., ¶ 4.) Given their popularity in the assumably law-abiding public, this Court is willing to proceed under the premise that these magazines are commonly owned for lawful purposes.

Decs. 22.

Finally, the court found "that a restraint on the amount of ammunition a citizen is permitted to load into his or her weapon – whether 10 rounds or seven – is also more than a 'marginal, incremental or even appreciable restraint' on the right to keep and bear arms." Decs. 23. Given that "the firearm itself implicates the Second Amendment, so too must the right to load that weapon with ammunition. Round restrictions, whether seven or 10, are therefore deserving of constitutional scrutiny." *Id*.

The District Court Erred in Applying Intermediate Scrutiny

The district court gave three reasons for applying intermediate scrutiny. Decs. 23-26. In Plaintiffs' view, a categorical approach or strict scrutiny should be applied, but that the provisions at issue should be found unconstitutional under intermediate scrutiny.

1. First, the court stated, a number of courts have "applied some form of intermediate scrutiny in the Second Amendment context." *Id*. at 23. But none of the cases cited involve possession of a common firearm by a law-abiding citizen in the home. Indeed, the court had just noted that *Kachalsky*, which concerned carrying handguns in public, did not have occasion to consider what standard to apply

---

perusal of the website of a popular American gun seller" underscores that "[s]emi-automatic rifles are commonly used for self defense in the home, hunting, target shooting, and competitions"); (King Aff. ¶¶ 16–18; Docket No. 116.)

in the home, where "Second Amendment guarantees are at their zenith." *Id.*, quoting *Kachalsky* v. *County of Westchester,* 701 F.3d 81, 89 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013).

United States v. Marzzarella, 614 F.3d 85, 94 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 958 (2011), upheld a ban on firearms with obliterated serial numbers only because that did not ban any type of firearm at all: "Because unmarked weapons are functionally no different from marked weapons, [the prohibition] does not limit the possession of any class of firearms." The Act here does just that. And *Marzzarella* was cited as authority in support of the holding in *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012), upholding yet another law that did not ban any type of firearm whatever. The reference to "adequate alternatives" concerned the ability to purchase the same firearm in New York as outside of New York, *id*. at 168, not to a ban on one type of firearm under the guise that another was available.

United States v. Skoien, 614 F.3d 638, 641-42 (7th Cir. 2010) (*en banc*), held that intermediate scrutiny applies to restrictions on possession of firearms by "people who have been convicted of violence once – toward a spouse, child, or domestic partner . . . ."[4] But where a regulation involves "law-abiding, responsible citizens," "a more rigorous showing than that applied in *Skoien* should be required, if not quite 'strict scrutiny.'" *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (gun range case not involving ban in the home). Similarly, Illinois, which banned any carrying of guns by law-abiding persons, "would have to make a stronger showing in this case than the government did in *Skoien*, because the curtailment of gun rights was much narrower: there the gun rights of persons convicted of domestic violence, here the gun rights of the entire law-abiding adult population of Illinois." *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).[5]

Again, *United States v. Walker,* 709 F. Supp.2d 460, 466 (E.D. Va. 2010), contrasted the right of "law-abiding, responsible citizens to use arms in defense of hearth and home" (*Heller,* 128 S.Ct. at 2821), holding that "where a person previously convicted of a misdemeanor crime of domestic violence

4

5

invokes the Second Amendment to justify possession of a firearm for hunting purposes, an intermediate level of scrutiny appears more appropriate."

Finally, *United States v. Lahey*, No. 10-CR-765 KMK, 2013 WL 4792852, at *17 (S.D. N.Y. Aug. 8, 2013), applied intermediate scrutiny to uphold a law in which "the defendant must know both that his employer is a convicted felon and that defendant is possessing a firearm in the course of his employment for a convicted felon . . . ." The court referred to an "emerging consensus" to apply intermediate scrutiny to Second Amendment challenges, but none of the cases cited for that proposition involve possession of a common firearm by a law-abiding citizen in the home. *Id*. at *15.

2. The second reason given by the district court here to apply intermediate scrutiny instead of strict scrutiny is that *Heller* and *McDonald* recognized some "presumptively lawful regulatory measures," such as the prohibition on firearm possession by a felon, and that Justice Breyer's *Heller* dissent suggested that "the majority implicitly . . . rejects [a] suggestion [that strict scrutiny should apply] by broadly approving a set of laws . . . whose constitutionality under a strict scrutiny standard would be far from clear." Decs. 24, quoting *Heller*, 554 U.S. at 688 (Breyer, J., dissenting) (brackets added by district court). Yet to allow a dissenting view about dictum in the majority opinion to morph into a holding is a stretch, especially given that the referenced regulatory measures are arguably fully consistent with strict scrutiny.[6]

The lower court added: "The district court in *Heller II* similarly noted that 'a strict scrutiny standard of review would not square with' the majority's holding in *Heller*." Decs. 24, quoting *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 187 (D. D.C. 2010). But that court rejected strict scrutiny because it incorrectly read *Heller* not to have found the Second Amendment to recognize a fundamental right: "If the Supreme Court had wanted to declare the Second Amendment right a fundamental right, it would have done so explicitly." *Id*. at 187.[7] But *McDonald* explicitly called the right "fundamental" repeatedly, including in its holding that "the right to keep and bear arms is fundamental to *our* scheme

6

7

of ordered liberty," and is "deeply rooted in this Nation's history and tradition . . . ." *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3036 (2010).

3. The third reason given by the district court to apply intermediate scrutiny was that the prohibition here "is akin to a time, place, and manner restriction" such as may be found in First Amendment jurisprudence. Decs. At 25. But the Act does not regulate the time, place, and manner in which the subject firearms may be possessed, but bans them in every time, place, and manner.

The district court further suggested that intermediate scrutiny applies because "alternative channels for the possession of substitute firearms exist," and the ban "applies only to a subset of firearms," but "does not totally disarm New York's citizens . . . ." *Id*. at 26. Citizens may obtain firearms "that lack the features outlawed by the SAFE Act." *Id*. But that was the same argument the District made to justify its handgun ban, to which *Heller* responded: "It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. . . . There are many reasons that a citizen may prefer a handgun for home defense . . . ." *Heller,* 554 U.S. at 630. Reasons also exist why a citizen may prefer a rifle or shotgun, including those with specific features. That other firearms with other features are available proves nothing. Newspapers may not be banned because magazines are available.[8]

The Specific Features at Issue Are Commonly Preferred by Law-Abiding Citizens for Self Defense and Other Lawful Uses

As the district court notes, plaintiffs "argue that a telescoping stock, which allows the user to adjust the length of the stock, does not make a weapon more dangerous, but instead, like finding the right size shoe, simply allows the shooter to rest the weapon on his or her shoulder properly and comfortably. Another outlawed feature, the pistol grip, also increases comfort and stability." Decs. 27. "But Plaintiffs later argue that the banned features increase the utility for self-defense – which is just another way of saying that the features increase their lethality." *Id*. at 28.[9]

8

9

So too, sights on firearms enhance their accuracy and usefulness for self-defense, and in that sense makes them more "lethal," but "arms" by their very definition are "lethal," and that is what the Second Amendment guarantees. The Supreme Court rejected the argument against incorporation of the right into the Fourteenth Amendment based on the idea that "that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety." *McDonald*, 130 S. Ct. at 3045. *See Illinois Ass'n of Firearms Retailers v. City of Chicago*, 2014 WL 31339, *12 (N.D. Ill. 2014) ("whatever burdens the City hopes to impose on criminal users also falls squarely on law-abiding residents who want to exercise their Second Amendment right.").

The district court opined that "the banned features are unusually dangerous, commonly associated with military combat situations, and are commonly found on weapons used in mass shootings." Decs. 29. Of course, so are barrels, sights, triggers, shoulder stocks, and grips. Because they are common features on firearms generally, the banned features are commonly possessed by law-abiding persons for lawful purposes. That is because, as the court notes, "there is not (and cannot be) a dispute that the outlawed features make semiautomatic weapons easier to use . . . ." *Id*. at 31.

The reason that the AR-15 is "the civilian version of the military's M-16 rifle," Decs. 30, quoting *Staples v. United States*, 511 U.S. 600, 603 (1994), is that its essential military feature – full automatic fire – has been removed. What remains, including the barrel, firing pin, pistol grip, etc., are commonly found on civilian firearms and have no military significance.

Pistol grip and thumbhole stock. The pistol grip and thumbhole stock allegedly facilitate "spray firing" from the hip. Decs. 31, citing Bruen Decl., ¶ 19; *Heller II*, 670 F.3d at 1262–63 (quoting Siebel Testimony); *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 685 (2nd Cir. 1996). The cited sources include no evidence other than the assertion, which was an improper finding on summary judgment about a material fact, given Plaintiffs' substantial, particularized evidence to the contrary.

The court failed to distinguish pistol grips on rifles from those on shotguns. New York's only submission on point was the ATF's conclusion that "pistol grips for the trigger hand are prevalent on shotguns and are therefore generally recognized as particularly suitable for sporting purposes." N.Y. Ex. 10, at 12.

Folding and telescoping stocks. Folding and telescoping stocks are said to aid concealability and portability. Decs. 31, citing Bruen Decl., ¶ 18; 2011 ATF Study at 9, attached as Ex. 10); *Richmond Boro*, 97 F.3d at 684–85. The court ignored that New York law elsewhere addresses concealability of long guns by restricting a weapon made from shotgun or rifle with overall length under 26". Penal Law § 265.00(3), § 265.01. Instead of applying a similar standard, long guns with folding or telescoping stocks are banned no matter how long they are in their shortest configuration.

Flash Suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate such. The court noted that a muzzle compensator reduces recoil and muzzle movement caused by rapid fire. Decs. 31. Since recoil and muzzle movement result from the discharge of each shot, they would also be reduced with slow fire. Reducing "kick" to the shoulder and keeping the barrel stable are desirable goals for all legitimate firearm uses. The court fails to suggest why firearms with such muzzle attachments or just threading lose Second Amendment protection.

Semiautomatic shotgun with ability to accept detachable magazine. The district court fails to mention, much less to justify, the ban on semiautomatic shotguns with detachable magazines. The ATF report which New York endorsed noted that shotguns have either tube magazines or detachable magazines, concluding: "In regard to sporting purposes, the working group found no appreciable difference between integral tube magazines and removable box magazines." N.Y. Ex. 10, at 10.

The district court concluded that "New York presents evidence that its regulations will be effective." Decs. 32. Yet New York presented no evidence that any of the "assault weapon" features, other than the pistol grip, has ever been used in a single crime. Nor did it present any evidence that the

crimes committed with rifles with pistol grips involved the alleged spray firing from the hip, or that the lack of a pistol grip would have made any difference.[10]

The district court noted that "the criminal use of assault weapons declined after the federal assault weapons ban was enacted in 1994." Decs. 32. But the crime rate began to decline before the enactment, the "ban" did not ban a single gun that was possessed before the enactment, and crime has continued to fall since the law expired in 2004. "Firearm-related homicides declined 39%, from 18,253 in 1993 to 11,101 in 2011." Bureau of Justice Statistics, *Firearm Violence, 1993-2011*, at 1 (2013).

The district court's statement that "Plaintiffs themselves concede that the banned features increase the lethality of firearms," Decs. 33, is accurate to the extent it means that these features enhance the comfort and accuracy of firearms, but not if it suggests that such features make them more powerful. The court quotes the unsworn testimony of Brian Siebel that the "military features" of "assault weapons," a term with no fixed meaning, are "designed to enhance the capacity to shoot multiple human targets rapidly . . . ." *Id*.; see NY Ex. 29, at 2.[11] Plaintiffs presented sworn testimony utterly refuting such rhetoric.

The court concluded that New York demonstrated "a substantial link, based on reasonably relevant evidence, between the SAFE Act's regulation of assault weapons and the compelling interest of public safety that it seeks to advance." Decs. 33. In fact, New York demonstrated no link whatever between the specific firearm features it bans and any public interest.

The Seven-Round Loaded Limit and the Ten-Round Capacity Limit for Magazines Violate the Second Amendment

The district court correctly invalidated the seven-round loaded limit for magazines under the Second Amendment. Decs. 34-37. Using the same reasoning, the court should have also invalidated the ten-round capacity limit, but upheld it instead. Decs. 33-34.

0
1

The district court found: "It stretches the bounds of this Court's deference to the predictive judgments of the legislature to suppose that those intent on doing harm (whom, of course, the Act is aimed to stop) will load their weapon with only the permitted seven rounds." Decs. 35. But it also stretches the bounds of one's imagination to suppose that those intent on doing harm will load their weapons with magazines with a capacity of only ten rounds.

Noting that *Heller* found the Second Amendment right to be "at its zenith in the home," and "highlighted the right of a citizen to arm him or herself for self defense," the court found that this restriction has "a disturbing perverse effect, pitting the criminal with a fully loaded magazine against the law-abiding citizen limited to seven rounds." Decs. 35. The ten-round capacity limit does the same.[12]

Continuing, the court correctly observed: "New York fails to explain its decision to set the maximum at seven rounds, which appears to be a largely arbitrary number." Decs. 36. So too is ten rounds an arbitrary number. Instead of an arbitrary number test, *Heller* held the test to be what is in common use by law-abiding citizens.

The district court added that "even if a person using a weapon in self-defense needs only a few rounds, and even if that is a rational reason for adopting the law, under intermediate scrutiny there must a 'substantial relation' between the means and the end." Decs. 36. That requires the justification to be "exceedingly persuasive." *Id.*, quoting *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012). The court concluded about the seven-round limit:

> This peripheral rationale, which is possibly meant to protect bystanders when a firearm is being discharged lawfully, or victims of impromptu acts of violence, is largely unsupported by evidence before this Court. It thus fails the more demanding test and must be stuck down.

Decs. 36-37. *See also id.* at 53 ("the purported link between the ban and the State's interest is tenuous, strained, and unsupported in the record.").[13]

2

3

In conflict with the above reasoning, the district court upheld the ban on standard magazines, dubbed "large-capacity," under intermediate scrutiny. Decs. 33-34. The court relied on some opinions and statistics about criminal misuse, and ignored lawful use. [NEED TO REBUT FACTUALLY]

Unconstitutional Vagueness

The district court agreed that the Second Circuit has declined to express a preference for either the "no-set-of-circumstances" or "permeated-with-vagueness" standards for analyzing vagueness claims. Decs. 38-39, quoting *United States v. Rybicki*, 354 F.3d 124, 132 n.2 (2d Cir.2003) (*en banc*). The court stated that "[i]t is unclear whether the challenged provisions here lack a *mens rea* requirement to a degree that would trigger the latter test," but held that the outcome would be the same under either standard. Decs. 39.

Yet the only precedent on point held that a defendant's knowledge of the specific characteristics of the relevant banned weapons need not be proven.[14] That renders the Act "a trap for those who act in good faith." *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 534 (6th Cir. 1998), quoting *Colautti v. Franklin*, 439 U.S. 379, 395 (1979).

Instead of explaining why specific terms are not vague, the court relied on the conclusory statements in *Richmond Boro*, 97 F.3d at 683-85, which also failed to make such explanations.

Conspicuously protruding pistol grip. Despite no objective measurements in inches, the court said the term was not vague based on "depictions of rifles" with such grips. Decs. 40. The court acknowledged that *Richmond Boro* assumed that the gun ban at issue "did not implicate a 'fundamental right,'" but the result was the same. *Id*. Nor did the result change "even under the 'permeated-with-vagueness' standard" articulated after the *Richmond Boro* decision. *Id*. at 41.

Threaded barrel designed to accommodate a flash suppressor. The court found this not to be vague "when the statute is applied to firearms advertised to include parts identified as

bayonet mounts, flash suppressors, barrel shrouds, or grenade launchers . . . ." Decs. 41, quoting *Richmond Boro*, 97 F.3d at 683. This ignores the existence of rifles with barrels threaded for other attachments, such as muzzle brakes (which the court held not to be restricted), not to mention that a person in possession of a rifle with a threaded barrel but no restricted attachment would have no idea what advertisements *Richmond Boro* was referring to.

Ten-round magazine limit applied to tubular magazine. The court found that "this provision is only possibly vague when applied to a specific use," but is not vague when applied to nontubular magazines. Decs. 42. The court failed to explain why it would not decide whether the term was vague when applied to tubular magazines.

The five-round limit for shotguns. The court said the term was not vague "[w]hen applied to a standard-length shell." *Id*. at 42. But a "standard" length does not exist, as 12 gauge shells come in lengths from 2" to 3 1/2". *Peoples Rights Organization*, 152 F.3d at 536 & n.15.

Magazines that can be readily restored or converted to hold more than ten rounds. The district court found itself "sympathetic to Plaintiffs' concerns," but failed to articulate any standard for the meaning of "readily" or how a person would know a magazine to be susceptible to such restoration or conversion. Decs. 43. Instead, the court stated that plaintiffs presented no evidence of "any confusion on this issue in the many years of its existence" since the 1994 federal ban. *Id*. But the vagueness is facial, and no obligation exists to analyze prior enforcement.

The "and if" clause of § 265.36. The district court held: "Plaintiffs correctly note that the clause beginning with 'and if' is unintelligible." Decs. 44. The court explained: "The error is more substantial than a mere mistake in grammar. Rather, the 'and if' clause is incomplete and entirely indecipherable; in short, it requires an ordinary person to 'speculate as to' its meaning." *Id*. (citation omitted). Accordingly, the clause was stricken as unconstitutionally vague. The stricken portion of § 265.36 is shown below:

> It shall be unlawful for a person to knowingly possess a large capacity ammunition feeding device manufactured before September thirteenth, nineteen hundred ninety-four~~, and if such person lawfully possessed such large capacity feeding device before the effective date of the chapter of the laws of two thousand thirteen which added this section, that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition~~.

The consequence of striking the clause is that it may be applied to a person in possession of a magazine manufactured before 1994, without anything further from the deleted portion. This makes such person eligible for the lenient treatment in § 265.36, which may include dismissal of the charge or potentially a misdemeanor, instead of the felony violation in § 265.02(8).

Muzzle "break." The district court noted that "a muzzle brake reduces recoil," *id*. at 44, which is a positive feature for any gun owner. The Act, by contrast, restricts muzzle "breaks." N.Y. Penal Law § 265.00(22)(a)(vi). New York argued that this was an oversight in drafting, but "it has provided no evidence suggesting that this was the legislature's intent." Decs. 44-45. "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160 (1990). "Legislatures and not courts should define criminal activity." *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). The district court concluded:

> Of course here, the word "break" has its own meaning, distinct from its homophone "brake." And there is no dispute that there is no accepted meaning to the term "muzzle break." Both sides agree that it is, quite simply, meaningless. . . . All references to muzzle "break" must therefore be stricken.

Decs. 45.

"Version" of an automatic weapon. "This Court also finds this language to be excessively vague, as an ordinary person cannot know whether any single semiautomatic pistol is a 'version' of an automatic one." Decs. 45. The court further noted: "The statute provides no criteria to inform this determination, and, aside from the largely irrelevant citations to case law, New York fails to point to any evidence whatsoever that would lend meaning to this term." *Id*. at 46. The term thus failed to

provide fair warning and encouraged arbitrary and discriminatory enforcement, and was stricken as vague. *Id*.

Manufactured weight of 50 ounces for pistols. The district court found "manufactured weight" to have "a plain and commonly-accepted meaning." Decs. 46. It ignored that a person has no way to know the weight when originally manufactured, as intervening changes in parts may cause a pistol to weigh less than 50 ounces.

Commercial transfer. The district court upheld the ban on the "commercial transfer" of ammunition other than through a firearm dealer or registered ammunition seller as having "an ordinary and commonly-accepted meaning." Decs. 46. But it is unclear whether the term applies to transfers other than retail sales, such as a hunter in a duck blind paying for a few shells from another hunter.

In sum, the court held that "three aspects of the law – the 'and if' clause of N.Y. Penal Law § 265.36, the references to muzzle 'breaks' in N.Y. Penal Law § 265.00(22)(a)(vi), and the regulation with respect to pistols that are 'versions' of automatic weapons in N.Y. Penal Law § 265.00(22)(c)(viii) – must be stricken because they do not adequately inform an ordinary person as to what conduct is prohibited." Decs. 53. The same holdings should have been applied to the other challenged provisions.

The Dormant Commerce Clause

The district court correctly held that the Commerce Clause claim challenging the ammunition restrictions, which became effective on January 15, 2014, was ripe. Decs. 47-49.[15] Pre-enforcement review is warranted where, as here, a person is "faced with a choice between risking likely criminal prosecution entailing serious consequences, or forgoing potentially lawful behavior." *Id*. at 48, quoting *Thomas v. City of New York*, 143 F.3d 31, 35 (2d Cir. 1998). The claim raises "a purely legal question," and "the impending effective date for the law imposes a direct and immediate dilemma, as Plaintiffs must prepare to comply with the law's new requirements." Decs. 49.

On the merits, the district court upheld the requirement that a citizen must purchase ammunition in a face-to-face transaction from a New York business. The court denied that this creates a monopoly for New York dealers because it "it eliminates the direct sale of ammunition to New Yorkers no matter the seller's place of business." *Id*. at 50. But this ignores that only New York businesses are eligible to transfer ammunition.

The court acknowledged Plaintiffs' argument that the goal "can be achieved through other means (such as electronic background checks)," but faulted Plaintiffs for not offering "evidence" on point. *Id*. at 51. But that was New York's burden in the first instance, as the "clearest showing" is required "to justify discriminatory state regulation . . . ." *Granholm v. Heald*, 544 U.S. 460, 490 (2005). In *Granholm*, the Second Circuit "recognize[d] that the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol." *Id*. at 471, quoting 358 F.3d 223, 238 (2nd Cir. 2004).

It is clear as a matter of law that out-of-state businesses could be electronically connected to the New York State Police's background check system in exactly the same manner as in-state businesses. Another alternative would be the method recently adopted by Connecticut, which requires an ammunition purchaser to provide copies of certain firearm licenses or certificates and an identification, and allows an out-of-state firm to ship ammunition to the purchaser as long as the shipping address matches that on the identification.[16]

"The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable." *Granholm*, 544 U.S. at 492-93. No such evidence exists here.

Conclusion

The district court correctly upheld standing to challenge the firearm and magazine bans under the Second Amendment. It correctly stated *Heller*'s common-use test, finding that the banned firearms

and magazines are in common use for lawful purposes. Without any particularized evidence about the features banned on firearms, the court incorrectly found that, under intermediate scrutiny, such firearms and magazines may be banned without regard to their common use.

The court correctly upheld standing and stated the standards for vagueness, declaring three provisions vague. It upheld the other challenged provisions based on conclusory allegations or without any mention.

The court correctly held the challenge to the ammunition restrictions under the Commerce Clause to be ripe, and upheld Plaintiffs' standing. It upheld the restrictions on the merits without evidence of adequate alternatives to the discrimination against out-of-state sellers.