2ND AMENDMENT COALITION

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The State's Case in *NYSRPA vs. Cuomo*: What the State Wants You to Believe About the [UN]SAFE Act

2nd Amendment Coalition
***by* Paloma A. Capanna,**
Attorney & Policy Analyst

www.2ACoalition.org

316 Irish Road • Colden, NY 14033 •
(716) 941-3286

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Foreword

by Stephen J. Aldstadt, President, SCOPE

The Second Amendment is under siege. Ratified in 1791 as part of the Bill of Rights, it stood, solemnly and quietly, as the guardian of all other of our civil liberties for more than 200 years.

But, somewhere in the late 1980s, our national culture started to shift. First, there was an import ban. Then, there was an "assault weapons" ban. Select states from California to New York chipped away at the rights of gun owners. Those who thought that the *Heller* decision in 2006 would enshrine our Second Amendment rights as "fundamental" and that the *MacDonald* decision in 2008 would halt state action turned out to be dreadfully wrong.

In 2013, New York, Connecticut, Maryland, and Colorado passed sweeping legislation that dealt a blow to the Second Amendment. Major litigation was launched in these states, and the *NYSRPA vs. Cuomo* lawsuit took the lead with an early District Court set back that was followed by comparable rulings in Connecticut and Maryland.

It became apparent to many in 2013 that a new strategy was called for to defend the Second Amendment, in light of which the Second Amendment Coalition Resource Center was launched in July 2014. Groups need to interact with each other. Members need to become a unified force. Industry, FFLs, and every gun owner who believes him or herself to be unaffected must do their part.

This White Paper is the first of what will be a series, critically examining government claims about firearms and gun control. It focuses upon the State's Brief to the Second Circuit Court of Appeals in the *NYSRPA vs. Cuomo* case, attacking the worst of the misleading assertions about what the State calls "assault weapons."

Make no mistake about it: New York State is determined to freeze and phase out as many firearms as possible, including what we know as the “modern sporting rifle” built on the AR platform.

We invite you to join us in the protection of the most important of our civil liberties, the right to bear arms under the Second Amendment of the United States Constitution.

Stephen J. Aldstadt, President
Shooters Committee on Political Education

1. EXECUTIVE SUMMARY

On January 15, 2013, New York Governor Andrew Cuomo signed sweeping legislation into law that became known as the "SAFE Act." Within two months, a lawsuit was filed in federal court, *NYSRPA vs. Cuomo*. By December 31, 2013, U.S. District Court Judge Skretny had issued a Decision and Order based upon a 2,500-page record. The Decision and Order of Judge Skretny is now on appeal to the Second Circuit Court of Appeals, the Brief from the Plaintiffs and the Brief from the State have been submitted, and the case could be heard for oral arguments by early January 2015. On August 21, 2014, the Second Circuit Court of Appeals ordered that the NY lawsuit be heard in tandem to a similar lawsuit originating in Connecticut. A third federal lawsuit is also pending from Maryland to the Fourth Circuit Court of Appeals. These cases could reach the U.S. Supreme Court, by spring of 2015.

Simply put, at issue is whether the firearms and magazines prohibited by the SAFE Act will be found to be protected under the Second Amendment of the United States Constitution for defense of family and home, as well as individual use and enjoyment.

This White Paper examines the arguments made by the State in its Brief of July 29, 2014 to the Second Circuit Court of Appeals with a particular focus on its depiction of various firearms as "assault weapons." The State arguments center around themes of federal and state statutes that went unchallenged in the courts since 1989, a blog called a "database" put together by Mother Jones, a retired police chief who did not examine the firearms used in a referenced criminal incident, and a researcher who abandons his own research findings to support the SAFE Act.

The State Attorneys write in a manner that is fast and lose – the same style they used in drafting their witness affidavits. The State appears to be getting away with its approach

because this is a lawsuit being determined "on papers" and not in a trial setting. This case does not involve live witnesses, cross-examination, or rulings on admissibility. Instead, there are motion papers that convert unchallenged written allegations into "evidence," pursuant to the Rules of Federal Civil Procedure.

The State's arguments are consistent with those pushing for gun control since the 1980s: it's a voice driven by fearmongering, not facts. Now, the State is using that hysteria in submissions to judges. Through its use of flamboyant language, will the State be able to divert the attention of judges away from a critical evaluation of the record of the case?

2. A PRIMER – ENGAGE IN THIS ANALYSIS

To go deep into an analysis of the State's Brief to the Second Circuit in the *NYSRPA v. Cuomo* lawsuit, you're going to need a primer. It's fascinating and it's not complicated – so don't be put off by this opening section. We're writing it into this White Paper because it's not the kind of basic information you would be able to easily pull through an Internet search or find on the nightly news.

We'll start with a short walk through the following (1.) the NY SAFE Act definition of an "assault weapon;" (2.) the lawsuit that was filed in the federal court; (3.) the District Court decision was made based on motion papers; (4.) the conversion of motion papers used in the District Court, to the Record on Appeal to the Second Circuit Court of Appeals; and, (5.) the questions that will be determined by the Second Circuit Court of Appeals.

2a. The NY SAFE Act Definition of "Assault Weapons"

The NY SAFE Act modified the Penal Law definition of "assault weapon," which was first enacted in 2000. The definitional text of it is provided on the next page; exceptions and exemptions are omitted. The current version of NY Penal Law §265.00(22) was referred to as a "one feature test," compared to its predecessor statutory version that is called a "two feature test."

There are distinctions between the NY definition of "assault weapon" and the statutory definitions found in CT and MD. There are further variations in other states and with the one piece of now-expired federal legislation. For those states using both a descriptive definition and a list of prohibited or permitted firearms, there are variations from one state to the next, even as to the specific manufacturer and model.

You don't need to turn yourself into a lawyer and start cross-referencing these provisions, but we do want you to be alert that whenever you see the word "assault weapon" you need to ask "by which definition?"

2b. A Recap on the Enactment of the SAFE Act – January 2013

The "SAFE Act" showed up on the afternoon of Monday, January 14, 2013 when Governor Cuomo issued a "Message of Necessity," calling for an immediate vote, first by the NYS Senate, then by the NYS Assembly. In the absence of this step by a governor, the NYS Constitution requires Bills to be marked and available to legislators for three days prior to a vote.[1] This is known as the "three day desk rule."

NY Penal Law §265.00(22)(A)-(D), "**Assault weapon**" means

(A) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least one of the following characteristics:

(I) a folding or telescoping stock;
(II) a pistol grip that protrudes conspicuously beneath the action of the weapon;
(III) a thumbhole stock;
(IV) a second handgrip or a protruding grip that can be held by the on-trigger hand;
(V) a bayonet mount;
(VI) a flash suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator;
(VII) a grenade launcher; or

(B) a semiautomatic shotgun that has at least one of the following 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) a fixed magazine capacity in excess of seven rounds;
(V) an ability to accept a detachable magazine; or

(C) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least one of the following 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 fifty ounces or more when the pistol is unloaded; or
(VIII) a semiautomatic version of an automatic rifle, shotgun or firearm;

(D) a revolving cylinder shotgun

(*N.B.:* this Penal Law section continues through subparagraphs E through H.)

On January 14, 2013 at approximately 10 pm, the NYS Senate Rules Committee voted on the Bill,[2] and, approximately one hour later, the full NYS Senate approved SB 2230 by a vote of 43-18.[3] The next day, the NYS Assembly approved the companion Bill, AB 2388, by a vote of 104-43.[4]

The 39-page Bill contained new provisions and amended existing ones in the Penal Law, Criminal Procedure Law, Correction Law, Family Court Act, Domestic Relations Law, Executive Law, General Business Law, Judiciary Law, Mental Hygiene Law, and the Surrogate's Court Procedure Act.[5] It was signed into law by Governor Cuomo on January 15, 2013.[6]

2c. The NYSRPA v. Cuomo Lawsuit – March 2013

The *New York State Rifle and Pistol Association v. Cuomo* lawsuit was filed on March 21, 2013 in the District Court for the Western District of New York.

There are three levels to the federal court system: the District Court, the Circuit Court of Appeals, and the U.S. Supreme Court. The appeal of a decision from the District Court to the Court of Appeals is, essentially, "as of right," meaning that it can be taken without needing permission.[7] By contrast, to reach the U.S. Supreme Court, a party must file a motion to request selection of the case by the high court.[8] Only about 75 cases out of approximately 10,000 petitions per year are determined by the U.S. Supreme Court[9] out of the hundreds of thousands that begin at the District Court level.[10]

New York 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; Batavia Marine & Sporting Supply; William Nojay, Thomas Galvin, and Roger Horvath,

Plaintiffs

vs.

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; Lawrence Friedman, District Attorney for Genesee County; and Gerald J. Gill, Chief of Police for the Town of Lancaster, New York,

Defendants

The *NYSRPA v. Cuomo* lawsuit was determined at the District Court level by Judge Skretny. His decision was based upon motion papers submitted by the attorneys that included various attachments. Some attachments were sworn "Declarations" (like an "affidavit"); others were simply photocopies of blogs and newspaper articles. All of the motions and attachments constitute the "Record on Appeal." It is nearly 2,500 pages long, presented in nine volumes.[11]

Decisions are routinely made based upon motions, including in cases involving questions of constitutional law. Judges and lawyers are guided by the Federal Rules of Civil Procedure, including the following rule applicable to evaluate the State's Motion for Summary Judgment:

> Rule 56(c)(4) – "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."

Under FRCP R.56(c)(4), the lawyers are supposed to restrict their written submissions to that which would be admissible during a trial – even if the parties to a lawsuit ask the court to make a decision on motions without live testimony, cross-examination, objections, or rulings on admissibility.

If you take only one thing out of our analysis let it be this: the State's submissions through motion would be largely inadmissible at trial.

Judge Skretny issued a Decision and Order (dated December 31, 2013)[12] that contained four essential rulings:

- that although "assault weapons" and "large capacity magazines" are in common use, regulation of these weapons is substantially related to the achievement of an important governmental interest and does not violate the Second Amendment;

- that a requirement that ammunition sales be conducted in person does not unduly burden interstate commerce;
- that the seven round limit is an arbitrary restriction that impermissibly infringes Second Amendment rights; and,
- that three provisions of the SAFE Act are unconstitutionally vague because an ordinary person must speculate as to what those provisions command or forbid.

The Plaintiff's lawyers then filed their Notice of Appeal to the Second Circuit Court of Appeals on January 3, 2014, and they framed the questions for appellate determination as follows:

1. Whether New York's ban on commonly possessed firearms that the State labels "assault weapons" violates the Second Amendment?
2. Whether New York's ban on standard capacity ammunition magazines that the State labels "large capacity" magazines violates the Second Amendment?
3. Whether certain provisions of the SAFE Act are unconstitutionally vague?

On April 29, 2014, the Plaintiffs' lawyers submitted their Brief to the Second Circuit Court of Appeals.[13] On July 29, 2014, the lawyers for the State submitted their Brief. The Plaintiffs' lawyers now have until September 29, 2014 to reply to the State's Brief.

For purposes of this White Paper, we're focusing our analysis on the State's arguments relative to "assault weapons" in its appellate Brief. Our presentation will focus on the language used by the State's lawyers and the pages of the Record on Appeal emphasized by them. Our goal is to provide you with a sufficient level of analysis so that you, too, can see that the State's case is literally "paper thin."

3. ANALYSIS OF THE STATE'S PRIMARY CLAIMS

In its Brief, the State asserts that the SAFE Act "…restricts assault weapons and large-capacity magazines, which are not within the core protections of the Second Amendment right…"[14] The State goes on to say, "The assault weapons and large-capacity magazines regulated by the SAFE Act are precisely the kinds of weapons that can be banned, or restricted, under *Heller*."[15]

These assertions by the State amount to legal fiction – at this point. Justice Scalia in the 2008 majority opinion of *Heller* specifically left for another day where the line will be drawn on the types of firearms that a government can restrict, referencing thus far only those firearms restricted since 1934 through the National Firearms Act.[16] *NYSRPA vs. Cuomo* may become the second half of *Heller* in that it could become the decision through which the U.S. Supreme Court draws the line at or more restrictively than NFA firearms.

The State's arguments on appeal can be summarized as follows:

- "assault weapons" pose a disproportionate risk to public safety and should be banned, registered, and phased out; and,
- the SAFE Act creates an easier enforcement mechanism by closing loopholes and resolving ambiguities.

In order to make its argument, the State repeatedly relied in its Brief on just a few pages from the massive Record on Appeal. It's where we'll focus our analysis, as well.

It bears noting, from the outset, that nowhere in the State's Brief does it present primary source information for any of the criminal incidents that it references. Instead, the State cites to and includes copies of newspaper articles, blogs, and outright witness speculation. Without this core evidence, the State fails to make a *prima facie* case that a ban on "assault weapons" is at least reasonably calculated to improve public safety by

eliminating firearms used in mass shootings. The State makes not even one such allegation in admissible form in the entirety of its submission.

So how did the State claim to support its arguments in its Brief to the Second Circuit Court of Appeals? Let's go through it, together.

3a. The Mother Jones "Database" – It's a Blog

The State and its witnesses rely heavily on a write-up on the Mother Jones website that purports to be a "database." In his Decision, District Court Judge Skretny characterized it as "…an exhaustive study of mass shootings in America…"[17] Judge Skretny concluded "Studies and data support New York's view that assault weapons are often used to devastating effect in mass shootings," referring to the Declarations that cite to Mother Jones.[18]

You can review the Mother Jones piece online for yourself,[19] and you'll see that it is in the nature of a blog, to which revisions are made and apologies for errors are issued. The Mother Jones "database" is just a chart, allegedly itemizing 62 criminal incidents from 1992 – 2012. One of the columns of the chart indicates that 20 firearms used in the listed criminal incidents could be characterized as "assault weapons," as the term was used in U.S. Senate Bill 150 (2013) drafted by U.S. Senator Diane Feinstein – a Bill that never reached a federal legislative vote.[20]

If you don't know "Mother Jones," here is how it describes itself on its website:

> "Mother Jones is a nonprofit news organization that specializes in investigative, political, and social justice reporting. We currently have two main "platforms": (*sic*) an award-winning bimonthly national magazine (circulation 240,000), and a website featuring new, original reporting 24-7. (In the past we've had a radio show and TV specials; theme parks are in the conceptual stage.)"[21]

Is this Mother Jones chart probative evidence of the firearms used in mass shootings? No, it's not, and it absolutely would not be admissible in a trial setting. Even so, the State attached it to its motion papers, Judge Skretny accepted it at face value, and now Mother Jones is part of the State's argument to the Second Circuit Court of Appeals.

Let's look into the Mother Jones blog and do a little analysis.[22]

Mother Jones claims that its blog is a piece of "investigative journalism," including a "database" of mass shootings, guns possessed by the criminal, whether the gun was loaded with a "large capacity magazine," and whether the gun was an "assault weapon"[23] (as defined by Sen. Feinstein's 2013 Bill).

The first problem is that the Mother Jones blog says it itemizes 62 criminal incidents, but the printout only shows 49.[24] Likewise, the printout does not show an itemized list of "guns possessed;" it shows a clipped column with descriptions like "10mm Glock, 9mm SIG" and "two .45-caliber semiaut." Most of the column titled "guns with high-capacity magazines" simply says "unknown." And the column headed "Assault weapons per Feinstein bill" claims 11 firearms would qualify; the blog says 20 firearms would qualify. It is not possible to reconcile the claims made in the Mother Jones blog against its own chart as it appears in the Record on Appeal. It is equally impossible to independently evaluate the claims made about whether a particular firearm meets the definition of a Sen. Feinstein "assault weapon."

There is not one instance in which Mother Jones references primary source materials from law enforcement agencies, and there is certainly nothing to indicate that it conducted any independent interviews or evidence reviews.

Why does all of this matter?

The State's witnesses rely upon the Mother Jones blog when making sworn statements to the Court. In a trial setting, not only would the Mother Jones blog be inadmissible, so too the allegations from the State's witnesses would also be inadmissible. The Mother Jones blog is hearsay and the witness allegations are double hearsay. "Hearsay" is a legal term of art, which, in its most simple form means that a witness cannot walk into a courtroom and testify about what someone else allegedly said. "Double hearsay" is hearsay upon hearsay. Yes, there are exceptions to the hearsay rule that can make hearsay admissible, but none apply to these write-ups or to the blog.

HEARSAY • \'hir-,sā\ • noun

The declarant does not make while testifying at the current trial or hearing; and, it is offered to prove the truth of the matter asserted in the statement.

Federal Rules of Evidence §801(c)

Even if the author of the blog wanted to testify in a trial setting about what is listed in the table, he wouldn't be permitted to do so. The author is relying upon what other writers published in their respective media outlet, and he doesn't have any primary source information, such as police photographs of firearms used in the commission of the crimes. Further, the writer doesn't present himself as having any qualifications as a firearms expert, and so even if he obtained police photographs of firearms used in the listed crimes, he wouldn't be permitted to comment upon the manufacturer, model, features, accessories, or any after-market modifications. He wouldn't be permitted to make conclusions about whether a particular firearm was or was not an "assault weapon," by any definition.

FOUNDATION • \faun-'dā-shən\

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

Federal Rules of Evidence §602

And yet, this Mother Jones blog is what is relied upon by the State's Attorneys in its Brief, as well as two of its key witnesses, Mr. Franklin Zimring and Ms. Lucy Allen. The District Court Judge in his Decision and Order expressed his reliance upon Mother Jones,[25] the Declaration of Mr. Zimring (relied on Mother Jones),[26] and the Declaration of Ms. Allen (who also relied on Mother Jones)[27]. It's not just that the State is making an argument; it was accepted by the District Court and it could be accepted by the higher court, as well.

Mr. Franklin Zimring is self-described as a professor of law at University of California, Berkeley, who has "…studied the relationship between firearms and violence, strategies of firearms control, and patterns of gun commerce and civilian gun usage since 1967."[28]

There are only three footnotes in Mr. Zimring's Declaration, one to the *Heller* case and two to Mother Jones. Mr. Zimring cites the Mother Jones blog as his source of information for "mass shooting episodes," including his assertion that of the incidents listed for the year 2012, "…the weapons used would have been prohibited by the SAFE Act…"[29] Mr. Zimring also cites the Mother Jones blog as his source of information for the sources of guns and ammunition "used in most mass shootings" as being "the ordinary channels of commerce."[30]

The Mother Jones blog does not provide a complete list of firearms used in mass shootings, nor does it provide a sufficient level of information about such firearms to make any analysis of whether a firearm could be characterized as an "assault weapon" under any statute. Mr. Zimring does not cite any primary source materials. Mr. Zimring does not claim to have any firearms experience that would allow him to conduct analysis of whether a particular firearm meets a particular definition of an "assault weapon." As a law professor, he could have engaged in a comparison of the various legislative definitions of "assault weapons," but he does not do this, either.

The allegations of Mr. Zimring's Declaration would not be admissible as live testimony in a trial setting because it is based upon hearsay and lacks foundation. Instead, unfortunately, the District Court Judge relied upon Mr. Zimring's Declaration in the Decision and Order, and this creates a heightened risk that the Circuit Court of Appeals does the same thing.

Another of the State's witnesses cited to by the District Court Judge is Ms. Lucy Allen, who relies upon the Mother Jones blog for her sworn statement to the Court.[31] Ms. Allen presents herself as a Senior Vice President of NERA Economic Consulting, providing "practical economic advice related to highly complex business and legal issues arising from competition, regulation, public policy, strategy, finance, and litigation."[32] She states she has a B.A. from Stanford University, an M.B.A., an M.A., and a M.Phil. from Yale University, and that she was an Economist on the Council of Economic Advisers for both President Bush and President Clinton.[33]

Ms. Allen's analysis of mass shootings uses only two sources: the Mother Jones blog and a publication of the Citizens Crime Commission of New York City.[34] Ms. Allen states that she "updated" the Mother Jones materials to create her own "data set," which she attaches as "Table 1: Combined Mass Shootings Data (1982 – June 15, 2013)."[35,36] It includes four New York mass shootings from 1992 to 2013, only one of which has a citation as to its source.[37] This chart does not list any individual firearms by name or model.

Ms. Allen goes on to make allegations about "large capacity magazines" and the number of shots fired, even though she adds a footnote "For many of the mass shootings, the data does not indicate whether a large-capacity magazine is used."[38] Ms. Allen likewise makes allegations about firearms being legally obtained prior to criminal use in mass shootings, relying upon the Mother Jones blog.[39]

Ms. Allen, like Mr. Zimring, is willing to use the items listed in the Mother Jones chart as if it were a properly constructed dataset built from primary source materials. But, it has no research integrity.

So what is really going on in the Mother Jones blog?

The Mother Jones blog is a vehicle for a liberal media outlet to present some limited news reports to support its use of words like "If [the Feinstein Bill] were to pass, the bill would outlaw highly lethal firearms that dozens of mass shooters in the United States have used to unleash carnage."[40] And, "Law enforcement officials we consulted[41] generally considered that to be a reasonable approach for distinguishing between firearms used for sport or self-defense and military-style weapons designed to maximize body counts."[42] The blog uses words like "slaughter," "daily gun violence," "casualties in street violence."[43]

Wouldn't you think that a true data compilation would be the first thing that any legislative body would compile prior to publicly debating gun control legislation?

What's going on here in the State's Brief and Record on Appeal is simple. The State doesn't present a true analysis because it doesn't exist in the NY legislative record for the SAFE Act. The NYS Legislature did not commission it, did not cite to anything like it during the floor comments prior to the vote. And neither did the U.S. Congress, prior to enacting the Assault Weapons Ban.

The District Court Judge could have ruled that in the absence of any probative data on the relationship between mass shootings and gun control legislation it would deny the State's request for a summary judgment ruling in favor of the constitutionality of the SAFE Act. The State failed to make out its first argument; the ruling would have been appropriate. And yet, Judge Skretny used the Mother Jones blog as part of its rationale to uphold the SAFE Act as constitutional in scope and application.

While it is typical for judicial decisions to be rendered on motions, it is abnormal for a decision to be anchored to an inadmissible and non-probative write-up from the Internet. The District Court Judge did just that when he ruled in favor of the State in the Decision and Order that is now on appeal.

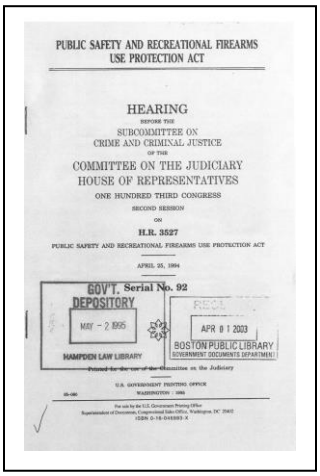
So just who did conduct any actual research into "assault weapons" and whether legislative restrictions on gun ownership have any direct correlation to a reduction in gun violence? Essentially, two people in the United States can jointly claim that credential and one of them showed up for the State. Unfortunately, in spite of his original 1998 research being "inconclusive," he supported the SAFE Act anyway.

3b. Koper's Inconclusive Research – He Doesn't Stand By Himself

There has only been one piece of federal legislation to use the term "assault weapon" and that was the "Public Safety and Recreational Firearms Use Protection Act,"[44] a subtitle from the "Violent Crime Control and Law Enforcement Act of 1994."[45] This former federal statute defined the term "assault weapon" in two ways: by firearm manufacturer and model, and by features. The 1994 Assault Weapons Ban contained a grandfathering provision and contained a 10-year sunset provision. It expired in 2004. It was not extended. And, the efforts failed in 2013 by Sen. Feinstein to enact a new ban.

In 2000, New York passed a state-level version of the 1994 federal legislation.[46] It included NY Penal Law §265.00(22), the predecessor two-feature test to the current one-feature test. The New York year 2000 legislation did contain a grandfathering provision; it did not, however, contain a sunset provision.

The State in its Brief represents that Congress conducted "five years" of hearings prior to passage of the 1994 Assault Weapons Ban.[47, 48] While it is true that various earlier versions of an "assault weapons ban" were in various stages across a five-year period, there was only one (1) partial day of testimony preceding passage of the 1994 Assault Weapons Ban.[49] In its Brief, all references by the State's Attorneys to testimony preceding the adoption of the 1994 Assault Weapons Ban are quotes taken from the transcript of a single, partial day of hearings on April 25, 1994 before 13 Members of the House of Representatives, Subcommittee on Crime and Criminal Justice, under the auspices of the Committee on the Judiciary,[50] Sen. Schumer (NY), Chairman, presiding.[51]


PUBLIC SAFETY AND RECREATIONAL FIREARMS USE PROTECTION ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON
CRIME AND CRIMINAL JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRD CONGRESS
SECOND SESSION
ON
H.R. 3527
PUBLIC SAFETY AND RECREATIONAL FIREARMS USE PROTECTION ACT

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WASHINGTON : 1994

What you need to understand about the "testimony" that day on the Hill is that it was all voluntary in nature. No one was under subpoena. It was not part of a special prosecutor's investigation. Members of U.S. House of Representatives did not ask questions of the witnesses. Essentially, people came into the room, gave a verbal statement, submitted any written materials, and went back out of the room. The transcript is 282-pages. The individuals who spoke were both pro and anti-gun control. Nearly every word spoken was based upon personal opinion with no scientific or primary source materials in support or in tandem.

Out of that one day of personal statements, the House Majority (Democrats) signed off on a "Background" section to the legislation.[52] The minority party (the Republicans) could only insert a "Dissenting Views" statement, which in this instance amounted to a bit over one page.[53] The Majority statement is a fairly hysterical opinion piece using words like "menace,"[54] "lethality,"[55] "carnage,"[56] "slaughter,"[57] and "drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder."[58]

The State, in its Brief, repeatedly quotes from the 1994 Majority statement, making it sound as if Congress had actually conducted scientific research in a laboratory. It did not. And the "quotes" used by the State tend to be words quilted together from the Majority statement without going back to the actual testimony of the individual. Because the Majority statement tangles up the words of the individuals, the State's Attorneys take it even further away from consideration of the person who spoke, their qualifications, and the admissibility or probative value of their opinion.

Let's look at one sentence from the State's Brief as an example – a sentence that was also quoted by Judge Skretny in his District Court Decision and Order.[59] The State's Attorneys wrote:

> "This evidence demonstrated that "{[t]he net effect of these military combat features is a capability for lethality – more wounds, more serious, in more victims – far beyond that of other firearms in general, including other semiautomatic guns."[60]

This sentence is found in the House Majority statement, where it is footnoted to a Dr. David Milzman, then Associate Director of Trauma Services at Georgetown University Medical Center.

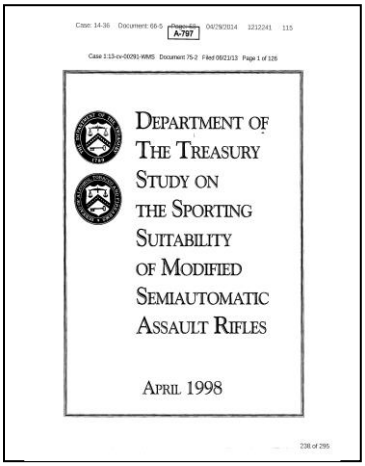
Dr. Milzman's delivery on April 25, 1994 to the Subcommittee belies any firearms expertise. For example, he starts with "First, that assault weapons, by their very nature of high-velocity missiles – or bullets, as commonly referred to – fire in automatic or semiautomatic fashion."[61] And he makes clear his position that "…such horrible weapons of destruction serve no public good and have no place in a civilized society."[62]

What is particularly interesting about Dr. Milzman's delivery is that he expressly declines to provide any "statistical data," including any scientific data on "the increased

incidence of assault weapon injuries and increasing prevalence of these assault weapons in the hands of young persons involved in organized crime and narcotics crime cases."[63]

Dr. Milzman's presence before a Congressional Subcommittee on the eve of passage of the 1994 Assault Weapons Ban added nothing more than personal opinion – however eloquently stated. These words in a trial setting would only amount to one man's narrative about his personal experience, treating victims of gunshot wounds. It would have no relevance to questions about the specific types of firearms used in the commission of mass shootings – which remains the burden that the State must overcome and does not.

We can illustrate this same problem with the State's claims around the 1989 ATF Working Group Report.


DEPARTMENT OF THE TREASURY
STUDY ON THE SPORTING SUITABILITY OF MODIFIED SEMIAUTOMATIC ASSAULT RIFLES
APRIL 1998

There have been four ATF Working Groups, 1968, 1989, 1998, and 2011. Each group was brought together different questions. The 1989 ATF Working Group was called together in response to a temporary suspension of the import of several makes of rifles that were determined to be "…semiautomatic versions of true selective fire military assault rifles."[64] The 1989 Report[65] reflected upon the import statute term of a "sporting purposes,"[66] eventually resulting in ATF Form 4590, "Factoring Criteria for Weapons."[67] From the time of the 1968 Gun Control Act until this 1989 Report, the Firearms Evaluation Panel had focused upon evaluating handguns under the "sporting purposes" test.[68] There was also a pair of ATF Rulings in 1984 relative to shotguns.[69]

The methodology of the 1989 ATF Working Group included the use of surveys and a review of advertising and marketing materials.[70] Here's one example of what the Working Group did with the responsive information:

> "The recommendations of editors were contradictory. One editor pointed out that what made the assault rifle successful as a military weapon made the semiautomatic version totally unfit for any other use. On the other hand, another editor stated that semiautomatic rifles had certain advantages over conventional sporting rifles especially for the physically disabled and left-handed shooters. While this may be true, there appears to be no advantage to using a semiautomatic assault rifle as opposed to a semiautomatic sporting rifle."[71]

The data set for this comment is a total of two magazine editors (unnamed), articulating two opposing opinions. The Working Group simply tosses out the input that doesn't fit the conclusion it intends to draw.

Keep in mind that the White House issued the import suspension first and then convened the 1989 ATF Working Group with the express purpose of finding support for a permanent ban. Comments among White House Staff at the time reveal this true purpose in convening the ATF Working Group:

> "The final track, which is expected to take 120 days, will focus on the actual purpose and use for which these weapons are acquired. This process will include a nationwide survey of the buyers and users of these weapons. This track offers the best chance for acquiring information supporting modification of the sporting purposes test to prohibit the importation of these weapons."[72]

At the same time, the ATF General Counsel's Office was scrambling to complete a Declaration to be signed by the ATF Director, for an unspecified District Court case. White House Staff was concerned they would be sued and they wanted to be ready. A draft was

prepared and circulated to the ATF General Counsel's office, including this paragraph, which was redlined to delete:

> "13. [??Immediate action with respect to the importation of the sporterized versions of semiautomatic assault-type rifles is necessary since these weapons may be used in crime and are a threat to public safety. (CRIME EXAMPLES)??]."

The handwritten note immediately following says,

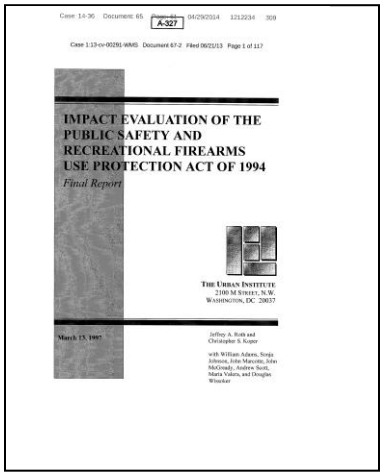
> "ATF cannot find examples + this paragraph will be deleted."[73]

How do we analyze this particularly damning remark from 1989 from the ATF General Counsel's Office in the context of the current case? The federal government did not have the necessary data on firearms used in crimes to support its import ban in 1989 and New York does not have the data to support its "assault weapons" ban in 2013.

As part of the 1994 ban, Congress directed that a study be commissioned to assess the impact, if any, of the statute. There was one study completed.[74] In the 1997 report, co-author Christopher Mr. Koper concluded "At best, the assault weapons ban can have only a limited effect on total gun murders, because the banned weapons and magazines were never involved in more than a modest fraction of all gun murders."[75]

The State's Attorneys try to explain away Mr. Koper's 1997 findings by writing "The effect of the federal restrictions was only beginning to be felt when the federal statute expired in 2004…"[76] What Mr. Koper admits in his 2013 Declaration is that "…the ban did not appear to have a measurable effect on overall gun crime during the limited time it was in effect…"[77]

Mr. Koper signed a Declaration for the State not because he concluded that gun control statutes like the federal ban on "assault weapons" was successful at reducing illegal gun use, but because the SAFE Act could "conceivably" do so.[78] The best Mr. Koper has to offer is "…had the federal ban remained in effect longer (or were it renewed), it could conceivably have yielded significant additional societal benefits as well…"[79] Mr. Koper's statement amounts to speculation and would be inadmissible in a trial setting.



And yet, we find in the Decision and Order of Judge Skretny the following, "Because New York's regulations are tighter than those in the federal ban, [Mr. Koper] believes, quite reasonably, that the affect (*sic*) will be greater." Mr. Koper did not even begin to speculate that there could be such a result, directly and specifically, in a reduction of mass shootings.

3c. The Sheppard "Declaration" – "Upon Information and Belief"

The second of the State's arguments is that passage of the SAFE Act was to close "loopholes."[80] The State repeatedly makes this claim in its Brief, and makes it specifically about the crimes that occurred in Webster, NY on December 24, 2012.

The State tries to slip in one witness who claims that the firearm used in the Webster shooting would not have qualified as an "assault weapon" under the predecessor version of the relevant provision of the SAFE Act, Penal Law §265.00(22).

The problem with the witness, however, is that he lacked the necessary competence: he made no allegation of having personally inspected either the firearm(s) and/or photographic documentation of the firearm(s) used in the Webster, NY shooting.

There is a substantial difference between what a lawyer can write in motion papers and what a witness can testify to in court, and that number one difference is signaled by the use of the phrase "upon information and belief." This legal phrase allows the lawyer to write allegations based upon what a person believes to be true, even if the witness does not have personal knowledge that it's true.

"Upon information and belief" is a dangerous phrase. When a litigation attorney sees that phrase in a written statement, it is a signal to attack because it represents a weakness in the opponent's case. In general, when a lawyer has a friendly witness with personal knowledge, it is that person who signs the affidavit. Lawyers generally use their best witnesses as early as possible because it reduces the possibility of exclusion and increases the odds of swaying judicial opinion early on.

The witness at issue is a former Rochester Chief of Police, who, with more than 30 years of experience, was willing to sign a Declaration alleging,

> "Upon information and belief, prior to enactment of the SAFE Act, the Bushmaster weapon used to such devastating effect in Webster, did not meet the definition of an assault weapon under New York law."[81] (emphasis added)

Nowhere in the Declaration of Mr. Sheppard does he indicate that he personally examined the firearms used in the commission of the crime in Webster, nor does he indicate he reviewed any law enforcement photographs, nor does he indicate he reviewed any reports written by law enforcement.

Why does this matter? If we block admissibility of this allegation, the State has presented no evidence in support of their "loophole" theory of legislative necessity. The State has failed to establish the second of its two arguments and their request to the court must be denied.

Except, that's not what happened in the District Court.

Ironically, District Court Judge Skretny considered Mr. Shepard a credible and weighty witness, referencing him in the Decision and Order as follows: "The Chief of Police for the Rochester Police Department (*sic*) expresses similar sentiments, stating that assault weapons "are designed for one purpose – to efficiently kill numerous people."[82] Judge Skretny writes on a very basic level about firearms, equating every modern rifle, shotgun, or pistol with the term "assault weapon" and equating "assault weapons" with "mass shootings."

4. THE PROBLEMS CREATED BY THE STATE.

In this White Paper, we've taken the top arguments advanced by the State in its Brief to the Second Circuit Court of Appeals and reviewed them in the context of the Record on Appeal, adding information where necessary to set the record straight. We've challenged whether the State has presented any case at all to support its claims that it was necessary to pass the SAFE Act to reduce mass shootings and to close loopholes.

The State knew, going into its appellate brief, that it had struck a chord with the District Court Judge. For Judge Skretny, the conclusion was "There thus can be no serious dispute that the very features that increase a weapon's utility for self-defense also increases its dangerousness to the public at large."[83] The State's Brief zeros in on the language of hysteria, providing little to no factual information. It's an approach consistent with gun control advocates since at least 1989 and it's an approach that was largely successful in the first round in court.

The problem for supporters of the Second Amendment is that the language of gun control was adopted and endorsed by Judge Skretny in his Decision and Order. The determination at the Second Circuit Court of Appeals will be made by a panel of three

judges. Their decision will bind the geographic region bounded by their jurisdiction and be advisory to others. A determination by the United States Supreme Court would, of course, be a determination for the nation, as a whole.

There will be two persistent problems with the State's submissions for a judge who tries to conduct a thorough analysis of the issue and not simply succumb to dramatic verbiage. First, the judge will not have sufficient factual information to properly evaluate the State's claims. Theoretically, this should result in a denial of the State's request for summary judgment upholding the "assault weapons" provision of the SAFE Act. This has not happened thus far in three states. Second, judges prefer to rule on the merits and are unlikely to dismiss a matter of such great importance. This, too, should go against the State as no judge is comfortable making a ruling without proper information as part of the record.

But our commentary in this last section assumes that at some level, some judge or majority of judges, quells any fears he or she may experience on a personal level to focus upon the constitutional law issues before them. The Second Amendment might date to 1791; these decisions are ones of "first impression" and are setting critical precedents.

5. CONCLUSION

The language of gun control is replete with hysteria. Voices from U.S. Presidents to Members of Congress to elected officials in New York have fanned the flames of fear. They are not concerned with facts. Now, there are three powerful cases working their way through the federal judiciary from NY, CT, and MD that could reach the U.S. Supreme Court in 2015. The State's Attorneys in *NYSRPA vs. Cuomo* are turning up the volume of fear in a manner that is really quite off-key for a submission in a high profile, federal case, where one reasonably expects to find substance and citations.

The State's approach works if a judge is also afraid of firearms because then the State and the judge are speaking the same language. The State's presentation resonated with Judge Skretny, a judge who began his decision with "In response to the tragic and incomprehensible shooting at Sandy Hook Elementary…"[84] and went on to use words like "frighteningly," "carnage,"[85] and, "undisputed potential for mass casualty."[86] We must then ask ourselves: what will be the impact if this language is adopted all the way to the U.S. Supreme Court?

The Governor of New York claimed that the SAFE Act "…will protect New Yorkers by reducing the availability of assault weapons and deterring the criminal use of firearms…"[87] This promise is political; it is not based upon any evidence.

The State does not pretend that the NY SAFE Act will eradicate gun violence or even mass shootings. Both the State's Attorneys and the State's witnesses admit that there is no known legislative response that can guarantee the eradication of mass shootings.[88]

Towards the end of its 67-page Brief, the State's Attorneys pull back on their own rhetoric, saying "the fit between the means and ends of the legislation 'need only be substantial, not perfect.'"[89] The State ends its Brief by posturing, "The Second Amendment does not require that any single approach provide a complete solution. If even a relatively small number of killings or injuries can be prevented by prohibiting a narrowly defined and unusually dangerous subcategory of weapons, the Second Amendment does not preclude New York from taking that step."[90]

Considering that the State failed to provide primary source information about even one "assault weapon" used in a mass shooting, their arguments should be dismissed out of hand. But, then again, look at how much the State has accomplished by arguing its case on motions to a District Court Judge who shared their fears. Keeping in mind that *Heller* was

a 5-4 decision at the U.S. Supreme Court, if the *NYSRPA vs. Cuomo* case is among the 0.0075% of petitioned cases that reach the high court in 2015, the State may stand a better chance at winning an affirmation of the District Court Decision and Order than we would prefer.

If there is any positive note on which to end this analysis, it has to be the reminder that as judges fall victim to their own fears, so, too, do judges consciously rise above them to rule in accordance with the civil liberties enshrined by our Founding Fathers. In the U.S. Supreme Court case of *Texas vs. Johnson* in 1989,[91] Justice Kennedy had such a moment of personal transcendence. At issue then was whether the burning of the United States flag was protected political speech under the First Amendment of the U.S. Constitution – an idea most of us find repugnant. Concurring as part of the majority in an affirmative decision, Justice Stevens wrote:

> "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases."[92]

He was right then, and his articulation of judicial philosophy remains a pillar for the ages.

Justice Kennedy continues in his role of Associate Justice of the U.S. Supreme Court. It remains to be seen whether he and his colleagues of the high court will embody this philosophy in their determination.

ENDNOTES

[1] NYS Constitution, Art. III, Sec. 14 (view at the NY Department of State website, "The Constitution of the State of New York," accessed 09/12/2014 at https://www.dos.ny.gov/info/constitution.htm).

[2] Official website of the NYS Senate, Rules Committee, "Committee Meeting: Rules Meeting" (January 14, 2013); accessed 09/12/2014 at http://www.nysenate.gov/event/2013/jan/14/rules-meeting.

[3] Official website of the NYS Senate, "Session: Senate Session 01-14-13;" accessed 09/12/2014 at http://www.nysenate.gov/event/2013/jan/14/senate-session-01-14-13; see also Official website of the NYS Senate, "S2230-2013: Enacts the NY SAFE Act of 2013," accessed 09/12/2014 at http://open.nysenate.gov/legislation/bill/s2230-2013.

[4] Official website of the NYS Assembly, "Live Stream of Legislative Proceedings: Archived Videos (1-15-13 Session)" (printed transcript version), accessed 09/12/2014 at http://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_e154019199755192c41f9f5c398d7269.pdf&view=1&showpdf=1.

[5] Official website of the NYS Senate, SB 2230-2013, accessed 09/12/2014 at http://open.nysenate.gov/legislation/bill/s2230-2013.

[6] Official website of New York Governor Andrew M. Cuomo, "Governor Cuomo Signs Groundbreaking Legislation That Will Give New York State the Toughest Protections Against Gun Violence in the Nation" (January 15, 2013); accessed 09/12/2014 at http://www.governor.ny.gov/press/01152013-outline-of-nys-groundbreaking-gun-legislation.

[7] Federal Rules of Appellate Procedure, Rule 3, "Appeal as of Right."

[8] Rules of the Supreme Court of the United States, Rule 12, "Review on Certiorari: How Sought; Parties."

[9] U.S. Supreme Court website, "Cases on Docket, Disposed of, and Remaining on Docket at Conclusion of October Terms, 2008 through 2012," accessed 09/12/2014 at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/A01Sep13.pdf.

[10] Just to give an idea of how few cases reach the U.S. Supreme Court, for the 12-month period ending September 30, 2013 there were 284,604 civil cases filed in District Court and 56,475 cases filed to the Courts of Appeals. See Federal Courts website, "Judicial Caseload Indicators" accessed 09/12/2014 at http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-caseload-indicators.aspx.

[11] All of the footnotes that you see to "A-####" in this White Paper refer to the Record on Appeal, the whole of which can be accessed through www.law-policy.com at the page tabbed "SCOPE."

[12] Decision and Order (Skretny, J., December 31, 2013); accessed 09/12/2014 at http://www.scribd.com/doc/194883550/Decision-and-Order-13-Cv-291. All references to Judge Skretny's Decision and Order in this White Paper reflect the page numbers of his document.

[13] The Plaintiffs' Brief to the Second Circuit Court of Appeals (dated April 29, 2014) can be found at www.law-policy.com on the page tabbed "SCOPE." The same is true of the State's Brief (dated July 29, 2014).

[14] Brief for the State, July 29, 2014, *id.*, p. 19.

[15] Brief for the State, July 29, 2014, *id.,* p. 24.

[16] *District of Columbia vs. Heller,* 554 U.S. 570, 626-627, 635-636 (2008). The decision, oral arguments, and various underlying documents can be reviewed at http://www.oyez.org/cases/2000-2009/2007/2007_07_290. See, also, the National Firearms Act (NFA), Pub. Law 474 (1934).

[17] Decision and Order (Skretny, J., December 31, 2013), *supra,* p. 29.

[18] Decision and Order (Skretny, J., December 31, 2013), *id.*

[19] Mother Jones website, "America Under the Gun: A Special Report on Gun Laws and the Rise of Mass Shootings" (accessed 09/12/2014 at http://www.motherjones.com/special-reports/2012/12/guns-in-america-mass-shootings).

[20] See, generally, https://beta.congress.gov/bill/113th-congress/senate-bill/150, accessed 09/12/2014.

[21] Mother Jones website, "What is Mother Jones?" (accessed 08/25/2014 at http://www.motherjones.com/about).

[22] Note is made that the State's case also includes a piece by Mayors Against Illegal Guns, titled "Analysis of Recent Mass Shootings," which claims to have put together incidents "identifiable through FBI data and media reports." It does not provide any citations beyond this description. Many of the incidents list firearms as "unknown" or use phrases like "two shotguns" and ".45 caliber handgun." Because this piece suffers from the same lack of firearms information and data integrity, we do not separately analyze it in this White Paper. [See A-1288 to A-1304.]

[23] The only assertion by the piece that appears to hold research integrity is the statement by Mother Jones that "Ultimately, "assault weapon" and "high-capacity magazine" are political terms – there is no official or widely accepted definition for either, and different legislation has treated them differently." [A-1284.]

[24] A-1284 to A-1287.

[25] Decision and Order (Skretny, J., December 31, 2013), *supra,* p. 29.

[26] Decision and Order (Skretny, J., December 31, 2013), *id.,* p. 29.

[27] Decision and Order (Skretny, J., December 31, 2013), *id.,* pp. 33 and 36.

[28] A-576.

[29] A-583.

[30] A-587.

[31] A-610 to A-622.

[32] A-611.

[33] *Id.*

[34] Due to space considerations, we are not reviewing every piece used by the State or its witnesses in this White Paper. However, it is worth nothing that the President of the Citizens Crime Commission is Mr. Richard M. Aborn, whose credentials on the group website include that he was the President of Handgun Control, Inc. (now the "Brady Campaign") from 1992 – 1996, "the leading gun control advocacy organization in the United States." The web page goes on to say "In this role, Mr. Aborn was one of the principal strategists behind the passage of the landmark Brady Bill and legislation banning assault weapons and large capacity clips." The group is self-described on its website as "non-partisan." (Accessed 9/12/2014 at http://www.nycrimecommission.org/aborn.php.)

[35] A-620 to A-621.

[36] Notably, the Mother Jones table does not include the criminal incident in Webster, New York from December 24, 2012, presumably as not fitting its minimum fatality count of four or more in a single incident. We mention this because the criminal incident that occurred in Webster in 2012 features prominently in the State's Brief, and we want to make clear it is not part of the Mother Jones blog.

[37] The one footnote references a New York Times article and a YNN write-up.

[38] A-617.

[39] A-619.

[40] A-1284.

[41] Care should be taken by the readers that nowhere in the Record on Appeal and nowhere in the pages of the Mother Jones website are there a single reference by name and law enforcement agency to support this assertion.

[42] *Id.*

[43] A-1285.

[44] Commonly referred to as the "1994 Assault Weapons Ban." [In relevant part at A-699 to A-713.]

[45] Pub. Law 103-322. A complete copy of this legislation can be seen at http://www.legisworks.org/GPO/STATUTE-108-Pg1796.pdf; accessed 09/12/2014.

[46] A-923 to A-938.

[47] Brief for the State, July 29, 2014, *supra,* p. 5.

[48] The "five year" reference considers two days of testimony taken in 1991 and two days of testimony taken in 1989. These five total days of testimony relate to three, different bills, the earlier two of which failed to pass. A-727, footnote 3; A-735.

[49] A-735.

[50] "Public Safety and Recreational Firearms Use Protection Act," Hearing before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary in the House of Representatives (April 25, 1994), U.S. Government Printing Office (1995); see also A-735.

[51] House of Representatives, Subcommittee Hearing, April 25, 1994, *id.,* ii; see also A-735.

[52] A-727 to A-736.

[53] A-757 to A-758.

[54] A-727.

[55] A-727, A-733.

[56] A-727.

[57] A-729.

[58] A-727.

[59] Decision and Order (Skretny, J., December 31, 2013), *supra,* p. 30.

[60] Brief for the State, July 29, 2014, *id,* p. 6.

[61] House of Representatives, Subcommittee Hearing, April 25, 1994, *supra,* p. 42.

[62] House of Representatives, Subcommittee Hearing, April 25, 1994, *id.*, p. 43.

[63] House of Representatives, Subcommittee Hearing, April 25, 1994, *id.*, p. 43.

[64] ATF website, "Memorandum" with "Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles" (dated July 6, 1989), p. 5, accessed 09/12/29014 at https://www.atf.gov/files/firearms/industry/july-1989-%20importability-of-certain-semiautomatic-rifles.pdf.

[65] ATF 1989 Working Group Report, *id.,* pp. 2-3.

[66] 18 U.S.C. §925(d)(3).

[67] ATF website, ATF Form 4590 (rev. 03/2008), "Factoring Criteria for Weapons;" accessed 09/12/2014 at http://www.atf.gov/files/forms/download/atf-f-5330-5.pdf.

[68] ATF 1989 Report, *supra,* p. 4.

[69] ATF Ruling 94-1, "USAS-12 Shotgun as NFA Weapon" and 94-2 "Striker 12 Shotgun Defined as NFA Weapon," both determining whether certain shotguns qualified for restrictions under the National Firearms Act. See https://www.atf.gov/regulations-rulings/rulings/index.html, accessed 09/12/2014.

[70] ATF 1989 Working Group Report, *supra,* pp. 10-11.

[71] ATF 1989 Working Group Report, *id.,* p. 11.

[72] White House "Memorandum for the President" (dated November 4, 1997), authored by Charles F.C. Ruff, Bruce Reed, and Rahm Emanuel, on the subject of the "Sporterized Assault Weapons Directive," page 2.

[73] Draft document facsimile from the office of the ATF Chief Counsel, "Declaration of John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms, (facsimile dated 10/23/97), p. 5.

[74] Roth, Jeffrey A. and Koper, Christopher S., "Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994: Final Report," The Urban Institute (1997), found at A-327 to A-443.

[75] A-335.

[76] Brief for the State, July 29, 2014, *supra,* p. 56.

[77] A-301.

[78] A-306.

[79] A-301.

[80] Brief for the State, July 29, 2014, *supra,* pp. 1, 11, and 19.

[81] A-633.

[82] Brief for the State, July 29, 2014, *supra,* p. 33.

[83] Decision and Order (Skretny, J., December 31, 2013), *id.,* p. 28.

[84] Decision and Order (Skretny, J., December 31, 2013), *supra,* p. 4.

[85] Decision and Order (Skretny, J., December 31, 2013), *id.,* p. 30.

[86] Decision and Order (Skretny, J., December 31, 2013), *id.,* p. 32.

[87] A-663.

[88] See, e.g., A-282, Declaration of Kevin Bruen, Assistant Counsel to the New York State Police.

[89] Brief for the State, July 29, 2014, *supra,* p. 61.

[90] Brief for the State, July 29, 2014, *id,* p. 67.

[91] *Texas vs. Johnson,* 491 U.S. 397 (1989).

[92] *Id.,* 420-421.

ORGANIZATION

Full name: **The Second Amendment Coalition**

The Second Amendment Coalition was launched in July 2014 to provide accurate information on firearms to the public and to combat the misinformation produced by gun control advocates. Comprised of more than 30 groups at its inception, the Second Amendment Coalition will be producing original materials to advance support for the Second Amendment. Its Second Amendment Coalition Resource Center will be a storehouse for public and proprietary resource materials, as well as hosting conferences and training.

Groups and individuals that support the civil liberties embodied in the Second Amendment are encouraged to contact us through SCOPE at (716) 941-3286, www.SCOPEny.org.

AUTHOR

Full name: **Paloma A. Capanna**

Title: **Attorney & Policy Analyst**

Paloma is an attorney and policy analyst in private practice with more than 20 years of litigation experience at the trial and appellate levels in state and federal courts. Her current clients include SCOPE, Empire State Arms Collectors, Gun Owners of America, and the Second Amendment Radio Show. She recently authored an Amicus Brief to the Second Circuit Court of Appeals in the case of *NYSRPA vs. Cuomo*. Earlier this year, the Regent Journal of Law & Public Policy published Paloma's article on the *Heller* "common usage" standard. Paloma is also part of the team at Orchid Advisors, helping manufacturers of firearms and ammunition to navigate the demands of federal and state laws and regulations. Paloma will be speaking at the Second Amendment Foundation national conference later this month, and next month at the Orchid Advisors first national industry conference.