

IN THE
Supreme Court of the United States

CUTBERTO VIRAMONTES, *et al.*,
Petitioners,

v.

COOK COUNTY, ILLINOIS, *et al.*,
Respondents.

EDDIE GRANT, JR., *et al.*,
Petitioners,

v.

RONNELL HIGGINS, IN HIS OFFICIAL
CAPACITY AS COMMISSIONER OF THE
CONNECTICUT DEPARTMENT OF EMERGENCY
SERVICES AND PUBLIC TRANSPORTATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS
OF APPEALS FOR THE SEVENTH AND SECOND CIRCUITS

JOINT APPENDIX

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TABLE OF APPENDICES

Page

**Appendices A–E: From Case 25-238,
*Viramontes v. Cook County***

APPENDIX A — STATEMENT OF UN- DISPUTED MATERIAL FACTS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED MARCH 3, 2023. . .	JA1
APPENDIX B — PLAINTIFFS’ RESPONSES AND OBJECTIONS TO DEFENDANTS’ RULE 56.1 STATEMENT OF MATERIAL FACTS, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, FILED APRIL 24, 2023	JA63
APPENDIX C — MOTION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED MAY 8, 2023. . .	JA206
APPENDIX D — PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTION TO STRIKE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED MAY 22, 2023	JA225

Table of Appendices

	<i>Page</i>
APPENDIX E — DEFENDANTS’ REPLY IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS’ RESPONSES TO RULE 56.1 OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED JUNE 5, 2023	JA243
 Appendix F: From Case 25-566, <i>Grant v. Higgins</i>	
APPENDIX F — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, FILED AUGUST 3, 2023.....	JA255
 The following documents were filed with the petition in case number 25-238, <i>Viramontes v. Cook County</i> :	
APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JUNE 2, 2025	1a
APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED MARCH 1, 2024	6a
APPENDIX C — CONSTITUTIONAL PRO- VISIONS, STATUTES, AND REGULATIONS INVOLVED.....	27a

Table of Appendices

	<i>Page</i>
The following documents were filed with the petition in case number 25-566, <i>Grant v. Higgins</i> :	
APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 22, 2025	1a
APPENDIX B — RULING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, FILED AUGUST 28, 2023	74a
APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 22, 2025 .	93a
APPENDIX D — CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED	96a
APPENDIX E — SECOND AMENDED COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, FILED JUNE 21, 2023	123a

JA1

**APPENDIX A — STATEMENT OF UNDISPUTED
MATERIAL FACTS OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION,
DATED MARCH 3, 2023**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 1:21-cv-04595

CUTBERTO VIRAMONTES,
AN INDIVIDUAL AND RESIDENT OF
COOK COUNTY, ILLINOIS, *et al.*,

Plaintiffs,

v.

THE COUNTY OF COOK, A BODY POLITIC
AND CORPORATE, *et al.*,

Defendants.

Assigned Judge: Rebecca R. Pallmeyer
Designated Magistrate Judge: Susan E. Cox

**DEFENDANTS' LOCAL RULE 56.1
STATEMENT OF UNDISPUTED MATERIAL
FACTS IN SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT**

Defendants, the County of Cook, Toni Preckwinkle
in her official capacity, Kimberly M. Foxx in her official

Appendix A

capacity, and Thomas Dart in his official capacity, by their attorney, Kimberly M. Foxx, State's Attorney of Cook County, and through her Assistants, pursuant to Local Rule 56.1, present their Statement of Undisputed Material Facts in support of their motion for summary judgment state as follows:

1. On May 24, 2022, Roy Guerrero, M.D., a Uvalde area pediatrician, reported to his office for a routine day. *The Urgent Need to Address the Gun Violence Epidemic: Hearing Before the H. Comm. on Oversight and Reform*, 117th Cong. 8-10 (2022) (statement of Dr. Roy Guerrero, Pediatrician, Uvalde, Tex.), attached hereto as *Exhibit 1*.
2. By 12:30 p.m., Dr. Guerrero found himself racing to the hospital only to find the parents of his patients sobbing and shouting their childrens' respective names, desperately begging for news of their survival. *Id.*
3. Dr. Guerrero made his way to the surgical area, searching for information about one of his patients. *Id.*
4. What he found "was something no prayer will ever relieve: two children whose bodies had been pulverized by bullets fired at them, decapitated, whose flesh had been ripped apart, that the only clue as to their identities was blood-spattered cartoon cloths still clinging to them []." *Id.*

Appendix A

5. As he waited with his fellow Uvalde doctors, nurses and first responders for children that could be saved, “they never arrived. All that remained was the bodies of 17 more children and the two teachers who cared for them.” *Id.*
6. On that fateful day, children and educators were attacked in an elementary school, murdered in an act of domestic terror by an assailant carrying an AR-15 rifle, a weapon regulated by the Cook County Blair Holt Assault Weapon Ordinance (“the Ordinance”), attached hereto as Exhibit 2; *Expert Report of Louis Klarevas* (“Klarevas”) at Table 4, attached hereto as Exhibit 3; *Declaration of Professor John J. Donohue* (“Donohue”) at ¶61, attached hereto as Exhibit 4.
7. More people have died or been injured in mass school shootings in the United States from 2000 to 2018 than in the entire twentieth century. Exhibit 4 Donohue at ¶ 48.
8. The assault weapons, in conjunction with high-capacity magazines, as defined under the Ordinance are capable of inflicting significant carnage upon civilians in a short period of time. *Expert Report of James E. Yurgealitis* (“Yurgealitis”) at p.31,32, attached hereto as Exhibit 5.
9. The assault weapons prohibited by the Ordinance are identical to military firearms

Appendix A

except for the ability to fire on a fully automatic mode. Exhibit 5 Yurgealitis at p.21.

10. The ability to convert a civilian AR-15 style gun into a fully automatic weapon is an additional factor that makes the weapons unusual. Exhibit 4 Donohue at ¶100.
11. During the period of 2012 to 2017, the Bureau of Alcohol, Tobacco, and Firearms recovered 814 machine gun conversion parts. During the period of 2017-2021, the Bureau recovered 5,454 machine gun conversion parts, a 570% jump. *National Firearms Commerce and Trafficking Assessment*, Vol. 2, p. 4, attached hereto as Exhibit 6.
12. Plaintiff Cutberto Viramontes seeks to own a Smith and Wesson Military & Police AR-15 style semiautomatic rifle, which is banned by the Ordinance. *Complaint* at ¶ 40, attached hereto as Exhibit 7.
13. Viramontes intends to possess a semi-automatic rifle for lawful purposes, particularly self-defense. Exhibit 7 Complaint at ¶ 40; *Deposition of Cutberto Viramontes* 6:20-22; 55:10-14, attached hereto as Exhibit 8.
14. Viramontes lives in a two-unit apartment building. Exhibit 8 Viramontes Dep. 8:7-12.

Appendix A

15. Plaintiff Christopher Khaya seeks to own an Israel Military Industries Galil AR-15 style semiautomatic rifle, which is banned by the Ordinance. Exhibit 7 Complaint at ¶ 42.
16. Khaya intends to possess a semiautomatic rifle for lawful purposes, particularly self-defense. Exhibit 7 Complaint at ¶ 42; *Deposition of Christopher Khaya* 7:17-22, attached hereto as Exhibit 9.
17. Khaya resides in an apartment in a building containing three other apartments. Exhibit 9 Khaya Dep., 7:23-8:3.
18. Khaya currently owns a .22 caliber semiautomatic Rossi rifle and a Smith and Wesson handgun. *Id.* 34:12-35:9; 48:17-49:20.
19. The organizational Plaintiffs maintain that their members seek to obtain or use semiautomatic rifles in Cook County that are banned by the Ordinance. Exhibit 7 Complaint at ¶ 43.
20. Assault weapons, whether rifles or handguns, are a poor choice for home defense or personal protection. Exhibit 5 Yurgealitis at 28.
21. Assault rifles were not designed for, and are not particularly suitable for, home defense in short range close quarter situations. *Id.* at 29.

Appendix A

22. Assault weapons and large capacity magazines facilitate excessive discharge of ammunition with a resultant risk to uninvolved individuals. *Id.* at 28.
23. In a home defense capacity, AK and AR type rifles present a problem of overpenetration of common household materials. *Id.* at 30.
24. The residents of Cook County are concentrated at a population density of 5,583 people per square mile. <https://www.census.gov/quickfacts/fact/table/chicagocityillinois,US/PST045221>
25. The population density within the City of Chicago is 12,059.8 people per square mile. <https://www.census.gov/quickfacts/fact/table/chicagocityillinois,US/PST045221>
26. The purpose and best use of assault weapons is to kill with extreme speed and efficiency, not self-defense or hunting. *Declaration of Chief Larry Snelling* (“Snelling”) at ¶ 18, attached hereto as Exhibit 10.
27. Firearms other than assault weapons are more suitable for personal defense than are assault weapons. *Expert Report and Declaration by Phil Andrew* (“Andrew”) at p.8, ¶¶24.25, attached hereto as Exhibit 11; Exhibit 5 Yurgealitis at p.28–29.

Appendix A

28. Home defense and/or retail robbery situations are rarely, if ever, lengthy shootouts with extensive exchanges of gunfire. Exhibit 5 Yurgealitis at p.28.
29. Most confrontations involve gunfire at close range, and most law enforcement agencies emphasize a 3–10-yard line of fire during their firearm training qualifications. Exhibit 11 Andrew at p.8.
30. Although there are over 300 million firearms in the United States, victims of violent crimes do not defend themselves with a firearm in 99.2% of attacks. Exhibit 4 Donohue at ¶ 115.
31. The firearms industry and pro-firearms groups hold the position that brandishing a firearm and not using it is enough to stop a perpetrator in the vast majority of violent criminal acts. *Id.* at ¶¶ 116–118.
32. Legally armed civilians and private security have had limited impact in stopping assault weapon attacks. Exhibit 11 Andrew at p.9.
33. Other weapons, such as a pump action shotgun or an eight-shot revolver, have stopping power, low probability of over penetration, and ease of use. Exhibit 5 Yurgealitis at p.28.

Appendix A

34. A shotgun disperses shot in a conical pattern, expanding in an ever-larger pattern as it travels, as opposed to a round from an AR-15, which travels like a laser beam. *Deposition of James Yurgealitis* (“Yurgealitis Dep.”), 92:1-7, attached hereto as Exhibit 12.
35. A shotgun’s conical shot pattern has more utility in a home defense scenario, for example, in a darkened house where the homeowner may be feeling the effects of adrenaline. Exhibit 12 Yurgealitis 92:1-17.

Witnesses

36. Phil Andrew is a public safety and crisis management specialist, a licensed attorney, and a detective. Exhibit 11 Andrew at ¶¶ 3-4, 6-7.
37. Andrew was a Special Agent of the Federal Bureau of Investigation for 21 years. *Id.* at ¶¶ 3-4, 6-7, 9-10, 12-15.
38. Dr. Christopher Colwell is the Chief of Emergency Medicine at Zuckerberg San Francisco General Hospital and Trauma Center. *Declaration of Christopher B. Colwell, M.D.* (“Colwell”) at p.1, attached hereto as Exhibit 13.
39. Dr. Colwell has over 30 years of experience treating gunshot wounds, including treating the victims of the shootings at Columbine High

Appendix A

School in Colorado, a movie theater in Aurora, Colorado, and the UPS facility in San Francisco. Colwell at 3. [N]ot one of the injuries from assault weapons that he has managed has come in the setting of self-defense. *Id.* at p.3.

40. John Donohue is the C. Wendell and Edith M. Carlsmith Professor of Law at Stanford Law School and was formerly a tenured chaired professor at both Yale Law School and Northwestern Law School. Professor Donohue teaches courses evaluating the nature of gun regulation in the United States and its impact on crime. Exhibit 4 Donohue at ¶¶ 3-5.
41. Dr. Stephen Hargarten is an emergency medicine specialist and a faculty member at the Comprehensive Injury Center at the Medical College of Wisconsin. He has practiced emergency medicine for over 35 years and conducted research on wound ballistics that involved shooting different styles of firearms at a gelatin standardized muscle tissue simulator. *Report of Stephen W. Hargarten, MD, MPH* (“Hargarten”) at ¶ 1, ¶ 8-12, and Viramontes 03545, attached hereto as Exhibit 14.
42. James Yurgealitis is a consultant and technical advisor in the field of firearms forensics. Exhibit 5 Yurgealitis at Viramontes 04176-4177.

Appendix A

43. Yurgealitis is a former Special Agent of the Bureau of Alcohol, Tobacco, and Firearms where he served as the Program Manager for Forensic Services at the ATF National Laboratory Center, as well as a Special Agent of the Federal Bureau of Investigation, the U.S. Secretary of State, and the U.S. Department of State. *Id.* at Viramontes 04176-4177.
44. Louis Klarevas is a security policy analyst and research professor at Teachers College, Columbia University. Exhibit 3 Klarevas at ¶¶ 1-4.
45. Klarevas is a founding member of the Columbia University Scientific Union for the Reduction of Gun Violence (SURGE) as well as a member of the Regional Gun Violence Research Consortium at the State University of New York's Nelson A. Rockefeller Institute of Government. *Id.* at ¶¶ 1-4.
46. Klarevas has served on the faculties of the George Washington University, the City University of New York, New York University, and the University of Massachusetts. He is a former Defense Analysis Research Fellow at the London School of Economics and Political Science and a United States Senior Fulbright Scholar in Security Studies at the University of Macedonia. *Id.* at ¶¶ 1-4.

Appendix A

47. Dr. Martin Schreiber is a Colonel in the U.S. Army Reserve and the Chief of the Division of Trauma, Critical Care, & Acute Care Surgery, a Professor of Surgery, and the trauma medical director at Oregon Health & Science University. *Declaration of Martin A. Schreiber, MD FACS FCCM COL, MC, USAR* (“Schreiber”) at Viramontes 003958, 03964, attached hereto as Exhibit 15.
48. Dr. Schreiber has served in Afghanistan twice and in Iraq once caring for combat injuries. *Id.*
49. Dr. Jillian Peterson is an associate professor of criminology and criminal justice and the Director of the Forensic Psychology program at Hamline University. *Expert Report of Jillian K. Peterson, PhD for Cook County State’s Attorney’s Office* (“Peterson”) at Viramontes 03908, attached hereto as Exhibit 16.
50. Dr. Peterson is the Co-founder and co-president of The Violence Project Research Center, which is best known for its public database of mass shooters in the U.S. *Id.*
51. Saul Cornell is the Paul and Diane Guenther Chair in American History at Fordham University, where he teaches constitutional history to undergraduates, graduates, and law students of the Fordham Law School. *Expert*

Appendix A

Report of Professor Saul Cornel (“Cornell”) at Viramontes 004185, attached hereto as Exhibit 17.

52. Professor Cornell has been a senior visiting research scholar at Yale Law School, the University of Connecticut Law School, and Benjamin Cardozo Law School. He has been widely published on the topic of the Second Amendment and gun regulation. *Id.*
53. Dr. Diana Palmer is a licensed mental health provider, clinical supervisor, and part- time lecturer in the Doctor of Law and Policy program at Northeastern University. She holds a doctorate degree in Law and Policy. *Expert Report and Declaration by Dr. Diana Palmer* (“Palmer”) at ¶¶ 1,2, attached hereto as Exhibit 18.
54. Chief Larry Snelling is the Chief of the Chicago Police Department’s Bureau of Counterterrorism. He has been a member of the Chicago Police Department since 1992. He is responsible for over twenty units, including the Intelligence Section, Special Weapons and Tactics (SWAT), Firearms Investigation Team, Canine Unit, Public Transportation Unit, Airport Operations, Marine Operations Unit, Mounted Unit, Gang Investigations Unit, and Bomb Squad of CPD. Exhibit 10 Snelling at ¶¶ 1-3, 6.

Appendix A

**Medical Implications of Injuries Caused by
Assault Weapons**

55. Injuries caused by assault weapons and events in which assault weapons are used are consistently more serious than those caused by non-assault weapons. Exhibit 13 Colwell at p.1.
56. Gunshot wounds from assault weapons, such as AR-15s and AK-47s, increase the likelihood for morbidity as well as difficulty in triaging and managing injuries. *Id.* at p.2.
57. Conversely, handgun injuries produce less harm to the human body and are generally survivable unless the bullet penetrates a critical organ or major blood vessel. Exhibit 15 Schreiber at p.2.
58. Victims of assault weapons are at greater risk for immediate and long-term complications from both damage caused by the velocity of the bullets and the number of wounds involved. Exhibit 13 Colwell at p.2,3.
59. The killing capacity of a weapon is primarily determined by the kinetic energy imparted by the bullet, its effective range, and the rate at which the weapon fires projectiles. Exhibit 15 Schreiber at p.2.

Appendix A

60. The muzzle velocity of an AR-15 is approximately 3,200 feet per second compared to approximately 1,200 feet per second for a 9mm Baretta. The kinetic energy of an AR-15 is 1,303 foot pounds, compared to 400 foot pounds for a 9mm Baretta. *Id.* at 2; Exhibit 5 Yurgealitis at p.16. The effective range of an A-R15 is approximately 400–500 yards compared to up to 50 yards for a typical handgun. Schreiber at 3.
61. The energy release with a bullet from AR 15 style rifles (5.56 NATO bullets) is over three times greater than from bullets from a Thompson Machine gun rifle (.45 ACP bullet). Exhibit 14 Hargarten at ¶¶ 11, 12.
62. When a projectile fired by an AR-15 penetrates the human body, it creates not only a permanent cavity the size of the bullet, but also a temporary cavity radiating radially from the permanent cavity path caused by the dispersion of kinetic energy. *Id.* at ¶ 10; Exhibit 15 Schreiber at p.2.
63. The temporary cavity can be up to 11–12.5 times larger than the diameter of the ammunition. Exhibit 5 Yurgealitis at p.17.
64. The temporary cavity of the 5.56 NATO bullet is over three times the size of the .45 caliber bullet's temporary cavity from the Thompson Machine gun. Exhibit 14 Hargarten at ¶¶ 11, 12.

Appendix A

65. An AR-15's kinetic energy release and resulting permanent and temporary cavities are more destructive than a bullet fired by a Thompson machine gun, with direct implications for injury and death. *Id.* at ¶ 13.
66. The “yaw” of assault rifle ammunition (the deviation of the bullet's axis in relation to its trajectory) also contributes to the creation of both temporary and permanent large wound cavities in the human body. Exhibit 5 Yurgealitis at p.16.
67. 5.56 bullets will yaw upon contacting tissue. Conversely, handgun bullets travelling at a lower velocity do not typically yaw upon contact with tissue and do not create as large of a wound cavity nor commensurate destruction of tissue. *Id.* at 16; Exhibit 12 Yurgealitis Dep. 67:12-24.)
68. The yaw effect of assault rifle ammunition can also cause the bullet to fragment upon striking human bone, which contributes to additional tissue damage not immediately adjacent to the cavity itself. Exhibit 5 Yurgealitis at p.16.
69. The fragmentation of assault rifle ammunition can amplify the effects of the temporary cavity, increasing the severity of the wound. *Id.* at p.17.
70. Organs such as the liver and spleen are more severely lacerated because of the development of

Appendix A

temporary cavitation. Exhibit 14 Hargarten at ¶ 14; Exhibit 15 Schreiber at p.2.

71. Patients with assault rifle injuries frequently have multiple organs injured as well as major blood vessels. They often require massive blood transfusions due to tremendous blood loss and require a series of operations, instead of just one as is common with handguns. Exhibit 15 Schreiber at p.2.
72. When patients with assault rifle injuries survive, they require prolonged hospitalizations and follow-up and suffer much greater disability for the rest of their shortened lives. *Id.*
73. Bullets from AR 15 style rifles are also more likely to fracture bones due to their higher energy release. Exhibit 14 Hargarten at ¶ 14.
74. Assault rifle blasts to the extremities frequently result in amputations, Exhibit 15 Schreiber at p.2, even where an injury to the same body part caused by a handgun would be treatable. Exhibit 13 Colwell at p.3.
75. Children who are shot by an AR-15 style bullet have extremely high mortality rates, partially due to having a smaller torso and lower blood reserve than teenagers or adults. Exhibit 14 Hargarten at ¶ 15.

Appendix A

76. The effective of an AR-15 is approximately 400–500 yards, compared to 50 yards for a typical handgun. Exhibit 15 Schreiber at p.3.
77. Assault weapons, especially when equipped with large capacity magazines, can also fire more shots faster, often causing more victims per event and more injuries per victim. Exhibit 13 Colwell at p.3.
78. The fact that there are multiple victims when assault weapons are involved adds to the complexity of managing cases as triage of multiple potentially serious injuries is often involved which can lead to delays in transport and treatment while resources are being used for multiple real or potential victims. *Id.*
79. Injuries caused by assault weapons are more likely to require implementation of disaster plans which focus resources on doing the greatest good for the greater number of victims, potentially limiting resources for other patients who may also need assistance. *Id.* at p.2.
80. These complex and difficult triage decisions are rarely, if ever, necessary when non-assault weapons are involved. *Id.* at p.3.
81. The injuries produced by assault type weapons frequently exceed the capabilities of

Appendix A

civilian trauma systems and trauma surgeons.
Exhibit 15 Schreiber at p.3.

82. When first introduced, military-style AR-15 types of weapons were not especially popular. Exhibit 17 Cornell at p.22.
83. The patent on the AR-15 expired in the late 1970s, which led to competition in the marketplace. Exhibit 5 Yurgealitis at p.14,15.
84. In the 1980s, gun manufacturers began branding military-style firearms with the label “assault” weapons to make them more marketable to civilians. *Id.* at 18–19; Exhibit 3 Klarevas at ¶ 14; Exhibit 4 Donohue at ¶ 90.
85. After the 1994 federal ban expired in 2004, legislation provided broad immunity to gun manufacturers, which allowed for a torrent of consumer advertising designed to highlight the battlefield appeal of modern assault weapons. Exhibit 4 Donohue at ¶ 84.
86. Gunmakers developed a set of marketing strategies linking these products to their origins in the military. Exhibit 17 Cornell at p.22.
87. Marketing campaigns used to sell assault weapons have utilized images of military assault capabilities. *Id.* at 23.

Appendix A

88. The gun industry marketed assault weapons with depictions of combat and phrases like, “The closest you can get without having to enlist,” and “Forces of opposition, bow down.” Exhibit 4 Donohue at ¶¶ 85, 87.
89. Adam Lanza, the perpetrator of the Newtown killings, used a Bushmaster AR-15 type weapon marketed with the slogan “Consider Your Man Card Reissued.” *Id.* at ¶ 91; Exhibit 17 Cornell at p.23.
90. The overall configuration of “copycat” AR rifles remains identical to the original production design adopted in the 1960s. Exhibit 5 Yurgealitis at p.15, 17, 18.
91. Shooters using assault weapons do not need a high level of firearm proficiency, professional training, or practice to inflict mass death and injury at close and longer ranges because they are able to fire rapidly with high-capacity magazines and remain accurate at ranges well beyond 100 yards with little skill development. Exhibit 10 Snelling at ¶ 12; Exhibit 11 Andrew at p.6.
92. Seventy percent of adults in the United States do not own any firearms at all. Exhibit 4 Donohue at ¶ 25.
93. The rise in popularity of assault weapons and their accessories is a recent development in American gun culture. Exhibit 17 Cornell at p.21.

Appendix A

94. As of December 2019, assault rifles made up approximately 4% of all firearms in circulation in American society. Exhibit 3 Klarevas at ¶ 27.
95. The average civilian assault-rifle owner owns three or more assault rifles, and 27% of owners have bought four or more. Exhibit 4 Donohue at ¶ 86.
96. The U.S. accounts for 5% of the world's population but has had one-third of the public shootings that have occurred worldwide since the late 1960s. *Id.* at ¶ 67.
97. Of all firearm homicides in the U. S. in 1993, 17.9% were committed with long guns. That percentage doubled to 35.6% by 2018. *Id.* at ¶ 36.
98. Since January 1, 1980, 1,195 people have died in the United States in mass public shootings, defined as shootings resulting in four or more casualties where the act occurred largely in a public setting and did not involve an underlying criminal objective. Exhibit 3 Klarevas at ¶ 23.
99. Since January 1, 1980, 1,126 people have died in the United States in mass shootings that involved 6 or more fatalities regardless of motive or location, known as high fatality mass shootings. *Id.*

Appendix A

100. 746 of those deaths occurred after the expiration of the federal ban in 2004. (*Id.*, Ex. B.)
101. There were an average of 2.7 events public mass shootings per year in the 1980s, rising to an average of 4.5 events per year from 2010 to 2013. Exhibit 4 Donohue at ¶ 4 1.
102. The eight deadliest acts of criminal violence in the United States since September 11, 2001 have been mass shootings. Exhibit 3 Klarevas at ¶ 24. Seven of those mass shootings involved assault weapons. *Id.* at ¶ 28.
103. 2010 to 2019 was the worst decade on record in terms of frequency and lethality of mass shootings in the United States. *Id.* at ¶ 25.
104. Assault weapons are disproportionately used in mass shootings relative to their use in other gun homicides. Exhibit 16 Peterson at p.8.
105. Over half of high-fatality mass shootings and mass public shootings in the last five years involved assault weapons. Exhibit 3 Klarevas at ¶ 26.
106. Over 70% of deaths in high-fatality mass shootings and mass public shootings in the last five years were from incidents involving assault weapons. *Id.*

Appendix A

107. In 2019, 75% of high-fatality mass shootings and 57% of all mass public shootings were committed with assault rifles, far outpacing the relative prevalence of assault rifles in American society. *Id.* at ¶ 27. Extended magazines were used in a fifth of all mass shootings with more than 4 fatalities from 1999 to 2022. Exhibit 16 Peterson at p.11.
108. Since 1980, high fatality mass shootings without an assault weapon had an average death toll of 8.0 fatalities per shooting. High fatality mass shootings with an assault weapon had an average death toll of 13.5 fatalities per shooting. Exhibit 3 Klarevas at ¶ 29.
109. Since 1980, mass public shootings without an assault weapon had an average death toll of 6.0 fatalities per shooting. Mass public shootings with an assault weapon had an average death toll of 10.6 fatalities per shooting. *Id.*
110. Since 2012, high fatality mass shootings without an assault weapon had an average death toll of 7.8 fatalities per shooting. High fatality mass shootings with an assault weapon had an average death toll of 18.1 fatalities per shooting. *Id.*
111. Since 2012, mass public shootings without an assault weapon had an average death toll of 6.2 fatalities per shooting. Mass public shootings

Appendix A

with an assault weapon had an average death toll of 13.9 fatalities per shooting. *Id.*

112. Mass shootings presently pose the deadliest threat of individual acts of violence in America in the post-September 11 era, and the problem is growing. *Id.* at ¶ 43.
113. Mass shootings involving assault weapons, on average, have resulted in a substantially larger loss of life than similar incidents that did not involve assault weapons. *Id.* at ¶ 43.
114. Restrictions on assault weapons have the potential to significantly reduce the frequency and lethality of mass shootings. *Id.* at ¶ 43; *see also* Exhibit 4 Donohue at ¶ 67.
115. Between January 1, 1990 and June 30, 2022, states that prohibited assault weapons experienced 44-percent and 14-percent decreases, respectively, in high-fatality mass shooting and mass public shooting incidence rates. Exhibit 3 Klarevas at ¶ 37.
116. Between January 1, 1990 and June 30, 2022, states with assault weapons bans experienced 57 percent fewer high-fatality mass shootings involving the use of an assault weapons and 32 percent fewer mass public shootings involving the use of assault weapons. *Id.* at ¶ 38.

Appendix A

117. In the ten years the federal assault weapons ban was in effect, gun massacres resulting in 6 or more deaths fell significantly compared to the ten years prior. In the ten years after the ban expired, gun massacres skyrocketed to levels higher than before the ban was in place. Exhibit 4 Donohue at ¶¶ 74–76, citing Klarevas.
118. There is not the slightest evidence that the federal assault weapons ban compromised the safety of law-abiding citizens. Exhibit 4 Donohue at ¶ 104.
119. Deaths per gun massacre increased 90% in the ten years after the federal ban was allowed to expire. *Id.* at ¶ 80.
120. There have been 15 gun massacres with 6 or more deaths since 2014, killing 272 people, and each one involved assault weapons and/or high capacity magazines that would have been prohibited under the federal ban had it still been in effect. *Id.* at ¶ 81.
121. In the five-year period from 2014-2019, the number of fatalities in gun massacres involving 6 or more deaths topped the amount that occurred in the ten years after the ban expired (2004-2013). *Id.* at ¶ 78.
122. Mass shooters who use assault rifles are likely influenced by two psychological phenomena:

Appendix A

the weapons effect and social proof. Exhibit 16 Peterson at p.12–13.

123. The weapons effect is a concept that states that the mere presence of weapons increases aggressive thoughts and aggression. *Id.*
124. Social proof is a concept stating that people tend to mimic those who came before when they do not know what to do. In the context of mass shootings, this means many mass shooters conform to expectations of what mass shooters do, and one mass shooting creates social proof for the next mass shooting, until eventually there is a generalized knowledge about mass shootings. *Id.* at 13.
125. In 2018, the FBI announced that the active shooter problem in the United States was growing. Exhibit 4 Donohue at ¶ 45.
126. According to the FBI's data, the number of active shooter incidents has doubled from 2017 to 2021, from 30 to 61. *Id.* at ¶ 46.
127. The number of mass shootings is higher following the termination of the federal assault weapons ban in 2004. *Id.* at ¶ 47.
128. After the federal ban lapsed in 2004, the gun market was flooded with increasingly more powerful weaponry that allowed mass killers to

Appendix A

kill even more quickly with predictable results.
Id. at ¶ 77.

129. The decade after the ban lapsed saw a 266 percent increase in mass shooting incidents and a 347 percent increase in fatalities, even as overall violent crime continued downward. *Id.* at ¶ 77.)

Cook County’s Ordinance

130. In November 2006, the Cook County Board of Commissioners enacted, and in July 2013 they revised, the Blair Holt Assault Weapons Ban (“the Ordinance”). Exhibit 7 Complaint at ¶ 18; Exhibit 2 Ordinance.

131. The Ordinance defines “assault weapon” and “large-capacity magazine” and makes it illegal to “manufacture, sell, offer or display for sale, give, lend, transfer ownership of, acquire, carry or possess” either item in Cook County. Exhibit 2 Ordinance; Exhibit 7 Complaint at ¶ 19.

132. Under section 24-211(1)(A)–(E) of the Ordinance, an assault weapon includes a “semiautomatic rifle that has the capacity to accept a large capacity magazine detachable or otherwise” as well as at least one of the following: only a pistol grip without a stock attached; any feature capable of functioning as a protruding grip that can be held by the non-trigger hand; a folding, telescoping, or thumbhole stock; a shroud attached to the barrel, or that partially or completely encircles the barrel, allowing the bearer to hold the firearm with the

Appendix A

non-trigger hand without being burned, but excluding a slide that encloses the barrel; or a muzzle break or muzzle compensator. Exhibit 2 Ordinance at § 24-211(1)(A)–(E); Exhibit 5 Yurgealitis at p.22.

133. Under section 24-211(2), an assault weapon includes a “semiautomatic pistol or any semiautomatic rifle that has a fixed magazine, that has the capacity to accept more than ten rounds of ammunition.” Exhibit 2 Ordinance at § 24-211(2); Exhibit 5 Yurgealitis at p.24.

134. Under section 24-211(3), an assault weapon has the capacity to accept a detachable magazine as well as at least one of the following: any feature capable of functioning as a protruding grip that can be held by the non-trigger hand; a folding, telescoping, or thumbhole stock; a shroud attached to the barrel, or that partially or completely encircles the barrel, allowing the bearer to hold the firearm with the non-trigger hand without being burned, but excluding a slide that encompasses the barrel; a muzzle brake or muzzle compensator; or the capacity to accept a detachable magazine at some location outside of the pistol grip. Exhibit 2 Ordinance at § 24-211(3); Exhibit 5 Yurgealitis at p.24–25.

135. Under section 24-211(4), an assault weapon includes a semiautomatic shotgun with one more of the following: only a pistol grip without a stock attached; any feature capable of functioning as a protruding grip that can be held by the non-trigger hand; a folding, telescoping, or thumbhole stock; an ability to accept a detachable

Appendix A

magazine. Exhibit 2 Ordinance at § 24-211(4); Exhibit 5 Yurgealitis at p.25.

136. Under section 24-211(5), an assault weapon includes any shotgun with a revolving cylinder. Exhibit 2 Ordinance at § 24-211(5).

137. A semiautomatic rifle or shotgun which includes only a pistol grip increases the ability of the operator to conceal the firearm, to maneuver the firearm in confined space, and to fire from positions other than the shoulder. Exhibit 5 Yurgealitis at p.22,26.

138. Semiautomatic rifles with a pistol grip and without a shoulder stock are used in the military. Exhibit 12 Yurgealitis Dep., 27:10-28:9.

139. A protruding foregrip allows the operator to better control recoil and muzzle climb, thus increasing the hit probability of successive shots. Exhibit 5 Yurgealitis at p.22,26.

140. Rifles with protruding foregrips or forward grips are military-style firearms as opposed to sporting style firearms. Exhibit 12 Yurgealitis Dep., 28:21-29:13.

141. A folding and/or telescoping stock facilitates easier or more comfortable firing from positions other than the shoulder and allows the operator to more easily conceal or maneuver the rifle in a confined space. Exhibit 5 Yurgealitis at p.23,26.

Appendix A

142. Folding, telescoping, and thumbhole stocks are not common features on sporting rifles. Exhibit 12 Yurgealitis Dep., 29:14-18.

143. A shroud or handguard that encircles the barrel protects the gas tube/ piston mechanism from inadvertent damage, protects the operator from injury due to a hot barrel or other component, and provides additional grip space for the operator to steady the rifle. Exhibit 5 Yurgealitis at p.23,26.

144. Barrell shrouds or handguards are more common on military firearms than sporting rifles. Exhibit 12 Yurgealitis Dep., 29:19-30:10.

145. A muzzle brake can allow the operator to regain control of the rifle more rapidly after firing by venting escaping gases upward at the end of the barrel. Exhibit 5 Yurgealitis at p.23,26.

146. Muzzle brakes and muzzle compensators are not common features on sporting rifles. Exhibit 12 Yurgealitis Dep., 31:2-6.

147. A secondary added grip increases stability in controlling a pistol. Exhibit 5 Yurgealitis at p.24.

148. A folding, telescoping, or thumbhole stock increases stability in controlling the pistol. *Id.*

149. Modern firearms with a detachable magazine forward of the pistol grip provide a second grip

Appendix A

point, increasing stability and allow more controlled rapid fire. *Id.* at p.25.

150. Increased controllability can result in more effective shot placement by the operator and require less time to acquire successive targets. *Id.* at p.24.

151. Most traditional hunting rifles or sporting rifles do not have the ability to accept or use detachable magazines with varying capacities. Exhibit 12 Yurgealitis Dep., 34:19-24.

152. The Ordinance also lists specific examples of banned assault weapons. Exhibit 2 Ordinance at § 54-211(7)(a); Exhibit 7 Complaint at ¶ 26.

153. Any person who legally possessed an “assault weapon” or “large-capacity magazine” prior to enactment of the Ordinance must remove it from county limits, modify it to render it permanently inoperable, or surrender it to the Sheriff. Exhibit 2 Ordinance at § 54-212(c); Complaint at ¶ 21.

154. Violation of the County Ordinance is a misdemeanor, carrying a fine ranging from \$5,000 to \$10,000 and a term of imprisonment of up to six months. Exhibit 2 Ordinance at § 54-214(a); Complaint at ¶ 23.

155. Controlling for population, the states that have prohibited assault weapons experienced 57% fewer high fatality mass shooting incidents involving assault weapons and 32% fewer mass public shooting incidents

Appendix A

involving assault weapons than states without assault weapons bans for the period of January 1, 1990 through June 30, 2022. Exhibit 3 Klarevas at ¶ 38.

156. The states that have prohibited assault weapons experienced 68% fewer fatalities resulting from high fatality mass shooting incidents involving assault weapons and 57% fewer fatalities resulting from mass public shooting incidents involving assault weapons than states without assault weapons bans for the period of January 1, 1990 through June 30, 2022. *Id.*

157. Controlling for population, and including shootings that did not involve assault weapons, the states that have prohibited assault weapons experienced 44% fewer high fatality mass shooting incidents with firearms of all kinds and 14% fewer mass public shooting incidents with firearms of all kinds than states without assault weapons bans for the period of January 1, 1990 through June 30, 2022. *Id.* at ¶ 37.

158. By population, the states that have prohibited assault weapons experienced 54% fewer fatalities resulting from high fatality mass shootings involving firearms of all kinds and 37% fewer fatalities resulting from mass public shootings involving firearms of all kinds than states without assault weapons bans for the period of January 1, 1990 through June 30, 2022. *Id.* at ¶ 37.

159. Cook County has experienced less frequent and less lethal high-fatality mass shootings and mass

Appendix A

public shootings than the rest of the United States since implementing the assault weapons ban in 1993. *Id.* at ¶ 40.

160. Cook County has not seen a high-fatality mass shooting or mass public shooting involving an assault weapon since the ban. *Id.* at ¶ 40.

161. The high-fatality mass shootings and mass public shootings perpetrated without an assault weapon that have occurred in Cook County since the ban have an average death toll of 6.0 per incident and 5.5 per incident, respectively. *Id.* at ¶ 40.

162. The average death toll of high fatality mass shootings and mass public shootings in the entire United States is 10.1 and 7.4, respectively. *Id.* at ¶ 40.

163. If the federal assault weapons ban had remained in place after 2004 and the country had moved toward a more complete ban, many of the gun tragedies of recent years would have been far less deadly and damaging to countless individuals who have been maimed and injured throughout the United States. Exhibit 4 Donohue at ¶ 114.

164. The FBI's analysis of active shooters over age 18 found that 65% had no adult convictions prior to the active shooting event. *Id.* at ¶ 50.

165. One in five assault weapons owners do not lock up their assault rifles, and more than 30% do not secure their ammunition. *Id.* at ¶ 86.

Appendix A

166. Teenage gunmen who are not eligible to possess assault weapons may take weapons from relatives who legally possess them and use them to commit mass shootings, as was the case in at least 20 of the 32 school shootings with at least three victims dead or injured that have occurred since 1990. *Id.* at ¶ 50; *see also Id.* at ¶106.

167. Approximately 400,000 guns fall into the possession of criminals each year when they are lost by or stolen from law-abiding citizens. *Id.* at ¶ 108.

168. Many of the most horrific and notorious mass shootings were perpetrated by law-abiding citizens armed with assault weapons: Stephen Paddock (Las Vegas, 59 killed); Omar Mateen (Pulse Nightclub, 49 killed); Adam Lanza (Sandy Hook Elementary, 26 killed); James Holmes (movie theater, 12 killed); Buffalo, New York supermarket (10 killed); Uvalde, Texas elementary school (21 killed). *Id.* at ¶ 109.

Impact on the Community

169. Survivors of mass shootings report a broad range of emotions, such as anger, sadness, fear, frustration, helplessness, and an eroded sense of safety and trust, as well as symptoms of depression, anxiety, cognitive issues, and post-traumatic stress disorder. Exhibit 16 Peterson at p.14; *see also* Exhibit 4 Donohue at ¶ 48.

170. The National Center for Post-Traumatic Stress Disorder states that 28% of people who witness a mass shooting develop PTSD and another third will develop acute stress disorder. Exhibit 16 Peterson at p.14.

Appendix A

171. Some studies have found that as many as 95% of mass shooting survivors develop PTSD in the aftermath. *Id.*

172. In communities where a mass shooting occurs, at least 5 to 10% of people who were not primary victims develop PTSD. *Id.*

173. Because mass shootings are seemingly random and unpredictable, these events cause helplessness, making them more traumatic than nearly all other causes of injury and death in the healthy populations that are exposed. *Id.*

174. Nearly half of all adults in the United States fear becoming a victim of a mass shooting. *Id.* at p.15.

175. Approximately 80% of U.S. adults report feeling stressed about mass shootings. *Id.* at p.15.

176. As of 2018, three out of four youth in America reported mass shootings being a primary source of stress. *Id.* at p.15.

177. Around 20% of youth report the potential of a school shooting causes them daily stress. *Id.* at p.15.

178. Following the 1984 San Ysidro McDonald's shooting in which 21 people were killed by a gunman with a semiautomatic Uzi, 12.6% of female members of the broader community who were not directly involved in the shooting showed symptoms of PTSD. *Id.* at p.15.

Appendix A

179. Public mass shootings are particularly high-visibility events that are quite shocking to the public and unsettling to the sense of public safety. Exhibit 4 Donohue at ¶ 61.

180. It is abundantly clear that the horrors of mass shootings such as the killing of 20 students and 6 teachers at Sandy Hook Elementary, 19 elementary students and 2 teachers in Uvalde, Texas, and 10 people who died in a hate crime in Buffalo, New York, have inflicted psychological distress far beyond the contours of those small communities and indeed caused suffering throughout the entire country. *Id.*

181. Studies consistently show that mass shootings can lead to increased levels of post-traumatic stress disorder, anxiety, and depression. *Id.* at ¶ 62.

182. The 2008 shooting at Northern Illinois University that left five people dead and 17 wounded led to a dramatic increase in PTSD symptoms among the university's students. *Id.* at ¶ 62.

183. In Norway, stress reactions were increased among the general population after a shooting in 2011 left 67 people dead and 32 wounded. *Id.* at ¶ 63.

184. Children and people who have experienced previous trauma or psychological disorders are more susceptible to mental health problems or PTSD after a mass shooting. *Id.* at ¶ 65.

Appendix A

185. One study found that local exposure to fatal school shootings increased youth antidepressant use by 21.4% in the following two years. *Id.* at ¶ 66.

186. Rifle caliber assault weapons prohibited under the Ordinance pose a significant risk to law enforcement officers. Exhibit 5 Yurgealitis at p.32.

187. Firearms based on the AR-15 design are the weapon of choice in 85% of mass shootings resulting in four or more victims. Exhibit 11 Andrew at p.4.

188. Domestic terrorists, extremists, and private militias with hate-related ideologies are attracted to and encouraged to acquire assault weapons based on the assault weapons' unique characteristics. *Id.*

189. Perpetrators of targeted violence arm themselves with assault weapons because they require limited professional training, they are effective at a distance, and because they are marketed as military-police style weapons. *Id.*; *see also* Exhibit 4 Donohue at ¶ 69.

190. Perpetrators seek to look cool, intimidate and embrace the appeal of the military or police wannabe due to intentional marketing tie-in by manufacturers. Exhibit 11 Andrew at p.4; *see also* Exhibit 4 Donohue at ¶ 69.

191. An assailant with an assault rifle is able to kill and injure twice the number of people compared to an

Appendix A

assailant with a non-assault rifle or handgun. Exhibit 11 Andrew at 4. “[F]rom a public safety perspective, once an attack begins with an assault weapon, it is already worst-case scenario.” Exhibit 11 Andrew at 3. “Death and severe injury is not avoidable.” Exhibit 11 Andrew at p.3.

192. An assault weapon transforms terrorists, criminals, deranged people, or disconnected teens with poor coping skills and an intent to kill into killing machines. Exhibit 11 Andrew at p.6.

193. Mass shooters frequently express the view that assault weapons will make others realize they are powerful. Exhibit 4 Donohue at ¶ 69.

194. The shooter who perpetrated a mass shooting at a high school in Parkland, Florida left a recording on his Instagram including the statement, “With the power of the A.R. you will know who I am.” *Id.* at ¶ 94.

195. The ability to kill or injure more people with an assault rifle has coincided with a sharp increase in mass shootings and related casualties, representing a significantly increased public safety threat and a decreased ability to effectively stop and respond to attacks with assault weapons without significant casualties and injuries. Exhibit 11 Andrew at p.4.

196. The general public and particularly large public venue events, schools, and workplaces are at greater risk today due to the limits of reasonable and practical

Appendix A

law enforcement and crisis planning efforts to mitigate the threat of an individual or group using assault weapons to attack. Exhibit 11 Andrew at p.5.

197. The widely endorsed “run, hide, and fight” active shooter response has limitations based on the crisis environment, the mindset of situational leaders, the age and capacity of those participating, and the attackers’ participation, surprise, and position, and still results in death and injury even with training and practice. Exhibit 11 Andrew at p.6.

198. “Law enforcement response, armed security, and concerned citizen response have proven to be slow for the few minutes that Assault Weapon attacks transpire and have low effectiveness in preventing death and injury in confrontations involving assault weapons . . . Attacks with assault weapons result in death and injury even with on-duty and off-duty law enforcement, armed security, and lawfully armed citizens present or in immediate vicinity or response.” Exhibit 11 Andrew at p.7. Law enforcement response to assault weapon-involved attacks requires highly aggressive officer responses, including specialized weapons, the surging of personnel, increased perimeters, and the mindset to undertake the force of violent action. Exhibit 11 Andrew at 7.

199. These incidents increasingly require tactics such as charging structures with armored vehicles, use of explosives, robots, and drones with explosives. Exhibit 11 Andrew at 6.

Appendix A

200. In the 2016 mass shooting at Pulse Nightclub, law enforcement used an armed personnel carrier (BearCat) to breach the wall after learning the shooter had an assault rifle. *Florida Department of Law Enforcement, Ninth Judicial Circuit, Use of Force Investigation Case #: OR-27-0258*, (“Orlando Report”) attached hereto as Exhibit 19, p.13,24.

201. The “good guy with a gun” actually requires significant training and expertise to confront an attacker safely and still rarely has the opportunity to respond under the surprise circumstances. Exhibit 11 Andrew at p.7, 8.

202. A well-placed attacker with an assault weapon is devastatingly effective and decreases the opportunity for effective law enforcement response, as demonstrated in the 2017 Las Vegas concert attack. *Id.* at p.8.

203. Approximately one in five police officers killed in the line of duty were killed with an assault weapon, despite the relative rarity of use of assault weapons in crime in general. Exhibit 4 Donohue at ¶ 132.

204. Law enforcement officers are aware of the higher rate of deaths and injuries of officers due to assault weapons, aware that assault weapons are being used to target law enforcement officers, and aware of the fact that not all body armor provides adequate protection in a shoot-out. Exhibit 11 Andrew at p.8.

Appendix A

205. This contributes to stress and hinders recruitment, retention, and performance. *Id.*; *see also* Exhibit 4 Donohue at ¶132.

206. Individuals who believe firearms will be present at a protest are less likely to attend, carry a sign, or vocalize their views at the protest than individuals who do not believe firearms will be present. Exhibit 18 Palmer at p.11. This is true for both gun owners and non-gun owners. *Id.*

207. Individuals who did not believe firearms would be present at a protest tended to say that their reasons for attending a protest included wanting to be heard, to influence others, support a cause, participate in a civic duty, and effect change. *Id.* at p.12.

208. Individuals who did believe firearms would be present at a protest tended to not believe they would be able to make a difference or not to believe that making a difference was worth the risk they perceived was posed by the firearms. *Id.* at p.12–13.

209. People who were less likely to attend, carry a sign, or vocalize their views at a protest if they believed firearms may be present perceived that firearms at a protest would be used to intimidate or threaten them if the people with the firearms did not agree with their point of view. *Id.* at p.8,9.

210. Even individuals who believe they are responsible gun owners do not trust other people with guns in a protest environment. *Id.* at p.10.

Appendix A

211. Research also shows that instructors on campus reported a chilling effect on speech when students were armed not necessarily due to any overt action on the student's part, but as a result of instructors' perceptions of the aggressive potential of the student due to campus carry. *Id.* at 9.

212. Both students who own guns and those who do not report feeling that the presence of legal guns on campus would negatively affect classroom debate and decrease feelings of safety. *Id.* at p.10.

213. The Chicago Police Department regularly recovers assault weapons and has recovered assault weapons that have been converted to fully automatic fire. Exhibit 10 Snelling at ¶ 12.

214. Because assault weapons allow a shooter to hit within a larger area and at a higher velocity, many victims of assault weapons are not the intended targets but innocent bystanders, including bystanders shot through cars or walls. This has occurred in Chicago. *Id.* at ¶ 14–15.

215. Gangs in Chicago are eager to procure assault weapons to intimidate other gangs or respond in kind to shootings involving assault weapons because they are more powerful and accurate. *Id.* at ¶ 17.

216. Gangs in Chicago see it as a sign of weakness not to possess assault weapons and seek to avoid that appearance. *Id.* at ¶ 17.

Appendix A

217. There is no rational reason for members of the public in Chicago to own assault weapons, even for self-defense. *Id.* at ¶ 18.

218. Prior to 2008, the Chicago Police Department did not assign assault rifles to police officers. Due to the prevalence of assault weapons on the street rising in recent years, CPD now maintains a small number of assault rifles. *Id.* at ¶ 19.

219. Most CPD officers do not carry assault weapons as part of their job duties and are not trained with them. *Id.* at ¶ 20.

220. The first officer responding to an active shooter incident involving an assault weapon in Chicago will likely have weaker firepower than the assailant. *Id.* at ¶ 20.

221. Standard police equipment has minimal effect on ammunition fired from assault weapons, and ammunition from assault weapons can travel through most bullet proof vests and standard protective equipment used by law enforcement. *Id.* at ¶ 13-14, 21.

222. Situations involving an assailant with an assault weapon require officers to wear the highest level of protective equipment, such as the highest level of bullet-proof vests with added trauma plates. *Id.* at ¶ 22.

223. The highest level of protective equipment can be prohibitively expensive and, for CPD officers, would have to be purchased out-of-pocket. *Id.* at ¶ 23.

Appendix A

224. An officer outfitted with equipment that stops a shot fired from an assault weapon can still suffer significant trauma because of the high velocity with which he was hit. *Id.* at ¶ 22.

225. Hits from assault weapons to parts of the body that are not covered by a vest will have a much higher likelihood of causing death or serious injury as compared to hits from other firearms. *Id.* at ¶ 22.

226. Due to the weight of the highest level of body armor and the fact that such body armor limits the wearer's mobility, it is not practical to require all officers to wear this equipment, if it were available, except after it has been confirmed that a shooter possesses an assault weapon. *Id.* at ¶ 23.

227. CPD has adjusted its large event and domestic terrorism preparations to address assault weapons and mass shootings. *Id.* at ¶ 24.

228. The rise in mass shootings and the increased prevalence of assault weapons has led to CPD to dedicate increasingly large amounts of resources and time to securing events and the general safety of the public. *Id.* at ¶ 25.

229. In preparation for 2022's Lollapalooza music festival, CPD asked residents near Grant Park to stay off their rooftops and instituted other safety precautions designed to address concerns from assault weapons from both within and without the perimeter. *Id.* at ¶ 26.

Appendix A

230. A threat to Lollapalooza was reported in 2022, which caused CPD to have to decide whether to evacuate everyone to outside the secure perimeter, where the potential shooter could be waiting for the crowd with an assault weapon. *Id.* at ¶ 27.

231. No matter how prepared or well-equipped CPD is, it is virtually impossible to guarantee a mass shooting with an assault weapon will be stopped. *Id.* at ¶ 28.

**History of Firearms Regulations in the
United States 1700-1900**

232. The dominant understanding of the Second Amendment and its state constitutional analogues at the time of their adoption in the Founding period forged an indissoluble link between the right to keep and bear arms with the goal of preserving the peace. Exhibit 17 Cornell at p.3.

233. At the time of the drafting of the Second Amendment, regulation was not understood to be an “infringement” on the right to bear arms, but rather the necessary foundation for the proper exercise of that right as required by the concept of ordered liberty. *Id.* at p.6.

234. The common law Americans inherited from England acknowledged that the right to self-defense was not unlimited and was designed to preserve the peace. *Id.* at 7.

Appendix A

235. The long-standing prohibition on dangerous and unusual weapons reflects the principle of *in terrorem populi*, which was a concept inherited from English common law. *Id.* at p.11.

236. According to the concept of *in terrorem populi*, the key determinant of legality was whether a particular weapon would provoke a terror and undermine the peace. *Id.* at p.11.

237. Statutory law in England and the United States functioned to secure the peace and public safety. *Id.* at p.7.

238. There was no serious homicide problem or other societal ill comparable to the modern gun violence problem for Americans to solve in the era of the Second Amendment. *Id.* at 7.

239. Levels of gun violence among those of white European ancestry in the era of the Second Amendment were relatively low compared to modern America. *Id.* at 8.

240. At the time of the Second Amendment, the guns most Americans owned were those most useful for life in an agrarian society such as fowling pieces and light hunting muskets. *Id.* at 8.

241. Eighteenth-century muzzle loading weapons were not effective tools of interpersonal violence and were seldom used to commit crimes because they took time to load and could not be stored loaded. *Id.* at p.8.

Appendix A

242. Keeping guns loaded in the eighteenth century was not a viable option. *Id.* at p.8.

243. The black powder used in eighteenth-century weapons was corrosive and attracted moisture. *Id.* at p.8.

244. Average citizens could theoretically stockpile gunpowder in their homes or places of business. Stephen Porter, *Accidental Explosions: Gunpowder in Tudor & Stuart London*, available at <https://www.historyextra.com/period/tudor/accidental-explosions-gunpowderin-tudor-and-stuart-london/>

245. In London, a gunpowder explosion at Tower Hill in 1552 killed seven, an explosion at Crooked Lane in 1560 killed eleven, another at Fetter Lane in 1583 killed three, another at Tower Street in 1650 killed 67 and destroyed fifteen houses, and in 1715 over a hundred houses on Thames Street were destroyed in a fire caused by a gunpowder explosion that leveled a house. Stephen Porter, *Accidental Explosions: Gunpowder in Tudor & Stuart London*, available at <https://www.historyextra.com/period/tudor/accidental-explosionsgunpowder-in-tudor-and-stuart-london/>

246. In the famed Gunpowder Plot of 1605, Guy Fawkes and his coconspirators amassed 36 barrels of gunpowder to level the House of Lords. *See generally*, Alan Haynes, *The Gunpowder Plot* (History Press 1994).

Appendix A

247. In England, the explosion at Crooked Lane led to an outright ban on gunpowder storage in houses, though that ban was later modified to allow storage of two pounds of powder. *See, supra*, Porter.

248. At the time of the Founding, the States regulated the possession and storage of gunpowder as part of the exercise of their police power. Exhibit 17 Cornell at p.12-14.

249. At the time of the Second Amendment, over ninety percent of weapons owned by Americans were long guns. *Id.* at p.9.

250. The production and marketing of guns increased and was greatly advanced technologically in the nineteenth century. *Id.* at p.10.

251. As cheaper, more dependable, and easily concealable handguns proliferated in large numbers in the nineteenth century, Americans began sporting them. *Id.* at p.10.

252. As a result of the new technology and increased availability of guns, new laws were passed in the mid-1800s to limit the sale of weapons and the use of weapons that threatened the peace. *Id.* at p.10.

253. Most courts upheld limits on the right to keep and bear arms. *Id.* at p.10.

Appendix A

254. The primary limit identified by courts in evaluating gun laws was whether the law negated the ability to act in self-defense. *Id.* at p.10.

255. The history and tradition of arms regulation has always recognized that the ability to inspire terrorem populi is a legitimate justification for regulation. *Id.* at p.23.

256. The power to regulate firearms and gunpowder has always been central to the police power. *Id.* at p.12–14.

257. Throughout Anglo-American legal history, government applications of the police power were marked by flexibility. *Id.* at p.15.

258. Throughout Anglo-American legal history, communities were able to adapt to changing circumstances and craft appropriate legislation to deal with shifting challenges. *Id.* at p.15.

259. As compared to the Revolution-era drafters, who feared standing armies and sought to entrench civilian control of the military, the Constitution writers in the era of the Fourteenth Amendment were motivated by the proliferation of especially dangerous weapons. *Id.* at p.16.

260. The language of the right-to-bear-arms provisions in Reconstruction-era state constitutions began

Appendix A

to reflect that the police power of the state could be used to regulate firearms. *Id.* at p.16.

261. The 1868 Texas Constitution included language that underscored the connection Anglo-American law had recognized between the right to keep and bear arms and the regulation of guns. *Id.* at p.16.

262. Sixteen state constitutions adopted during this period employed language acknowledging states' police power authority over firearms. *Id.* at p.16.

263. Driven in part by the violence of the Reconstruction period, post-Civil War legislatures also enacted a range of new laws to regulate arms. Exhibit 17 Cornell at p.17, 18.

264. The number of laws enacted regulating firearms increased by over four hundred percent from antebellum levels. *Id.* at p.17.

265. The Reconstruction period witnessed an intensification of firearms regulation. *Id.* at p.18.

266. Republicans in this time sought to protect the rights of African Americans to bear arms but were also insistent on enacting regulations aimed at public safety following the violence of the Reconstruction period. *Id.* at p.18.

Appendix A

The Advent of Semi-Automatic Weapons

267. The first assault weapon or assault rifle was a German Sturmgewehr Model 1944 used by the German military in World War II. Exhibit 5 Yurgealitis at p.11.

268. A semiautomatic firearm utilizes the energy generated by firing a cartridge to power the firearm's cycle of fire and reload the next cartridge to be fired without any action by the user. This is in contrast to pump action, bolt action, or lever action weapons, all of which require the user to manually reload (by pumping a forearm piece or pulling a bolt or lever, e.g.) the next cartridge after firing. *Id.* at p.8–10.

269. The assault weapons prohibited by the Ordinance were developed for use in war or are direct descendants of weapons developed for use in war. *Id.* at p.11–15, 19, 29.)

270. Weapons designed for military use are designed to be maximally effective, i.e., to deliver reliable lethality or the ability to incapacitate a chosen target. *Id.* at p.21.)

271. The assault weapons adopted by the U.S. military used 5.56mm/.223 caliber ammunition. *Id.* at p 15.

272. The 5.56mm/.223 caliber ammunition is smaller and lighter than the ammunition used in rifles prior to the advent of assault weapons. *Id.* at p.15.

Appendix A

273. The 5.56mm/.223 caliber ammunition allowed a soldier to carry more ammunition and allowed the firearms to accommodate larger capacity magazines. *Id.* at p.15,16.

274. Despite being smaller, the 5.56mm/.223 caliber ammunition traveled with the same muzzle velocity as the larger ammunition – approximately 3,200 feet per second. *Id.* at p.16.

275. Typically, the 5.56mm/.223 caliber ammunition used in assault weapons will rotate on its axis (“yaw”) when it hits human tissue. *Id.* at p.16.

276. Handgun bullets travel at a lower velocity and do not typically experience yaw. *Id.* at p.16.

277. When the military tested the 5.56mm/.223 caliber cartridge, they found that it had the capability to create a horrendous wound channel in a human target given the smaller size of the bullet. Exhibit 12 Yurgealitis Dep., 65:15-19.

278. An M855A1 5.56mm/.223 caliber cartridge, which is used by the U.S. Army and readily available to the public, is capable of penetrating a concrete block at 20–40 yards and 3/8-inch-thick steel plate at 300 yards. Exhibit 5 Yurgealitis at p.30,31.

279. In 2017, a shooter at the Sutherland Springs Baptist Church killed 26 people by standing outside the

Appendix A

church and shooting an AR-15 254 times through the walls of the building. Exhibit 4 Donohue at ¶ 60.

280. Many of the features and accessories specifically banned by the Ordinance allow a shooter to more easily conceal and/or stabilize a semiautomatic rifle. Exhibit 5 Yurgealitis at p.22–26.

281. The ability to fire an increased quantity of cartridges without reloading, which is afforded by a high-capacity magazine, increases the lethality and effectiveness of assault rifles. *Id.* at p.26.

282. Assault rifles were not designed for traditional hunting, nor was 5.56mm/.223 caliber ammunition. *Id.* at p.27.

**Regulations on Firearms in the Late
19th Century and After**

283. At the beginning of the 20th century, changes in technology, consumer behavior, and society in the early decades of the 1900s created a novel gun-violence problem. Exhibit 17 Cornell at p.19.

284. The emergence of fully automatic and semiautomatic weapons in the early decades of the twentieth century exacerbated urban crime. *Id.*

285. As rapid-fire weapons, including semiautomatic and fully automatic weapons proliferated and undermined public safety, new laws were crafted to mitigate their harms. *Id.*

Appendix A

286. Historically, legislation has only been deemed necessary once new weapons become popular enough to cause a problem that requires government action. *Id.*

287. Restrictions on weaponry have historically followed growing criminal abuse and social harm, rather than at the time these weapons are first introduced. Exhibit 4 Donohue at ¶ 3 2; Exhibit 17 Cornell at p.19.

288. Although fully automatic weapons like the Tommy gun became available for civilian purchase after World War I, they were not immediately perceived to present a sufficient public safety concern to prompt regulation. Exhibit 17 Cornell at p.19,20.

289. In the 1920s and 1930s weapons like the “Tommy gun” became a preferred weapon for gangsters. Exhibit 4 Donohue at ¶ 3 3.

290. The first group of state restrictions on weapons deemed inappropriate for civilian use were adopted in the 1920s and 1930s. *Id.*

291. It was not until the mid-to-late 1920s, when fully automatic weapons became the preferred weapons for gangsters, that states moved to restrict them. Exhibit 17 Cornell at 20.

292. As states restricted fully automatic weapons in response to “gangsterism” in the 1920s, many semiautomatic weapons were also restricted. *Id.*

Appendix A

293. In the 1920s, multiple states passed new laws banning fully automatic machine guns. *Id.*

294. By the early 1930s, more than half the states had passed some type of prohibition on fully automatic or semiautomatic weapons. *Id.*

295. Multiple states embraced the view that fully automatic and semiautomatic weapons should be classified as “machine guns” for legal purposes. *Id.*

296. A 1933 Minnesota law’s definition of machine gun included “any firearm capable of automatically reloading after each shot is fired, whether firing singly by separate trigger pressure or firing continuously by continuous trigger pressure; which said firearm shall have been changed, altered, or modified to increase the magazine from the original design as manufactured by the manufacturers thereof, or by the addition thereto of extra and/or longer grips or stocks to accommodate such extra capacity, or by the addition, modification, and/or attachment thereto of any other device capable of increasing the magazine capacity thereof[.]” *Id.* at p.20,21.

297. A 1934 South Dakota law defined machine guns as weapons “from which more than five shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine.” *Id.* at p.21.

Appendix A

The Rise of Assault Weapons in the United States

298. In 1957, the Army invited Armalite's chief gun designer, Eugene Stoner, to produce a lightweight, high-velocity rifle that could operate in both semi- and fully-automatic modes with firepower capable of penetrating a steel helmet or standard body armor at 500 yards. Exhibit 4 Donohue at ¶¶ 96, 132.

299. Stoner devised the AR-15 to meet these specifications. *Id.* at ¶ 96.

300. One of its designers stated that the AR-15 assault rifle was originally engineered to generate "maximum wound effect." *Id.* at ¶ 101.

301. A confidential ARPA report in July 1962 noted that the AR-15 was subject to comprehensive field evaluation under combat conditions in Vietnam and that the "lethality of the AR-15 and its reliability record were particularly impressive." *Id.* at ¶ 97.

302. In December 1963 the Army adopted the AR-15 and rebranded it the M-16. *Id.* at ¶ 99; *see also* Exhibit 5 Yurgealitis at p.13,14.

303. Colt, a firearms manufacturer, proposed the sale of its assault rifles on the civilian market in 1963. Exhibit 5 Yurgealitis at p.17.

304. The civilian version of the assault rifles did not include the capability to fire fully automatic but

Appendix A

maintained the same appearance, physical features, and semiautomatic rate of fire. Exhibit 4 Donohue at ¶ 100; Exhibit 5 Yurgealitis at p.17–18.

305. In the 1980s, sharp increases in crime occurred as more powerful weaponry started to proliferate and led to a second round of restrictions limiting magazine capacity and banning assault weapons. Exhibit 4 Donohue at ¶ 33.

306. The rise of mass shootings in the last decades of the twentieth century impacted firearms regulation. Exhibit 17 Cornell at p.21.

307. Defining “assault weapons” has been contentious issue in political debate over gun regulation. *Id.*

308. Some in the gun rights community argue that “modern sporting rifles” share features with other guns including hunting rifles. *Id.* at p.22.

309. Because of the propensity of the 5.56mm/.223 caliber round to create significant damage upon impacting living tissue, it is not generally considered nor favored as a hunting cartridge. Exhibit 5 Yurgealitis at p.17.

310. The development of the AR-15 was tied to the strategic requirements of the American military to find a replacement for heavier World War II era rifles. Exhibit 17 Cornell at p.22.

Appendix A

311. As social, economic, and technological changes have occurred, government has responded with evolving gun regulation. Exhibit 17 Cornell at p.26.

312. California banned assault weapons after the Stockton School Massacre in 1989, in which a gunman killed 5 children and injured 32 others in less than 3 minutes with an AK47-type assault rifle. *Id.* at p.21; Exhibit 3 Klarevas at ¶ 3 1.

313. New Jersey (1990), Hawaii (1992), Connecticut (1993), and Maryland (1994) passed assault weapons restrictions or bans soon after the Stockton Massacre. Exhibit 3 Klarevas at ¶ 3 1.

314. In September 1994, the United States Congress enacted a nationwide ban on assault weapons, which prohibited the manufacture, importation, possession, and transfer of assault weapons not legally owned prior to the date the law took effect. *Id.* at ¶ 33.

315. The federal assault weapons ban included a 10-year sunset provision. Cognizant that the federal ban may be allowed to expire, Massachusetts and New York enacted their own state assault weapons bans prior to its expiration. *Id.* at ¶ 34.

316. The District of Columbia enacted an assault weapons ban after the federal ban expired. *Id.* at ¶ 34.

317. Currently eight state-level jurisdictions within the U.S. ban assault weapons: California, New

Appendix A

Jersey, Hawaii (assault pistols only), Connecticut, Maryland, Massachusetts, New York, and the District of Columbia. *Id.* at ¶ 35.

318. California, New Jersey, and Hawaii's bans have been in place for over 30 years. *Id.* at ¶ 35.

319. Over a quarter of the U.S. population is subject to an assault weapons ban. *Id.* at ¶ 35.

320. 18 U.S.C. 924(c) provides an additional ten-year sentence for the use of a semiautomatic assault weapon during a crime of violence or drug trafficking offense. 18 U.S.C. 924(c).

321. Much of the current controversy over bans or restrictions on dangerous or unusual weapons revolves around the AR-15 and similar types of weapons. Exhibit 17 Cornell at p.22.

322. The debate over restrictions on dangerous and unusual weapons focuses heavily on technological factors, which obscures the fact that legislative efforts to ban those weapons fit squarely within the long Anglo-American tradition of limiting public access to weapons capable of provoking terror. *Id.*

323. The statutes at issue in this case are analogous to a long-established tradition of firearms regulation in America, beginning in the colonial period and stretching across time to the present. *Id.* at 26.

Appendix A

324. The maximum range of an M16 is 3,000 meters, and the effective range is 550 meters. Exhibit 5 Yurgealitis at p. 30. <https://www.tecom.marines.mil/portals/120/docs/student%20materials/fmst%20manual/m16.doc>¹

325. The civilian AR-15 in 5.56mm ammunition retains the same performance characteristics in terms of muzzle velocity, range, etc.) as the military M16. Exhibit 5 Yurgealitis at p.29.

326. The M-16 performing in semiautomatic mode fires at a rate of 45-65 rounds per minute. *Id.* at p.30.

327. The M-16 performing in automatic mode fires at a rate of 150-200 rounds per minute. *Id.* at p.30.

The Challenge of Policing in Public Spaces

328. There are more than 1,000 sworn staff under Chief Snelling's supervision, and he serves as the Incident Commander for all major events in Chicago, including protests, festivals, concerts, etc. Exhibit 10 Snelling at ¶ 6.

329. Chief Snelling also ensures that the CPD assists the FBI and other law enforcement agencies in

1. Pursuant to Fed. R. Evidence 201(b)(2) the Court can take judicial notice of facts that can be accurately and readily determined from sources whose accuracy cannot be reasonably be questioned.

Appendix A

defending against international and domestic terrorism. *Id.* at ¶ 8.

330. As a member of the CPD, Chief Snelling possesses decades of experience with firearms, including assault weapons. *Id.* at ¶ 10. He has been present on crime scenes involving individuals shot or murdered by assault weapons and regularly receives and reviews reports of shootings in Chicago involving assault weapons. *Id.*

331. Chicago has experienced a significant increase in the number of shootings involving assault weapons in the last ten years, and CPD recovers assault weapons regularly. *Id.* at ¶ 11.

332. Gangs in particular seem to be in a race to procure assault weapons to intimidate other gangs or respond in kind to shootings involving assault weapons. *Id.* at ¶ 17.

333. Gangs prefer assault weapons because they are more powerful and accurate, thus increasing the likelihood of fatalities. *Id.* at ¶ 17.

334. There has also been an increase over the last several years of social media posts, meant to intimidate others and/or glamorize gang violence, depicting individuals brandishing assault weapons. *Id.* at ¶ 17.

335. Assault rifles are the weapon of choice for mass shootings in public spaces, because they allow a person to kill or injure as many people as possible in a

Appendix A

short time, much more than with a handgun or non-semi-automatic rifle. *Id.* at ¶ 24.

336. Most officers do not carry assault weapons as part of their job duties, nor are they trained with them, so an officer first responding to an active shooter incident involving an assault weapon will have weaker firepower than the assailant. *Id.* at ¶ 20.

337. CPD has thus adjusted its large event and domestic terrorism preparations to address assault weapons and mass shootings. *Id.* at ¶ 24.

338. The rise in mass shootings and the increased prevalence of assault weapons has required CPD to dedicate increasingly large amounts of resources and time to securing public events and the general safety of the public. *Id.* at ¶ 25.

339. No matter how prepared or well-equipped CPD is, it is virtually impossible to guarantee a mass shooting with an assault weapon will be stopped. *Id.* at ¶ 28.

Dated March 3, 2023

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JA62

Appendix A

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**APPENDIX B — PLAINTIFFS' RESPONSES
AND OBJECTIONS TO DEFENDANTS' RULE 56.1
STATEMENT OF MATERIAL FACTS, UNITED
STATES DISTRICT COURT, NORTHERN DISTRICT
OF ILLINOIS, FILED APRIL 24, 2023**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No. 1:21-cv-04595
Chief Judge Rebecca R. Pallmeyer

CUTBERTO VIRAMONTES, *et al.*,

Plaintiffs,

v.

THE COUNTY OF COOK, *et al.*,

Defendants.

**PLAINTIFFS' RESPONSES AND OBJECTIONS
TO DEFENDANTS' RULE 56.1 STATEMENT OF
MATERIAL FACTS**

Pursuant to Local Rule 56.1(e), Plaintiffs Cutberto Viramontes, Christopher Khaya, Firearms Policy Coalition, Inc., and Second Amendment Foundation submit the following responses and objections to Defendants' statement of material facts (ECF No. 81). By responding, Plaintiffs do not concede the materiality or relevance of any fact.

Appendix B

1. On May 24, 2022, Roy Guerrero, M.D., a Uvalde area pediatrician, reported to his office for a routine day. *The Urgent Need to Address the Gun Violence Epidemic: Hearing Before the H. Comm. on Oversight and Reform*, 117th Cong. 8-10 (2022) (statement of Dr. Roy Guerrero, Pediatrician, Uvalde, Tex.), attached hereto as Exhibit 1.

Response: Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time.

2. By 12:30 p.m., Dr. Guerrero found himself racing to the hospital only to find the parents of his patients sobbing and shouting their childrens' respective names, desperately begging for news of their survival. *Id.*

Response: Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time.

3. Dr. Guerrero made his way to the surgical area, searching for information about one of his patients. *Id.*

Response: Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time.

4. What he found “was something no prayer will ever relieve: two children whose bodies had been pulverized by bullets fired at them, decapitated, whose flesh had been ripped apart, that the only clue as to their identities was blood-spattered cartoon cloths still clinging to them [].” *Id.*

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute

Appendix B

at this time, to the extent it reflects Dr. Guerrero's impressions of what he saw. While this statement speaks for itself, it is necessary for context to understand that "AW-type firearms do not operate differently than other comparable semiautomatics, nor do they fire more lethal ammunition." Christopher S. Koper, *Assessing the Potential to Reduce Deaths and Injuries from Mass Shootings Through Restrictions on Assault Weapons and Other High-Capacity Semiautomatic Firearms*, 19 CRIM'Y & PUB. POL'Y 147, 149 (2020), attached as Exhibit 1. Indeed, according to a renowned forensic pathologist, former medical examiner, and former member of the Justice Department's National Commission on Forensic Science, "[o]ne of the common fallacies about assault rifles is that the wounds produced by them are more severe than those due to regular military rifle and hunting rifles. In fact, the wounds are less severe, even when compared to such venerable hunting rifles as the Winchester M-94 (introduced in 1894) and its cartridge the .30-30 (introduced in 1895)." Vincent J.M. DiMaio, *GUNSHOT WOUNDS: PRACTICAL ASPECTS OF FIREARMS, BALLISTICS, AND FORENSIC TECHNIQUES* (2d ed. 1999), attached as Exhibit 2. Furthermore, the bullets typically fired by an AR-style rifle are far smaller than those used since before the Founding: "Muskets, which were being transitioned from matchlocks to flintlocks, were typically .75 caliber. That was a powerful, deadly weapon that could create a three-quarters-of-an-inch wound. By comparison, today's AR-15 rifle typically fires a .223 caliber bullet, which is less than a quarter of an inch in diameter. In other words, the seventeenth-century musket fired a bullet three times larger in diameter than the bullet usually fired by the

Appendix B

AR-15.” Stephen P. Halbrook, *AMERICA’S RIFLE: THE CASE FOR THE AR-15* 104 (Google Books ed. 2022), attached as Exhibit 3.

5. As he waited with his fellow Uvalde doctors, nurses and first responders for children that could be saved, “they never arrived. All that remained was the bodies of 17 more children and the two teachers who cared for them.” *Id.*

Response: Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time.

6. On that fateful day, children and educators were attacked in an elementary school, murdered in an act of domestic terror by an assailant carrying an AR-15 rifle, a weapon regulated by the Cook County Blair Holt Assault Weapon Ordinance (“the Ordinance”), attached hereto as Exhibit 2; *Expert Report of Louis Klarevas* (“Klarevas”) at Table 4, attached hereto as Exhibit 3; *Declaration of Professor John J. Donohue* (“Donohue”) at ¶61, attached hereto as Exhibit 4.

Response: Plaintiffs admit that the Uvalde shooter used an AR-15 rifle, which is a firearm banned by Cook County. Plaintiffs dispute Defendants’ characterizations of the shooting to the extent inconsistent with the official investigative report of the shooting issued by the Texas House of Representatives. *See Interim Report 2022: Investigative Committee on the Robb Elementary Shooting*, Tex. H.R., 88th Leg. (July 17, 2022), attached as Exhibit 4.

Appendix B

7. More people have died or been injured in mass school shootings in the United States from 2000 to 2018 than in the entire twentieth century. Exhibit 4 Donohue at ¶ 48.

Response: Dispute. The study referenced by Defendants defines a “mass shooting” as a shooting during which “four or more people are killed (excluding the shooter).” Not only is there “no standard definition of what constitutes a mass shooting,” with “different data sources—such as media outlets, academic researchers, and law enforcement agencies—frequently us[ing] different definitions when discussing and analyzing mass shootings,” the soundness of Defendants’ statistical observation dispositively turns on what they choose to define as a “mass shooting.” Rosanna Smart & Terry L. Schell, *Mass Shootings in the United States*, RAND CORP. (Apr. 15, 2021), <https://bit.ly/3L9kzH4>, attached as Exhibit 5.

8. The assault weapons, in conjunction with high-capacity magazines, as defined under the Ordinance are capable of inflicting significant carnage upon civilians in a short period of time. *Expert Report of James E. Yurgealitis* (“Yurgealitis”) at p.31, 32, attached hereto as Exhibit 5.

Response: Dispute. “Assault weapons,” as defined by the Ordinance, “do not function differently than other comparable semiautomatics, nor do they fire more lethal ammunition.” See Koper, *supra* Resp. to Statement 4, at 149. Of course, all firearms are capable of causing injury or death, but to the extent the County claims the

Appendix B

prohibited firearms are more damaging or lethal than other semiautomatic firearms that are not prohibited, the County is wrong. Indeed, according to a renowned forensic pathologist, former medical examiner, and former member of the Justice Department's National Commission on Forensic Science, "[o]ne of the common fallacies about assault rifles is that the wounds produced by them are more severe than those due to regular military rifle and hunting rifles. In fact, the wounds are less severe, even when compared to such venerable hunting rifles as the Winchester M-94 (introduced in 1894) and its cartridge the .30-30 (introduced in 1895)." *See* DiMaio, *supra* Resp. to Statement 4. Furthermore, the bullets fired by an AR-style rifle are far smaller than those used since before the Founding: "Muskets, which were being transitioned from matchlocks to flintlocks, were typically .75 caliber. That was a powerful, deadly weapon that could create a three-quarters-of-an-inch wound. By comparison, today's AR-15 rifle typically fires a .223 caliber bullet, which is less than a quarter of an inch in diameter. In other words, the seventeenth-century musket fired a bullet three times larger in diameter than the bullet usually fired by the AR-15." *See* Halbrook, *supra* Resp. to Statement 4, at 104. All semiautomatic firearms have exactly the same inherent rate of fire because the number of bullets that exit the muzzle in a unit of time depends entirely on how fast its operator physically pulls the trigger: "Once one pulls the trigger and fires a round, another round loads itself and may be fired by another pull of the trigger." *See* Halbrook, *supra* Resp. to Statement 4, at 206. Consequently, the semiautomatic rifles banned by the City for being "assault weapons" can shoot no faster

Appendix B

than any other semiautomatic firearm. Additionally, Defendants' reference to "high-capacity" magazines is of no consequence as their restrictions on those magazines are not challenged here.

9. The assault weapons prohibited by the Ordinance are identical to military firearms except for the ability to fire on a fully automatic mode. Exhibit 5 Yurgealitis at p.21.

Response: Dispute. Some of the banned firearms are similar in some respects to firearms also used by the military. In particular, the AR-15, the most popular rifle in the country, is a semi-automatic version of the M16, a military rifle with select-fire capability (meaning it can fire in semiautomatic mode like an AR-15, where one round is discharged each time the trigger is pulled, or in automatic mode, where one pull of the trigger discharges more than one bullet), *see* NSSF Fast Facts, Background Information On So-Called "Assault Weapons," NSSF (May 2022), attached as Exhibit 6, but the firearms are not "identical" in any meaningful sense. This is because the M16, as an automatic weapon, has a much higher rate of fire than an AR-15, *see Rifle Marksmanship: M16-/M4-Series Weapons*, DEP'T OF THE ARMY 2-1 tbl. 2-1 (2008), <https://bit.ly/3pvS3SW>, attached as Exhibit 7. Indeed, having thoroughly reviewed industry and military manuals, former Army officer and infantryman Dennis Chapman concludes, "Semiautomatic rifles such as the AR-15 cannot even approximate—much less replicate—the effective rates of fire of machineguns or selective-fire weapons, and they cannot even remotely approach

Appendix B

the extreme capabilities that some poorly informed commentators attribute to them.” Dennis P. Chapman, *THE AR-15 CONTROVERSY: SEMIAUTOMATIC RIFLES AND THE SECOND AMENDMENT* 34 (2nd ed. 2022), attached as Exhibit 82. And “[n]o aspect of the semiautomatic AR-15’s capabilities or features render it any more a military arm or “weapon of war”—or any “deadlier”—than any other semiautomatic rifle.” *Id.* at 100. The Supreme Court has itself observed that, unlike machineguns, semiautomatic rifles like AR-15s “traditionally have been widely accepted as lawful possessions.” *Staples v. United States*, 511 U.S. 600, 611–12 (1994). As the Court noted at the very outset of its opinion, the only categorical distinction between a machinegun and a semiautomatic firearm is that the former “fires repeatedly with a single pull of the trigger,” while the latter “fires only one shot with each pull of the trigger.” *Staples*, 511 U.S., at 602 n.1. This distinction is supported by the very history of firearms development: “At the end of the 19th Century and the beginning of the 20th, a new technology emerged that would set out a clear line of demarcation between firearms adapted solely to military applications and those useful in other shooting applications—technology that would, for the first time, set apart “weapons of war” from other firearms. That technology was automatic fire: the ability to fire more than one round, whether in a continuous stream or in a burst, with each pull of the trigger.” Chapman, *supra* at 110-111. Contrary to Defendants’ characterization, the automatic-semiautomatic distinction is central to the nature and function of a firearm—not a peripheral point to be shrugged off.

Appendix B

10. The ability to convert a civilian AR-15 style gun into a fully automatic weapon is an additional factor that makes the weapons unusual. Exhibit 4 Donohue at ¶100.

Response: Dispute. As just explained, the AR-15 is not capable of automatic fire. The law at issue here does not ban firearms converted to be able to fire automatically, but firearms that are *only* capable of semiautomatic fire. Machinegun conversion devices like auto sears can be used on semiautomatic firearms generally and not just on the firearms the County bans as “assault weapons”. Alain Stephens & Keegan Hamilton, *The Return of the Machine Gun*, THE TRACE (Mar. 24, 2022), attached as Exhibit 9. If, as the County contends, the “ability to convert a civilian... gun into a fully automatic weapon...makes the weapon unusual,” all semiautomatic firearms are unusual. That conclusion is clearly foreclosed by, inter alia, *District of Columbia v. Heller*, 554 U.S. 570 (2008).

11. During the period of 2012 to 2017, the Bureau of Alcohol, Tobacco, and Firearms recovered 814 machine gun conversion parts. During the period of 2017-2021, the Bureau recovered 5,454 machine gun conversion parts, a 570% jump. *National Firearms Commerce and Trafficking Assessment*, Vol. 2, p. 4, attached hereto as Exhibit 6.

Response: Dispute. Defendants mischaracterize the report as evidence of proliferation in the availability or use of machine gun conversion parts. It appears to be the result of merely a change in definition. The ATF’s final rule reinterpreting the statutory term “machinegun” to

Appendix B

include bumpstock devices went into effect on March 26, 2019, for the first time including those devices among the “machine gun conversion parts” it reports as recovered. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,522 (Dec. 26, 2018), attached as Exhibit 10. That means that for at least part of 2017-2021, the definition of “machine gun conversion parts” covered at least 520,000 more devices than the same term did from 2012 to 2017. Greg Stohr, *Bump-Stock Ban Left Intact as Supreme Court Rejects Challenges*, BLOOMBERG LAW (Oct. 3, 2022), <https://bit.ly/43W35Gq>, attached as Exhibit 11. Defendants’ attempted comparison of the two five-year periods fails because the spike in recovered machine gun conversion parts can be explained by the ATF’s radical expansion of the kind and number of devices covered by the term.

12. Plaintiff Cutberto Viramontes seeks to own a Smith and Wesson Military & Police AR-15 style semiautomatic rifle, which is banned by the Ordinance. *Complaint* at ¶ 40, attached hereto as Exhibit 7.

Response: Admit.

13. Viramontes intends to possess a semiautomatic rifle for lawful purposes, particularly self-defense. Exhibit 7 *Complaint* at ¶ 40; *Deposition of Cutberto Viramontes* 6:20-22; 55:10-14, attached hereto as Exhibit 8.

Response: Admit.

14. Viramontes lives in a two-unit apartment building. Exhibit 8 Viramontes Dep. 8:7-12.

JA73

Appendix B

Response: Admit.

15. Plaintiff Christopher Khaya seeks to own an Israel Military Industries Galil AR-15 style semiautomatic rifle, which is banned by the Ordinance. Exhibit 7 Complaint at ¶ 42.

Response: Admit.

16. Khaya intends to possess a semiautomatic rifle for lawful purposes, particularly self-defense. Exhibit 7 Complaint at ¶ 42; *Deposition of Christopher Khaya* 7:17-22, attached hereto as Exhibit 9.

Response: Admit.

17. Khaya resides in an apartment in a building containing three other apartments. Exhibit 9 Khaya Dep., 7:23-8:3.

Response: Admit.

18. Khaya currently owns a .22 caliber semi-automatic Rossi rifle and a Smith and Wesson handgun. *Id.* 34:12-35:9; 48:17-49:20.

Response: Admit.

19. The organizational Plaintiffs maintain that their members seek to obtain or use semiautomatic rifles in Cook County that are banned by the Ordinance. Exhibit 7 Complaint at ¶ 43.

Appendix B

Response: Admit.

20. Assault weapons, whether rifles or handguns, are a poor choice for home defense or personal protection. Exhibit 5 Yurgealitis at 28.

Response: Dispute. The common firearms that the County tendentiously labels “assault weapons,” especially those with the features specifically prohibited by Cook County, are, in fact, well-suited for self-defense. For instance, a pistol grip and other features “capable of functioning as a protruding grip that can be held by the non-trigger hand” help to stabilize a firearm and permits its operator to maintain accuracy. David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 J. CONTEMP. L. 381, 392–93 (1994), attached as Exhibit 8. A muzzle brake or compensator reduces recoil by redirecting energy and so permits the operator to aim the firearm more effectively. *Id.* “Recoil can be painful, and muzzle movement interferes with accuracy. A telescoping stock...‘allows the user to adjust the length of the stock,’ which, ‘like finding the right size shoe, simply allows the shooter to rest the weapon on his or her shoulder properly and comfortably.’” *See* Halbrook, *supra* Resp. to Statement 4, at 383 (quoting *New York State Rifle & Pistol Ass’n v. Cuomo*, 990 F. Supp. 2d 349, 368 (2013)). Similarly, a flash suppressor “reduces noise and potentially increases accuracy,” while “there is no law enforcement concern for pistol grips or thumbhole stocks, which simply assist a shooter in absorbing recoil.” *Id.* at 399 (quoting *Murphy v. Guerrero*, No. 1:14-CV-00026, 2016 WL 5508998, *19 (D. N. Mariana Islands,

Appendix B

Sept. 28, 2016). “Such features...do not render the AR-15 more deadly by making it fire faster . . . or impact with far more power. They mostly serve the same ergonomic functions as similar features on non-banned firearms, making the AR-15 easier and safer to use.” E. Gregory Wallace, “*Assault Weapon*” *Lethality*, 88 TENN. L. REV. 1, 13–14 (2020), attached as Exhibit 12.

As Wallace explains in detail, “When a rifle fires, recoil from the bullet and propellant gases exiting the muzzle of the barrel moves the rifle back along the centerline of the barrel. With many hunting rifles and shotguns, the centerline of the barrel is higher than the shooter’s shoulder because the buttstock of the rifle is angled lower than the barrel. Recoil thus causes the barrel of the rifle to move back and up.” E. Gregory Wallace, “*Assault Weapon*” *Myths*, 43 S. ILL. U. L. J. 193, 228–29 (2018), attached as Exhibit 13. To mitigate the inaccuracy due to recoil, “M16 rifles were designed to reduce muzzle rise by moving the buttstock in line with the barrel so that the rifle’s recoil will push straight back against the shooter’s shoulder.” *Id.* at 229. This straight-line alignment, which the semiautomatic AR-15 also has, “requires a pistol grip separate from the buttstock because it is too awkward to pull the trigger while gripping the raised buttstock when firing the rifle from the shoulder, whether standing, kneeling, or prone.” *Ibid.* A pistol grip “thus allows for accurate firing from the shoulder, which is how the rifle was designed to shoot.” *Ibid.* Indeed, this is how the Department of Defense’s Defense Advanced Research Projects Agency (DARPA) explained the purpose of pistol grips for AR-15s: “a plastic stock with a rubber butt,

Appendix B

assembled in line with the bore” that “in conjunction with its high line of sight and separate hand grip, is designed to minimize rotation about the shoulder during firing.” U.S. DEP’T OF DEF.: ADVANCED RSCH. PROJECTS AGENCY, REPORT OF TASK NO. 13A: TEST OF ARMALITE RIFLE, AR-15 (U) (Aug. 20, 1962), attached as Exhibit 14. The pistol grip is positioned “in such a manner as to provide a more natural, comfortable, and effective grasp of the rifle. It is this purpose, and no other, for which the modern pistol grip is intended.” See Chapman, *supra* Resp. to Statement 9 at 38.

Indeed, “the M4 rifle, which is equivalent to a .223 caliber rifle [like the AR-15], is relatively light in both force and velocity compared to many other shoulder-fired weapons used for hunting and recreation.” Joseph W. Galvin et al., *Rate and time to return to shooting following arthroscopic and open shoulder surgery*, 6 JSES INT’L 968 (2022), attached as Exhibit 99. So much so, in fact, that “[w]hen compared to many hunting rifles, the M4 often produces 3 to 4 times less recoil energy and typically about half of the recoil velocity.” *Ibid.*

Generally known as “handguards,” a barrel shroud “is the metal or plastic enclosure that covers typically all but a few inches of the barrel” and, on an AR-15, “has multiple functions: (1) it provides the shooter with a forward grip on the rifle using the non-trigger hand; (2) it protects the shooter’s hand from a hot barrel; (3) it protects the barrel and gas tube or piston from damage; (4) it helps ventilate and cool the barrel; and (5) it provides a base for attaching accessories to the rifle such as sights, slings,

Appendix B

flashlights, forward vertical grips, and bipods. None of these functions make the AR-15 exceptionally lethal, especially when compared to non-banned rifles.” *See* Wallace, *supra* Resp. to Statement 20, at 231. Indeed, the County’s ordinance by its own terms describes the banned barrel shroud as “allowing the bearer to hold the firearm with the non-trigger hand without being burned,” raising the curious question of whether the County would prefer more burned hands during the operation of firearms. Code of Ordinances of Cook Cnty., Ill. § 54-211, (Dec. 15, 2020), <https://bit.ly/2Lcts75>. Rifles also “have been equipped with “barrel shroud” handguards for more than 100 years,” with bolt-actions being “the first rifles so equipped.” *See* Chapman, *supra* Resp. to Statement 9 at 65. Because burned hands pose “a critically important safety concern” for the millions of Americans who own these rifles, these handguards “exist to protect shooters from injury by contact with hot rifle barrels during ordinary, routine shooting activities.” *Id.* at 66-67.

The County also isolates folding, telescoping, or thumbhole stocks as a banned feature. Broadly termed “adjustable stocks,” these accessories are ergonomic improvements over earlier fixed-stock rifle configurations” that are “designed to allow adjustments in the rifle’s length of pull, making the firearm more comfortable to shoot in both military and civilian applications.” *See* Wallace, *supra* Resp. to Statement 20, at 232. “A telescoping stock makes a rifle easier to shoulder properly for different users, or for one user when shooting from different positions or wearing different thicknesses of clothing.” *Id.* In fact, the military’s fully automatic M16

Appendix B

“has a fixed stock,” while the civilian semiautomatic AR-15 has “telescoping rather than folding stocks.” *Id.* A thumbhole stock is simply a hole in the stock through which the user can place his or her thumb to allow a more secure grip on the firearm. Adjustable stocks serve a perfectly sensible function, one in fact rooted in American tradition: “Most people cannot afford to have a rifle custom-stocked to fit their precise size and shape and certainly cannot afford to have custom stocks made for each member of their family. Collapsible or adjustable stocks provide a standard, off-the-shelf solution that allows each shooter to adjust the rifle to their own body and thus optimize their shooting experience; adjustable buttstocks enable multiple members of a family to practice shooting with the same rifle, optimizing the shooting experience for each. In this respect, adjustable buttstocks reflect the American shooting tradition, wherein hunting, target shooting, and arms for self-defense have always been the province of ordinary working people of modest means as opposed to the European tradition wherein the shooting sports were the domain of the wealthy and privileged classes who could afford to indulge in fine handcrafted and extremely expensive custom sporting arms.” *See Chapman, supra* Resp. to Statement 9 at 83-84. The bottom line is that none of the “assault” features identified by the County are nearly as nefarious as it suggests. Rather, they improve the functions of a rifle, render its operation simpler and more accurate, and so render the rifles they accessorize favored firearms for defense of self and home.

It is not surprising, then, that millions of Americans have chosen the banned firearms for exactly these

Appendix B

purposes. *See* William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* at 33–34, GEO. UNIV. (May 13, 2022) (finding that 24.6 million Americans, or 30.2% of gun owners, had owned or did own an AR-15 or similar style rifle, and that the most common reasons for owning them were target shooting (66% of owners), home defense (61.9% of owners) and hunting (50.5% of owners)), attached as Exhibit 15; *see Poll of current gun owners* at 1, WASH. POST-IPSOS (Mar. 27, 2023) (finding 20% of gun owners currently own an AR-15 or similar style rifle, 60% of respondents citing target shooting as a “major reason” for owning them and 30% citing that as a “minor reason,” and protection of self, family, and property rating as even *more* important, with 65% as a major reason and 26% reporting it as a minor reason), attached as Exhibit 16. A recent survey of over 2,000 owners of such firearms reached the same result, showing again that home-defense and recreational target shooting are the two most important reason for owning these firearms. *See* Modern Sporting Rifle: Comprehensive Consumer Report at 5, NAT’L SHOOTING SPORTS FOUND., INC. (July 14, 2022), attached as Exhibit 17; *see also* Sport Shooting Participation in the U.S. in 2020 at *iii*, NAT’L SHOOTING SPORTS FOUND., INC. (2021), <https://bit.ly/3sPuEQL>, attached as Exhibit 104 (noting that in 2020, 20 million American participated in sport or target shooting with firearms like those banned by the County). “AR-style rifles are popular with civilians and law enforcement around the world because they’re accurate, light, portable, and modular. . . . [The AR-style rifle is] also easy to shoot and has little recoil, making it popular with women. The AR-15 is so user-friendly that

Appendix B

a group called ‘Disabled Americans for Firearms Rights’ . . . says the AR-15 makes it possible for people who can’t handle a bolt-action or other rifle type to shoot and protect themselves.” Frank Minitier, *THE FUTURE OF THE GUN* 46-47 (Google Books ed. 2014), attached as Exhibit 105. This popularity among a diverse demographic of Americans is, in part, because an AR-15 “firing .223 or 5.56 mm ammunition produces *zero* felt recoil—that is, nearly all the recoil produced by firing is absorbed by the buffer assembly, transmitting almost none to the shooter’s shoulder.” Chapman, *supra* Resp. to Statement 9 at 127.

But not only are semiautomatic rifles useful in self-defense generally, they are particularly useful when one is confronted by multiple assailants. Indeed, 51.2 percent of all self-defense incidents annually involve two or more attackers, while 20.4 percent of such incidents involve three or more attackers. *See* English, *supra* Resp. to Statement 20, at 15. In 2019, a Houston homeowner repelled five armed home invaders with his semiautomatic AK-47. Stefania Okolie, *5 Shot and 3 Killed After Homeowner Opens Fire on Suspects in East Houston*, ABC13 (Jan. 20, 2019), attached as Exhibit 18. An eight-months-pregnant mother in Florida used an AR-15 to defend herself and her family when two masked men forcibly entered her home, pistol-whipped her husband, and grabbed her daughter. She fatally shot one of the attackers, while the other ran away. Joe Tacopino, *Pregnant Florida mom uses AR-15 to kill home intruder*, N.Y. POST (Nov. 4, 2019), attached as Exhibit 19. When the owner of a Santa Monica liquor store, and his friends, stood in front of his store armed with AR-15s, the looters who had plundered and razed

Appendix B

neighboring stores simply passed them by without incident. *Santa Monica Owner Protects His Store With Guns Amid Looting*, CBS L.A. (June 1, 2020), attached as Exhibit 20. A homeowner in Florida used his AR-15 to fight off four home invaders in Summerfield, Fla. Two died from their injuries, two were arrested near the house, and the homeowner was injured. Austin Miller, *MCSO: 2 of 4 intruders dead, homeowner injured in home invasion*, OCALA STAR BANNER (July 10, 2019), attached as Exhibit 21. When firearms instructor Dave Thomas ran into his apartment hallway with his AR-15 because he heard women screaming, he found blood in the hallway and a man stabbing another. The stabber ran away when Thomas threatened to shoot him. Hannah Leone, *Gun instructor uses AR-15 to stop attacker in Oswego: "He was half a breath away from getting his head blown off,"* CHI. TRIB. (Mar. 1, 2018), attached as Exhibit 22. The 19-year-old son of a homeowner in Oklahoma shot and killed two of three home invaders who had entered the house through the back door with the goal of burglarizing it. *Homeowner's son shoots, kills three would-be burglars*, FOX NEWS (Mar. 27, 2017), attached as Exhibit 23. In Texas, the teenage son of a police officer's son was babysitting his 12-year-old sister when two burglars who had ransacked neighboring homes broke into their house through a back window. The boy repelled them with his father's rifle, hitting one of them and sending them both scurrying to the local hospital. *Investigators: 15-year-old son of deputy shoots burglary suspect*, KHOU11 (June 29, 2010), attached as Exhibit 24. The rifles used in all these instances of self- or home-defense are banned by the County on account of their cosmetic features.

Appendix B

21. Assault rifles were not designed for, and are not particularly suitable for, home defense in short range close quarter situations. *Id.* at 29.

Response: Dispute. *See* Resp. to Statement 20.

22. Assault weapons and large capacity magazines facilitate excessive discharge of ammunition with a resultant risk to uninvolved individuals. *Id.* at 28.

Response: Dispute. So-called assault weapons function in precisely the same way as any other semiautomatic firearms. So-called large capacity magazines permit individuals to have a firearm equipped with sufficient ammunition to effectively defend themselves in many situations without reloading, which can be a fatal pause in self-defense situations. Indeed, “from the perspective of a victim trying to defend her home and family, the time required to re-load a pistol after the tenth shot might be called a ‘lethal pause,’ as it typically takes a victim much longer to re-load (if they can do it at all) than a perpetrator planning an attack. In other words, the re-loading ‘pause’ the State seeks in hopes of stopping a mass shooter, also tends to create an even more dangerous time for every victim who must try to defend herself with a small-capacity magazine. The need to reload and the lengthy pause that comes with banning all but small-capacity magazines is especially unforgiving for victims who are disabled, or who have arthritis, or who are trying to hold a phone in their off-hand while attempting to call for police help. The good that a re-loading pause might do in the extremely rare mass shooting incident is vastly outweighed by the

Appendix B

harm visited on manifold law-abiding, citizen-victims who must also pause while under attack.” *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1178–79 (S.D. Cal. 2019); *see also* Gary Kleck, *Large-Capacity Magazines and the Casualty Counts in Mass Shootings: The Plausibility of Linkages*, 17 J. RES. & POL’Y 28, 42–44 (2016), attached as Exhibit 25. In any event, Defendants’ reference to “large capacity” magazines is of no consequence as their restrictions on those magazines are not challenged here.

23. In a home defense capacity, AK and AR type rifles present a problem of overpenetration of common household materials. *Id.* at 30.

Response: Dispute. Overpenetration is largely a result of the ballistic qualities of the rounds an individual uses with their firearms, and it can be just as significant of a problem with other types of firearms. Many civilians, for precisely this reason, load their AR- or AK-type firearms with deforming ammunition that greatly reduces the risks of overpenetration. Indeed, “one of the advantages of an AR rifle compared to a handgun is that the AR bullet is much smaller than typical defensive handgun rounds. Hence, the bullet loses velocity sooner than does a bigger bullet when it strikes the target. Therefore, the AR bullet is less likely to over-penetrate—that is, to exit the criminal’s body and thereby endanger other people.” David Kopel, *How powerful are AR rifles?*, REASON MAG. (Feb. 27, 2023) (internal emphasis omitted), attached as Exhibit 26; *see also The Pros and Cons of the Home Defense AR-15*, GUNCRAFT TRAINING ACAD. (Apr. 30, 2018), attached as Exhibit 27. But the County’s own ordinance

Appendix B

does not evince any real concern for overpenetration. Not only has the County left off its list of banned firearms guns like shotguns or hunting rifles that shoot more penetrative rounds, it has banned features that make rifles more accurate, thereby reducing the risk of overpenetration on missed shots, *see* Resp. to Statement 20, and it has also banned the very style of rifles that fire smaller and less penetrative rounds. *See supra* Wallace “*Lethality*” Resp. to Statement 20, at 8; *see also id.* at 68. Indeed, a round from an AR-15 “normally penetrates less through walls than common handgun and shotgun rounds, reducing the risk to public safety from bullet overpenetration.” *Id.* at 57. The degree of penetration, after all, “would depend on the caliber” of the round, and the County draws no distinctions as to caliber. *See* Halbbrook, *supra* Resp. to Statement 4, at 398. It would seem that the County does not in fact care about overpenetration at all.

24. The residents of Cook County are concentrated at a population density of 5,583 people per square mile. <https://www.census.gov/quickfacts/fact/table/chicagocityillinois,US/PST045221>.

Response: The cited source speaks for itself and, on that basis, Plaintiffs admit.

25. The population density within the City of Chicago is 12,059.8 people per square mile. <https://www.census.gov/quickfacts/fact/table/chicagocityillinois,US/PST045221>

Response: The cited source speaks for itself and, on that basis, Plaintiffs admit.

Appendix B

26. The purpose and best use of assault weapons is to kill with extreme speed and efficiency, not self-defense or hunting. *Declaration of Chief Larry Snelling* (“Snelling”) at ¶ 18, attached hereto as Exhibit 10.

Response: Dispute. Plaintiffs object that this is not a “fact” requiring a response, but an opinion. To the extent warranting response, *see* Resp. to Statement 20. As for the “purpose” of a firearm, that is not an intrinsic feature of a firearm but is entirely dependent on the user. After all, “[p]olice nationwide are issued, or purchase their own, AR-15-style rifles,” and jurisdictions “that ban “assault weapons” for civilians exempt law enforcement officers and even retired officers.” *See* Halbrook, *supra* Resp. to Statement 4, at 38. The County’s own ban exempts law enforcement officers and government employees at all levels from its ambit. Code of Ordinances of Cook Cnty., Ill. §§ 54-212(a)(1). Indeed, “[i]n today’s patrol vehicles it seems you’re more likely to find a semi-automatic rifle chambered in .223. It’s probably an AR-15 variant with a barrel that measures somewhere between 16” to 20”.” Lt. Frank Borelli, *The Patrol Rifle Necessity*, OFFICER.COM (Apr. 18, 2019), attached as Exhibit 28. Chicago’s own police department, after all, has listed the “AR-15/M-4 type, semiautomatic carbine chambered in 5.56 mm” as an “approved carbine” for department issue. Chicago Police Department, *Police Carbine Operator Program*, U04-02-05 (Feb. 2, 2015), attached as Exhibit 29. But police officers issued, and permitted to possess, AR-style rifles plainly do not wish “to kill with extreme speed and efficiency.” Rather, “police use such rifles...because they are considered well suited for self-defense, including in

Appendix B

an urban environment.” *See* Halbrook, *supra* Resp. to Statement 4, at 38.

27. Firearms other than assault weapons are more suitable for personal defense than are assault weapons. *Expert Report and Declaration by Phil Andrew* (“Andrew”) at p.8, ¶¶24.25, attached hereto as Exhibit 11; Exhibit 5 Yurgealitis at p.28–29.

Response: Dispute. Plaintiffs object that this is not a “fact” requiring a response, but an opinion. To the extent warranting response, *see* Resp. to Statement 20. Additionally, the evidence shows that the banned firearms are used much more frequently in self-defense than the County believes. Professor English found that 31.1% of gun owners—approximately 25.3 million Americans—report having used a firearm in self-defense, with approximately 1.67 million defensive gun uses every year. *See* English, *supra* Resp. to Statement 20, at 9. Thirteen percent of these defensive gun uses were with rifles. *Id.* at 10–11.

28. Home defense and/or retail robbery situations are rarely, if ever, lengthy shootouts with extensive exchanges of gunfire. Exhibit 5 Yurgealitis at p.28.

Response: Dispute. “Rarely” is far too subjective an adverb to factually describe the occurrence of self-defense events, particularly those involving life and death. As detailed in Resp. to Statement 20, shootouts with assailants occur, and a majority of defensive firearm uses occur against multiple assailants. *See* English,

Appendix B

supra Resp. to Statement 20, at 15. The benefits of AR-style firearms, also detailed in Resp. to Statement 20, are particularly pronounced in those contexts. In fact, “lengthy shootouts with extensive exchanges of gunfire” are often avoided precisely *because* of the unique defensive advantages AR-style firearms offer a means to speedily and effectively end violent encounters, as the features and incidents recounted in Resp. to Statement 20 demonstrate. But it is an independent analytical error to presume, as the County does, that firearms and the Second Amendment are meant only for those situations it considers normal, frequent, or routine. Rather, in many ways, “[t]he Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once...” *Silveira v. Lockyer*, 328 F.3d 567, 568–70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

29. Most confrontations involve gunfire at close range, and most law enforcement agencies emphasize a 3–10-yard line of fire during their firearm training qualifications. Exhibit 11 Andrew at p.8.

Response: Plaintiffs presently lack knowledge of law enforcement agencies’ line-of-fire training emphases and, on that basis, decline to dispute at this time.

Appendix B

30. Although there are over 300 million firearms in the United States, victims of violent crimes do not defend themselves with a firearm in 99.2% of attacks. Exhibit 4 Donohue at ¶ 115.

Response: Dispute. About “25.3 million adult Americans have used a gun in self-defense.” English, *supra* Resp. to Statement 20, at 12 The vast majority of these cases (81.9%) do not involve a fired shot. *Id.* at 9. For 31.8% of gun owners, “the mere presence of a gun has deterred criminal conduct.” *Id.* at 16. Indeed, “this suggests that approximately 25.9 million gun owners have been involved in an incident in which the presence of a firearm deterred crime on some 44.9 million occasions. This translates to a rate of approximately 1.5 million incidents per year for which the presence of a firearm deterred crime.” *Id.* at 16. According to a large-scale survey of defensive gun uses, only 59.5% of respondents involved in defensive gun uses also reported personal ownership of a gun. Gary Kleck & Marc Gertz, *Armed resistance to crime: The prevalence and nature of self-defense with a gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 187 (1995), attached as Exhibit 30. This means even those who do not own firearms benefit from defensive uses of firearms by those who do. Furthermore, even if true, the County’s proffered statistic compels no material inference. Victims of violent crime may not have defended themselves with a firearm simply because they did not have access to one at the time they were victimized. They might have been targeted because they were known or suspected to be unarmed. They might have survived, or suffered less at their attackers’ hands, had they had the benefit of armed self-defense. How many victims do not, or

Appendix B

do not have a chance to, avail themselves of an advantage in defending their lives and homes has no impact on the rights of those who do wish to avail themselves of it.

31. The firearms industry and pro-firearms groups hold the position that brandishing a firearm and not using it is enough to stop a perpetrator in the vast majority of violent criminal acts. *Id.* at ¶¶ 116–118.

Response: Admit that brandishing or displaying a firearm is often enough to defend oneself from a violent criminal attack. Dispute that displaying and deterring with a firearm is not “use” of a firearm. *See also* Resp. to Statement 30.

32. Legally armed civilians and private security have had limited impact in stopping assault weapon attacks. Exhibit 11 Andrew at p.9.

Response: Dispute. In 2017, former NRA instructor, civilian Stephen Willeford used his semiautomatic rifle to confront and disable the shooter who attacked the First Baptist Church in Sutherland Springs, Tex. *See* Saeed Ahmed, Doug Criss, and Emanuella Grinberg, “*Hero*” *exchanged fire with gunman, then helped chase him down*, CNN (Nov. 7, 2017), attached as Exhibit 31. In 2007, a security guard engaged and shot a gunman armed with a rifle who killed four people at a Colorado church, ending the assault as the gunman killed himself. *Despite Shots From Security Guard, 24-Year-Old Murray Killed Himself*, ABC NEWS (Feb. 26, 2009), attached as Exhibit 32. In any event, this statistic suffers from the same

Appendix B

infirmity as that in Statement 30: it compels no material inference. The “impact” that legally armed citizens have in stopping attacks depends, inter alia, on whether there are armed citizens at the location of a shooting, whether they are able to access their firearms in time, locate the shooter, safely get within firing range of the shooter, and engage the shooter. Whether the constellation of factors involved in disabling a shooter align in a particular case is immaterial to the rights of those who wish to avail themselves of the advantage of armed self-defense and so enlarge their own, and others’, chances of survival.

33. Other weapons, such as a pump action shotgun or an eight-shot revolver, have stopping power, low probability of over penetration, and ease of use. Exhibit 5 Yurgealitis at p.28.

Response: Dispute. Defendants’ statement evinces a misunderstanding of the force at which shotgun pellets strike in close range and the short range at which they are most effective. “Shotguns are low-velocity weapons, but at close range, their pellets or slugs have considerable wounding potential.” *See supra* Wallace “*Lethality*” Resp. to Statement 20, at 51. At a range of under ten feet, “the shotgun produces the most devastating injuries of all small arms.” Panagiotis K. Stefanopoulos et al., *Wound Ballistics of Firearm-Related Injuries—Part 1: Missile Characteristics and Mechanisms of Soft Tissue Wounding*, 43 INT’L J. ORAL & MAXILLOFACIAL SURGERY 1445, 1454 tbl.2 (2014), attached as Exhibit 33. “The kinetic energy of typical twelve-gauge 00 buckshot fired at 1,200 fps is about 1,700 ft/lbs at the muzzle. Wounding is severe

Appendix B

due to the pellets acting as a single large projectile, their rapid deceleration and transfer of all their energy to tissue, and the creation of multiple wound tracks due to the so-called “billiard ball effect” scattering the pellets inside the tissue.” *See supra* Wallace “*Lethality*” Resp. to Statement 20, at 51. While “[s]hotgun pellets do not produce a temporary cavity like expanding, yawing, or fragmenting handgun and rifle bullets,” *id.*, “[t]hese wounding effects . . . are of lesser extent compared to the distinctively massive injuries produced by shotgun blasts,” *see supra* Stefanopoulos et al., *Wound Ballistics*, at 1454. “Shotgun slugs deform and cause temporary cavitation,” *see supra* Wallace “*Lethality*” Resp. to Statement 20, at 51, “produc[ing] massive internal injuries within a range of [one hundred] meters, comparable in severity to those encountered from hunting rifle bullets.” *see supra* Stefanopoulos et al., *Wound Ballistics*, at 1453. “The kinetic energy of a typical twelve-gauge shotgun slug is around 2,600 ft/lbs, which approximates the energy of larger caliber rifle bullets.” *See supra* Wallace “*Lethality*” Resp. to Statement 20, at 51. The stronger recoil of shotguns also renders them more unwieldy for self- and home-defense than semiautomatic rifles: “the typical shotgun has more recoil than most handguns and rifles.” Brandon Mattox, *How to Reduce Shotgun Recoil*, SILENCER CENT. (Jan. 17, 2023), <https://bit.ly/40x6TLE>, attached as Exhibit 36. Defendants’ evangelization of the benefits of revolvers does not square with the retirement of the outdated firearm among police departments. Indeed, the revolver “is being phased out” by the largest police department in the United States as “the [New York] Police Department and most other law enforcement

Appendix B

agencies to switch to semiautomatic weapons.” Ashley Southall, *New York Police Department Is Retiring the Revolver*, THE NEW YORK TIMES (May 31, 2018), <https://nyti.ms/3KQ0K7m>, attached as Exhibit 34. But this switch from revolvers to semiautomatic firearms is neither novel nor sudden—police departments have been “replacing the time-honored .38-caliber revolver with a 9-millimeter semiautomatic pistol as a standard weapon” since at least 1989. Amy Hill Hearth, *Police Turning to 9-mm. Guns to Fight Crime*, THE NEW YORK TIMES (Mar. 12, 1989), attached as Exhibit 35.

34. A shotgun disperses shot in a conical pattern, expanding in an ever-larger pattern as it travels, as opposed to a round from an AR-15, which travels like a laser beam. *Deposition of James Yurgealitis* (“Yurgealitis Dep.”), 92:1-7, attached hereto as Exhibit 12.

Response: Dispute. A round from an AR-15, like all rifle and handgun rounds, travels in a generally straight line, accounting for effects from gravity and from wind. It does not “travel[] like a laser beam.” This sort of hyperbolic language is both inaccurate and indicative of the County’s experts’ attempts to describe ordinary functioning of ordinary firearms in overblown and frightening language.

35. A shotgun’s conical shot pattern has more utility in a home defense scenario, for example, in a darkened house where the homeowner may be feeling the effects of adrenaline. Exhibit 12 Yurgealitis 92:1-17.

Response: Dispute. While a shotgun may have some advantages in some cases, the way shotgun shot spreads

Appendix B

can also be a disadvantage where precise shooting, or shooting over longer distances, is required. *See also* Resp. to Statement 33. Shotguns also have overpenetration problems at short distances due to the incredible amounts of kinetic energy they have at short distances. *See id.*

Witnesses

36. Phil Andrew is a public safety and crisis management specialist, a licensed attorney, and a detective. Exhibit 11 Andrew at ¶¶ 3-4, 6-7.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

37. Andrew was a Special Agent of the Federal Bureau of Investigation for 21 years. *Id.* at ¶¶ 3-4, 6-7, 9-10, 12-15.F

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

38. Dr. Christopher Colwell is the Chief of Emergency Medicine at Zuckerberg San Francisco General Hospital and Trauma Center. *Declaration of Christopher B. Colwell, M.D.* (“Colwell”) at p.1, attached hereto as Exhibit 13.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

39. Dr. Colwell has over 30 years of experience treating gunshot wounds, including treating the victims

Appendix B

of the shootings at Columbine High School in Colorado, a movie theater in Aurora, Colorado, and the UPS facility in San Francisco. Colwell at 3. [N]ot one of the injuries from assault weapons that he has managed has come in the setting of self-defense. *Id.* at p.3.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

40. John Donohue is the C. Wendell and Edith M. Carlsmith Professor of Law at Stanford Law School and was formerly a tenured chaired professor at both Yale Law School and Northwestern Law School. Professor Donohue teaches courses evaluating the nature of gun regulation in the United States and its impact on crime. Exhibit 4 Donohue at ¶¶ 3-5.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

41. Dr. Stephen Hargarten is an emergency medicine specialist and a faculty member at the Comprehensive Injury Center at the Medical College of Wisconsin. He has practiced emergency medicine for over 35 years and conducted research on wound ballistics that involved shooting different styles of firearms at a gelatin standardized muscle tissue simulator. *Report of Stephen W. Hargarten, MD, MPH* (“Hargarten”) at ¶ 1, ¶ 8-12, and Viramontes 03545, attached hereto as Exhibit 14.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

Appendix B

42. James Yurgealitis is a consultant and technical advisor in the field of firearms forensics. Exhibit 5 Yurgealitis at Viramontes 04176-4177.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

43. Yurgealitis is a former Special Agent of the Bureau of Alcohol, Tobacco, and Firearms where he served as the Program Manager for Forensic Services at the ATF National Laboratory Center, as well as a Special Agent of the Federal Bureau of Investigation, the U.S. Secretary of State, and the U.S. Department of State. *Id.* at Viramontes 04176-4177.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

44. Louis Klarevas is a security policy analyst and research professor at Teachers College, Columbia University. Exhibit 3 Klarevas at ¶¶ 1-4.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

45. Klarevas is a founding member of the Columbia University Scientific Union for the Reduction of Gun Violence (SURGE) as well as a member of the Regional Gun Violence Research Consortium at the State University of New York's Nelson A. Rockefeller Institute of Government. *Id.* at ¶¶ 1-4.

Appendix B

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

46. Klarevas has served on the faculties of the George Washington University, the City University of New York, New York University, and the University of Massachusetts. He is a former Defense Analysis Research Fellow at the London School of Economics and Political Science and a United States Senior Fulbright Scholar in Security Studies at the University of Macedonia. *Id.* at ¶¶ 1-4.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

47. Dr. Martin Schreiber is a Colonel in the U.S. Army Reserve and the Chief of the Division of Trauma, Critical Care, & Acute Care Surgery, a Professor of Surgery, and the trauma medical director at Oregon Health & Science University. *Declaration of Martin A. Schreiber, MD FACS FCCM COL, MC, USAR* (“Schreiber”) at Viramontes 003958, 03964, attached hereto as Exhibit 15.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

48. Dr. Schreiber has served in Afghanistan twice and in Iraq once caring for combat injuries. *Id.*

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

Appendix B

49. Dr. Jillian Peterson is an associate professor of criminology and criminal justice and the Director of the Forensic Psychology program at Hamline University. *Expert Report of Jillian K. Peterson, PhD for Cook County State's Attorney's Office* ("Peterson") at Viramontes 03908, attached hereto as Exhibit 16.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

50. Dr. Peterson is the Co-founder and co-president of The Violence Project Research Center, which is best known for its public database of mass shooters in the U.S. *Id.*

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

51. Saul Cornell is the Paul and Diane Guenther Chair in American History at Fordham University, where he teaches constitutional history to undergraduates, graduates, and law students of the Fordham Law School. *Expert Report of Professor Saul Cornell* ("Cornell") at Viramontes 004185, attached hereto as Exhibit 17.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

52. Professor Cornell has been a senior visiting research scholar at Yale Law School, the University of Connecticut Law School, and Benjamin Cardozo Law

Appendix B

School. He has been widely published on the topic of the Second Amendment and gun regulation. *Id.*

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

53. Dr. Diana Palmer is a licensed mental health provider, clinical supervisor, and part-time lecturer in the Doctor of Law and Policy program at Northeastern University. She holds a doctorate degree in Law and Policy. *Expert Report and Declaration by Dr. Diana Palmer* (“Palmer”) at ¶¶ 1,2 , attached hereto as Exhibit 18.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

54. Chief Larry Snelling is the Chief of the Chicago Police Department’s Bureau of Counterterrorism. He has been a member of the Chicago Police Department since 1992. He is responsible for over twenty units, including the Intelligence Section, Special Weapons and Tactics (SWAT), Firearms Investigation Team, Canine Unit, Public Transportation Unit, Airport Operations, Marine Operations Unit, Mounted Unit, Gang Investigations Unit, and Bomb Squad of CPD. Exhibit 10 Snelling at ¶¶ 1-3, 6.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

Appendix B

**Medical Implications of Injuries Caused by
Assault Weapons**

55. Injuries caused by assault weapons and events in which assault weapons are used are consistently more serious than those caused by non-assault weapons. Exhibit 13 Colwell at p.1.

Response: Dispute. *See* Resp. to Statement 4.

56. Gunshot wounds from assault weapons, such as AR-15s and AK-47s, increase the likelihood for morbidity as well as difficulty in triaging and managing injuries. *Id.* at p.2.

Response: Dispute. *See* Resps. to Statements 4 and 8.

57. Conversely, handgun injuries produce less harm to the human body and are generally survivable unless the bullet penetrates a critical organ or major blood vessel. Exhibit 15 Schreiber at p.2.

Response: Dispute. The amount of harm inflicted by a firearm of any type is primarily dependent upon *where* an individual is injured by a bullet or bullets, not what sort of firearm fired the bullet. *See* Deposition Transcript of James Yurgealitis at 42:24–42:6. According to Navy Combat Surgeon, and president of the International Wound Ballistics Association Colonel Martin L. Fackler, “widespread misinformation persists” regarding the wounding power of rifles like the AR-15, and “[t]he damage caused by the military rifle bullet [5.56mm] cannot be

Appendix B

differentiated from that caused by a handgun bullet even by the most expert.” Martin L. Fackler, *Gunshot Wound Review*, ANNALS OF EMERGENCY MED. 202 (Aug. 1996), attached as Exhibit 37. And this 5.56 mm cartridge is the very one the AR-15 is designed to accept—in fact, as a key feature: “Notwithstanding its distinctive appearance and unique aluminum, fiberglass, and plastic construction, the AR-15’s most groundbreaking feature was, arguably, its ammunition—the intermediate .223 Remington and 5.56mm NATO rounds.” Dennis P. Chapman, *Firearms Chimera: The Counter Productive Campaign to Ban the AR-15 Rifle*, 8 BELMONT L. REV. 191, 203 (2020), attached as Exhibit 38. In short, “AW-type firearms do not operate differently than other comparable semiautomatics, nor do they fire more lethal ammunition.” See Koper, *supra* Resp. to Statement 4, at 149; see also Resps. to Statements 4 and 8.

58. Victims of assault weapons are at greater risk for immediate and long-term complications from both damage caused by the velocity of the bullets and the number of wounds involved. Exhibit 13 Colwell at p.2,3.

Response: Dispute. Defendants’ failure to indicate a comparator renders the statement incomplete and impossible to answer. See also Resps. to Statements 4, 8, and 57.

59. The killing capacity of a weapon is primarily determined by the kinetic energy imparted by the bullet, its effective range, and the rate at which the weapon fires projectiles. Exhibit 15 Schreiber at p.2.

Appendix B

Response: Dispute. Defendants identify three discrete factors as “primarily” determining the “killing capacity” of a firearm, and these undefined terms leave this statement vague and ambiguous. Furthermore, it should be noted that the features of firearms that make them targets of Cook County’s ban do not impact any of the features which “primarily” determine the firearms “killing capacity.” Finally, there are many other factors which determine the “killing capacity” of a firearm in particular circumstances: “How bullets injure and kill has less to do with velocity and kinetic energy than with the location of impact, the bullet’s physical characteristics (mass, shape, and construction), and the type of tissues disrupted along the bullet’s path.” *See supra* Wallace “*Lethality*” Resp. to Statement 20, at 45 (summarizing research from Martin L. Fackler, *Civilian Gunshot Wounds and Ballistics: Dispelling the Myths*, 16 EMERGENCY MED. CLINICS 17, 19 (1998) and Martin L. Fackler, *Gunshot Wound Review*, 28 ANNALS EMERGENCY MED. 194, 202 (1996). *See also* Resps. to Statements 4, 8, and 57.

60. The muzzle velocity of an AR-15 is approximately 3,200 feet per second compared to approximately 1,200 feet per second for a 9mm Baretta. The kinetic energy of an AR-15 is 1,303 foot pounds, compared to 400 foot pounds for a 9mm Baretta. *Id.* at 2; Exhibit 5 Yurgealitis at p.16. The effective range of an A-R15 is approximately 400–500 yards compared to up to 50 yards for a typical handgun. Schreiber at 3.

Response: Admit that the specifications of the AR-15 listed here are accurate, but Plaintiffs dispute

Appendix B

that comparison to a 9mm handgun is material or even relevant. Cook County has singled out certain semiautomatic rifles as illegal. The question is not whether they are more powerful than handguns, but whether they are more powerful than rifles which are not banned by the County. In fact, other centerfire rifles which are not banned are equal to or more powerful than the AR-15 in these respects. *See Jacob Sullum, Neither ‘Capacity’ Nor ‘Power’ Distinguishes ‘Assault Weapons’ From Other Firearms*, REASON (Oct. 31, 2018), attached as Exhibit 39.

61. The energy release with a bullet from AR 15 style rifles (5.56 NATO bullets) is over three times greater than from bullets from a Thompson Machine gun rifle (.45 ACP bullet). Defs.’ Ex. 14, Hargarten Rep. at ¶¶ 11, 12.

Response: Dispute. It is unclear what Defendants mean by “energy release” and whether they mean the energy released at the time the projectile leaves the muzzle or at the time of the projectile’s impact. At any rate, “the AR-15’s smaller .223/5.56 bullets strike with only one-fourth to one-half of the energy of most other centerfire rifle bullets despite having higher velocities.” *See supra* Wallace, “*Lethality*” Resp. to Statement 20, at 53.

62. When a projectile fired by an AR-15 penetrates the human body, it creates not only a permanent cavity the size of the bullet, but also a temporary cavity radiating radially from the permanent cavity path caused by the dispersion of kinetic energy. *Id.* at ¶ 10; Exhibit 15 Schreiber at p.2.

Appendix B

Response: Admit. All bullets create both permanent and temporary cavities when they strike a target. Jeremy J. Hollerman et al., *Gunshot wounds: Bullets, Ballistics, and Mechanisms of Injury*, 155 AM. J. OF ROENTGENOLOGY 685, 686 (Oct. 1990), attached as Exhibit 40.

63. The temporary cavity can be up to 11–12.5 times larger than the diameter of the ammunition. Exhibit 5 Yurgealitis at p.17.

Response: Admit. Large temporary cavities can result from large handgun bullets and center-fire rifle bullets generally, not just bullets fired from the banned firearms. See Hollerman, et al., *supra* Resp. to Statement 62, at 687.

64. The temporary cavity of the 5.56 NATO bullet is over three times the size of the .45 caliber bullet's temporary cavity from the Thompson Machine gun. Exhibit 14 Hargarten at ¶¶ 11, 12.

Response: Admit. As discussed above, rifle ammunition produces larger temporary cavities than typical handgun bullets, like a .45 ACP. See Hollerman et al., *supra* Resp. to Statement 62, at 687. 65. An AR-15's kinetic energy release and resulting permanent and temporary cavities are more destructive than a bullet fired by a Thompson machine gun, with direct implications for injury and death. *Id.* at ¶ 13.

Response: Admit in part, dispute in part. The most lethal feature of bullets fired from a machine gun is not their individual ballistic qualities but the fact that they

Appendix B

are fired from a gun capable of automatic fire. Simply describing individual wounds and comparing them for lethality creates a false impression of how the firearms that shot them compare.

66. The “yaw” of assault rifle ammunition (the deviation of the bullet’s axis in relation to its trajectory) also contributes to the creation of both temporary and permanent large wound cavities in the human body. Exhibit 5 Yurgealitis at p.16.

Response: Dispute. Not all ammunition “yaws,” and while yawing is a feature of some, primarily military, 5.56mm full-metal jacket rounds, the more common .223 caliber rounds used by civilians typically do not yaw (though the bullets, in many other ways, perform similarly). *See* Kopel, *supra*, Resp. to Statement 23, at II.B. At any rate, the yawing of a bullet depends far less on the firearm than on other factors. And there is no categorical difference between the yawing of a bullet fired from an “assault weapon” and one fired from any other semiautomatic firearm. “The yaw of a bullet is defined as the deviation of the long axis of the bullet from its line of flight. When a bullet is fired down a rifled barrel, the rifling imparts a gyroscopic spin to the bullet. The purpose of the spin is to stabilize the bullet’s flight through the air. Thus, as the bullet leaves the barrel, it is spinning on its long axis, which in turn corresponds to the line of flight. As soon as the bullet leaves the barrel, however, it begins to wobble or yaw. The amount or degree of yaw of a bullet depends on the physical characteristics of the bullet (its length, diameter, cross-sectional density), the

Appendix B

rate of twist of the barrel, and the density of the air.” *See* DiMaio, *supra* Resp. to Statement 4.

67. 5.56 bullets will yaw upon contacting tissue. Conversely, handgun bullets travelling at a lower velocity do not typically yaw upon contact with tissue and do not create as large of a wound cavity nor commensurate destruction of tissue. *Id.* at 16; Exhibit 12 Yurgealitis Dep. 67:12–24.)

Response: Admit in part, dispute in part. Yawing is a feature of some 5.56mm rounds, but as discussed above, many civilian rounds do not have that effect. “In fact, many AR users choose ammunition that is designed *not* to yaw but instead to deform.” *See* Kopel, *supra*, Resp. to Statement 23.

68. The yaw effect of assault rifle ammunition can also cause the bullet to fragment upon striking human bone, which contributes to additional tissue damage not immediately adjacent to the cavity itself. Exhibit 5 Yurgealitis at p.16.

Response: Admit in part, dispute in part. *See* Resp. to Statement 66.

69. The fragmentation of assault rifle ammunition can amplify the effects of the temporary cavity, increasing the severity of the wound. *Id.* at p.17.

Response: Dispute to the extent meant to imply this is a unique feature of assault rifle ammunition.

Appendix B

70. Organs such as the liver and spleen are more severely lacerated because of the development of temporary cavitation. Exhibit 14 Hargarten at ¶ 14; Exhibit 15 Schreiber at p.2.

Response: Admit.

71. Patients with assault rifle injuries frequently have multiple organs injured as well as major blood vessels. They often require massive blood transfusions due to tremendous blood loss and require a series of operations, instead of just one as is common with handguns. Exhibit 15 Schreiber at p.2.

Response: Dispute. Whether multiple organs are injured, and the amount of blood lost, are all dependent upon *where* an individual is injured by a bullet or bullets, not what sort of firearm fired the bullet. *See* Deposition Transcript of James Yurgealitis at 42:24–42:6, Defs.’ Ex. 12. According to Navy Combat Surgeon, Colonel Martin L. Fackler and president of the International Wound Ballistics Association, “widespread misinformation persists” regarding the wounding power of rifles like the AR-15, and “[t]he damage caused by the military rifle bullet [5.56mm] cannot be differentiated from that caused by a handgun bullet even by the most expert.” Fackler, *supra* Resp. to Statement 57. In short, “AW-type firearms do not operate differently than other comparable semiautomatics, nor do they fire more lethal ammunition.” *See* Koper, *supra* Resp. to Statement 4, at 149.

72. When patients with assault rifle injuries survive, they require prolonged hospitalizations and follow-up

Appendix B

and suffer much greater disability for the rest of their shortened lives. *Id.*

Response: Dispute. As explained in Resp. to Statement 71, the extent of an individual's injuries are dependent upon many factors, but the cosmetic features of the firearm that fired the bullet is not one of them. Many wounds from AR-15 style rifles are no more severe than wounds from a handgun and have been successfully treated the same way. See Fackler, *supra* at 195, 202; Koper, *supra* at 149.

73. Bullets from AR 15 style rifles are also more likely to fracture bones due to their higher energy release. Exhibit 14 Hargarten at ¶ 14.

Response: Dispute. As Hargarten himself explains, "energy release" causes the creation of a temporary cavity. Defs.' Ex. 14, Hargarten Rep. at ¶ 14. "Fractures from cavitation are rare in the human being: I have seen but two (both from short-range shotgun blasts) and have not seen a verified report of any in the literature." Fackler, *supra* at 199; Koper, *supra* at 149.

74. Assault rifle blasts to the extremities frequently result in amputations, Exhibit 15 Schreiber at p.2, even where an injury to the same body part caused by a handgun would be treatable. Exhibit 13 Colwell at p.3.

Response: Dispute. Injuries to extremities from firearms like an AR-15 are frequently no more severe than a handgun wound to an extremity. Reports of such wounds in Vietnam during the Vietnam War noted that they generally "showed small entry and exit wounds and

Appendix B

a clean soft-tissue track with little or no devitalization of tissue. Such wounds usually healed if left alone.” Fackler, *supra* at 195. Furthermore, “[d]elegates to the Tri-Service War Surgery conferences of 1970 and 1971 reported no unusual problems associated with ‘high-velocity’ bullet wounds in Vietnam. There were *no reports* of rifle bullet wounds causing traumatic amputation of an extremity.” *Id.* (emphasis added); *see also* Koper, *supra* Resp. to Statement 4, at 149.

75. Children who are shot by an AR-15 style bullet have extremely high mortality rates, partially due to having a smaller torso and lower blood reserve than teenagers or adults. Exhibit 14 Hargarten at ¶ 15.

Response: Dispute. *See* Resp. to Statement 4, 8, 57, 71.

76. The effective range of an AR-15 is approximately 400–500 yards, compared to 50 yards for a typical handgun. Exhibit 15 Schreiber at p.3.

Response: Admit.

77. Assault weapons, especially when equipped with large capacity magazines, can also fire more shots faster, often causing more victims per event and more injuries per victim. Exhibit 13 Colwell at p.3.

Response: Dispute. This statement of fact is incomplete, as it provides no comparison for what an “assault weapon” supposedly shoots “faster” than. A semiautomatic rifle shoots at the same rate as a semiautomatic handgun and

Appendix B

at a significantly lower rate than an automatic firearm. *See Rifle Marksmanship: M16-/M4-Series Weapons*, DEP'T OF THE ARMY at tbl. 2-1 (2008), <https://bit.ly/3pvS3SW>, attached as Exhibit 7 (noting that an M16 has an effective rate of fire 150-200 rounds per minute in automatic mode but just 45-65 rounds per minute in semiautomatic mode).

78. The fact that there are multiple victims when assault weapons are involved adds to the complexity of managing cases as triage of multiple potentially serious injuries is often involved which can lead to delays in transport and treatment while resources are being used for multiple real or potential victims. *Id.*

Response: Dispute. The firearms banned by Cook County are involved in a very small portion of firearm homicides. *See* John Gramlich, *What the data says about gun deaths in the U.S.*, PEW RSCH. CTR. (Feb. 3, 2022), <https://pewrsr.ch/3MxkLve>, attached as Exhibit 41. Mass shootings are an exceptionally rare form of gun crime, making up a minuscule percentage of all homicides. *See* Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994-2004*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 166 (Daniel W. Webster & Jon S. Vernick eds., 2013), attached as Exhibit 42; D'Vera Cohn et al., *Gun Homicide Rate Down 49% Since 1993 Peak; Public Unaware*, PEW RSCH. CTR. (May 7, 2013), <https://pewrsr.ch/3qwE94l>, attached as Exhibit 43. And even so, mass shootings involving multiple victims are most often carried out with handguns, not so-called “assault weapons.” James Alan Fox & Monica DeLateur,

Appendix B

Mass Shootings in America: Moving Beyond Newtown, 18 HOMICIDE STUDIES 125, 136 (2013) (noting that the “overwhelming majority of mass murderers use firearms that would not be restricted by an assault weapons ban” and “semiautomatic handguns are far more prevalent”); accord Daniel W. Webster et al., *Evidence Concerning the Regulation of Firearms Design, Sale, and Carrying on Fatal Mass Shootings in the United States*, 19 CRIM’Y & PUB. POL’Y 171, 188 (2020).

79. Injuries caused by assault weapons are more likely to require implementation of disaster plans which focus resources on doing the greatest good for the greater number of victims, potentially limiting resources for other patients who may also need assistance. *Id.* at p.2.

Response: Dispute. *See* Resps. to Statements 4, 8, 57, 71, 78.

80. These complex and difficult triage decisions are rarely, if ever, necessary when non-assault weapons are involved. *Id.* at p.3.

Response: Dispute. *See* Resp. to Statement 79.

81. The injuries produced by assault type weapons frequently exceed the capabilities of civilian trauma systems and trauma surgeons. Exhibit 15 Schreiber at p.3.

Response: Dispute. *See* Resp. to Statement 79.

Appendix B

82. When first introduced, military-style AR-15 types of weapons were not especially popular. Exhibit 17 Cornell at p.22.

Response: Plaintiffs object that the initial popularity of the AR-15 is irrelevant, as the Supreme Court has made clear that what matters for the “common use” analysis is whether a firearm is in “common use *today*.” See *Bruen*, 142 S. Ct. at 2143 (emphasis added).

83. The patent on the AR-15 expired in the late 1970s, which led to competition in the marketplace. Exhibit 5 Yurgealitis at p.14,15.

Response: Admit.

84. In the 1980s, gun manufacturers began branding military-style firearms with the label “assault” weapons to make them more marketable to civilians. *Id.* at 18–19; Exhibit 3 Klarevas at ¶ 14; Exhibit 4 Donohue at ¶ 90.

Response: Plaintiffs object that the marketing of the banned firearms is irrelevant to any part of the analysis under *Bruen*, and this fact is not in any way “material” to this case. Subject to that objection, Plaintiffs dispute. While “assault rifle” has a technical meaning (different from the meaning used by the County here), “assault weapon” does not. “Prior to 1989, the term ‘assault weapon’ did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of ‘assault rifles’ so as to allow an attack on

Appendix B

as many additional firearms as possible on the basis of undefined ‘evil’ appearance.” *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (citation omitted).

85. After the 1994 federal ban expired in 2004, legislation provided broad immunity to gun manufacturers, which allowed for a torrent of consumer advertising designed to highlight the battlefield appeal of modern assault weapons. Exhibit 4 Donohue at ¶ 84.

Response: Plaintiffs object that the marketing of the banned firearms is irrelevant to any part of the analysis under *Bruen*, and this fact is not in any way “material” to this case. Plaintiffs admit that in 2004 Congress passed the Protection of Lawful Commerce in Arms Act to protect the firearms industry from spurious lawsuits intending to hold manufacturers liable for criminal misuse of their products. Plaintiffs dispute the rest of Statement 85.

86. Gunmakers developed a set of marketing strategies linking these products to their origins in the military. Exhibit 17 Cornell at p.22.

Response: Plaintiffs object that the marketing of the banned firearms is irrelevant to any part of the analysis under *Bruen*, and this fact is not in any way “material” to this case. Plaintiffs presently lack knowledge regarding the “marketing strategies” of firearms manufacturers and, on that basis, decline to dispute at this time.

Appendix B

87. Marketing campaigns used to sell assault weapons have utilized images of military assault capabilities. *Id.* at 23.

Response: Plaintiffs object that the marketing of the banned firearms is irrelevant to any part of the analysis under *Bruen*, and this fact is not in any way “material” to this case. The examples of firearms advertisements cited by Professor Cornell speak for themselves.

88. The gun industry marketed assault weapons with depictions of combat and phrases like, “The closest you can get without having to enlist,” and “Forces of opposition, bow down.” Exhibit 4 Donohue at ¶¶ 85, 87.

Response: Plaintiffs object that the marketing of the banned firearms is irrelevant to any part of the analysis under *Bruen*, and this fact is not in any way “material” to this case. The examples of firearms advertisements cited by Professor Donohue speak for themselves.

89. Adam Lanza, the perpetrator of the Newtown killings, used a Bushmaster AR-15 type weapon marketed with the slogan “Consider Your Man Card Reissued.” *Id.* at ¶ 91; Exhibit 17 Cornell at p.23.

Response: Plaintiffs object that the marketing of the banned firearms is irrelevant to any part of the analysis under *Bruen*, and this fact is not in any way “material” to this case. Plaintiffs admit that Lanza used a Bushmaster AR-15. Plaintiffs dispute that there is any evidence Lanza

Appendix B

saw the type of marketing Professor Donohue cites. The examples of firearms advertisements cited by Professor Donohue speak for themselves.

90. The overall configuration of “copycat” AR rifles remains identical to the original production design adopted in the 1960s. Exhibit 5 Yurgealitis at p.15, 17, 18.

Response: Admit.

91. Shooters using assault weapons do not need a high level of firearm proficiency, professional training, or practice to inflict mass death and injury at close and longer ranges because they are able to fire rapidly with high-capacity magazines and remain accurate at ranges well beyond 100 yards with little skill development. Exhibit 10 Snelling at ¶ 12; Exhibit 11 Andrew at p.6.

Response: Plaintiffs admit that firearms deemed “assault weapons” by Cook County are safe and accurate to use, even for non-experts. See Resp. to Statement 20. But, rather than making them more dangerous, this fact makes them a good choice for individuals who are not firearms experts who desire to protect themselves and their homes. Plaintiffs dispute that anyone with “little skill development” can fire rapidly and accurately at ranges “well beyond 100 yards” because “little” and “well beyond” are subjective terms used in service of an opinion that cannot be responded to on a factual basis.

92. Seventy percent of adults in the United States do not own any firearms at all. Exhibit 4 Donohue at ¶ 25.

Appendix B

Response: Dispute. This understates firearm ownership. As of 2020, 32% of American adults reported owning a firearm personally, and 44% reported living in a house with a firearm. *See* Lydia Saad, *What Percentage of Americans Own Guns?*, GALLUP (Nov. 13, 2020), <https://bit.ly/3MXF23N>, attached as Exhibit 46. *See* English, *supra* Resp. to Statement 20, at 8.

93. The rise in popularity of assault weapons and their accessories is a recent development in American gun culture. Exhibit 17 Cornell at p.21.

Response: Plaintiffs object that how recently AR-15s became popular is irrelevant, because what matters under *Bruen* is whether a firearm is in “common use today.” 142 S. Ct. at 2143. Subject to that objection, Plaintiffs dispute. AR-15s and similar rifles have been commercially available since the 1960s and have been popular since at least the 1980s. *See* Jon Schuppe, *America’s rifle: Why so many people love the AR-15*, NBC NEWS (Dec. 27, 2017), <https://nbcnews.to/43ScOxy>, attached as Exhibit 47.

94. As of December 2019, assault rifles made up approximately 4% of all firearms in circulation in American society. Exhibit 3 Klarevas at ¶ 27.

Response: Admit with respect to total stock of firearms, but this is misleading. AR-15s and other similar rifles are exceptionally popular and sell at a much higher rate than their share of the total stock indicates. In recent years, the AR-15 has been “the best-selling rifle type in the United States,” Nicholas J. Johnson, *Supply Restrictions*

Appendix B

at the Margins of Heller and the Abortion Analogue, 60 HASTINGS L.J. 1285, 1296 (2009), attached as Exhibit 48. Modern sport rifles are the second most common type of firearm sold, behind only semiautomatic handguns. Sales of modern sport rifles account for approximately 20% of nationwide firearm sales. *See 2021 Firearms Retailer Survey Report*, NAT'L SHOOTING SPORTS FOUND., INC., at 9, <https://bit.ly/3gWhI8E>, attached as Exhibit 49. Today, the number of AR-rifles and other similar rifles in circulation in the United States exceeds twenty-four million. *Commonly Owned: NSSF Announces Over 24 Million MSRS in Circulation*, NSSF (July 20, 2022), <https://bit.ly/3QBxiyv>, attached as Exhibit 50. *See also* English, *supra* Resp. to Statement 20, at 1. By comparison, there are just 4.56 million noninstitutionalized civilians with doctoral degrees, and 3.15 with professional degrees, in the United States. *See Educational Attainment in the United States: 2019*, U.S. Census Bureau tbl. 1 (Mar. 30, 2020), <https://bit.ly/3qBy077>, attached as Exhibit 51.

95. The average civilian assault-rifle owner owns three or more assault rifles, and 27% of owners have bought four or more. Exhibit 4 Donohue at ¶ 86.

Response: Dispute. A recent large-scale survey of American gun owners indicates that approximately 24.6 million Americans have owned an AR-15 or similar modern semiautomatic rifle, with the “median owner” identified as owning a single rifle. *See* English, *supra* Resp. to Statement 20, at 2, 33.

Appendix B

96. The U.S. accounts for 5% of the world's population but has had one-third of the public shootings that have occurred worldwide since the late 1960s. *Id.* at ¶ 67.

Response: Dispute. There is no accepted definition of “public shooting” and this fact is insufficiently specific to respond to adequately.

97. Of all firearm homicides in the U.S. in 1993, 17.9% were committed with long guns. That percentage doubled to 35.6% by 2018. *Id.* at ¶ 36.

Response: Dispute. In 2018, according to the FBI, there were 10,265 homicides committed in the United States with firearms, but just 297 were committed with rifles (2.9%) and just 235 were committed with shotguns (2.3%). *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2014–2018, Crime in the United States*, FBI, U.S. DEP'T OF JUST. (2018), <https://bit.ly/2p0bw4D>, attached as Exhibit 52. By contrast, 6,603 were committed with handguns (64%). The only way to get to the percentages reached by Professor Donohue is to lump together every non-handgun category together and *assume* they are all rifles, despite the fact that the largest single non-handgun category is “firearms, type not stated,” which accounts for 2,963 (29%) and there is *no reason* to assume that the unidentified firearms differ in general breakdown from the identified firearms such that they would even slightly increase the share of crime committed with long guns, let alone *entirely consist* of long guns. Professor Donohue's assertion is also contrary to a widely cited 2004 study

Appendix B

which found that so-called “assault weapons” “are used in a small fraction of gun crimes.” Christopher Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994–2003* (2004), U.S. DEP’T OF JUST., at 2, <https://bit.ly/3hZiy5v>, attached as Exhibit 53. And furthermore, although Professor Donohue denigrates relying on FBI statistics for understanding homicide trends and suggests instead that CDC data would be a better choice, *his own numbers* here are based on the FBI data (just misinterpreted). See Grace Kena & Jennifer L. Truman, *Trends and Patterns in Firearm Violence, 1993–2018*, BUREAU OF JUST. STAT. SPECIAL REP. at Tbl. 4 (Apr. 2022), <https://bit.ly/3ojUJYS> (noting source of data is FBI Supplementary Homicide Reports), attached as Exhibit 54; *see also* Donohue Report, Defs.’ Ex. 4 at n.13. This makes sense, since the Bureau of Justice Statistics has elsewhere explained that FBI “data are better suited for understanding the circumstances surrounding homicide incidents,” as we are interested in doing here. *The Nation’s Two Measures of Homicide*, BUREAU OF JUST. STAT. PROGRAM REP. at 4 (July 2014), <https://bit.ly/41mlLO8>, attached as Exhibit 55.

Finally, Plaintiffs note that the 2021 FBI data demonstrates that rifles, and long guns in general, still form a minuscule portion of homicides. There were 510 homicides committed with rifles of any type that year, the same number as were committed with “personal weapons” like hands and feet, and far fewer than the 5,363 committed with handguns. *U.S. Homicide Offense characteristics: Type of Weapon Involved by Offense*, FBI CRIME DATA EXPLORER (2023), <https://bit.ly/40NHSMC>, attached as Exhibit 56.

Appendix B

98. Since January 1, 1980, 1,195 people have died in the United States in mass public shootings, defined as shootings resulting in four or more casualties where the act occurred largely in a public setting and did not involve an underlying criminal objective. Exhibit 3 Klarevas at ¶ 23.

Response: Dispute. It “is difficult to make accurate generalizations about mass shootings. These challenges occur, in part, because (1) there are many different definitions for mass shootings, each of which may be useful for a somewhat different purpose; (2) we have incomplete data sources that do not track these events in a consistent manner over time, likely include a biased sample of incidents, and lack the full range of individual and incident characteristics researchers are interested in; and (3) there are statistical limitations inherent in trying to draw inferences from rare and idiosyncratic events.” See Smart & Schell, *supra* Resp. to Statement 7. As a result, there is little agreement even among researchers regarding “how often mass shooting events occur, how the rate has changed over time, and incident characteristics.” *Id.* And the differences in views are massive. “Depending on which data source is referenced, there were somewhere between six and 503 mass shootings and between 60 and 628 mass shooting fatalities in 2019.” *Id.* See also Resp. to Statement 7.

99. Since January 1, 1980, 1,126 people have died in the United States in mass shootings that involved 6 or more fatalities regardless of motive or location, known as high fatality mass shootings. *Id.*

Appendix B

Response: Dispute. *See* Resps. to Statements 7 and 98.

100. 746 of those deaths occurred after the expiration of the federal ban in 2004. (*Id.*, Ex. B.)

Response: Dispute. *See* Resps. to Statements 7 and 98.

101. There were an average of 2.7 events public mass shootings per year in the 1980s, rising to an average of 4.5 events per year from 2010 to 2013. Exhibit 4 Donohue at ¶ 41.

Response: Dispute. *See* Resps. to Statements 7 and 98. This also overstates the actual rise in “mass public shooting” incidents, which data from multiple studies suggests has only slightly increased over the past four decades. *See* Smart & Schell, *supra* Resp. to Statement 7.

102. The eight deadliest acts of criminal violence in the United States since September 11, 2001 have been mass shootings. Exhibit 3 Klarevas at ¶ 24. Seven of those mass shootings involved assault weapons. *Id.* at ¶ 28.

Response: Dispute. *See* Resps. to Statements 7 and 98. Plaintiffs also note that this is missing important context which overstates its significance. Mass shootings, despite their prevalence in the media, are a very rare form of crime. In 2018, for instance, “mass public shootings . . . represent[ed] fewer than one of every 200 homicides.” *See* Smart & Schell, *supra* Resp. to Statement 7.

Appendix B

103. 2010 to 2019 was the worst decade on record in terms of frequency and lethality of mass shootings in the United States. *Id.* at ¶ 25.

Response: Dispute. *See* Resps. to Statements 7 and 98.

104. Assault weapons are disproportionately used in mass shootings relative to their use in other gun homicides. Exhibit 16 Peterson at p.8.

Response: Dispute. *See* Resps. to Statements 7 and 98. A Congressional Research report concluded that “offenders used firearms that could be characterized as ‘assault weapons’ in . . . 9.78% [of mass shootings].” William J. Krouse & Daniel Richardson, CONG. RSCH SERV., R44126, MASS MURDER WITH FIREARMS: INCIDENTS AND VICTIMS, 1999-2013 29 (2015), attached as Exhibit 100. In addition, handguns are the firearm most commonly involved in active shootings and mass shootings; semiautomatic rifles or ‘assault-style’ weapons are used in an estimated 10 to 36 percent of active shootings and mass shootings.” *See* Smart & Schell, *supra* Resp. to Statement 7.

105. Over half of high-fatality mass shootings and mass public shootings in the last five years involved assault weapons. Exhibit 3 Klarevas at ¶ 26.

Response: Dispute. *See* Resps. to Statements 7, 98, and 104. Plaintiffs also note that the problem with making statistical generalizations of already rare events is exacerbated when an artificially truncated timeframe, like “the last five years,” is used.

Appendix B

106. Over 70% of deaths in high-fatality mass shootings and mass public shootings in the last five years were from incidents involving assault weapons. *Id.*

Response: Dispute. *See* Resps. to Statements 7, 98, 104, and 105. It appears that Professor Klarevas included within his “last five years” the Las Vegas shooting which occurred in October 2017. *See* Klarevas Report, Defs.’ Ex. 3 at 10 n.16.

107. In 2019, 75% of high-fatality mass shootings and 57% of all mass public shootings were committed with assault rifles, far outpacing the relative prevalence of assault rifles in American society. *Id.* at ¶ 27. Extended magazines were used in a fifth of all mass shootings with more than 4 fatalities from 1999 to 2022. Exhibit 16 Peterson at p.11.

Response: Dispute. *See* Resps. to Statements 7, 98, 104, and 105. Additionally, the objection that the problem with making statistical generalizations of already rare events is exacerbated when an artificially short timeframe, like a single year, is used. Plaintiffs note that, when not cherry-picking a single year for alarmist analysis, and relying on longer time frames, so-called assault weapons are used in mass shootings at a far lower rate than Professor Klarevas suggests.

108. Since 1980, high fatality mass shootings without an assault weapon had an average death toll of 8.0 fatalities per shooting. High fatality mass shootings with an assault

Appendix B

weapon had an average death toll of 13.5 fatalities per shooting. Exhibit 3 Klarevas at ¶ 29.

Response: Dispute. *See* Resps. to Statements 7 and 98. Professor Klarevas’s work has found an unusually marked effect on the presence or absence of so-called “assault weapons” at mass shootings. The RAND Corporation noted that a 2019 paper by Klarevas showed “improbably large” effect sizes which it concluded were “likely biased” because of the limited number of incidents considered by Klarevas and his coauthors. *See Effects of Assault Weapon and High-Capacity Magazine Bans on Mass Shootings*, RAND Corp. (Jan. 10, 2023), <https://bit.ly/3mR58uT>, attached as Exhibit 57.

109. Since 1980, mass public shootings without an assault weapon had an average death toll of 6.0 fatalities per shooting. Mass public shootings with an assault weapon had an average death toll of 10.6 fatalities per shooting. *Id.*

Response: Dispute. *See* Resps. to Statements 7, 98, and 108.

110. Since 2012, high fatality mass shootings without an assault weapon had an average death toll of 7.8 fatalities per shooting. High fatality mass shootings with an assault weapon had an average death toll of 18.1 fatalities per shooting. *Id.*

Response: Dispute. *See* Resps. to Statements 7, 98, and 108.

Appendix B

111. Since 2012, mass public shootings without an assault weapon had an average death toll of 6.2 fatalities per shooting. Mass public shootings with an assault weapon had an average death toll of 13.9 fatalities per shooting. *Id.*

Response: Dispute. *See* Resps. to Statements 7, 98, and 108

112. Mass shootings presently pose the deadliest threat of individual acts of violence in America in the post-September 11 era, and the problem is growing. *Id.* at ¶ 43.

Response: Dispute. *See* Resps. to Statements 7, 98, and 108. It is unclear how mass shootings are “the deadliest threat,” but the fact is they are an exceptionally rare form of gun crime, making up a minuscule percentage of all homicides. *See* Koper, *supra* Resp. to Statement 78, at 166; *see also* Cohn et al., *supra* Resp. to Statement 78, at 4.

113. Mass shootings involving assault weapons, on average, have resulted in a substantially larger loss of life than similar incidents that did not involve assault weapons. *Id.* at ¶ 43.

Response: Dispute. *See* Resps. to Statements 7, 98, and 108. Plaintiffs also note that “substantially larger” is a subjective term that cannot be understood or answered on a factual basis.

114. Restrictions on assault weapons have the potential to significantly reduce the frequency and

Appendix B

lethality of mass shootings. *Id.* at ¶ 43; *see also* Exhibit 4 Donohue at ¶ 67.

Response: Dispute. *See* “*Effects of Assault Weapon Bans*,” *supra* Resp. to Statement 108 (finding uncertain effects from assault weapon bans on mass shootings). This is because these firearms “do not operate differently than other comparable semiautomatics.” *See* Koper, *supra* Resp. to Statement 4, at 149; *see also* Benjamin M. Blau et al., *Guns, laws and public shootings in the United States*, APPLIED ECONOMICS, Vol. 48, Issue 49, 4732 (2016), attached as Exhibit 58; Webster, et al., *Evidence concerning the regulation of firearms design, sale, and carrying on fatal mass shootings in the United States*, CRIMINOLOGY & PUB. POL’Y, Vol. 19, Issue 1 (2020) (finding “no evidence that . . . assault weapons bans . . . were associated with the incidence of fatal mass shootings”). Plaintiffs also note that “significantly reduce” is a subjective term that cannot be understood or answered on a factual basis.

115. Between January 1, 1990 and June 30, 2022, states that prohibited assault weapons experienced 44-percent and 14-percent decreases, respectively, in high-fatality mass shooting and mass public shooting incidence rates. Exhibit 3 Klarevas at ¶ 37.

Response: Dispute. *See* Resps. to Statements 7, 98, and 108.

116. Between January 1, 1990 and June 30, 2022, states with assault weapons bans experienced 57 percent fewer high-fatality mass shootings involving the use of

Appendix B

an assault weapons and 32 percent fewer mass public shootings involving the use of assault weapons. *Id.* at ¶ 38.

Response: Dispute. *See* Resps. to Statements 7, 98, and 108.

117. In the ten years the federal assault weapons ban was in effect, gun massacres resulting in 6 or more deaths fell significantly compared to the ten years prior. In the ten years after the ban expired, gun massacres skyrocketed to levels higher than before the ban was in place. Exhibit 4 Donohue at ¶¶ 74–76, citing Klarevas.

Response: Dispute. *See* Resps. to Statements 7, 98, and 108.

118. There is not the slightest evidence that the federal assault weapons ban compromised the safety of law-abiding citizens. Exhibit 4 Donohue at ¶ 104.

Response: Dispute. *See* English, *supra* Resp. to Statement 20, at 12, 15 (finding that 31% of firearm owners have used firearms in self-defense and that 13% of such uses involved a rifle). When individuals are deprived of their right to possess such firearms, they cannot use them successfully for self-defense.

119. Deaths per gun massacre increased 90% in the ten years after the federal ban was allowed to expire. *Id.* at ¶ 80.

Response: Dispute. *See* Resps. to Statement 7, 98, and 108. The implication of this statement that the federal ban

Appendix B

had been suppressing mass shootings is incorrect. No such link has been shown. *See* Resp. to Statement 114.

120. There have been 15 gun massacres with 6 or more deaths since 2014, killing 272 people, and each one involved assault weapons and/or high capacity magazines that would have been prohibited under the federal ban had it still been in effect. *Id.* at ¶ 81.

Response: Dispute, subject to the objection above that it is very difficult to make generalizations about mass shooting violence, Professor Donohue does not distinguish between “assault weapons” and “high capacity magazines” but this case does not challenge the magazine size restrictions put in place by the County. Without distinguishing these features, Professor Donohue’s numbers cannot say anything informative about so-called “assault weapons” alone.

121. In the five-year period from 2014-2019, the number of fatalities in gun massacres involving 6 or more deaths topped the amount that occurred in the ten years after the ban expired (2004-2013). *Id.* at ¶ 78.

Response: Dispute. *See* Resps. to Statements 114.

122. Mass shooters who use assault rifles are likely influenced by two psychological phenomena: the weapons effect and social proof. Exhibit 16 Peterson at p.12–13.

Response: Dispute. *See* Resps. to Statement 7, 98, and 108.

Appendix B

123. The weapons effect is a concept that states that the mere presence of weapons increases aggressive thoughts and aggression. *Id.*

Response: Dispute that the weapons effect is a valid psychological phenomenon. “The most recent meta-analysis of the weapons effect (Benjamin, et al. 2018) suggests that although the mere presence of weapons appeared to reliably increase accessibility of aggressive cognition and hostile threat appraisals, the available literature suggested that the influence of the mere presence of weapons on aggressive behavioral outcomes was at best inconclusive.” Arlin J. Benjamin, Jr., *Weapons Effect* at 2, in THE INT’L ENCYCLOPEDIA OF MEDIA PSYCH. (2020), <https://bit.ly/3AeVu8q>, attached as Exhibit 59. There have been a few more recent studies that appear to show a “weapons effect” increasing aggressive behaviors, but the studies are hardly conclusive, with both limited sample and effect sizes. *Id.* at 2–3.

124. Social proof is a concept stating that people tend to mimic those who came before when they do not know what to do. In the context of mass shootings, this means many mass shooters conform to expectations of what mass shooters do, and one mass shooting creates social proof for the next mass shooting, until eventually there is a generalized knowledge about mass shootings. *Id.* at 13.

Response: Dispute. *See* Resps. to Statement 7, 98, and 108. Additionally, if anything this tends against any finding that the type of firearm used plays a causal role in the lethality of mass shootings.

Appendix B

125. In 2018, the FBI announced that the active shooter problem in the United States was growing. Exhibit 4 Donohue at ¶ 45.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

126. According to the FBI's data, the number of active shooter incidents has doubled from 2017 to 2021, from 30 to 61. *Id.* at ¶ 46.

Response: The data speaks for itself. To the extent this mischaracterizes the data, dispute.

127. The number of mass shootings is higher following the termination of the federal assault weapons ban in 2004. *Id.* at ¶ 47.

Response: Dispute. *See* Resps. to Statement 7, 98, and 108. Defendants' statement is also vague and impossible to answer factually in the absence of a comparator.

128. After the federal ban lapsed in 2004, the gun market was flooded with increasingly more powerful weaponry that allowed mass killers to kill even more quickly with predictable results. *Id.* at ¶ 77.

Response: Dispute. *See* Resps. to Statements 8, 9, 20, and 22. The firearms banned by the County as "assault weapons" are not "more powerful" than, and function no differently from, any other comparable semiautomatic firearms.

JA130

Appendix B

129. The decade after the ban lapsed saw a 266 percent increase in mass shooting incidents and a 347 percent increase in fatalities, even as overall violent crime continued downward. *Id.* at ¶ 77.)

Response: Dispute. *See* Resps. to Statement 7, 98, and 108.

Cook County’s Ordinance

130. In November 2006, the Cook County Board of Commissioners enacted, and in July 2013 they revised, the Blair Holt Assault Weapons Ban (“the Ordinance”). Exhibit 7 Complaint at ¶ 18; Exhibit 2 Ordinance.

Response: Admit.

131. The Ordinance defines “assault weapon” and “large-capacity magazine” and makes it illegal to “manufacture, sell, offer or display for sale, give, lend, transfer ownership of, acquire, carry or possess” either item in Cook County. Exhibit 2 Ordinance; Exhibit 7 Complaint at ¶ 19.

Response: Dispute that this is not a “fact” but rather a statement of the law. The terms of the Ordinance speak for themselves.

132. Under section 24-211(1)(A)–(E) of the Ordinance, an assault weapon includes a “semiautomatic rifle that has the capacity to accept a large capacity magazine detachable or otherwise” as well as at least one of the

Appendix B

following: only a pistol grip without a stock attached; any feature capable of functioning as a protruding grip that can be held by the non-trigger hand; a folding, telescoping, or thumbhole stock; a shroud attached to the barrel, or that partially or completely encircles the barrel, allowing the bearer to hold the firearm with the non-trigger hand without being burned, but excluding a slide that encloses the barrel; or a muzzle break or muzzle compensator. Exhibit 2 Ordinance at § 24- 211(1)(A)–(E); Exhibit 5 Yurgealitis at p.22.

Response: Dispute that this is not a “fact” but rather a statement of the law. The terms of the Ordinance speak for themselves.

133. Under section 24-211(2), an assault weapon includes a “semiautomatic pistol or any semi-automatic rifle that has a fixed magazine, that has the capacity to accept more than ten rounds of ammunition.” Exhibit 2 Ordinance at § 24-211(2); Exhibit 5 Yurgealitis at p.24.

Response: Dispute that this is not a “fact” but rather a statement of the law. The terms of the Ordinance speak for themselves.

134. Under section 24-211(3), an assault weapon has the capacity to accept a detachable magazine as well as at least one of the following: any feature capable of functioning as a protruding grip that can be held by the non-trigger hand; a folding, telescoping, or thumbhole stock; a shroud attached to the barrel, or that partially or completely encircles the barrel, allowing the bearer to

Appendix B

hold the firearm with the non-trigger hand without being burned, but excluding a slide that encompasses the barrel; a muzzle brake or muzzle compensator; or the capacity to accept a detachable magazine at some location outside of the pistol grip. Exhibit 2 Ordinance at § 24-211(3); Exhibit 5 Yurgealitis at p.24–25.

Response: Dispute that this is not a “fact” but rather a statement of the law. The terms of the Ordinance speak for themselves.

135. Under section 24-211(4), an assault weapon includes a semiautomatic shotgun with one more of the following: only a pistol grip without a stock attached; any feature capable of functioning as a protruding grip that can be held by the non-trigger hand; a folding, telescoping, or thumbhole stock; an ability to accept a detachable magazine. Exhibit 2 Ordinance at § 24-211(4); Exhibit 5 Yurgealitis at p.25.

Response: Dispute that this is not a “fact” but rather a statement of the law. The terms of the Ordinance speak for themselves.

136. Under section 24-211(5), an assault weapon includes any shotgun with a revolving cylinder. Exhibit 2 Ordinance at § 24-211(5).

Response: Dispute that this is not a “fact” but rather a statement of the law. The terms of the Ordinance speak for themselves.

Appendix B

137. A semiautomatic rifle or shotgun which includes only a pistol grip increases the ability of the operator to conceal the firearm, to maneuver the firearm in confined space, and to fire from positions other than the shoulder. Exhibit 5 Yurgealitis at p.22,26.

Response: Dispute. *See* Resp. to Statement 20.

138. Semiautomatic rifles with a pistol grip and without a shoulder stock are used in the military. Exhibit 12 Yurgealitis Dep., 27:10-28:9.

Response: Plaintiffs admit that there are examples of firearms with this configuration that have been used by the military, but Plaintiffs further note that much more common military firearms, like the M16 for instance, do not have this configuration. Nor do most commonly owned AR-15 rifles. In fact, the ordinary meaning of “rifle” specifically requires the firearm in question to be equipped with a shoulder stock because a rifle is designed to be fired from the shoulder. *See, e.g.*, 18 U.S.C. § 921(a)(7).

139. A protruding foregrip allows the operator to better control recoil and muzzle climb, thus increasing the hit probability of successive shots. Exhibit 5 Yurgealitis at p.22,26.

Response: Admit. *See* Resp. to Statement 20.

140. Rifles with protruding foregrips or forward grips are military-style firearms as opposed to sporting style firearms. Exhibit 12 Yurgealitis Dep., 28:21-29:13.

Appendix B

Response: Dispute. Professor Yurgealitis admitted he “could not say . . . absolutely” that protruding or forward grips were not used for sporting purposes, Defs.’ Ex. 12 at 29:12–13. In fact, they are common features of semiautomatic rifles: “Vertical foregrips are pretty common and they are essentially a bar mounted to the bottom of the handguard of an AR.” Sean Curtis, *8 Best AR-15 Foregrips: Vertical & Angled*, PEWPEW TACTICAL (Dec. 22, 2022), attached as Exhibit 60.

141. A folding and/or telescoping stock facilitates easier or more comfortable firing from positions other than the shoulder and allows the operator to more easily conceal or maneuver the rifle in a confined space. Exhibit 5 Yurgealitis at p.23,26.

Response: Dispute. Folding and telescoping stocks increase the likelihood of successful home defense by permitting safe storage of defense instruments in accessible spaces and making the rifle maneuverable in confined spaces. *See* Kopel, *supra* Resp. to Statement 20, at 398–99. Although the smaller size makes the firearm more concealable, handguns are still “far more concealable than rifles in any configuration.” *Id.* Even with an adjustable stock, these rifles are intended to be shot from the shoulder. *See* Resp. to Statement 20.

142. Folding, telescoping, and thumbhole stocks are not common features on sporting rifles. Exhibit 12 Yurgealitis Dep., 29:14-18.

Response: Dispute. “[T]he civilian AR-15 has telescoping rather than folding stocks. Adjustable stocks are

Appendix B

ubiquitous on civilian rifles.” *See supra* Wallace, “*Myths*” Resp. to Statement 20, at 232.

143. A shroud or handguard that encircles the barrel protects the gas tube/piston mechanism from inadvertent damage, protects the operator from injury due to a hot barrel or other component, and provides additional grip space for the operator to steady the rifle. Exhibit 5 Yurgealitis at p.23,26.

Response: Admit. *See* Resp. to Statement 20.

144. Barrell shrouds or handguards are more common on military firearms than sporting rifles. Exhibit 12 Yurgealitis Dep., 29:19-30:10.

Response: Dispute. *See* Resp. to Statement 20.

145. A muzzle brake can allow the operator to regain control of the rifle more rapidly after firing by venting escaping gases upward at the end of the barrel. Exhibit 5 Yurgealitis at p.23,26.

Response: Admit. *See* Resp. to Statement 20.

146. Muzzle brakes and muzzle compensators are not common features on sporting rifles. Exhibit 12 Yurgealitis Dep., 31:2-6.

Response: Dispute. *See* Resp. to Statement 20.

147. A secondary added grip increases stability in controlling a pistol. Exhibit 5 Yurgealitis at p.24.

Appendix B

Response: Admit. *See* Resp. to Statement 20.

148. A folding, telescoping, or thumbhole stock increases stability in controlling the pistol. *Id.*

Response: Admit.

149. Modern firearms with a detachable magazine forward of the pistol grip provide a second grip point, increasing stability and allow more controlled rapid fire. *Id.* at p.25.

Response: Admit in part, dispute to the extent that the statement is too vague to permit a response, because “rapid fire” is undefined.

150. Increased controllability can result in more effective shot placement by the operator and require less time to acquire successive targets. *Id.* at p.24.

Response: Admit.

151. Most traditional hunting rifles or sporting rifles do not have the ability to accept or use detachable magazines with varying capacities. Exhibit 12 Yurgealitis Dep., 34:19-24.

Response: Dispute. “Since the beginning of the twentieth century, semiautomatic firearms with detachable magazines have been commonly possessed.” *See* Halbrook, *supra* Resp. to Statement 4, at 16. Furthermore, it is unclear what Defendants mean by “traditional”.

Appendix B

152. The Ordinance also lists specific examples of banned assault weapons. Exhibit 2 Ordinance at § 54-211(7)(a); Exhibit 7 Complaint at ¶ 26.

Response: Plaintiffs object that this is not a “fact” but rather a statement of the law. The terms of the Ordinance speak for themselves.

153. Any person who legally possessed an “assault weapon” or “large-capacity magazine” prior to enactment of the Ordinance must remove it from county limits, modify it to render it permanently inoperable, or surrender it to the Sheriff. Exhibit 2 Ordinance at § 54-212(c); Complaint at ¶ 21.

Response: Plaintiffs object that this is not a “fact” but rather a statement of the law. The terms of the Ordinance speak for themselves.

154. Violation of the County Ordinance is a misdemeanor, carrying a fine ranging from \$5,000 to \$10,000 and a term of imprisonment of up to six months. Exhibit 2 Ordinance at § 54-214(a); Complaint at ¶ 23.

Response: Plaintiffs object that this is not a “fact” but rather a statement of the law. The terms of the Ordinance speak for themselves.

155. Controlling for population, the states that have prohibited assault weapons experienced 57% fewer high fatality mass shooting incidents involving assault weapons and 32% fewer mass public shooting incidents involving

Appendix B

assault weapons than states without assault weapons bans for the period of January 1, 1990 through June 30, 2022. Exhibit 3 Klarevas at ¶ 38.

Response: Dispute. In a meta-analysis of six studies, including one by Professor Klarevas, the RAND Corporation found that “assault weapon” bans have uncertain effects on mass shootings and evidence of any relationship is inconclusive. *See “Effects of Assault,” supra* Resp. to Statement 108. Speaking of Professor Klarevas’s study specifically, the analysis concluded that the effect sizes demonstrated by Professor Klarevas “were improbably large,” an error that suggested the outcome of the study was “likely biased because of the sparsity” of the data analyzed. *Id.*; *see also* Resp. to Statement 98.

156. The states that have prohibited assault weapons experienced 68% fewer fatalities resulting from high fatality mass shooting incidents involving assault weapons and 57% fewer fatalities resulting from mass public shooting incidents involving assault weapons than states without assault weapons bans for the period of January 1, 1990 through June 30, 2022. *Id.*

Response: Dispute. *See* Resps. to Statements 7, 98, 108, and 155.

157. Controlling for population, and including shootings that did not involve assault weapons, the states that have prohibited assault weapons experienced 44% fewer high fatality mass shooting incidents with firearms of all kinds and 14% fewer mass public shooting incidents with firearms of all kinds than states without assault

Appendix B

weapons bans for the period of January 1, 1990 through June 30, 2022. *Id.* at ¶ 37.

Response: Dispute. *See* Resps. to Statements 7, 98, 108, and 155.

158. By population, the states that have prohibited assault weapons experienced 54% fewer fatalities resulting from high fatality mass shootings involving firearms of all kinds and 37% fewer fatalities resulting from mass public shootings involving firearms of all kinds than states without assault weapons bans for the period of January 1, 1990 through June 30, 2022. *Id.* at ¶ 37.

Response: Dispute. *See* Resps. to Statements 7, 98, 108, and 155.

159. Cook County has experienced less frequent and less lethal high-fatality mass shootings and mass public shootings than the rest of the United States since implementing the assault weapons ban in 1993. *Id.* at ¶ 40.

Response: Dispute. Mass public shootings are extremely rare events, most places in the United States have experienced *none* since 1993. It is misleading to compare the rate of mass shootings within Cook County (a very small sample) against the rate across the entire country as a whole (an all-inclusive sample). *See also* Resps. to Statements 7, 98, and 108.

160. Cook County has not seen a high-fatality mass shooting or mass public shooting involving an assault weapon since the ban. *Id.* at ¶ 40.

Appendix B

Response: Subject to the objection above that it is very difficult to make generalizations about mass shooting violence, Plaintiffs admit. Though Cook County *has* experienced mass shootings since the Ban, as Professor Klarevas admits.

161. The high-fatality mass shootings and mass public shootings perpetrated without an assault weapon that have occurred in Cook County since the ban have an average death toll of 6.0 per incident and 5.5 per incident, respectively. *Id.* at ¶ 40.

Response: Dispute. *See* Resps. to Statements 7, 98, and 108.

162. The average death toll of high fatality mass shootings and mass public shootings in the entire United States is 10.1 and 7.4, respectively. *Id.* at ¶ 40.

Response: Dispute. *See* Resps. to Statements 7, 98, and 108.

163. If the federal assault weapons ban had remained in place after 2004 and the country had moved toward a more complete ban, many of the gun tragedies of recent years would have been far less deadly and damaging to countless individuals who have been maimed and injured throughout the United States. Exhibit 4 Donohue at ¶ 114.

Response: Dispute. This is not a fact at all, but rather unfounded conjecture. As explained above, “assault weapons” bans have no demonstrated effect on mass shootings. *See* Resp. to Statement 154; *see also* Resp. to

Appendix B

Statement 7, 98, and 108. This is hardly surprising, given that “AW-type firearms do not operate differently than other comparable semiautomatics, nor do they fire more lethal ammunition.” *See* Koper, *supra* Resp. to Statement 4, at 149.

164. The FBI’s analysis of active shooters over age 18 found that 65% had no adult convictions prior to the active shooting event. *Id.* at ¶ 50.

Response: Admit.

165. One in five assault weapons owners do not lock up their assault rifles, and more than 30% do not secure their ammunition. *Id.* at ¶ 86.

Response: The results of the survey speak for themselves. Dispute to the extent this mischaracterizes the survey.

166. Teenage gunmen who are not eligible to possess assault weapons may take weapons from relatives who legally possess them and use them to commit mass shootings, as was the case in at least 20 of the 32 school shootings with at least three victims dead or injured that have occurred since 1990. *Id.* at ¶ 50; *see also Id.* at ¶106.

Response: Defendants’ sources speak for themselves. Dispute to the extent Defendants misconstrue the sources.

167. Approximately 400,000 guns fall into the possession of criminals each year when they are lost by or stolen from law-abiding citizens. *Id.* at ¶ 108.

Appendix B

Response: Dispute. This overstates it. From 2005-2010, according to the Bureau of Justice Statistics, there were an average of 172,040 firearms stolen each year. U.S. Bureau of Justice Statistics, *Firearms Stolen During Household Burglaries and Other Property Crimes, 2005–2010*, U.S. Dep’t of Just. (Nov. 2012), <https://bit.ly/2D9ujOd>, attached as Exhibit 61.

168. Many of the most horrific and notorious mass shootings were perpetrated by law-abiding citizens armed with assault weapons: Stephen Paddock (Las Vegas, 59 killed); Omar Mateen (Pulse Nightclub, 49 killed); Adam Lanza (Sandy Hook Elementary, 26 killed); James Holmes (movie theater, 12 killed); Buffalo, New York supermarket (10 killed); Uvalde, Texas elementary school (21 killed). *Id.* at ¶ 109.

Response: Dispute. Mass murderers obviously are not law-abiding citizens.

Impact on the Community

169. Survivors of mass shootings report a broad range of emotions, such as anger, sadness, fear, frustration, helplessness, and an eroded sense of safety and trust, as well as symptoms of depression, anxiety, cognitive issues, and post-traumatic stress disorder. Exhibit 16 Peterson at p.14; *see also* Exhibit 4 Donohue at ¶ 48.

Response: Plaintiffs object that this fact is not specific to the types of firearms banned by Cook County. Plaintiffs further object that it is very difficult to make

Appendix B

generalizations about mass shooting violence. *See* Resps. to Statements 7 and 98. Furthermore, mass shootings are also statistically rare. In the most recent years for which data are available (2015–2019), the FBI reports that 71,704 murders were committed, 52,125 with a firearm. *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015–2019, Crime in the United States*, FBI, U.S. DEP'T OF JUST. (2019), <https://bit.ly/31WmQ1V>, attached as Exhibit 101. The FBI reported 125 active shooter incidents during the same 5-year period. Lacey Wallace, *Mass Shootings are Rare—Firearm Suicides Are Much More Common, and Kill More Americans*, PBS (Mar. 30, 2021), <https://to.pbs.org/3LlU8z9>, attached as Exhibit 63. According to one source, mass shootings account for 0.2% of total firearm deaths. *Facts and Figures: The Human Toll*, U.C. DAVIS HEALTH, <https://bit.ly/43SBQww>, attached as Exhibit 64. And even in these events, rifles are not the weapon of choice for perpetrators. *See* Resp. to Statement 104. Subject to these objections, Plaintiffs admit.

170. The National Center for Post-Traumatic Stress Disorder states that 28% of people who witness a mass shooting develop PTSD and another third will develop acute stress disorder. Exhibit 16 Peterson at p.14.

Response: Subject to the objections above, *see* Resp. to Statement 169, Plaintiffs state that they presently lack knowledge and, on that basis, decline to dispute at this time.

171. Some studies have found that as many as 95% of mass shooting survivors develop PTSD in the aftermath. *Id.*

Appendix B

Response: See Resp. to Statement 170.

172. In communities where a mass shooting occurs, at least 5 to 10% of people who were not primary victims develop PTSD. *Id.*

Response: Subject to the objection above, *see* Resp. to Statement 169, Plaintiffs dispute. This assertion mischaracterizes the source, which analyzed “disaster victims” in general, not communities impacted by mass shootings specifically. Dr. Peterson’s report cites, a U.S. Department of Veterans Affairs article, to a study by Yuval Neria et al., *Post-traumatic stress disorder following disasters: a systematic review*, 38 PSYCH. MED. 467 (Apr. 2008), <https://bit.ly/3GTJOLR>, attached as Exhibit 65, which analyzed few “mass shootings” in its study of man-made disasters. Instead, the authors focused primarily on the Oklahoma City Bombing and the 2001 attack on the World Trade Center.

173. Because mass shootings are seemingly random and unpredictable, these events cause helplessness, making them more traumatic than nearly all other causes of injury and death in the healthy populations that are exposed. *Id.*

Response: Dispute. The “seemingly random” and “unpredictable” natures of mass shootings are not unique features to these types of tragedies and are not a basis on which to distinguish “all other causes of injury and death in the healthy populations that are exposed.”

Appendix B

174. Nearly half of all adults in the United States fear becoming a victim of a mass shooting. *Id.* at p.15.

Response: Dispute. Plaintiffs admit that Peterson cites a few studies indicating a large portion of adults in the United States fear becoming a victim of a mass shooting, but Plaintiffs dispute that fear is reasonable. *See* Resp. to Statement 169. As of 2015, only 41% of Americans were not at all afraid of flying in an airplane, with a majority of adults either “bothered slightly” or “afraid,” despite air travel’s well-understood safety record. *See* Kathy Frankovic, *Most Americans now worried about flying*, YOUGOVAMERICA (Apr. 1, 2015), <https://bit.ly/3KVyccy>, attached as Exhibit 66. Mass shootings are tragic, traumatic, and shocking events. . . . However, they represent a very small fraction of the homicides in the United States.” *See* Smart & Schell, *supra* Resp. to Statement 7. In fact, from 1976 through 2018, an average of just 26 people were killed per year in public mass shooting incidents (defined as “incidents that occur in the absence of other criminal activity (e.g., robberies, drug deals, and gang ‘turf’ wars’) in which a gun was used to kill four or more victims in a public location within a 24-hour period”). Grant Duwe, *Patterns and Prevalence of Mass Violence*, 2019 J. CRIM. & PUB. POL’Y 1, 12 (2019), <https://bit.ly/3ovd19A>, attached as Exhibit 67. That is slightly lower than the number of individuals (27) killed each year by lightning strikes and significantly lower than the number injured by lightning strikes (243). *How Dangerous is Lightning?*, NAT’L WEATHER SERV., <https://bit.ly/3wN3iNU>, attached as Exhibit 68. 175. Approximately 80% of U.S.

Appendix B

adults report feeling stressed about mass shootings. *Id.* at p.15.

Response: *See* Resp. to Statement 174.

176. As of 2018, three out of four youth in America reported mass shootings being a primary source of stress. *Id.* at p.15.

Response: *See* Resp. to Statement 174.

177. Around 20% of youth report the potential of a school shooting causes them daily stress. *Id.* at p.15.

Response: *See* Resp. to Statement 174.

178. Following the 1984 San Ysidro McDonald's shooting in which 21 people were killed by a gunman with a semi-automatic Uzi, 12.6% of female members of the broader community who were not directly involved in the shooting showed symptoms of PTSD. *Id.* at p.15.

Response: Admit.

179. Public mass shootings are particularly high-visibility events that are quite shocking to the public and unsettling to the sense of public safety. Exhibit 4 Donohue at ¶ 61.

Response: This is a statement of opinion to which no response is required or possible. *See* Resps. to Statements 173 and 174.

Appendix B

180. It is abundantly clear that the horrors of mass shootings such as the killing of 20 students and 6 teachers at Sandy Hook Elementary, 19 elementary students and 2 teachers in Uvalde, Texas, and 10 people who died in a hate crime in Buffalo, New York, have inflicted psychological distress far beyond the contours of those small communities and indeed caused suffering throughout the entire country. *Id.*

Response: This is a statement of opinion to which no response is required or possible. *See* Resps. to Statements 173 and 174.

181. Studies consistently show that mass shootings can lead to increased levels of posttraumatic stress disorder, anxiety, and depression. *Id.* at ¶ 62.

Response: Subject to the objections above that it is very difficult to make generalizations about mass shooting violence and that mass shootings are rare events that are most commonly perpetrated with handguns, Plaintiffs admit. *See also* Resp. to Statement 169.

182. The 2008 shooting at Northern Illinois University that left five people dead and 17 wounded led to a dramatic increase in PTSD symptoms among the university's students. *Id.* at ¶ 62.

Response: Admit.

183. In Norway, stress reactions were increased among the general population after a shooting in 2011 left 67 people dead and 32 wounded. *Id.* at ¶ 63.

Appendix B

Response: Admit.

184. Children and people who have experienced previous trauma or psychological disorders are more susceptible to mental health problems or PTSD after a mass shooting. *Id.* at ¶ 65.

Response: Subject to the objections above that it is very difficult to make generalizations about mass shooting violence and that mass shootings are rare events that are most commonly perpetrated with handguns, Plaintiffs admit. *See also* Resp. to Statement 169.

185. One study found that local exposure to fatal school shootings increased youth antidepressant use by 21.4% in the following two years. *Id.* at ¶ 66.

Response: Subject to the objections above that it is very difficult to make generalizations about mass shooting violence and that mass shootings are rare events that are most commonly perpetrated with handguns, Plaintiffs admit. *See* Resp. to Statement 169.

186. Rifle caliber assault weapons prohibited under the Ordinance pose a significant risk to law enforcement officers. Exhibit 5 Yurgealitis at p.32.

Response: Dispute. The firearms banned by the Ordinance are not identified by caliber, and the Ordinance bans firearms that are not “rifle caliber” if they have banned features. Furthermore, rifle-caliber firearms are used extremely rarely in crime, as discussed above.

Appendix B

See Resp. to Statement 97. Finally, “rifle caliber assault weapons” pose no greater threat to law enforcement than other rifle-caliber firearms because they operate the same way as any other semiautomatic firearm. *See also* Resp. to Statement 162.

187. Firearms based on the AR-15 design are the weapon of choice in 85% of mass shootings resulting in four or more victims. Exhibit 11 Andrew at p.4.

Response: Dispute. As discussed above, handguns are much more commonly used in mass shootings than “firearms based on the AR-15 design.” *See* Smart & Schell, *supra* Resp. to Statement 7; *see also* Resp. to Statement 98. The figure on which Mr. Andrew relies is higher than the figure found by *any* of the studies analyzed by Smart & Schell. And in fact, the study from which it was derived, DiMaggio et al., *Changes in U.S. mass shooting deaths associated with the 1994 federal assault weapons ban: Analysis of open-source Data*, J. OF TRAUMA & ACUTE CARE SURGERY 86, no. 1 (2019): 11–19, attached as Exhibit 69, inspired a letter to the editor from another of the County’s experts, Professor Klarevas. Professor Klarevas wrote that, of the “three key findings” presented by DiMaggio and his coauthors—(1) that 77% of mass shootings between 1981 and 2017 involved “assault weapons” which were responsible for 86% of the fatalities, (2) “assault weapons” accounted for all mass-shooting fatalities in 15 of the years surveyed, and (3) a statistical analysis of the period when the federal “assault weapons” ban was in effect “seven preventable deaths were attributable to assault weapons alone”—“the first two findings are incorrect,

Appendix B

calling into question the third finding and any broader conclusion that can be drawn from the study regarding the impact of the AWB.” Louis Klarevas, *Letter to the editor re: DiMaggio, C., Et al. “Changes in U.S. mass shooting deaths associated with the 1994-2004 federal assault weapons ban: Analysis of open-source data*, J. OF TRAUMA & ACUTE CARE SURGERY 86, no. 5 (2019): 926–28, attached as Exhibit 70. Professor Klarevas went on to note that “after reviewing the study’s data set, I believe that the authors misidentified the involvement of assault weapons in roughly half the incidents” and that “when the erroneous cases are recalibrated, the number of incidents involving assault weapons drops 62% . . . and the number of fatalities resulting from such shootings drops 46%” bringing the study into rough consistency with the others to look at the issue. *Id.* Professor Klarevas closed by noting that “[w]ith such a large number of misclassifications, the study’s overarching conclusions about the effect of the AWB is called into question.” *Id.*; FBI, *supra* *Expanded Homicide Data Table 8*, Resp. to Statement 169.

In response to Professor Klarevas’s letter, DiMaggio acknowledged that his methodology had counted all semiautomatic firearms as “assault weapons.” Charles DiMaggio, *Author’s Response: “Changes in U.S. mass shooting deaths associated with the 1994-2004 federal assault weapons ban. Analysis of open-source data*, J. OF TRAUMA & ACUTE CARE SURGERY 87, no. 4: 1003–04, attached as Exhibit 102.

188. Domestic terrorists, extremists, and private militias with hate-related ideologies are attracted to

Appendix B

and encouraged to acquire assault weapons based on the assault weapons' unique characteristics. *Id.*

Response: Dispute. Beyond objecting to the subjectivity of the term “hate-related ideologies,” Plaintiffs note that the features of “assault weapons” are neither nefarious nor unique to the banned firearms. An “assault weapon” fires no faster, and is no more dangerous, than any other semiautomatic firearm. *See* Resps. to Statements 20 and 22.

189. Perpetrators of targeted violence arm themselves with assault weapons because they require limited professional training, they are effective at a distance, and because they are marketed as military-police style weapons. *Id.*; *see also* Exhibit 4 Donohue at ¶ 69.

Response: Dispute. *See* Resps. to Statements 20, 22, 187, and 188.

190. Perpetrators seek to look cool, intimidate and embrace the appeal of the military or police wannabe due to intentional marketing tie-in by manufacturers. Exhibit 11 Andrew at p.4; *see also* Exhibit 4 Donohue at ¶ 69.

Response: Dispute. *See* Resps. to Statements 20, 22, 187, and 188.

191. An assailant with an assault rifle is able to kill and injure twice the number of people compared to an assailant with a non-assault rifle or handgun. Exhibit 11

Appendix B

Andrew at 4. “[F]rom a public safety perspective, once an attack begins with an assault weapon, it is already worst-case scenario.” Exhibit 11 Andrew at 3. “Death and severe injury is not avoidable.” Exhibit 11 Andrew at p.3.

Response: Dispute. “Assault weapons” function no differently from any other semiautomatic firearm. See Resps. to Statements 4, 8, 20, and 22. Furthermore, the actions of criminals do not affect the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

192. An assault weapon transforms terrorists, criminals, deranged people, or disconnected teens with poor coping skills and an intent to kill into killing machines. Exhibit 11 Andrew at p.6.

Response: Dispute. “Assault weapons” function no differently from any other semiautomatic firearm. *See* Resps. to Statements 4, 8, 20, and 22.

193. Mass shooters frequently express the view that assault weapons will make others realize they are powerful. Exhibit 4 Donohue at ¶ 69.

Response: Dispute. Although there are some examples of this, it is far from “frequent.” Furthermore, the actions of criminals do not affect the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

Appendix B

194. The shooter who perpetrated a mass shooting at a high school in Parkland, Florida left a recording on his Instagram including the statement, “With the power of the A.R. you will know who I am.” *Id.* at ¶ 94.

Response: Admit. The actions of criminals do not affect the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

195. The ability to kill or injure more people with an assault rifle has coincided with a sharp increase in mass shootings and related casualties, representing a significantly increased public safety threat and a decreased ability to effectively stop and respond to attacks with assault weapons without significant casualties and injuries. Exhibit 11 Andrew at p.4.

Response: Dispute. As discussed above, the AR-15 has been commercially available for decades and popular for at least the last 40 years. The “sharp increase in mass shootings and related casualties” which Mr. Andrew purports to find (based on a *Newsweek* article), occurs long after the availability and popularity of the AR-15 was already well-established. *See also* Resps. to Statements 4, 8, 20, and 114. Furthermore, the actions of criminals do not affect the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

196. The general public and particularly large public venue events, schools, and workplaces are at greater risk

Appendix B

today due to the limits of reasonable and practical law enforcement and crisis planning efforts to mitigate the threat of an individual or group using assault weapons to attack. Exhibit 11 Andrew at p.5.

Response: Dispute. It is unclear from Mr. Andrew's report what this statement means, particularly to what "limits" he is referring. More than that, as discussed above, the general public is at *extremely little* risk from mass public shootings compared to other sorts of crime, since they are an exceptionally rare form of firearm crime. *See also* Resps. to Statement 78. Furthermore, the actions of criminals do not affect the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

197. The widely endorsed "run, hide, and fight" active shooter response has limitations based on the crisis environment, the mindset of situational leaders, the age and capacity of those participating, and the attackers' participation, surprise, and position, and still results in death and injury even with training and practice. Exhibit 11 Andrew at p.6.

Response: Dispute. Whatever the limitations of responses to active-shooter situations, they are not unique to situations involving the use of "assault weapons." *See* Resps. to Statements 4, 8, 20, and 22. Furthermore, the actions of criminals do not affect the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

Appendix B

198. “Law enforcement response, armed security, and concerned citizen response have proven to be slow for the few minutes that Assault Weapon attacks transpire and have low effectiveness in preventing death and injury in confrontations involving assault weapons... Attacks with assault weapons result in death and injury even with on-duty and off-duty law enforcement, armed security, and lawfully armed citizens present or in immediate vicinity or response.” Exhibit 11 Andrew at p.7. Law enforcement response to assault weapon-involved attacks requires highly aggressive officer responses, including specialized weapons, the surging of personnel, increased perimeters, and the mindset to undertake the force of violent action. Exhibit 11 Andrew at 7.

Response: Dispute. Whatever the limitations of responses to active-shooter situations, they are not unique to situations involving the use of “assault weapons.” *See* Resps. to Statements 4, 8, 20, and 22. Furthermore, neither the actions of criminals nor the response of law enforcement affects the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

199. These incidents increasingly require tactics such as charging structures with armored vehicles, use of explosives, robots, and drones with explosives. Exhibit 11 Andrew at 6.

Response: Dispute. Whatever the limitations of responses to active-shooter situations, they are not unique to situations involving the use of “assault weapons.” *See*

Appendix B

Resps. to Statements 4, 8, 20, and 22. Furthermore, neither the actions of criminals nor the response of law enforcement affects the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home. Mr. Andrew's statement also does not suggest mass shootings "increasingly" require these extreme measures, but merely cites to a New York Times article regarding a single incident in which a SWAT truck was driven into a building under circumstances that are extremely unclear from the article. *See* Andrew Rep., Defs.' Ex. 11 at 7 & n.22. He cites no examples of the use of explosives, robots, or drones with explosives, in response to an "assault weapon" being used in crime of any kind.²⁰⁰ In the 2016 mass shooting at Pulse Nightclub, law enforcement used an armed personnel carrier (BearCat) to breach the wall after learning the shooter had an assault rifle. *Florida Department of Law Enforcement, Ninth Judicial Circuit, Use of Force Investigation Case #: OR-27-0258*, ("Orlando Report") attached hereto as Exhibit 19, p.13, 24.

Response: Dispute. Whatever the limitations of responses to active-shooter situations, they are not unique to situations involving the use of "assault weapons." *See* Resps. to Statements 4, 8, 20, and 22. Furthermore, neither the actions of criminals nor the response of law enforcement affects the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

201. The "good guy with a gun" actually requires significant training and expertise to confront an attacker

Appendix B

safely and still rarely has the opportunity to respond under the surprise circumstances. Exhibit 11 Andrew at p.7, 8.

Response: Dispute. Mr. Andrew's report is contradictory on this point. He asserts that a bad guy with a gun "can easily kill a large number of people with little or no training and preparation" and yet the same firearm will be useless in the hands of a "good guy with a gun" who must have "significant training and expertise to confront an attacker safely." Defs.' Ex. 11, Andrew at ¶ 21. As an example of the inability of a "good guy with a gun," Mr. Andrew chooses the 2017 Las Vegas shooting in which the shooter was located a great distance from the concert he attacked at which "200 law enforcement officers where [sic] present." *Id.* In any event, this statistic suffers from the same infirmity as those in Statements 30 and 32: it compels no material inference. The impact that legally armed citizens have in stopping attacks depends, inter alia, on whether there are armed citizens at the location of a shooting, whether they are able to access their firearms in time, locate the shooter, safely get within firing range of the shooter, and engage the shooter. Whether the constellation of factors involved in disabling a shooter align in a particular case is immaterial to the rights of those who wish to avail themselves of the advantage of armed self-defense and so enlarge their own, and others', chances of survival. Finally, the Ordinance draws no lines on the basis of training—the firearms tendentiously labeled "assault weapons" are banned no matter how well-trained one who wishes to possess it may be.

Appendix B

202. A well-placed attacker with an assault weapon is devastatingly effective and decreases the opportunity for effective law enforcement response, as demonstrated in the 2017 Las Vegas concert attack. *Id.* at p.8.

Response: Dispute. “Assault weapons” function no differently from, and are no more effective than, any other semiautomatic firearm. *See* Resps. to Statements 4, 8, 20, and 22. Even if firearms had any transformative power, “assault weapons” would have no more of it than any other semiautomatic firearm. Furthermore, neither the actions of criminals nor the response of law enforcement affects the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

203. Approximately one in five police officers killed in the line of duty were killed with an assault weapon, despite the relative rarity of use of assault weapons in crime in general. Exhibit 4 Donohue at ¶ 132.

Response: Dispute. Both the claim about the number of police officers killed using so-called assault weapons and the comparison of that number to the general criminal use of assault weapons are flawed. First, Defendant’s own expert admits that the percentage of police murders that involve assault weapons may be substantially lower—closer to 13 percent, or one in ten police officers killed in the line of duty. Donohue at ¶ 132. The one in ten ratio is more accurate than the one in five ratio because the higher calculation is based on much older data (1998–2001 vs. 2009–2013), and because there is no

Appendix B

indication that the higher calculation excluded instances where an officer was killed with his own service weapon. *Officer Down: Assault Weapons and the War on Law Enforcement*, VIOLENCE POL'Y CTR. (May 2003), <https://bit.ly/3UVEPA6>, attached as Exhibit 72. The study cited for the lower calculation explicitly excluded these killings from the data. Donohue at ¶ 132. This exclusion is highly relevant because such tragedies are in no way impacted by bans on *private* ownership of assault weapons. Second, Defendant inappropriately implies that assault weapons are disproportionately chosen by criminals who seek to kill police officers. For the proposition that the portion of police killings committed with “assault weapons” is higher than the portion of other gun crimes committed with “assault weapons,” Defendants cite to Professor Donohue, whose source for this claim makes no mention of the rate of general criminal use of assault weapons. *Id.*

204. Law enforcement officers are aware of the higher rate of deaths and injuries of officers due to assault weapons, aware that assault weapons are being used to target law enforcement officers, and aware of the fact that not all body armor provides adequate protection in a shoot-out. Exhibit 11 Andrew at p.8.

Response: Dispute. This statement is too general and unsupported by Mr. Andrew or his sources. For instance, to prove that “assault weapons are being used to target law enforcement officers” Mr. Andrew cites to a single Dallas shooting in which one of the firearms used was a so-called “assault weapon.” This citation to a lone instance demonstrates that it is impossible to

Appendix B

respond to this statement because there is no reference to the degree to which assault weapons are being used to target law enforcement officers. To the extent that the assumption that assault weapons are being used to target law enforcement officers relies on sources referenced in Statement 203, *see* Resp. to Statement 203. Additionally, the statement does not provide enough detail about “the fact that [law enforcement officers are aware] not all body armor provides adequate protection in a shoot-out,” a claim for which Mr. Andrew has no source except his own experience. The statement does not indicate that this concern relates to a specific class of firearms, and it is thus irrelevant to the case.

205. This contributes to stress and hinders recruitment, retention, and performance. *Id.*; *see also* Exhibit 4 Donohue at ¶132.

Response: Dispute. This statement is too general to adequately respond to, and it is not supported. Mr. Andrew provides no citations for any of the claims in the statement. Professor Donohue provides a citation for the proposition that private ownership of assault weapons impacts law enforcement *training*, but he does not demonstrate a link between increased training and poor performance, recruitment, and/or retention. Professor Donohue’s references to delayed police responses at two mass shootings are far from dispositive and are directly contradicted by the highly reactive actions taken by law enforcement in the recent Nashville school shooting. Teddy Grant & Alexandra Faul, *Nashville Police Officers Speak about Response to Mass Shooting: ‘Training is*

Appendix B

What Kicked in, ABC NEWS (Apr. 4, 2023), <https://abcnews/41xbVZK>, attached as Exhibit 73. The unsubstantiated assertions in this statement are also at odds with the fact that the vast majority of police officers in the United States oppose bans on assault weapons. Rich Morin et al., *Police Views, Public Views*, PEW RSCH. CTR. (Jan. 17, 2017), <https://pewrsr.ch/3oxMBUO>, attached as Exhibit 74.

206. Individuals who believe firearms will be present at a protest are less likely to attend, carry a sign, or vocalize their views at the protest than individuals who do not believe firearms will be present. Exhibit 18 Palmer at p.11. This is true for both gun owners and non-gun owners. *Id.*

Response: The survey cited speaks for itself, but Plaintiffs dispute to the extent this mischaracterizes the survey. Plaintiffs also object that this is irrelevant, as it does not distinguish between so-called “assault weapons” and any other arm.

207. Individuals who did not believe firearms would be present at a protest tended to say that their reasons for attending a protest included wanting to be heard, to influence others, support a cause, participate in a civic duty, and effect change. *Id.* at p.12.

Response: Dispute. *See* Resp. to Statement 206.

208. Individuals who did believe firearms would be present at a protest tended to not believe they would be able to make a difference or not to believe that making a

Appendix B

difference was worth the risk they perceived was posed by the firearms. *Id.* at p.12–13.

Response: Dispute. *See* Resp. to Statement 206.

209. People who were less likely to attend, carry a sign, or vocalize their views at a protest if they believed firearms may be present perceived that firearms at a protest would be used to intimidate or threaten them if the people with the firearms did not agree with their point of view. *Id.* at p.8,9.

Response: Dispute. *See* Resp. to Statement 206.

210. Even individuals who believe they are responsible gun owners do not trust other people with guns in a protest environment. *Id.* at p.10.

Response: Dispute. *See* Resp. to Statement 206.

211. Research also shows that instructors on campus reported a chilling effect on speech when students were armed not necessarily due to any overt action on the student's part, but as a result of instructors' perceptions of the aggressive potential of the student due to campus carry. *Id.* at 9.

Response: Dispute. *See* Resp. to Statement 206.

212. Both students who own guns and those who do not report feeling that the presence of legal guns on campus would negatively affect classroom debate and decrease feelings of safety. *Id.* at p.10.

Appendix B

Response: Dispute. *See* Resp. to Statement 206.

213. The Chicago Police Department regularly recovers assault weapons and has recovered assault weapons that have been converted to fully automatic fire. Exhibit 10 Snelling at ¶ 12.

Response: Dispute, as there is no definition of “regularly.” Evidence indicates that “well under 1% [of crime guns] are ‘assault rifles.’” GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 112 (1997), attached as Exhibit 75; *see also* Resp. to Statement 97. Of the top 20 firearms seized by Chicago Police in 2014, *all 20* were handguns. *See* Sarah Kollmorgen, *Chicago Criminals’ Favorite Gunmakers: A Visual Ranking*, *THE TRACE* (Jan. 6, 2016), <https://bit.ly/41tIDv7>, attached as Exhibit 76. That same year, “Chicago police recovered only three assault weapons associated with criminal incidents.” *Id.* Nationally, from 2016 through 2021, only 2.5% of murders were committed with *any* type of rifle. *See Expanded Homicide Offense Characteristics: Murder Victims by Weapon (2016-2021)*, *FBI Crime Data Explorer*, U.S. DEP’T OF JUST. (2021), attached as Exhibit 103; *supra* FBI, *Expanded Homicide Data Table 8*, Resp. to Statement 169 (90,594 total murders; 2,028 with rifles). Murder by “hands, fists, feet, etc.” was almost twice as common, at 4,008, over the same time period—and murder by handgun, at over 40,000, was over *20 times* as common. *Id.* As of 2016, only 0.8 percent of state and federal prisoners reported using *any* kind of rifle during the offense for which they were serving time. Mariel Alper & Lauren Glaze, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016*, U.S. DEP’T OF

Appendix B

JUST., OFF. OF JUST. PROGS., BUREAU OF JUST. STATS. 5 tbl. 3 (Jan. 2019), <https://bit.ly/31VjRa9>, attached as Exhibit 77. Furthermore, neither the actions of criminals nor the response of law enforcement affects the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home. *See also* Resp. to Statement 10.

214. Because assault weapons allow a shooter to hit within a larger area and at a higher velocity, many victims of assault weapons are not the intended targets but innocent bystanders, including bystanders shot through cars or walls. This has occurred in Chicago. *Id.* at ¶ 14–15.

Response: Dispute. “Assault weapons” function no differently from any other semiautomatic firearm. *See* Resps. to Statements 4, 8, 20, and 22. Furthermore, neither the actions of criminals nor the response of law enforcement affects the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

215. Gangs in Chicago are eager to procure assault weapons to intimidate other gangs or respond in kind to shootings involving assault weapons because they are more powerful and accurate. *Id.* at ¶ 17.

Response: Dispute. *See* Resps. to Statements 97 and 213. “The weapons of choice for gangs today are 9mm semiautomatic handguns, followed by .40 caliber and .45 caliber semiautomatics,” says Thomas Ahern, an ATF senior agent based in Chicago. It makes sense then

Appendix B

that those calibers account for about half of the crime guns recovered by police.” Kollmorgen, *supra* Resp. to Statement 212. “Assault weapons” also function no differently from any other semiautomatic firearm. *See* Resps. to Statements 4, 8, 20, and 22. Furthermore, neither the actions of criminals nor the response of law enforcement affects the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

216. Gangs in Chicago see it as a sign of weakness not to possess assault weapons and seek to avoid that appearance. *Id.* at ¶ 17.

Response: Dispute. *See* Resp. to Statement 215.

217. There is no rational reason for members of the public in Chicago to own assault weapons, even for self-defense. *Id.* at ¶ 18.

Response: Dispute. *See* Resps. to Statements 20 and 22.

218. Prior to 2008, the Chicago Police Department did not assign assault rifles to police officers. Due to the prevalence of assault weapons on the street rising in recent years, CPD now maintains a small number of assault rifles. *Id.* at ¶ 19.

Response: Dispute to the extent that the County is referring to “assault rifles” in the sense of battlefield rifles capable of selective fire. Indeed, far from undermining Plaintiff’s claim in this case, this demonstrates that so-

Appendix B

called “assault weapons” have important defensive uses. *See* Resps. to Statements 20, 22, and 26.

219. Most CPD officers do not carry assault weapons as part of their job duties and are not trained with them. *Id.* at ¶ 20.

Response: Admit. Plaintiffs dispute that this is relevant; the share of a city’s police force that uses semiautomatic rifles does not impact the rights of those who wish to avail themselves of the benefits that such firearms offer in defense of self and home.

220. The first officer responding to an active shooter incident involving an assault weapon in Chicago will likely have weaker firepower than the assailant. *Id.* at ¶ 20.

Response: Dispute. “Assault weapons” are not unique in their “firepower.” *See* Resps. To Statements 4, 8, 20, and 22. Furthermore, neither the actions of criminals nor the response of law enforcement affects the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

221. Standard police equipment has minimal effect on ammunition fired from assault weapons, and ammunition from assault weapons can travel through most bullet proof vests and standard protective equipment used by law enforcement. *Id.* at ¶ 13-14, 21.

Response: Dispute. “Assault weapons” function no differently from any other semiautomatic firearm. *See*

Appendix B

Resps. to Statements 4, 8, 20, and 22. And “virtually *all* rifle ammunition will pierce soft body armor, which is why federal law defines ‘armor piercing ammunition’ as a projectile for use in *a handgun* with certain metallic properties.” See Halbrook, *supra* Resp. to Statement 4, at 393 (quoting 18 U.S.C. § 921(a)(17)(B)) (emphasis in original). Indeed, an “AR-15 rifle is no better at piercing soft body armor than any other rifle of the same caliber.” *Ibid.* Furthermore, the actions of criminals do not affect the rights of those who wish to avail themselves of the advantages common semiautomatic rifles offer for defense of self and home.

222. Situations involving an assailant with an assault weapon require officers to wear the highest level of protective equipment, such as the highest level of bullet-proof vests with added trauma plates. *Id.* at ¶ 22.

Response: Dispute. See Resp. to Statement 221.

223. The highest level of protective equipment can be prohibitively expensive and, for CPD officers, would have to be purchased out-of-pocket. *Id.* at ¶ 23.

Response: Dispute. Because “assault weapons” operate and fire no differently from any other semiautomatic firearm, they cause no greater incurrence of costs than other semiautomatic firearms. See Response to Statement 221. Furthermore, Plaintiffs dispute Defendants’ characterization of the Chicago Police Department’s cost-distribution policy as specific to “[t]he highest level of protective equipment.” In fact, this is the departmental

Appendix B

norm: “Chicago police officers are responsible for replacing their own vests...in addition to other equipment and uniform expenses.” *Get Behind the Vest: The Bullet Proof Vest*, CHICAGO POLICE MEM’L FOUND., <https://bit.ly/3UYurHP>, attached as Exhibit 78.

224. An officer outfitted with equipment that stops a shot fired from an assault weapon can still suffer significant trauma because of the high velocity with which he was hit. *Id.* at ¶ 22.

Response: Admit. This is not unique to so-called “assault weapons.” *See* Resp. to Statement 221.

225. Hits from assault weapons to parts of the body that are not covered by a vest will have a much higher likelihood of causing death or serious injury as compared to hits from other firearms. *Id.* at ¶ 22.

Response: Dispute. *See* Resps. to Statements 20 and 221.

226. Due to the weight of the highest level of body armor and the fact that such body armor limits the wearer’s mobility, it is not practical to require all officers to wear this equipment, if it were available, except after it has been confirmed that a shooter possesses an assault weapon. *Id.* at ¶ 23.

Response: Dispute. *See* Resps. to Statements 20 and 221.

Appendix B

227. CPD has adjusted its large event and domestic terrorism preparations to address assault weapons and mass shootings. *Id.* at ¶ 24.

Response: Dispute. “Assault weapons” function no differently from, and require no more addressing than, other semiautomatic firearms. *See* Resps. to Statements 4, 8, 20, and 22. As for the problems with “mass shootings” as a factual term, *see* Resps. to Statements 7 and 98. Beyond this, the actions of the Chicago Police Department speak for themselves.

228. The rise in mass shootings and the increased prevalence of assault weapons has led to CPD to dedicate increasingly large amounts of resources and time to securing events and the general safety of the public. *Id.* at ¶ 25.

Response: Dispute. “Assault weapons” function no differently from, and require no greater dedication of resources to secure against than, other semiautomatic firearms. *See* Resps. to Statements 4, 8, 20, and 22. As for the problems with “mass shootings” as a factual term, *see* Resps. to Statements 7 and 98. Beyond this, the actions of the Chicago Police Department speak for themselves.

229. In preparation for 2022’s Lollapalooza music festival, CPD asked residents near Grant Park to stay off their rooftops and instituted other safety precautions designed to address concerns from assault weapons from both within and without the perimeter. *Id.* at ¶ 26.

Appendix B

Response: Dispute. “Assault weapons” function no differently from, and require no more heightened precautions to secure against than, other semiautomatic firearms. *See* Resps. to Statements 4, 8, 20, and 22. Beyond this, the actions of the Chicago Police Department speak for themselves.

230. A threat to Lollapalooza was reported in 2022, which caused CPD to have to decide whether to evacuate everyone to outside the secure perimeter, where the potential shooter could be waiting for the crowd with an assault weapon. *Id.* at ¶ 27.

Response: Dispute. “Assault weapons” function no differently from, and require no more heightened precautions to secure against than, other semiautomatic firearms. *See* Resps. to Statements 4, 8, 20, and 22. Beyond this, the actions of the Chicago Police Department speak for themselves.

231. No matter how prepared or well-equipped CPD is, it is virtually impossible to guarantee a mass shooting with an assault weapon will be stopped. *Id.* at ¶ 28.

Response: Dispute. “Assault weapons” function no differently from, and require no greater dedication of resources to secure against than, other semiautomatic firearms. *See* Resps. to Statements 4, 8, 20, and 22. As for the problems with “mass shootings” as a factual term, *see* Resps. to Statements 7 and 98. But, even as a general matter, it is “virtually impossible to guarantee” that any harm will not occur. That pertains not only to harms from

Appendix B

all firearms but to all harms, everywhere. And it is all the more reason to permit law-abiding citizens to defend themselves.

**History of Firearms Regulations in the
United States 1700-1900**

232. The dominant understanding of the Second Amendment and its state constitutional analogues at the time of their adoption in the Founding period forged an indissoluble link between the right to keep and bear arms with the goal of preserving the peace. Exhibit 17 Cornell at p.3.

Response: Dispute. This statement relates to the analysis of history as it informs the meaning of the text of the Second Amendment. The analysis of history is not a factual inquiry but a *legal* one. See *Bruen*, 142 S. Ct. at 2130 n.6 (“The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That ‘legal inquiry is a refined subset’ of a broader ‘historical inquiry’ and it relies on ‘various evidentiary principles and default rules’ to resolve uncertainties.” (quoting W. Baude & S. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810–11 (2019))). *Bruen* itself dealt with historical claims not as findings of fact but as part of its legal analysis. Finally, the State’s expert, Professor Cornell, is not a reliable source on the history of firearm regulation in this country. He has derided *Bruen* as “bonkers” for applying “fiction, fantasy, and mythology” as an interpretive model. Saul Cornell, *Cherry-picked history*

Appendix B

and ideology-driven outcomes: Bruen’s originalist distortions, SCOTUSBLOG (June 27, 2022), <https://bit.ly/3Jp4EDa>, attached to Exhibit 79. While Plaintiffs will respond to the substance of the statements in this section where appropriate, when the issue relates to the *legal* analysis prescribed by *Bruen*, Plaintiffs will engage with their substance in their legal briefing.

233. At the time of the drafting of the Second Amendment, regulation was not understood to be an “infringement” on the right to bear arms, but rather the necessary foundation for the proper exercise of that right as required by the concept of ordered liberty. *Id.* at p.6.

Response: Dispute. *See* Resp. to Statement 232.

234. The common law Americans inherited from England acknowledged that the right to self-defense was not unlimited and was designed to preserve the peace. *Id.* at 7.

Response: Dispute. *See* Resp. to Statement 232.

235. The long-standing prohibition on dangerous and unusual weapons reflects the principle of *in terrorem populi*, which was a concept inherited from English common law. *Id.* at p.11.

Response: Dispute. *See* Resp. to Statement 232.

236. According to the concept of *in terrorem populi*, the key determinant of legality was whether a particular

Appendix B

weapon would provoke a terror and undermine the peace. *Id.* at p.11.

Response: Dispute. *See* Resp. to Statement 232.

237. Statutory law in England and the United States functioned to secure the peace and public safety. *Id.* at p.7.

Response: Dispute. *See* Resp. to Statement 232.

238. There was no serious homicide problem or other societal ill comparable to the modern gun violence problem for Americans to solve in the era of the Second Amendment. *Id.* at 7.

Response: Dispute. *See* Resp. to Statement 232. *See also* Randolph Roth, AMERICAN HOMICIDE 162, 171, 185 (2012) (giving examples of high rates of homicide in the latter half of the 1700s), attached as Exhibit 80.

239. Levels of gun violence among those of white European ancestry in the era of the Second Amendment were relatively low compared to modern America. *Id.* at 8.

Response: Dispute. *See* Resp. to Statement 232.

240. At the time of the Second Amendment, the guns most Americans owned were those most useful for life in an agrarian society such as fowling pieces and light hunting muskets. *Id.* at 8.

Response: Dispute. *See* Resps. to Statements 4 and 232.

Appendix B

241. Eighteenth-century muzzle loading weapons were not effective tools of interpersonal violence and were seldom used to commit crimes because they took time to load and could not be stored loaded. *Id.* at p.8.

Response: Dispute. *See* Resp. to Statement 4 and 232.

242. Keeping guns loaded in the eighteenth century was not a viable option. *Id.* at p.8.

Response: Admit.

243. The black powder used in eighteenth-century weapons was corrosive and attracted moisture. *Id.* at p.8.

Response: Admit.

244. Average citizens could theoretically stockpile gunpowder in their homes or places of business. Stephen Porter, *Accidental Explosions: Gunpowder in Tudor & Stuart London*, HISTORY EXTRA (Sept. 22, 2016), <https://bit.ly/3AiZt3C>.

Response: Plaintiffs lack knowledge to admit or dispute this fact and, on that basis, decline to dispute at this time.

245. In London, a gunpowder explosion at Tower Hill in 1552 killed seven, an explosion at Crooked Lane in 1560 killed eleven, another at Fetter Lane in 1583 killed three, another at Tower Street in 1650 killed 67 and destroyed fifteen houses, and in 1715 over a hundred houses on Thames Street were destroyed in a fire caused

Appendix B

by a gunpowder explosion that leveled a house. *Accidental Explosions: Gunpowder in Tudor & Stuart London*, History Extra (Sept. 22, 2016), <https://bit.ly/3AiZt3C>.

Response: Admit.

246. In the famed Gunpowder Plot of 1605, Guy Fawkes and his coconspirators amassed 36 barrels of gunpowder to level the House of Lords. *See generally*, Alan Haynes, *The Gunpowder Plot* (History Press 1994).

Response: Admit.

247. In England, the explosion at Crooked Lane led to an outright ban on gunpowder storage in houses, though that ban was later modified to allow storage of two pounds of powder. *See* Stephen Porter, *supra* Resp. to Statement 243.

Response: Admit.

248. At the time of the Founding, the States regulated the possession and storage of gunpowder as part of the exercise of their police power. Exhibit 17 Cornell at p.12-14.

Response: Dispute. *See* Resp. to Statement 232.

249. At the time of the Second Amendment, over ninety percent of weapons owned by Americans were long guns. *Id.* at p.9.

Appendix B

Response: Admit.

250. The production and marketing of guns increased and was greatly advanced technologically in the nineteenth century. *Id.* at p.10.

Response: Plaintiffs object that this asserted fact is too vague to allow a response and, on that basis, dispute.

251. As cheaper, more dependable, and easily concealable handguns proliferated in large numbers in the nineteenth century, Americans began sporting them. *Id.* at p.10.

Response: Dispute. *See* Resp. to Statement 250.

252. As a result of the new technology and increased availability of guns, new laws were passed in the mid-1800s to limit the sale of weapons and the use of weapons that threatened the peace. *Id.* at p.10.

Response: Dispute. *See* Resp. to Statement 232.

253. Most courts upheld limits on the right to keep and bear arms. *Id.* at p.10.

Response: Dispute. *See* Resp. to Statement 232.

254. The primary limit identified by courts in evaluating gun laws was whether the law negated the ability to act in self-defense. *Id.* at p.10.

Appendix B

Response: Dispute. *See* Resp. to Statement 232.

255. The history and tradition of arms regulation has always recognized that the ability to inspire terrorem populi is a legitimate justification for regulation. *Id.* at p.23.

Response: Dispute. *See* Resp. to Statement 232.

256. The power to regulate firearms and gunpowder has always been central to the police power. *Id.* at p.12–14.

Response: Dispute. *See* Resp. to Statement 232.

257. Throughout Anglo-American legal history, government applications of the police power were marked by flexibility. *Id.* at p.15.

Response: Dispute. *See* Resp. to Statement 232.

258. Throughout Anglo-American legal history, communities were able to adapt to changing circumstances and craft appropriate legislation to deal with shifting challenges. *Id.* at p.15.

Response: Dispute *See* Resp. to Statement 232.

259. As compared to the Revolution-era drafters, who feared standing armies and sought to entrench civilian control of the military, the Constitution writers in the era of the Fourteenth Amendment were motivated

Appendix B

by the proliferation of especially dangerous weapons. *Id.* at p.16.

Response: Dispute. *See* Resp. to Statement 232.

260. The language of the right-to-bear-arms provisions in Reconstruction-era state constitutions began to reflect that the police power of the state could be used to regulate firearms. *Id.* at p.16.

Response: Dispute. *See* Resp. to Statement 232.

261. The 1868 Texas Constitution included language that underscored the connection Anglo-American law had recognized between the right to keep and bear arms and the regulation of guns. *Id.* at p.16.

Response: Dispute. *See* Resp. to Statement 232. The language of the 1868 Texas Constitution speaks for itself.

262. Sixteen state constitutions adopted during this period employed language acknowledging states' police power authority over firearms. *Id.* at p.16.

Response: Dispute. *See* Resp. to Statement 232. The language of these state constitutions speak for themselves.

263. Driven in part by the violence of the Reconstruction period, post-Civil War legislatures also enacted a range of new laws to regulate arms. Exhibit 17 Cornell at p.17, 18.

Appendix B

Response: Dispute. *See* Resp. to Statement 232.

264. The number of laws enacted regulating firearms increased by over four hundred percent from antebellum levels. *Id.* at p.17.

Response: Dispute. *See* Resp. to Statement 232.

265. The Reconstruction period witnessed an intensification of firearms regulation. *Id.* at p.18.

Response: Dispute. *See* Resp. to Statement 232.

266. Republicans in this time sought to protect the rights of African Americans to bear arms but were also insistent on enacting regulations aimed at public safety following the violence of the Reconstruction period. *Id.* at p.18.

Response: Dispute. *See* Resp. to Statement 232.

The Advent of Semi-Automatic Weapons

267. The first assault weapon or assault rifle was a German Sturmgewehr Model 1944 used by the German military in World War II. Exhibit 5 Yurgealitis at p.11.

Response: Dispute. This is misleading to the extent it suggests “assault weapons” and “assault rifles” are the same things. Assault rifles are “short, compact, selective-fire weapons that fire a cartridge intermediate in power between submachine gun and rifle cartridges. In other

Appendix B

words, assault rifles are battlefield rifles which can fire automatically.” See Kopel, *supra* Resp. to Statement 20, at 386 (quotation marks omitted). As defined by Cook County, “assault weapons” are not capable of automatic fire.

268. A semiautomatic firearm utilizes the energy generated by firing a cartridge to power the firearm’s cycle of fire and reload the next cartridge to be fired without any action by the user. This is in contrast to pump action, bolt action, or lever action weapons, all of which require the user to manually reload (by pumping a forearm piece or pulling a bolt or lever, e.g.) the next cartridge after firing. *Id.* at p.8–10.

Response: Admit.

269. The assault weapons prohibited by the Ordinance were developed for use in war or are direct descendants of weapons developed for use in war. *Id.* at p.11–15, 19, 29.)

Response: Dispute. It is true that the AR-15 specifically is a semiautomatic version of the M16, but even that does not establish that the banned firearms “were developed for use in war.” As Dennis Chapman has noted specifically regarding the AR-15, “None of its features are exclusively military in character, and those of its features that were most groundbreaking at the time of its development [the materials it uses and the ammunition it fires] owed their existence, not to the dictates of military procurement officers, but to the innovation of civilian firearms enthusiasts and engineers. The AR-15 is not a

Appendix B

‘weapon of war.’ What it is, rather, is a highly versatile general-purpose rifle well suited to most civilian shooting applications.” Chapman, *supra* Resp. to Statement 9 at 95.

270. Weapons designed for military use are designed to be maximally effective, i.e., to deliver reliable lethality or the ability to incapacitate a chosen target. *Id.* at p.21.)

Response: Dispute. Certain military firearms have applications that are not related to the ability to “deliver reliable lethality” or “incapacitate a chosen target.” For instance, while the military generally discourages the use of fully automatic fire (because it is *ineffective* at delivering reliable lethality), it is nevertheless useful in battlefield situations which call for “suppressing fire” intended to keep an enemy pinned down. *See* Chapman, The AR-15 Controversy, *supra* Resp. to Statement 9 at 112-115.

271. The assault weapons adopted by the U.S. military used 5.56mm/.223 caliber ammunition. *Id.* at p15.

Response: Dispute that the firearms used by the U.S. military are “assault weapons.” *See* Resp. to Statement 267. Admit that the M-16 uses 5.56mm ammunition.

272. The 5.56mm/.223 caliber ammunition is smaller and lighter than the ammunition used in rifles prior to the advent of assault weapons. *Id.* at p.15.

Response: Admit that the 5.56mm round is a smaller and lighter round than what was used in military rifles before

Appendix B

the adoption of the M-16, dispute that it was lighter than all previous rifle ammunition. The .223 caliber round is based on a pre-existing rifle round of similar size—the .222 Remington. *See* Richard A. Mann, *The .223 Family Tree*, GUNDIGEST (June 3, 2022), <https://bit.ly/43HXvYp>, attached as Exhibit 83.

273. The 5.56mm/.223 caliber ammunition allowed a soldier to carry more ammunition and allowed the firearms to accommodate larger capacity magazines. *Id.* at p.15,16.

Response: Admit.

274. Despite being smaller, the 5.56mm/.223 caliber ammunition traveled with the same muzzle velocity as the larger ammunition—approximately 3,200 feet per second. *Id.* at p.16.

Response: Admit. Because energy is a function of both mass and velocity, the smaller rounds have lower energy than larger rounds with the same muzzle velocity. *See* Kopel, *supra* Resp. to Statement 23, at II.B.

275. Typically, the 5.56mm/.223 caliber ammunition used in assault weapons will rotate on its axis (“yaw”) when it hits human tissue. *Id.* at p.16.

Response: Dispute. *See* Resp. to Statement 66.

276. Handgun bullets travel at a lower velocity and do not typically experience yaw. *Id.* at p.16.

Appendix B

Response: Dispute. How bullets travel is dependent upon a number of variables, and this is too general a statement to adequately respond to.

277. When the military tested the 5.56mm/.223 caliber cartridge, they found that it had the capability to create a horrendous wound channel in a human target given the smaller size of the bullet. Exhibit 12 Yurgealitis Dep., 65:15-19.

Response: Dispute. Although there were initial reports, during field tests of M16s during the Vietnam War, of incredible wounding power of the 5.56mm round, the Army's Wound Ballistic Laboratory repeatedly tested the ammunition to try and duplicate the reported results and they were unable to do so. *See* Kopel, *supra* Resp. to Statement 23 at II.C. In the subsequent decades of military use, the much more common complaint has been that the cartridge is underpowered for military use. *See* Anthony F. Milavic, *It's the Cartridge, Stupid—Not the Rifle*, Proceedings, Vol. 128 (Aug. 2002), <https://bit.ly/41lJdLj>, attached as Exhibit 84; *see also* Resp. to Statement 4, 8, 57, 71, and 84

278. An M855A1 5.56mm/.223 caliber cartridge, which is used by the U.S. Army and readily available to the public, is capable of penetrating a concrete block at 20–40 yards and 3/8-inch-thick steel plate at 300 yards. Exhibit 5 Yurgealitis at p.30,31.

Response: Admit.

Appendix B

279. In 2017, a shooter at the Sutherland Springs Baptist Church killed 26 people by standing outside the church and shooting an AR-15 254 times through the walls of the building. Exhibit 4 Donohue at ¶ 60.

Response: Dispute. The Sutherland Springs Baptist Church shooter did fire his rifle at the outside of the church, but that did not result in the deaths of the 26 victims. Professor Donohue cites no report that supports this claim (indeed, Professor Donohue himself does not make this claim but rather says that the shooter fired on the church from outside “on his way to killing 26 men, women, and children”). Defs.’ Ex. 4, Donohue Decl. ¶ 60. Other reports make clear that the shooter entered the church before murdering victims inside. *See, e.g.,* Terence Cullen, *Survivors of Texas massacre recall moment gunman entered church*, DAILY NEWS (Nov. 7, 2017), <https://bit.ly/40uXT9L>, attached as Exhibit 85.

280. Many of the features and accessories specifically banned by the Ordinance allow a shooter to more easily conceal and/ or stabilize a semi-automatic rifle. Exhibit 5 Yurgealitis at p.22–26.

Response: Dispute. *See* Resps. to Statements 20 and 22.

281. The ability to fire an increased quantity of cartridges without reloading, which is afforded by a high-capacity magazine, increases the lethality and effectiveness of assault rifles. *Id.* at p.26.

Response: Dispute. *See* Resp. to Statement 22.

Appendix B

282. Assault rifles were not designed for traditional hunting, nor was 5.56mm/.223 caliber ammunition. *Id.* at p.27.

Response: Admit to the extent this is referring to “assault rifles” meaning battlefield rifles capable of selective fire, but dispute to the extent it refers to so-called “assault weapons.” *See* Resp. to Statement 268. As for the ammunition, as noted above, it was based on a varmint hunting cartridge, the .222 Remington. *See id.* at 270.

Regulations on Firearms in the Late 19th Century and After

283. At the beginning of the 20th century, changes in technology, consumer behavior, and society in the early decades of the 1900s created a novel gun-violence problem. Exhibit 17 Cornell at p.19.

Response: Dispute. Gun violence was not a novel problem. *See* Resp. to Statement 238; *see also id.* at 232.

284. The emergence of fully automatic and semi-automatic weapons in the early decades of the twentieth century exacerbated urban crime. *Id.*

Response: Dispute. This statement is much too broad to permit an adequate response, but the rise in crime in the early 20th century was multicausal, with perhaps the most important contribution coming from the rise of organized crime as a result of prohibition. *See The FBI and the American Gangster, 1924-1938*, FBI, <https://bit>.

Appendix B

ly/2UEWP1r, attached as Exhibit 86; *see also* Resp. to Statement 232.

285. As rapid-fire weapons, including semi-automatic and fully automatic weapons proliferated and undermined public safety, new laws were crafted to mitigate their harms. *Id.*

Response: Dispute. Professor Cornell cites on this point a law from Michigan in 1927, which did not outlaw semiautomatics generally but instead targeted magazine capacity, prohibiting ownership of firearms capable of firing more than sixteen times without reloading. *See* 1929 Mich. Pub. Acts, Act No. 206 § 3, Comp. Laws 1929, 16751. This law, like the handful of other state laws that similarly restricted certain semiautomatic firearms, was not long lived. It was repealed in 1959 Mich. Pub. Acts 249, 250. *See* Resp. to Statement 232.

286. Historically, legislation has only been deemed necessary once new weapons become popular enough to cause a problem that requires government action. *Id.*

Response: Dispute. As just noted, some states did target semiautomatic firearms with certain capacity, but those restrictions were almost all repealed. *See* Resp. to Statement 285; *see also* Resp. to Statement 232.

287. Restrictions on weaponry have historically followed growing criminal abuse and social harm, rather than at the time these weapons are first introduced. Exhibit 4 Donohue at ¶ 32; Exhibit 17 Cornell at p.19.

Appendix B

Response: Dispute. *See* Resp. to Statement 286.

288. Although fully automatic weapons like the Tommy gun became available for civilian purchase after World War I, they were not immediately perceived to present a sufficient public safety concern to prompt regulation. Exhibit 17 Cornell at p.19,20.

Response: Dispute. *See* Resp. to Statement 232.

289. In the 1920s and 1930s weapons like the “Tommy gun” became a preferred weapon for gangsters. Exhibit 4 Donohue at ¶ 33.

Response: Admit. *See* Resp. to Statement 232.

290. The first group of state restrictions on weapons deemed inappropriate for civilian use were adopted in the 1920s and 1930s. *Id.*

Response: Dispute. *See* Resp. to Statement 232.

291. It was not until the mid-to-late 1920s, when fully automatic weapons became the preferred weapons for gangsters, that states moved to restrict them. Exhibit 17 Cornell at 20.

Response: Dispute. *See* Resp. to Statement 232.

292. As states restricted fully automatic weapons in response to “gangsterism” in the 1920s, many semi-automatic weapons were also restricted. *Id.*

Appendix B

Response: Dispute. *See* Resp. to Statement 232 and 285.

293. In the 1920s, multiple states passed new laws banning fully automatic machine guns. *Id.*

Response: Dispute. *See* Resp. to Statement 285; *see also* Resp. to Statement 232.

294. By the early 1930s, more than half the states had passed some type of prohibition on fully automatic or semi-automatic weapons. *Id.*

Response: Dispute. This is seriously misleading, because it does not distinguish between laws that targeted both fully automatic and certain semiautomatic weapons, and those that targeted only fully automatic weapons. The rifles banned by the County are semiautomatic. *See* Resp. to Statement 232.

295. Multiple states embraced the view that fully automatic and semi-automatic weapons should be classified as “machine guns” for legal purposes. *Id.*

Response: Dispute. *See* Resps. to Statements 285 and 294.

296. A 1933 Minnesota law’s definition of machine gun included “any firearm capable of automatically reloading after each shot is fired, whether firing singly by separate trigger pressure or firing continuously by continuous trigger pressure; which said firearm shall have been changed, altered, or modified to increase the

Appendix B

magazine from the original design as manufactured by the manufacturers thereof, or by the addition thereto of extra and/or longer grips or stocks to accommodate such extra capacity, or by the addition, modification, and/or attachment thereto of any other device capable of increasing the magazine capacity thereof[.]” *Id.* at p.20,21.

Response: The law speaks for itself, and in fact shows that it was not a blanket restriction on semiautomatic firearms but was a restriction on magazine capacity. *See* Resp. to Statement 232.

297. A 1934 South Dakota law defined machine guns as weapons “from which more than five shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine.” *Id.* at p.21.

Response: Dispute. This quote misleadingly omits a crucial part of the statute, which targeted machine guns from which “more than five shots or bullets may be fired rapidly or automatically, or semiautomatically discharged from a magazine, *by a single function of the firing device.*” 1933 S.D. Sess. Laws 245–47. As the full quote makes clear, this law targeted automatic firearms, as we use that term today. It should also be noted that Professor Cornell’s report on this particular point is very confused. The quotation above is actually from a 1933 South Dakota Law, but the citation he offers points to a 1934 South Carolina law regulating machine gun possession (which does not have the reference to “semi-automatically” that appears in the South Dakota law). *See* 1934 S.C. Acts 1288. *See* Resp. to Statement 232.

Appendix B

The Rise of Assault Weapons in the United States

298. In 1957, the Army invited Armalite's chief gun designer, Eugene Stoner, to produce a lightweight, high-velocity rifle that could operate in both semi- and fully-automatic modes with firepower capable of penetrating a steel helmet or standard body armor at 500 yards. Exhibit 4 Donohue at ¶¶ 96, 132.

Response: Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time.

299. Stoner devised the AR-15 to meet these specifications. *Id.* at ¶ 96.

Response: Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time.

300. One of its designers stated that the AR-15 assault rifle was originally engineered to generate "maximum wound effect." *Id.* at ¶ 101.

Response: Dispute. Rolling Stone provides no citation for the "maximum wound effect" quote in its article, and there is no evidence that Eugene Stoner, the designer of the ArmaLite AR-15 rifle, ever said that his design was engineered to generate "maximum wound effect." See Tim Dickinson, *All-American Killer: How the AR-15 Became Mass Shooters' Weapon of Choice*, Rolling Stone (Feb. 22, 2018), <https://bit.ly/3H3VFXy>, attached as Exhibit 87; see also Resps. to Statements 4, 8, 57, 71, and 87.

Appendix B

301. A confidential ARPA report in July 1962 noted that the AR-15 was subject to comprehensive field evaluation under combat conditions in Vietnam and that the “lethality of the AR-15 and its reliability record were particularly impressive.” *Id.* at ¶ 97.

Response: Dispute. *See* Resp. to Statement 277.

302. In December 1963 the Army adopted the AR-15 and rebranded it the M-16. *Id.* at ¶ 99; *see also* Exhibit 5 Yurgealitis at p.13,14.

Response: Admit, though this is misleading, since the AR-15 at the time was a military assault rifle with selective fire capability, unlike the semiautomatic rifles banned by Cook County. By the time the Army had adopted the M-16, the original design had already been sold to a new company, Colt, and the semiautomatic, civilian design has since been adapted by many other manufacturers with variations on the original design, meaning the firearms covered by the Cook County ban are significantly different from the design adopted by the Army in 1963. *See* Greg Myre, A Brief History Of The AR-15, NPR (Feb. 28, 2018), <https://n.pr/2Ja5Ryr>, attached as Exhibit 88.

303. Colt, a firearms manufacturer, proposed the sale of its assault rifles on the civilian market in 1963. Exhibit 5 Yurgealitis at p.17.

Response: Admit, though this is misleading, since Colt proposed the sale of a *semiautomatic version* of the rifles in question in 1963. Completely distinct from the automatic

Appendix B

M-16 sold to the Army in 1963, the semiautomatic AR-15 was sold to law enforcement and to the general public. *See* Myre, *supra* Resp. to Statement 302.

304. The civilian version of the assault rifles did not include the capability to fire fully automatic but maintained the same appearance, physical features, and semiautomatic rate of fire. Exhibit 4 Donohue at ¶ 100; Exhibit 5 Yurgealitis at p.17–18.

Response: Dispute to the extent the term “physical features” includes the internal components necessary to permit automatic fire, which were included in the military M-16 rifle but not in the civilian AR-15. Unlike the military M-16, the civilian AR-15 does not include “both semiautomatic (i.e. autoloading) and fully automatic fire-control options” and so lacks the physical components, like fire selectors, of the military M-16. *See M16 rifle*, Encyclopedia Britannica (May 25, 2022), <https://bit.ly/40tupc7>, attached as Exhibit 89.

305. In the 1980s, sharp increases in crime occurred as more powerful weaponry started to proliferate and led to a second round of restrictions limiting magazine capacity and banning assault weapons. Exhibit 4 Donohue at ¶ 33.

Response: Dispute. “[D]ata from the Uniform Crime Reports (UCR) suggests only a mild increase in crime over this period, while the National Crime Survey (NCS) actually depicts lower levels of criminal activity,” according to the National Bureau of Economic Research. Scott Boggress & John Bound, *Did Criminal Activity*

Appendix B

Increase During the 1980s? Comparisons Across Data Sources, Nat'l Bureau of Econ. Res. (Aug. 1993), <https://bit.ly/43NiDwl>, attached as Exhibit 90. Additionally, increases in drug-related activity contributed significantly to arrests and incarcerations during the 1980s. Again, the NBER states, "During the latter part of the 1980s a dramatic increase in the number of arrests and incarcerations for drug law violations also played an important role," meaning changes in crime rates, if at all significant, must be attributed to drug activity and myriad other factors than changes in weaponry. *See id.* Moreover, the passage of the landmark Firearm Owners' Protection Act and other federal firearms legislation in the 1980's points to the loosening of firearms restrictions, rather than an increase in restrictions, during this period. *See* David Welna, *The Decades-Old Gun Ban That's Still On The Books*, NPR (Jan. 16, 2013), <https://n.pr/41LAQbG>, attached as Exhibit 91.

306. The rise of mass shootings in the last decades of the twentieth century impacted firearms regulation. Exhibit 17 Cornell at p.21.

Response: Dispute. *See* Resp. to Statement 232.

307. Defining "assault weapons" has been contentious issue in political debate over gun regulation. *Id.*

Response: Admit. *See* Resp. to Statement 84.

308. Some in the gun rights community argue that "modern sporting rifles" share features with other guns including hunting rifles. *Id.* at p.22.

Appendix B

Response: Admit.

309. Because of the propensity of the 5.56mm/.223 caliber round to create significant damage upon impacting living tissue, it is not generally considered nor favored as a hunting cartridge. Exhibit 5 Yurgealitis at p.17.

Response: Dispute. The 5.56mm/.223 caliber round is a “varmint” round, used for small game hunting and target shooting (as well as self-defense) but generally not favored for larger animal hunting because it is *insufficiently* damaging upon impact. *See* Resps. to Statements 4, 8, 57, and 71.

310. The development of the AR-15 was tied to the strategic requirements of the American military to find a replacement for heavier World War II era rifles. Exhibit 17 Cornell at p.22.

Response: Admit, thought this omits important context. While the AR-15 was developed for use in the military, its only exclusively military attribute was selective fire capability. *See* Resp. to Statement 269.

311. As social, economic, and technological changes have occurred, government has responded with evolving gun regulation. Exhibit 17 Cornell at p.26.

Response: Dispute. *See* Resp. to Statement 232.

312. California banned assault weapons after the Stockton School Massacre in 1989, in which a gunman

Appendix B

killed 5 children and injured 32 others in less than 3 minutes with an AK-47-type assault rifle. *Id.* at p.21; Exhibit 3 Klarevas at ¶ 31.

Response: Dispute that this is not a “fact” but rather a statement of the law. California’s laws speak for themselves.

313. New Jersey (1990), Hawaii (1992), Connecticut (1993), and Maryland (1994) passed assault weapons restrictions or bans soon after the Stockton Massacre. Exhibit 3 Klarevas at ¶ 31.

Response: Dispute that this is not a “fact” but rather a statement of the law. The States’ laws speak for themselves.

314. In September 1994, the United States Congress enacted a nationwide ban on assault weapons, which prohibited the manufacture, importation, possession, and transfer of assault weapons not legally owned prior to the date the law took effect. *Id.* at ¶ 33.

Response: Dispute that this is not a “fact” but rather a statement of the law. Federal law speaks for itself.

315. The federal assault weapons ban included a 10-year sunset provision. Cognizant that the federal ban may be allowed to expire, Massachusetts and New York enacted their own state assault weapons bans prior to its expiration. *Id.* at ¶ 34.

Appendix B

Response: Dispute that this is not a “fact” but rather a statement of the law. Federal law speaks for itself.

316. The District of Columbia enacted an assault weapons ban after the federal ban expired. *Id.* at ¶ 34.

Response: Dispute that this is not a “fact” but rather a statement of the law. The District of Columbia’s ordinances speak for themselves.

317. Currently eight state-level jurisdictions within the U.S. ban assault weapons: California, New Jersey, Hawaii (assault pistols only), Connecticut, Maryland, Massachusetts, New York, and the District of Columbia. *Id.* at ¶ 35.

Response: Dispute that this is not a “fact” but rather a statement of the law. The States’ laws speak for themselves.

318. California, New Jersey, and Hawaii’s bans have been in place for over 30 years. *Id.* at ¶ 35.

Response: Dispute that this is not a “fact” but rather a statement of the law. The States’ laws speak for themselves.

319. Over a quarter of the U.S. population is subject to an assault weapons ban. *Id.* at ¶ 35.

Response: Admit.

Appendix B

320. 18 U.S.C. 924(c) provides an additional ten-year sentence for the use of a semi-automatic assault weapon during a crime of violence or drug trafficking offense. 18 U.S.C. 924(c).

Response: Dispute that this is not a “fact” but rather a statement of the law. The statute speaks for itself.

321. Much of the current controversy over bans or restrictions on dangerous or unusual weapons revolves around the AR-15 and similar types of weapons. Exhibit 17 Cornell at p.22.

Response: Dispute. *See* Resp. to Statement 232. Plaintiffs note that whether a type of arm is “dangerous *and* unusual” (the County misstates the test in this factual assertion) is a legal inquiry, which the Supreme Court has addressed in detail and which does not permit the banning of any firearm that is “in common use today” for lawful purposes, which AR-15s “and similar types” undeniably are. *See Bruen*, 142 S. Ct. at 2143.

322. The debate over restrictions on dangerous and unusual weapons focuses heavily on technological factors, which obscures the fact that legislative efforts to ban those weapons fit squarely within the long Anglo-American tradition of limiting public access to weapons capable of provoking terror. *Id.*

Response: Dispute. *See* Resps. to Statements 232 and 321.

Appendix B

323. The statutes at issue in this case are analogous to a long-established tradition of firearms regulation in America, beginning in the colonial period and stretching across time to the present. *Id.* at 26.

Response: Dispute. *See* Resps. to Statements 232 and 321.

324. The maximum range of an M16 is 3,000 meters, and the effective range is 550 meters. Exhibit 5 Yurgealitis at p. 30. <https://www.tecom.marines.mil/portals/120/docs/student%20materials/fmst%20manual/m16.doc>.

Response: Admit.

325. The civilian AR-15 in 5.56mm ammunition retains the same performance characteristics in terms of muzzle velocity, range, etc.) as the military M16. Exhibit 5 Yurgealitis at p.29.

Response: Dispute. While the specific characteristics listed are the same, the civilian AR-15 is materially different from the M-16 because of its inability to fire in automatic mode.

326. The M-16 performing in semi-automatic mode fires at a rate of 45-65 rounds per minute. *Id.* at p.30.

Response: Admit. All semiautomatic firearms have the same inherent rate of fire because the number of bullets that exit the muzzle in a unit of time depends entirely on how fast its operator physically pulls the trigger: “Once one pulls the trigger and fires a round, another

Appendix B

round loads itself and may be fired by another pull of the trigger.” *See* Halbrook, *supra* Resp. to Statement 4, at 206. Consequently, the semiautomatic rifles banned by the City can shoot no faster than any other semiautomatic firearm. *See* Resps. to Statements 8 and 20.

327. The M-16 performing in automatic mode fires at a rate of 150-200 rounds per minute. *Id.* at p.30.

Response: Admit that this is the “effective rate of fire” of an M-16 performing in automatic mode. However, it should be noted that an M-16 in automatic mode can actually fire much more rapidly. If one just holds the trigger down, it is capable of firing 700-950 rounds per minute. *See M16 Rifle, supra* Resp. to Statement 304.

The Challenge of Policing in Public Spaces

328. There are more than 1,000 sworn staff under Chief Snelling’s supervision, and he serves as the Incident Commander for all major events in Chicago, including protests, festivals, concerts, etc. Exhibit 10 Snelling at ¶ 6.

Response: Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time.

329. Chief Snelling also ensures that the CPD assists the FBI and other law enforcement agencies in defending against international and domestic terrorism. *Id.* at ¶ 8.

Response: Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time.

Appendix B

330. As a member of the CPD, Chief Snelling possesses decades of experience with firearms, including assault weapons. *Id.* at ¶ 10. He has been present on crime scenes involving individuals shot or murdered by assault weapons and regularly receives and reviews reports of shootings in Chicago involving assault weapons. *Id.*

Response: Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time.

331. Chicago has experienced a significant increase in the number of shootings involving assault weapons in the last ten years, and CPD recovers assault weapons regularly. *Id.* at ¶ 11.

Response: Dispute, this claim leaves out important context. Assault weapons like the AR-15 are a minute portion of crime guns recovered in Chicago. *See* Resp. to Statement 213. For example, from 2013-2016, more than 90% of crime guns recovered were handguns. Rifles, by contrast, made up just 4.8% of recovered firearms. *Gun Trace Report 2017* at 9, Chi. Police Dep't, <https://bit.ly/2Jl3iM2>, attached as Exhibit 92; *see also* Dep. Trans. of Sgt. Chris Imhof, 22:21–24, attached as Exhibit 93 (stating the majority of recovered firearms are handguns). Moreover, rifles made up only 4.5% of all recovered crime guns traced by the ATF in Chicago from 2017–2021, and the ATF concluded that handguns were the most frequently traced type of crime gun in Chicago, making up over 80% of recovered crime guns. In the words of the Chicago Sun-Times, “The ATF report shows 9mm pistols — manufactured by Glock, Taurus and Smith

Appendix B

& Wesson — were the firearms most often traced in Chicago.” See Frank Main, *Shorter ‘time-to-crime’ for guns used in crimes in Chicago than in NY, LA, a sign of illegal trafficking, Justice Department says*, Chi. Sun-Times (Feb. 4, 2023), <https://bit.ly/3N5wl7N>, attached as Exhibit 95; see also *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two*, ATF (Feb. 2, 2023), <https://bit.ly/3Lj3c7S>, attached as Exhibit 94. Of the top 20 firearms seized by Chicago Police in 2014, *all 20* were handguns. See Sarah Kollmorgen, *supra* Resp. to Statement 213. That same year, “Chicago police recovered only three assault weapons associated with criminal incidents.” *Id.*

332. Gangs in particular seem to be in a race to procure assault weapons to intimidate other gangs or respond in kind to shootings involving assault weapons. *Id.* at ¶ 17.

Response: Dispute, see Resps. to Statements 215 and 331. Additionally, in its report on crime guns in Chicago, *The Trace* noted that “[t]he weapons of choice for gangs today are 9mm semiautomatic handguns, followed by .40 caliber and .45 caliber semiautomatics, says Thomas Ahern, an ATF senior agent based in Chicago. It makes sense then that those calibers account for about half of the crime guns recovered by police.” Kollmorgen, *supra* Resp. to Statement 213. In fact, gangs are more focused on procuring handguns, which they illegally modify with “switches” that permit fully automatic fire. James Barlow, a firearms enforcement officer with the ATF, told NPR that “Chicago has one of the worst switch problems in

Appendix B

the country,” creating a correlation “between the rise in citywide mass shootings and the proliferation of switches.” See Frank Main et al., *In Chicago, handguns turned into high-capacity machine guns fuel deadly violence*, NPR (Oct. 28, 2022), <https://n.pr/3H6Jeuy>, attached as Exhibit 96. But the “switch” problem is almost entirely a *handgun* problem. “At least 643 of the 706 modified weapons recovered by the Chicago police between 2018 and last month were Glock handguns,” *Ibid.* Recent gang violence, then, owes more to the race to procure handguns outfitted with illegal modifications than to any procurement of the firearms targeted by this law. *Ibid.*

333. Gangs prefer assault weapons because they are more powerful and accurate, thus increasing the likelihood of fatalities. *Id.* at ¶ 17.

Response: Dispute, see Resps. to Statements 215, 331, and 332. Additionally, Phillip Cook, a Duke University economist specializing in gun violence, observes that handguns with illegal modifications are “especially attractive to gang members” over rifles because of the handguns’ effectiveness and concealability. See Frank Main et al, *supra* Resp. to Statement 331. “I think Chicago has, of course, a lot of gang violence, sadly, so the gangs are well-informed about options when it comes to firepower,” Cook noted, adding that handguns, unlike rifles, have become status symbols among the Chicago gang communities due to their ubiquity. *Ibid.*

334. There has also been an increase over the last several years of social media posts, meant to intimidate

Appendix B

others and/or glamorize gang violence, depicting individuals brandishing assault weapons. *Id.* at ¶ 17.

Response: Dispute. *See* Resps. to Statements 213, 215, 331, 332, and 333. Handguns are by far the most prevalent type of weapon in social media posts involving firearms. In one study analyzing Twitter posts involving firearms, researchers found that “semi-automatic handguns were the most common type of firearm representing 91.7% of all guns depicted,” while posts featuring rifles made up only 3.6% of the pool. *See* Desmond U. Patton et al., *Guns on social media: complex interpretations of gun images posted by Chicago youth*, Palgrave Commc’ns at 5 (Oct. 15, 2019), <https://go.nature.com/40v17tJ>, attached as Exhibit 97.

335. Assault rifles are the weapon of choice for mass shootings in public spaces, because they allow a person to kill or injure as many people as possible in a short time, much more than with a handgun or non-semi-automatic rifle. *Id.* at ¶ 24.

Response: Dispute. As explained above, mass shootings, like other crimes, are most often committed with handguns, not “assault weapons.” *See* Resps. to Statements 98 and 104. Additionally, “Six out of every 10 mass public shootings are carried out by handguns alone, while only one in 10 is committed with a rifle alone. *The Current Gun Debate: Mass Shootings*, The Heritage Found. (Mar. 12, 2018), <https://herit.ag/3mYGqZx>, attached as Exhibit 98. Numerous mass public shooters have used handguns to kill or injure dozens of people. *See id.*

Appendix B

336. Most officers do not carry assault weapons as part of their job duties, nor are they trained with them, so an officer first responding to an active shooter incident involving an assault weapon will have weaker firepower than the assailant. *Id.* at ¶ 20.

Response: Dispute. As discussed above, so-called “assault weapons” are not more powerful than other semiautomatic rifles and do not fire more dangerous ammunition. *See* Resps. to Statements 20, 22.

337. CPD has thus adjusted its large event and domestic terrorism preparations to address assault weapons and mass shootings. *Id.* at ¶ 24.

Response: Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time.

338. The rise in mass shootings and the increased prevalence of assault weapons has required CPD to dedicate increasingly large amounts of resources and time to securing public events and the general safety of the public. *Id.* at ¶ 25.

Response: Admit that CPD has dedicated increasingly large amounts of resources and time to securing public events and the general safety of the public, but dispute that change was necessitated by “increased prevalence” of so-called “assault weapons” which remain a small minority of the firearms used in crime. *See also* Resp. to Statement 330.

JA205

Appendix B

339. No matter how prepared or well-equipped CPD is, it is virtually impossible to guarantee a mass shooting with an assault weapon will be stopped. *Id.* at ¶ 28.

Response: *See* Resp. to Statement 231.

Dated: April 24, 2023

Respectfully Submitted,

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**APPENDIX C — MOTION IN THE UNITED
STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION,
FILED MAY 8, 2023**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 21 CV 4595

CUTBERTO VIRAMONTES, *et al.*,

Plaintiffs,

v.

THE COUNTY OF COOK, *et al.*,

Defendants.

Filed May 8, 2023

**MOTION TO STRIKE PLAINTIFFS'
RESPONSES AND OBJECTIONS TO
DEFENDANTS' RULE 56.1 STATEMENT
OF MATERIAL FACTS AND EXHIBITS**

Judge Rebecca R. Pallmeyer
Magistrate Judge Susan E. Cox

NOW COME the Defendants, the County of Cook,
Toni Preckwinkle, Kimberly M. Foxx, and Thomas Dart,
by and through their attorney, Kimberly M. Foxx, State's

Appendix C

Attorney of Cook County, through her Assistant State's Attorney Jessica M. Scheller, pursuant to Fed. R. Civ. P. 12(f), for their Motion to Strike Plaintiffs' Responses and Objections to Defendants' Rule 56.1 Statement of Material Facts [Docket #98] ("Response to SOF") and Exhibits, now state as follows:

INTRODUCTION

On March 3, 2023, Defendants moved for summary judgment. Dkt. 80-82 ("Defendant's motion" or "the motion".) Consistent with Local Rule 56.1(a)(1)(3), Defendants filed a Statement of Undisputed Material Facts which Defendants maintain entitle them to summary judgment. Dkt. 81. Local Rule 56.1(b)(3) requires the nonmoving party to file a concise response to each numbered paragraph in the moving party's statement, stating whether the fact is admitted or disputed, and identifying by specific reference to the record, supporting affidavits, or other materials which support any facts that they dispute. On April 24, 2023, Plaintiffs responded to Defendants' L.R. 56.1 Statement of Undisputed Material Facts. Dkt. 98. Plaintiffs' response is comprised almost exclusively of improper legal argument, statements of additional fact which are not permitted in a L.R. 56.1(b)(3) statement, immaterial statements of fact or law, purported disputes which are either failures to take a position on the fact or admissions disguised as disputes, and are reliant almost entirely on evidence which is not admissible and therefore may not be considered at the summary judgment stage. Plaintiffs' response is irredeemable and should be stricken in its entirety for violating L.R. 56.1.

Appendix C

LEGAL STANDARD

“A motion to strike is governed by Federal Rule of Civil Procedure 12(f). Under Rule 12(f), upon a motion by a party a court may strike from any pleading “any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” While a motion to strike is disfavored and generally unnecessary at the summary judgment stage, because a Court can only consider admissible evidence, *Berg v. CI Invs., Inc.* 2017 U.S. Dist LEXIS 53505, *10-11 citing *Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009), a motion to strike can be granted if “...the defect in the pleading causes some prejudice to the party bringing the motion.” *Berg v. CI Invs., Inc.* 2017 U.S. Dist LEXIS 53505, *11 citing *Affiliated Capital Corp. v. Buck*, 1994 U.S. Dist. LEXIS 17163, 1994 WL 691189, at *4 (N.D. Ill. Dec. 2, 1994).

“The Seventh Circuit has repeatedly held that a district court is entitled to expect strict compliance with L.R. 56.1.” See *Barth v. Village of Mokena*, 2006 WL 862673, at *1 (N.D. Ill. 2006). Courts in this district have repeatedly affirmed the importance of strict compliance with Rule 56.1. See *Malec v. Sanford*, 191 F.R.D. 581, 584 (N.D. Ill., 2000) (holding that the penalty for failure to strictly comply with L.R. 56.1 is usually summary judgment because the movant’s facts are deemed admitted.)

The local rules that structure the summary judgment process “assist the court by organizing evidence, identifying undisputed facts, and demonstrating precisely

Appendix C

how each side proposed to prove a disputed fact with admitted evidence.” *Bordelon v. Chicago Sch. Reform Bd. Of Trustees*, 2000 U.S. App. LEXIS 29027, **6; quoting *Markham v. White*, 172 F.3d 486, 490 (7th Cir. 1999). Given the rules’ importance, district courts have discretion to require strict compliance with local rules governing summary judgment and where “the statement is so full of argument, evasion, and improper denials that it defeats the whole point” of local rules “to identify just what facts are in disputed.” *Bordelon*, 2000 U.S. App. LEXIS 29027, **6-7.

“Affidavits submitted in opposition to summary judgment must (1) be made on personal knowledge; (2) set forth facts in admissible form; and (3) show the affiants are competent to testify to the matters stated therein. *Fed. R. Civ. P. 56(e)*; *Palmer v. Marion County*, 327 F.3d 588, 595 (7th Cir. 2003). Rule 56 affidavits must present concrete facts; mere conjecture or speculation is insufficient. *Johal v. Little Lady Foods, Inc.*, 434 F.3d 943, 947 (7th Cir. 2006). Consistent with Rule 56, Local Rule 56.1 requires a party opposing summary judgment to file a *concise* response to the movant’s statement of facts, and in case of any disagreement, to refer to affidavits or the record. LR 56.1(b)(3)(B) (emphasis added).

Further, legal arguments are “not a recitation of a ‘fact’ to which an affiant is competent to testify” and therefore do not belong in a Local Rule 56.1 (b)(3)(B) response. *Pfeil v. Rogers*, 757 F.2d 850, 862 (7th Cir. 1985); see also *Salamanca v. Robert Half Corp.*, 2003 U.S. Dist. LEXIS 5602, at *2 (N.D. Ill. Apr. 4, 2003) (Conlon, J.)

Appendix C

(striking legal argument in Local Rule 56.1 statement). Nor may a response contain additional facts beyond the movant's statement because they must be submitted separately. LR 56.1(b)(3)(C); see also *Cichon v. Exelon Generation Co., L.L.C.*, 401 F.3d 803, 810 (7th Cir. 2005) (a district court may refuse to consider additional facts submitted in a Local Rule 56.1(b)(3)(B) response).

A response may be stricken for failure to comply with these rules. *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 987 (7th Cir. 2001) (a district court has discretion to enforce these rules "strictly or somewhat leniently"). *Jagla v. LaSalle Bank*, 2006 U.S. Dist. LEXIS 73834, *24,25. See also *Id.* at *14, 15; *Citing Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003) (the court "is not required to 'wade through improper denials and legal argument in search of a genuinely disputed fact'" (quoting *Bordelon* 233 F.3d at 529; See also *Smith v. Adams* 804 Fed. Appx. 390, *392 (2020). Courts in this district have granted motions to strike Rule 56.1 responses which are wholly argumentative, immaterial, contain lengthy responses filled with improper denials or legal argument, unsupported factual assertions, or 'disputes' which are actually admissions with 'elaborative facts' added. See, e.g., *Keen v. Merck Sharp & Dohme Corp.*, 2018 U.S. Dist. LEXIS 35537, at *4-5 (N.D. Ill., 2018); *De v. City of Chicago*, 912 F. Supp. 2d 709, 713-714, at fn 4 (N.D. Ill., 2012).

Appendix C

ARGUMENT

1. Multiple Responses Fail to Properly Admit or Dispute Facts.

Defendants object to Plaintiffs' Response 1-5, 36-54, 125, 170-171, 328-330, 337-338 as they each fail to specify that they are admitting facts, but evasively claim "Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time." ECF No. 98, *Response to SOF* ¶ 1-5, 36-54, 125, 170-171, 328-330, 337-338.

Local Rule 56.1(b)(2) requires that a response to a statement of material fact comply with LR 56.1(e) and LR 56.1(e)(2) requires that "Each response must *admit* the asserted fact, *dispute* the asserted fact, or *admit in part and dispute in part* the asserted fact." LR 56.1(e)(2) (emphasis added). "Lack of knowledge" and/or "declining to dispute" are not proper answers to a 56.1 Statement of Material Facts and paragraphs 1-5, 36-54, 125, 170-171, 328-330, 337-338 should be stricken from Plaintiffs' *Response to SOF*, thereby making those paragraphs uncontested.

2. Improper Legal Argument.

Plaintiffs' *Response to SOF* ¶¶ 4, 10-11, 20-23, 26-28, 30-35, 55-69, 71-75, 77-82, 84-86, 91-95, 97-124, 126-127, 129, 131-137, 139, 141-147, 151-159, 160-166, 174-177, 179-180, 186, 188-192, 195-202, 214-218, 220-223, 225-241, 244, 248, 252-267, 272, 275-277, 280-282, 283-301, 303, 306-307, 309-323, 326-327, and 339 set forth legal arguments which are

Appendix C

“not a recitation of a ‘fact’ to which an affiant is competent to testify” and therefore do not belong in a Local Rule 56.1 (b)(3)(B) response. *Pfeil*, 757 F.2d at 862; [ECF No. 98]. Neither are the legal arguments to make objections, including objections to admissibility, materiality, or absence of evidentiary support as would be allowed under LR 56.1(b)(2)&(3). Plaintiffs wrongly incorporate legal arguments that should be in their responding brief into their response to Defendants’ statement of material facts. Further, additional statements of fact that Plaintiffs claim contradict the meaning or implication of Defendants’ facts, to the extent they were supported by admissible evidence, should be asserted in Plaintiffs’ Statement of Additional Material Facts [Docket #99]. L.R. 56.1(b)(3)(C). Plaintiffs filed a Statement of Additional Material Facts but did not assert any facts that go to the merits of the case and failed to include any of the information asserted in their response to Defendants’ Statement of Undisputed Material Facts. Thus, the court should strike: Plaintiffs’ *Response to SOF* ¶¶ 4, 10-11, 20-23, 26-28, 30-35, 55-69, 71-75, 77-82, 84-86, 91-95, 97-124, 126-127, 129, 131-137, 139, 141-147, 151-159, 160-166, 174-177, 179-180, 186, 188-192, 195-202, 214-218, 220-223, 225-241, 244, 248, 252-267, 272, 275-277, 280-282, 283-301, 303, 306-307, 309-323, 326-327, and 339. [ECF No. 98]

3. Lack of foundation and hearsay.

Evidence in summary judgment must be presented in a form that would be admissible in evidence. Fed. R. Civ. P. 56(c)(2). The Plaintiffs’ failure to properly support their proposed facts or address Defendants’ facts with

Appendix C

admissible evidence may result in the court issuing an appropriate order, including granting summary judgment. Fed. R. Civ. P. 56(e). *Berg*, 2017 U.S. Dist LEXIS at *10-11. Hearsay is an “out-of-court statement ‘offered in evidence to prove the truth of the matter asserted.’” FRE 801(c); *United States v. Rettenger*, 344 F.3d 702 (7th Cir. 2003). *Bombard v. Fort Wayne Newspapers*, 92 F.3d 560, 562 (1996).

Throughout their response to Defendants’ Statement of Facts, Plaintiffs challenge Defendants’ experts’ statistics with statistics of their own, citing to articles and studies which lack proper foundation, lack proper authentication, and/or are hearsay. Plaintiffs’ exhibits cited in Plaintiffs’ *Response to SOF* ¶¶ 4, 7-11, 20-23, 26-28, 30, 32-33, 35, 55-57, 59-64, 66-68, 71-75, 77-81, 91-95, 97-124, 127, 129, 137-147, 155-159, 161-163, 167, 169-171, 174-177, 179-181, 184-192, 196-200, 202-205, 213-218, 220-223, 225-241, 248, 252-266, 269-272, 275, 277, 280-297, 299-303, 305-306, 309-311, 321-323, 326, 331-336, and 339 suffer from lack of foundation because the authors have not offered sworn testimony or its equivalent and are not properly authenticated under Federal Rules of Evidence (“FRE”) Rule 901, et al. *Friedel v. Madison*, 832 F.2d 965, 970 (7th Cir. 1987). (Evidence offered at summary judgment must be authenticated by vehicles designed to ensure reliability, such as supporting affidavits, deposition testimony, sworn answers to interrogatories, or admissions.) Plaintiffs do not support their exhibits with any testimony or sworn statements of any kind.

Compounding their error, Plaintiffs cite to their exhibits to establish the truth of the matters asserted, and

Appendix C

not for any other purpose. As a representative example, in their response to Defendants' *SOF* ¶ 4, Plaintiffs quote articles from Christopher S. Koper ("Koper"), Vincent J.M. DiMaio ("DiMaio"), and Stephen P. Halbrook ("Halbrook") to establish the lethality of assault weapons, other semi-automatic weapons, and the Winchester M-94 and comparing AR-15 rifles to muskets. *Response to SOF* ¶ 4. This is classic hearsay, which Plaintiffs may not rely on in opposing summary judgment. *Bombard*, 92 F.3d at 562. Even exhibits which may be self-authenticated or otherwise fall under an exception to Rule 901, nevertheless are hearsay and therefore inadmissible. FRE Rule 801. Statements that lack a proper foundation for an assertion, or rely upon hearsay, should not be considered. *Vassileva v. City of Chicago*, 2023 U.S. Dist. LEXIS 43046, *6 *citing Malec* 191 F.R.D. at 584.

Finally, even if these exhibits were otherwise admissible, Plaintiffs' failure to disclose them during discovery is fatal. Plaintiffs may not rely upon the opinions of these authors as expert witnesses, and the proper remedy is to exclude the statements which Plaintiffs attached as exhibits to their response to Defendants' Statement of Facts. Thus, Plaintiffs' *Response to SOF* ¶¶ 4, 7-11, 20-23, 26-28, 30, 32-33, 35, 55-57, 59-64, 66-68, 71-75, 77-81, 91-95, 97-124, 127, 129, 137-147, 155-159, 161-163, 167, 169-171, 174-177, 179-181, 184-192, 196-200, 202-205, 213-218, 220-223, 225-241, 248, 252-266, 269-272, 275, 277, 280-297, 299-303, 305-306, 309-311, 321-323, 326, 331-336, and 339 and the exhibits they cite should be stricken.

Appendix C

Practically all of Plaintiffs' responses should be stricken for violating L.R. 56.1. However, in the interest of preserving judicial resources, Defendants highlight several representative samples as follows:

a. *Response to SOF ¶ 4*

Plaintiffs incorporate their *Response to SOF ¶ 4* throughout their response, thereby making it a good representative sample. In Plaintiffs' *Response to SOF ¶ 4*, Plaintiffs present legal argument quoting from and citing articles by: 1) Koper, *Assessing the Potential to Reduce Deaths and Injuries from Mass Shootings Through Restrictions on Assault Weapons and Other High-Capacity Semiautomatic Firearms*, 19 CRIM'Y & PUB. POL'Y 147, 149 (2020), attached to the *Response to SOF* as Exhibit 1; 2) DiMaio, GUNSHOT WOUNDS: PRACTICAL ASPECTS OF FIREARMS, BALLISTICS, AND FORENSIC TECHNIQUES (2d ed. 1999), attached to the *Response to SOF* as Exhibit 2; and 3) Halbrook, AMERICA'S RIFLE: THE CASE FOR THE AR-15 104 (Google Books ed. 2022), attached as Exhibit 3. *Response to SOF ¶ 4*.

Defendants' SOF ¶ 4 [Docket #81] quotes Dr. Roy Guerrero, M.D., an Uvalde area pediatrician testifying before Congress on May 24, 2022 describing his personal observations from the Uvalde shooting. Dr. Guerrero stated that what he found

“was something no prayer will ever relieve: two children whose bodies had been pulverized by

Appendix C

bullets fired at them, decapitated, whose flesh had been ripped apart, that the only clue as to their identities was blood-spattered cartoon cloths still clinging to them []." Defendants' SOF ¶ 4

Plaintiffs' legal arguments are non-responsive to Defendants' SOF ¶ 4. Moreover, the statements Plaintiffs attribute to Koper, DiMaio, and Halbbrook are all out of court statements Plaintiffs' offer as proof of their assertions of fact and are therefore hearsay in violation of FRE 801. Even if the statements and articles were to be considered exceptions to hearsay under FRE 803, they would still be inadmissible because there is no expert witness testimony or other sworn statement from any of these authors designed to authenticate their reliability. *Friedel*, 832 F. 2d at 970. Plaintiffs' Responses to other paragraphs repeatedly references back to their *Response to SOF* ¶ 4 and incorporate it throughout their other Responses. Therefore, all the subsequent paragraphs incorporating it should likewise be stricken.

b. *Response to SOF* ¶ 7

Similarly, Plaintiffs' *Response to SOF* ¶ 7 presents non-responsive legal argument relying on quotes from an article that lacks foundation and is hearsay. In Defendants' SOF ¶ 7, Defendants state: "More people have died or have been injured in mass school shootings in the United States from 2000 to 2018 than in the entire twentieth century" and cite to a sworn expert report, *Declaration of Professor John J. Donohue* attached to the SOF as Exhibit 4.

Appendix C

In Plaintiffs' *Response to SOF* ¶ 7, they write only—"Dispute"—and then go on to argue the definition of "mass shooting", which is not responsive to the statement of fact, relying on the out of court statements of Rosanna Smart & Terry L. Schell from their publication, *Mass Shootings in the United States*, RAND CORP. (Apr. 15, 2021), <https://bit.ly/3L9kzH4>, attached to Plaintiffs' *Response to SOF* ¶ 7 as Exhibit 5. The article lacks foundation, and the quotes offered in *Response to SOF* ¶ 7 are hearsay and should be stricken. "[T]he evidence supporting a factual assertion must represent admissible evidence." *Bordelon*, 811 F.3d at 989, quoting *Judson Atkinson Candies, Inc.*, 529 F.3d at 382. All responses that follow referencing *Response to SOF* ¶ 7 should also be stricken.

c. *Response to SOF* ¶ 20

Defendants' *SOF* ¶ 20 simply states "Assault weapons, whether rifles or handguns, are a poor choice for home defense or personal protection" citing to the *Expert Report of James E. Yurgealitis* ("Yurgealitis") at p.31, 32, attached to Defendants' *SOF* as Exhibit 5, which is admissible expert testimony under FRE 702, et seq. and goes unchallenged by Plaintiff.

In response to the one-sentence ¶ 20, Plaintiffs make a five-page legal argument. Plaintiffs cite to an article by David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 392-93 (1994), attached to Plaintiffs' *Response to SOF* ¶ 20 as Exhibit 8, as proof of their non-responsive and immaterial argument regarding the function of a pistol grip. This

Appendix C

article lacks foundation and the statements are hearsay in violation of FRE 801. Plaintiffs then rely on Halbrook's article from their *Response to SOF* ¶ 4 which is hearsay, as argued above. Plaintiffs take it a step further and cite quotes from E. Gregory Wallace and his articles "Assault Weapon" *Lethality*, 88 TENN. L. REV. 1, 13-14 (2020), attached to Plaintiffs' *Response to SOF* as Exhibit 12 and *Assault Weapon* *Myths*, 43 S. ILL. U. L. J. 193, 228-29 (2018), attached to Plaintiffs' *Response to SOF* as Exhibit 13 to argue at length about AR-15 and M-16 recoil and pistol grips. Both articles and their contents have no place in a response to a statement of facts and are without foundation and the contents are hearsay.

Plaintiffs continue with quotes from Joseph W. Galvin et al., *Rate and time to return to shooting following arthroscopic and open shoulder surgery*, 6 JSES INT'L 968 (2022), attached to Plaintiffs' *Response to SOF* as Exhibit 99 to argue about force and velocity of the M4 and .223 caliber rifles like the AR-15. Similarly, Gavin's article lacks foundation and is hearsay.

Plaintiffs' response to *SOF* ¶ 20 is argumentative, repeatedly cites unauthenticated records for the purpose of inadmissible hearsay, improperly asserts multitudes of additional purported facts in a Rule 56.1(b)(3) response and manages to do so in a five-page narrative response that categorically violates Rule 56.1. The response to *SOF* ¶ 20 combines all of the common ways a party can disregard its obligations under the local rule to this court. All responses that follow referencing *Response to SOF* ¶ 20 should also be stricken. Even in those responses

Appendix C

which do not reference *Response to SOF* ¶ 20, Plaintiffs continue their pattern and practice of citing various news articles and publications which lack foundation and contain hearsay statements both in the exhibits themselves and the quotations used in *Response to SOF* ¶ 20.

4. Plaintiffs Failed to Disclose or Offer Expert Witnesses to Support Opinions and Statistics in Their Legal Arguments.

Expert testimony is required when the issue is not within the understanding of a lay person. *Piltch v. Ford Motor Co.*, 778 F.3d 628, 632 (7th Cir. 2015). The sanction for failure to disclose an expert's testimony relied upon in opposing summary judgment is exclusion of that expert's testimony. Fed. R. Civ. P. 37(c)(1). In determining whether a failure to disclose is harmless, the court should consider "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date." *Tribble v. Evangelides*, 670 F.3d 753, 760 (7th Cir. 2012).

Plaintiffs did not disclose any expert witnesses during discovery¹. Dkt. 37 (Noting that Plaintiffs "will

1. Defendants have complied with U.S. District Court for the Northern District of Illinois Local Rule 37.2. Defendants attempted to address Plaintiffs' discovery violations with Plaintiffs but, due to no fault of Defendants, were unable to conference with Plaintiffs' counsel. On May 8, 2023 at approximately 10:30 A.M., Defendants' attorneys Edward M. Brener and Prathima

Appendix C

not disclose affirmative experts.) Fed. R. Civ. P. 26(a)(2) requires Plaintiffs to have disclosed any witnesses they will use to present evidence under Federal Rule of Evidence 702 (Testimony by Expert Witness), 703 (Basis for Expert's Opinion Testimony), or 705 (Disclosing Facts or Data Underlying Expert's Opinion).

For a representative example, Defendants again turn to Plaintiffs' *Response to SOF* ¶ 20. Plaintiffs cite an article by William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* at 33-34, GEO. UNIV. (May 13, 2022) for statistical studies and arguments. Plaintiffs chose not to disclose English, or *any* expert witnesses under Fed. R. Civ. P. 26(a)(2). It is clear from context that English is offered as a subject matter expert, both because he offers no opinions regarding the specific facts of this case, and also because his methods and findings require scientific and specialized knowledge which are outside the understanding of a lay person. FRE 702; See also *Piltch*, 778 F.3d at 632.

Plaintiffs' failure to disclose English, or any of its other experts, is not harmless. It is patently prejudicial to Defendants to force them to respond to arguments in summary judgment advanced by witnesses who have not

Yeddanapudi called Plaintiffs' attorney Will V. Bergstrom to discuss Plaintiffs' discovery violations and the appropriate remedy. Attorney Bergstrom did not answer and attorney Brener left a detailed voicemail. Attorney Brener then followed up with an email, which attorney Bergstrom responded to later that same day. Attorney Bergstrom advised that Plaintiffs believed their disclosures to be proper and that they would not be withdrawn.

Appendix C

been subject to cross-examination to assess the subject matter of their opinions, or whether the witnesses satisfy the *Daubert* standard. Plaintiffs have had years during which they failed to disclose their expert witnesses. Instead, they informed Defendants (and the court) that they would not rely on affirmative experts (Dkt. 37) before springing them on Defendants in response to their filed summary judgment motion. Nor can Plaintiffs cure the prejudice given that discovery is long closed, and any attempt to cure would delay the adjudication of this case given that both parties have moved for summary judgment. Dkt. 80, 100. Plaintiffs are trying to thwart the discovery rules and litigate by surprise. All opinions and expert statements which Plaintiffs first disclosed in their response to Defendants' Statement of Facts should be stricken.

5. Alternatively, Plaintiffs' Exhibits 1-105 Should be Stricken from their Response to Statement of Facts.

Plaintiffs support their various denials with references to 105 newly disclosed exhibits which are an assortment of newspaper, magazine, on-line, or journal articles. Dkt. 98-1 — 98-13. Plaintiffs offer those exhibits to prove the truth of the matters asserted. Multiple exhibits purport to set forth data and studies, but Plaintiffs have not presented any witness testimony which would establish a foundation, authenticate the data, or the methodology used to obtain the data. FRE Rule 702, 703, 705. Plaintiffs have not presented *any* witness testimony in the exhibits attached to their *Response to SOF*. Dkt. 98.

Appendix C

Consequently, all the statements in the assorted newspaper, magazine, on-line, or journal articles are out of court statements intended to prove the matters asserted thereby constituting hearsay under FRE 801. Nor do any of them qualify as hearsay exceptions under FRE 803. Even the various law journal articles do not qualify under the learned treatises exception under FRE 803(18) which specifically requires statements in such publications to be “called to the attention of an expert witness on cross-examination or relied upon by the expert on direct examination; *and* the publication is established as a reliable authority by the expert’s admission or testimony, by another expert’s testimony, or by judicial notice.” FRE 803(18)(a) and (b) (emphasis added). As Plaintiffs’ have offered no experts, nor could they as they made no Rule 26(a)(2) disclosures, such statements in the exhibits do not qualify for a hearsay exception and are still hearsay.

Additionally, Plaintiffs fail to establish a foundation for any of their exhibits. While most of the assorted newspaper, magazine, on-line, or journal articles themselves may qualify as self-authenticating under FRE 902, the studies and data within them do not. The same can be argued about Exhibit 14 [Dkt. 98-2, page 117-171] and referred to in Plaintiffs’ *Response to SOF* ¶ 20, is purported to be from the Department of Defense’s Defense Advanced Research Projects Agency (DARPA) U.S. DEP’T OF DEF.: ADVANCED RSCH. PROJECTS AGENCY, REPORT OF TASK NO. 13A: TEST OF ARMALITE RIFLE, AR-15 (U) (Aug. 20, 1962). While it is questionable whether Exhibit 14 is really from DARPA, nevertheless, the studies and data within them are not

JA223

Appendix C

self-authenticated under FRE Rule 902. Even if the Court were to find Exhibit 14 and the assorted newspaper, magazine, on-line, or journal articles, and their respective studies and data self-authenticated, they would still be hearsay under FRE Rule 802.

“[T]he evidence supporting a factual assertion must represent admissible evidence.” *Bordelon*, 811 F.3d at 989, quoting *Judson Atkinson Candies, Inc.*, 529 F.3d at 382. For the reasons above, none of Plaintiffs’ Exhibits 1-105 are admissible evidence. All of Plaintiffs’ exhibits should, therefore, be stricken from Plaintiffs’ *Response to SOF* rendering Defendants’ Statement of Facts uncontroverted. Even if the exhibits could be reviewed, they have not been properly disclosed during the course of discovery — and this type of briefing by ambush should not be permitted.

WHEREFORE, Defendants respectfully request that this Honorable Court strike Plaintiffs’ Local Rule 56.1(b)(3) Response and Exhibits, and in the alternative deem the facts admitted, and for all other appropriate relief.

Dated: May 8, 2023

Respectfully submitted,

KIMBERLY M. FOXX
State’s Attorney of Cook County

JA224

Appendix C

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JA225

**APPENDIX D — PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO STRIKE OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN
DIVISION, DATED MAY 22, 2023**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 1:21-cv-04595

CUTBERTO VIRAMONTES, *et al.*,

Plaintiffs,

v.

THE COUNTY OF COOK, *et al.*,

Defendants.

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO STRIKE**

Plaintiffs, by and through undersigned counsel, for
their Opposition to Defendants' Motion to Strike, states
as follows:

Introduction

Defendants' motion to strike must be denied, as
it completely ignores the key distinction between

Appendix D

adjudicative facts and legislative facts. Adjudicative facts are “facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent.” Fed. R. Evid. 201, 1972 Advisory Committee Note. Legislative facts, on the other hand, concern general facts about the world that transcend the immediate activities of the parties; they “are those which have relevance to legal reasoning . . . in the formulation of a legal principle or ruling by a judge or court.” *Id.* In a facial constitutional challenge like the one made by Plaintiffs, *all* of the facts going to the merits of the dispute are legislative in nature. That is because in a facial constitutional challenge, “[o]nce standing is established, the plaintiff’s personal situation becomes irrelevant.” *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011). Adjudicative facts—the who, what, when, and where facts concerning the parties—do not matter. Rather, what will determine the outcome of this case are “facts that bear on the justification for” Cook County’s semiautomatic firearm ban, *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), measured against the methodology prescribed by the Supreme Court in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). Those facts are all legislative in nature, and the Court properly may consider all of the information Plaintiffs have submitted for its consideration. Indeed, the Court’s review of information is entirely unlimited beyond the limits “already inherent in affording opportunity to hear and be heard and exchanging briefs.” Fed. R. Evid. 201, 1972 Advisory Committee Note.

In light of the distinction between legislative and adjudicative facts, the County’s motion to strike clearly

Appendix D

lacks merit. In support of its motion for summary judgment, the County submitted 339 separate statements of allegedly material facts, covering topics such as the suitability of the banned firearms for defensive use, the ballistic performance of some common rifle ammunition, the history of gunpowder storage laws at the Founding, and the history of the development of the banned firearms. Information on these subjects and everything else in the County's statement of material facts other than specific facts about the parties are legislative facts, not adjudicative facts. Plaintiffs properly engaged the County's assertions to show through publicly available sources that the County was wrong about the nature of the banned firearms and their use, history, and characteristics. The County now seeks to blind the Court to any and all contradictory evidence and wrongly complains that the Plaintiffs' citation to these publicly available sources amounts to improper legal argument, seeks to focus the Court's attention on inadmissible evidence, and was not properly disclosed through expert witness testimony. But the County's arguments are predicated on a failure to recognize that the facts at issue are legislative facts. Legislative facts necessarily are bound up with legal argument, they are exempt from the ordinary limitations imposed by the rules of evidence, and they need not be presented through expert witnesses. As a result, the Court should deny the County's motion to strike.

Appendix D

Argument

I. This Case Turns On Legislative Facts, And The Court Is Unrestricted In Its Review Of Them.

The County's motion is based on a fundamental misunderstanding of the types of facts at issue in this case and the rules that govern them. The vast majority of the 339 allegedly material facts that the County put forward in support of its motion for summary judgment are legislative facts rather than adjudicative facts. "Adjudicative facts are simply the facts of the particular case." Fed. R. Evid. 201, 1972 Advisory Committee Note. They are facts "about the parties and their activities, businesses, and properties, as distinguished from general facts which help the tribunal decide questions of law and policy and discretion." *Langevin v. Chenango Ct., Inc.*, 447 F.2d 296, 300 (2d Cir. 1971) (Friendly, C.J.) (quotation marks omitted). "Legislative facts, on the other hand, are those which have relevance to the legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court in the enactment of a legislative body." Fed. R. Evid. 201, 1972 Advisory Committee Note. Legislative facts are, in other words, "facts relevant to shaping a general rule." *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990). "The concept of a legislative fact comes into its own when there is no reason to believe that certain facts pertinent to a case vary from locality to locality, or from person to person." *Frank v. Walker*, 773 F.3d 783, 795 (7th Cir. 2014) (Posner, J., dissenting from denial of reh'g en banc).

Appendix D

With these principles in mind, it is not difficult to separate the legislative facts presented by the County’s statement of material facts from the adjudicative ones. For example, Statement 14, “Viramontes lives in a two-unit apartment building,” deals with a fact that is specific to a plaintiff in this litigation. In another case that raises the constitutionality of restrictions on common semiautomatic rifles, the plaintiff may live in a townhouse, or a much larger apartment building, or he too may live in a two-unit building—but Viramontes’ living situation is specific to Viramontes, and to this case. *See* Pls.’ Resps. & Objs. to Defs.’ Rule 56.1 Statement of Material Facts at 8, Doc. 98 (Apr. 24, 2023) (“Pls.’ Resps.”). It is an adjudicative fact. By contrast, Statement 34, “A shotgun disperses shot in a conical pattern, expanding in an ever-larger pattern as it travels, as opposed to a round from an AR-15, which travels like a laser beam,” is not a fact particular to this case. *Id.* at 22. The way shotgun shot spreads, and the way a rifle round travels, is not different for Viramontes or Khaya than it is for any other person. These things are governed by the laws of physics and “appl[y] broadly to the state of the world.” *United States v. Turner*, 47 F.4th 509, 525 (7th Cir. 2022).

This distinction is important for several reasons. *First*, legislative facts are ordinarily not found through trials, and they need not be submitted to a jury. *See Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 227 (1908) (Holmes, J.) (“A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide.”). As the Seventh Circuit has explained in the Second Amendment context,

Appendix D

“[o]nly adjudicative facts are determined in trials, and only legislative facts are relevant to the constitutionality of the Illinois gun law.” *Moore*, 702 F.3d at 942. As a result, “judicial access to legislative facts” is unrestricted—and “any limitation in the form of indisputability, any formal requirement of notice other than those already inherent in affording an opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level” is “inappropriate.” Fed. R. Evid. 201, 1972 Advisory Committee Note. The Rules of Evidence simply do not apply. *See, e.g., Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) (“The constitutionality of statutes is typically determined by reference to general considerations, values, intuitions, and other ‘legislative facts’ (in the sense of considerations that typically influence legislative judgments) rather than to facts presented through testimony and other formal evidence subject to rules of evidence developed largely for the control of lay juries.”). These facts are not ordinarily presented through testimony and cross-examination, but “more often are facts reported in books and other documents not prepared specially for litigation or refined in its fires.” *Indiana Harbor Belt*, 916 F.2d at 1182. As a result, not only are the parties not required to “lay a foundation” for evidence of legislative facts, or present it in admissible form for summary judgment, the Court may itself investigate these matters, and can rely on sources put forward by *no* party. Fed. R. Evid. 201, Advisory Committee Note (“[T]he judge is unrestricted in his investigation and conclusion. He may reject the proposition of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make

Appendix D

an independent search for persuasive data or rest content with what he has or what the parties present.”) (quotation marks omitted).

Second, legislative facts are not subject to the limitations in the rule of evidence governing judicial notice, which expressly “governs judicial notice of an adjudicative fact only, not a legislative fact.” *See* Fed. R. Evid. 201(a). This stems from the “fundamental differences” between legislative and adjudicative facts. *Id.*, 1972 Advisory Committee Note. The factual underpinnings necessary for deciding a broad rule of law—such as the constitutional contours of the Second Amendment—may rarely satisfy the rules for judicial notice. *See, e.g., United States v. Windsor*, 570 U.S. 744, 815 n.7 (2013) (Alito, J., dissenting) (“At times, the trial reached the heights of parody, as when the trial judge questioned his ability to take into account the views of great thinkers of the past because they were unavailable to testify in person in his courtroom.”). And courts making such consequential decisions, with implications far beyond the parties to the particular case, should not face any limitations on their ability to consider *all* relevant facts.

Third, appellate courts give *de novo* consideration to findings of legislative fact. *See Free v. Peters*, 12 F.3d 700, 706 (7th Cir. 1993) (“The district judge announced a rule; and appellate review of rules, and therefore (it follows) of the social scientific or other data on which the rules are based, is plenary.”); *United States v. Singleterry*, 29 F.3d 733, 740 (1st Cir. 1994) (“The clear error standard does not apply . . . when the fact-finding at issue concerns

Appendix D

‘legislative’ . . . facts.”); *Dunagin v. Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (Reavley, J., plurality op.); *Lockhart v. McCree*, 476 U.S. 162, 169 n.3 (1986) (declining to decide the standard of review but noting the Court was “far from persuaded . . . that the ‘clearly erroneous’ standard of Rule 52(a) applies to the kind of ‘legislative’ facts at issue here”). Unlike adjudicative facts, legislative facts undergird broad legal rulings that are binding in future cases, so deferring to district court findings of legislative facts could result in an important legal issue turning, for the entire circuit (or the whole federal judiciary), on a single trial court’s determination of contested issues of social science, sociology, or economics. *See Dunagin*, 718 F.2d at 748 n.8 (Reavley, J., plurality op.); *see also Windsor*, 570 U.S. at 815 n.7 (Alito, J., dissenting) (“[S]ome professors of constitutional law have argued that we are bound to accept the trial judge’s findings—including those on major philosophical questions and predictions about the future—unless they are ‘clearly erroneous.’ . . . Only an arrogant legal culture that has lost all appreciations of its own limitations could take such a suggestion seriously.”).

Fourth, when addressing legislative facts, appellate courts are not limited by the record below. In evaluating district court decisions based on legislative facts, “[i]nsisting on a cramped notion of what is part of the record is particularly inappropriate.” *United States v. Hunt*, 63 F.4th 1229, 1250 (10th Cir. 2023). This is consistent with the practice of the highest court in the Nation, as “the writings and studies of social science experts on legislative facts are often considered and

Appendix D

cited by the Supreme Court with or without introduction into the record or even consideration by the trial court.” *Dunagin*, 718 F.2d at 748 n.8 (Reavley, J., plurality op.) (collecting examples). Indeed, “courts sometimes rely on nothing more than the personal intuitions of its members (as when it selected the burden of persuasion for libel actions based on how it thought the press would react to different standards [citing *New York Times v. Sullivan*, 376 U.S. 254, 282 (1964)]), and they sometimes rely on their review of sources never presented to the court (as with the *per curiam* majority in *Bush v. Gore*, 531 U.S. 98, 103 (2000), and Justices Stevens and Breyer on multiple occasions, including for the court in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142-1423 (1999).” *Hunt*, 63 F.4th at 1251 (citations omitted).

The Supreme Court’s Second Amendment jurisprudence exemplifies the way in which courts handle legislative facts. In *District of Columbia v. Heller*, for example, for the proposition that handguns are “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” the Court cited not to record “evidence” but to the D.C. Circuit’s decision below. 554 U.S. 570, 628–29 (2008). The D.C. Circuit, in turn, had likewise eschewed reliance on a “record”—the court was sitting in review of a judgment granting a motion to dismiss, after all—but had supported this conclusion by citing directly to one of the very same social science papers that Plaintiffs have cited here. *See Parker v. Dist. of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007) (citing Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence & Nature of Self-Defense with a Gun*, 86

Appendix D

J. CRIM. L. & CRIMINOLOGY 150 (1995)); *see also* Pls.’ Resp. at 19 (citing the same). And in *Heller*, the Court declined to grant the Department of Justice’s request to build out portions of the record that purportedly were lacking—including “whether, and to what extent, long guns provide a functionally adequate alternative to handguns for self-defense in the home,” preferring to consider such issues itself on the basis of legislative facts available to it. *See* Br. for the United States of America at 31 n.9, *District of Columbia v. Heller*, No. 07-290 (Jan. 11, 2008).

In his *Caetano v. Massachusetts* concurrence, Justice Alito quoted a Michigan Court of Appeals decision for the proposition that “hundreds of thousands of Tasers and stun guns have been sold to private citizens.” 577 U.S. 411, 420 (2016) (Alito, J., concurring) (cleaned up). That decision based its conclusion on a law review article which, in turn, relied on “a newspaper article from 1985.” *See People v. Yanna*, 824 N.W.2d 241, 245 n.5 (Mich. Ct. App. 2012). And *Bruen* is no different. In *Bruen* there was *no* district court record—the district court had entered judgment on the pleadings because Bruen’s claims were foreclosed by circuit precedent when the complaint was filed. *See New York State Rifle & Pistol Ass’n, Inc. v. Beach*, 354 F. Supp. 3d 143 (N.D.N.Y. 2018). In holding that New York’s may-issue licensing scheme violated the Second Amendment, the Supreme Court expressly rejected the argument that it could not “answer the question presented without giving respondents the opportunity to develop an evidentiary record” relating to the operation of New York’s law. *Bruen*, 142 S. Ct. at 2135 n.8. “[I]n light of the text of the Second Amendment, along with the Nation’s

Appendix D

history of firearm regulation,” the latter being a type of legislative fact that the County would seek to limit to a narrowly defined record, the conclusion “that a State may not prevent law-abiding citizens from publicly carrying handguns because they have not demonstrated a special need for self-defense” did not require development of any adjudicative facts. *Id.*

Seventh Circuit precedent is just as clearly on Plaintiffs’ side. In *Moore*, the Seventh Circuit reversed a pair of district court orders dismissing Second Amendment challenges to an Illinois law that flatly banned public carry of firearms. 702 F.3d at 942. But the Seventh Circuit went further than merely reversing—it remanded with instruction to grant summary judgment to plaintiffs, explaining that while “adjudicative facts are determined in trials . . . *only* legislative facts are relevant to the constitutionality of the Illinois gun law,” so no record development was necessary. *Id.* (emphasis added). And in *Ezell*, the Seventh Circuit, again confronting a facial challenge to a restrictive statute regulating the right to keep and bear arms, explained that “[i]n a facial constitutional challenge, individual application facts do not matter. Once standing is established, the plaintiff’s personal situation becomes irrelevant. It is enough that we have only the statute itself and the statement of basis and purpose that accompanied its promulgation.” 651 F.3d at 697 (cleaned up). And as in *Heller* and *Bruen*, the Seventh Circuit in *Ezell* undertook an analysis of the history of regulating firearm range training through reference to original historical and secondary sources which it cited without reference to a narrow “record.” *See id.* at 704-05, 709-10.

Appendix D

Putting these things together, *Ezell* and *Moore* show that, once standing is established *the only* facts that are relevant to a case like this one are “legislative facts.” Plaintiffs’ standing is established by record evidence, and for all other “facts” in this case it would be inappropriate for the Court to limit itself to a narrow record, as the County urges—especially since the Seventh Circuit will exercise plenary review and be free to look at any and all legislative facts it views as helpful to resolving this case, whether this Court did so first or not.

II. The County’s Motion to Strike Offers No Valid Reason to Strike Plaintiffs’ Rule 56.1 Response.

A. Plaintiffs Responses Declining to Dispute Certain Facts Should Not Be Stricken.

The County’s first objection is to Responses 1–5, 36–54, 125, 170–71, 328–30, and 337–38, to which Plaintiffs responded (at least in part) “Plaintiffs presently lack knowledge and, on that basis, decline to dispute at this time.” *See* Mot. to Strike Pls.’ Resps. & Objections to Defs.’ Rule 56.1 Statement of Material Facts & Exs. at 4, Doc. 104 (May 8, 2023) (“Mot.”). There is no need to strike these responses (which, in some cases, include additional related statements of fact). By saying Plaintiffs decline to dispute them at this time, it follows that they are to be treated as admitted for purposes of the County’s summary judgment motion.

*Appendix D***B. Plaintiffs' Responses Do Not Contain Improper Legal Argument.**

The County argues that the majority of Plaintiffs' responses should be stricken for including "improper legal argument." *See id.* at 5. But the few illustrative examples it provides do not contain legal argument at all. Instead, the responses the County highlights consist of facts that are directly responsive to the statements which they are offered to dispute. For instance, the County's first example is Plaintiffs' response to Statement 4, in which the County charges Plaintiffs with "present[ing] legal argument quoting from and citing articles by" Christopher Koper, Vincent J.M. DiMaio, and Stephen Halbrook, *see id.* at 7–8, but none of these citations discusses the law at all. Instead, what they do discuss is the wounding power of the banned rifles as compared to other firearms, an issue that is responsive to the County's statement, *see* Pls.' Resps. at 2–3. The Halbrook citation, for instance, is to a statement that common rifle ammunition at the Founding was much larger than the ammunition fired by most AR-15s today. *Id.* It is hard to understand—and the County fails to explain—how such a statement could be construed as a legal argument.

The County objects to Plaintiffs offering factual responses too. The County claims that any "additional statements of fact that Plaintiffs claim contradict the meaning or implication of Defendants' facts . . . should be asserted" separately in a statement of additional facts. Mot. at 5. But Plaintiffs' responsive statements, which tend to show that the County's statements are in fact

Appendix D

not true and are certainly not undisputed, complied with Local Rule 56.1(e)(2), which permits parties to assert “fairly responsive” facts in the process of disputing a fact. Nor is there a requirement that the Plaintiffs’ response approximate the length of the fact asserted. The County complains, discussing Statement 20, that in response to a one-sentence statement, Plaintiffs submitted a five-page response. Mot. at 9. But again, Plaintiffs response consists of factual assertions that dispute the County’s statement. And though it was only one sentence, the statement to which Plaintiffs were responding was an exceptionally broad one— “[a]ssault weapons, whether rifles or handguns, are a poor choice for home defense or personal protection”—and it merited a significant response. Pls.’ Resps. at 8. Plaintiffs’ response, and the facts and sources cited therein, all related to whether the banned firearms are, in fact, useful for self-defense, including detailed explanations of how the features of the banned firearms aid in accurate firing and reduce recoil, *see id.* at 9–11, and proof that millions of Americans in fact *have* chosen to own the banned firearms for the very purpose for which the County believes it is qualified to decide they are “a poor choice,” *see* Pls.’ Resp. at 12–13. Such a response is perfectly appropriate to the County’s broad assertion of unsuitability, and in any event, by putting all those responsive facts in one place, Plaintiffs were being efficient and seeking to make the Court’s job in reviewing the large filing easier. Those same facts were implicated repeatedly by the County’s erroneous assertions, and Plaintiffs referenced their response to Statement 20 several times in response to other statements. *See, e.g., id.* at 14, 16–19, 21–22, 29–30, 39–41, 48, 52–54.

Appendix D

Finally, even if the County were right, either in stating that Plaintiffs' statements amounted to legal argument, or that their factual responses were better suited for separate statement, that would not matter. The responses to which the County levies this objection are all, as Plaintiffs have explained above, responses to statements of "legislative fact." Legislative facts are, themselves, more akin to legal argument than they are to statements of adjudicative fact, which is why "[a] judge sitting with a jury" may herself resolve disputes over them. *See Prentis*, 211 U.S. at 227. And to the extent that Plaintiffs are faulted for discussing them in the response to the statement of material facts (ordinarily reserved for *undisputed* and *adjudicative* facts), the County deserves the lion's share of the blame, since it raised these issues in its statement of facts in the first place. In any event, the statements (and responses) were not improper to include in the Rule 56.1 submission, just as they could have been set forth directly in the briefs of both parties. "[Legislaitve] facts and the sources from which they are derived could be incorporated in the argument section of the brief, but they can with equal propriety be set forth in the statement of facts." *Wiesmueller v. Kosobucki*, 547 F.3d 740, 742 (7th Cir. 2008) (discussing Seventh Circuit Rule 28). In other words, Plaintiffs could have sought additional pages in their opposition brief and included all their factual citations there, but it was not improper for them to prefer to respond to the facts in the same place where the County chose to assert them. Indeed, it was imperative to address the facts where the County asserted them to avoid any charge that Plaintiffs have conceded that the County's assertions are undisputed.

*Appendix D***C. Plaintiffs' Responses Rely On Evidence This Court Can Consider At Summary Judgment.**

Next, the County objects that the sources Plaintiffs have cited are not admissible, either because they lack a proper foundation, have not been authenticated, or are hearsay. Mot. at 6. On this basis, the County again urges the court to strike nearly all of Plaintiffs' substantive responses. But again, this argument is meritless because the County has failed to appreciate that the facts in question are legislative facts "that lie outside the domain of [the] rules of evidence." *Wiesmueller*, 547 F.3d at 742. Therefore, whether the sources Plaintiffs have cited are "unauthenticated, inadmissible hearsay, [or] violate[] the best evidence rule" is irrelevant. *United States v. Silvers*, No. 5:18-cr-50, 2023 WL 2714003, at *8 (W.D. Ky. Mar. 30, 2023); *see* 1 Mueller & Kirkpatrick, Fed. Evid. 2:12 (4th ed. Thomson Reuters/Westlaw 2013) ("[T]he Rules do not regulate . . . any aspect of noticing legislative facts.") (quoted in *Silvers*, 2023 WL 2714003, at *8).

The County makes the related argument that the responses should be stricken because Plaintiffs did not disclose each source as an expert report and so "Plaintiffs may not rely upon the opinions of these authors as expert witnesses." Mot. at 7; *see also id.* at 11. The County complains that without disclosure of all of these cited sources, they have been forced "to respond to arguments in summary judgment advanced by witnesses who have not been subject to cross-examination to assess the subject matter of their opinions, or whether the witnesses satisfy the *Daubert* standard." *Id.* at 12. These arguments also

Appendix D

fail because of the crucial legislative/adjudicative fact distinction. Plaintiffs are not relying upon the documents (or their authors, some of whom are no longer living) as experts in this matter, they are merely sources of information regarding the general facts about the world that are relevant to this matter. It is perfectly ordinary for this Court to rely on information that was not “developed through testimony and cross-examination” and “documents not prepared specially for litigation or refined in its fires” to establish legislative facts. *Indiana Harbor Belt*, 916 F.2d at 1182. And *Daubert* does not apply here, where the Court is given wide latitude to consider sources that bear on legislative facts. *See Hunt*, 63 F.4th at 1250-51.

D. The County’s Alternative Relief Should Be Denied

The County seeks, in the alternative, to strike every source Plaintiffs cite in their responses to the County’s factual statements. The County’s basis for requesting this relief is the same as its basis for requesting that the responses themselves be struck: “Plaintiffs have not presented any witness testimony which would establish a foundation, authenticate the data, or the methodology used to obtain the data” in the publicly available sources, the sources are hearsay, and in general, the evidence is inadmissible. Mot. at 12–13. For the same reason that these arguments were insufficient to strike the responses themselves—namely, that the facts in question are legislative facts and the Court’s review of them is unrestricted—they do not support striking the exhibits either.

JA242

Appendix D

Conclusion

For the foregoing reasons, the Court should deny the County's motion to strike.

Dated: May 22, 2023

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JA243

**APPENDIX E — DEFENDANTS’ REPLY IN SUPPORT
OF MOTION TO STRIKE PLAINTIFFS’ RESPONSES
TO RULE 56.1 OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION, DATED JUNE 5, 2023**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 21 CV 4595

CUTBERTO VIRAMONTES, *et al.*,

Plaintiffs,

v.

THE COUNTY OF COOK, *et al.*,

Defendants.

Judge Rebecca R. Pallmeyer
Magistrate Judge Susan E. Cox

**DEFENDANTS’ REPLY FILED IN SUPPORT
OF DEFENDANTS’ MOTION TO STRIKE
PLAINTIFFS’ RESPONSES AND OBJECTIONS
TO DEFENDANTS’ RULE 56.1 STATEMENT OF
MATERIAL FACTS AND EXHIBITS**

NOW COME the Defendants, the County of Cook,
Toni Preckwinkle, Kimberly M. Foxx, and Thomas
Dart, by and through their attorney, Kimberly M. Foxx,

Appendix E

State's Attorney of Cook County, through her Assistant State's Attorney Jessica M. Scheller, pursuant to Fed. R. Civ. P. 12(f), for their Reply to Plaintiffs' Opposition to Defendants' Motion to Strike Plaintiffs' Responses and Objections to Defendants' Rule 56.1 Statement of Material Facts [Docket #98] ("*Response to SOF*") and Exhibits, now state as follows:

INTRODUCTION

Defendants offer their Rule 56.1 Statement of Material Facts to establish that Cook County's Ordinance "regulates activity falling" outside the scope of the Second Amendment "as originally understood." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (cleaned up). As such, Defendants' proffered evidence is adjudicative, not legislative. And, therefore, all evidence offered by Plaintiffs to the contrary in their *Response to SOF* is also adjudicative, not legislative. *Bruen* expressly advised lower courts to "rel[y] on 'various evidentiary principles and default rules' to resolve uncertainties," buttressed by "the principle of party presentation" whereby courts "decide a case based on the historical record *compiled by the parties*." *Bruen*, at 2130 n.6 (2022) (quoting W. Baude & S. Sachs, *Originalism and the Law of the Past*, 37 L. & Hist. Rev. 809, 810-811 (2019) (emphasis added)). This Court should follow *Bruen* and rely on admissible evidence to determine whether Cook County's ordinance is constitutional. Accordingly, the Federal Rules of Evidence applies to all evidence, articles, surveys and opinions offered by Plaintiffs to evince essential elements of their Second Amendment claims.

Appendix E

In Plaintiffs' Response to Defendants' Motion to Strike ("*Response to Motion to Strike*"), they attempt to distract from their flawed *Response to SOF* by shifting focus to "adjudicative facts" and "legislative facts." (Dkt. 111, Resp. at 1-8). Local Rule 56.1(e) mandates that the nonmoving party file a concise response to each numbered paragraph in the moving party's statement, stating whether the fact is admitted or disputed, and identifying by specific reference to the record, supporting affidavits, or other materials which support any facts that they dispute. Throughout their *Response to SOF*, Plaintiffs present facts and evidence that are inadmissible and attempt to dodge their obligations by recasting their response as 'legislative facts' which they maintain are exempt from both the Federal Rules of Civil Procedure and the Federal Rules of Evidence. This is not so. Plaintiffs cannot avoid their failure to comply with Local Rule 56.1. Plaintiffs' *Response to SOF* must be stricken.

ARGUMENT**I. Plaintiffs Violated Local Rule 56.1 Without Authority or Excuse.**

"The Seventh Circuit has repeatedly held that a district court is entitled to expect strict compliance with L.R. 56.1." *See Barth v. Village of Mokena*, 2006 WL 862673, at *1 (N.D. Ill. 2006). Courts in this district have repeatedly affirmed the importance of strict compliance with Rule 56.1. *See Malec v. Sanford*, 191 F.R.D. 581, 584 (N.D. Ill., 2000) (holding that the penalty for failure to strictly comply with L.R. 56.1 is usually summary

Appendix E

judgment because the movant's facts are deemed admitted.)

Plaintiffs have not and cannot cite authority that supports a party's willful disregard for the Local Rules of this Court. As to one of the violations, Plaintiffs resort to stating that they "were being efficient and seeking to make the Court's job in reviewing the large filing easier." (Dkt. 111, at p. 11). Plaintiffs suggest their personal system of drafting is more helpful to the Court than the local rules drafted and approved by the judges of the Northern District of Illinois themselves. It is not left to Plaintiffs' discretion to determine how to make the Court's job easier. The purpose of the local rules is to "assist the court by organizing evidence, identifying undisputed facts, and demonstrating precisely how each side proposed to prove a disputed fact with admitted evidence." *Bordelon v. Chicago Sch. Reform Bd. Of Trustees*, 2000 U.S. App. LEXIS 29027, **6; quoting *Markham v. White*, 172 F.3d 486, 490 (7th Cir. 1999). Ignoring L.R. 56.1 is not helpful to the Court. It is not permitted. It should result in Plaintiffs' facts being stricken.

II. Plaintiffs Cannot Recast Improper and Inadmissible Facts as "Legislative Facts."

Plaintiffs violate Local Rule 56.1 by asserting additional facts and disputing Defendants' facts all while relying on evidence that was never properly disclosed and is inadmissible. Plaintiffs attempt to avoid this problem by claiming all the facts and evidence they use to support their arguments are legislative, as opposed to

Appendix E

adjudicative, facts. According to Plaintiffs, the “Rules of Evidence do not apply” when considering legislative facts. (Dkt. 111, at p. 4). Plaintiffs cite to *Metzl v. Leininger* for the proposition that, if legislative facts are at issue, then they need not support them with a proper foundation. *Id.* at 4. In *Metzl*, the district court had granted summary judgment in favor of plaintiff on the issue of whether using public funds and closing public schools on Good Friday was a violation of the establishment clause of the First Amendment. *Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995). The court affirmed, noting that there was a question of fact, upon which no evidence was presented, and criticized the government for failing to develop the record. It did not conclude, as Plaintiffs claim, that the Federal Rules of Evidence are set aside when legislative facts are at issue. *Id.* at 621. Moreover, *Metzl*’s dicta regarding legislative facts, cited by Plaintiffs on page 4, does not support the admissibility of evidence that is disputed, lacks foundation, or is based on hearsay. *Id.* at 622. And unlike in *Metzl*, Defendants have developed an extensive record on which their summary judgment motion rests.

Plaintiffs also cite *Indiana Harbor Belt Railroad Company v. American Cyanamid Company* for the proposition that a party is not required to “lay a foundation” for legislative facts. (Dkt. 111, at p. 5). However, in *Indiana Harbor Belt*, the parties *agreed* that there was only a question of law before the court. *Ind. H. B. R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1176 (7th Cir. 1990). There is no such agreement in the instant matter. The so-called legislative facts at issue here are hotly contested.

Appendix E

Indiana Harbor Belt is therefore easily distinguished. And in any event, none of the cases cited support the notion that Plaintiffs may disregard the local rule when legislative facts are before it. Plaintiffs' discussion of Fed. R. Evid. 201 and judicial notice is likewise misguided as the purpose of Rule 201 is not to relax the rules of evidence for admission of highly contested facts.

A. Plaintiffs' facts are not legislative in nature.

Plaintiffs insist that the facts put forth in their *Response to SOF* are "legislative facts" that "lie outside the domain of [the] rules of evidence." (Dkt. 111, at p. 12.) In *Frank v. Walker*, the Seventh Circuit indicated that:

"The concept of a legislative fact comes into its own when there is no reason to believe that certain facts pertinent to a case vary from locality to locality, or from person to person; a typical definition of legislative facts is broad, general facts that are not unique to a particular case and provide therefore an appropriate basis for legislation of general application. For example, black lung disease (pneumoconiosis) is either a progressive disease, like asbestosis, or it is not. Nothing supports the idea that it is progressive for Miner A and halts for Miner B." *Frank v. Walker*, 773 F.3d 783, 795 (7th Cir. 2014).

The facts cited by Plaintiffs in their *Response to SOF* do not fit into this definition of legislative facts.

Appendix E

Many of Plaintiffs' "legislative facts" are undisclosed opinions set forth by alleged experts. See, e.g., *Response to SOF* ¶¶4, 7-11, 20-23, 26-28, 30, 32-33, 35, 55-57, 59-64, 66-68, 71-75, 77-81, 91-95, 97-124, 127, 129, 137-147, 155-159, 161-163, 167, 169-171, 174-177, 179-181, 184-192, 196-200, 202-205, 213-218, 220-223, 225-241, 248, 252-266, 269-272, 275, 277, 280-297, 299-303, 305-306, 309-311, 321-323, 326, 331-336, and 339. As the experts and opinions were never disclosed in discovery, they were never subjected to scrutiny by Defendants or their experts. These facts are both disputed and their disclosure at this phase circumvents this court's discovery orders. Plaintiffs also attempt to set forth surveys as "legislative facts," relying on them to establish that the regulated weapons are used in self-defense, a key fact which is highly disputed. (ECF 98, at ¶¶ 20, 30.) If this fact was indeed undisputed, there would be no need to further litigate this matter. Because it is a contested fact, evidence supporting Plaintiffs' proposition should have been properly disclosed in discovery. Plaintiffs cannot skirt their duty to disclose by now claiming all their proposed facts are legislative facts which are automatically admitted.

Plaintiffs' reliance on *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) is similarly misguided. While the court in *Moore* noted that there were no evidentiary issues in that case, it was decided pre-*Bruen*, which requires a two-step analysis aided by evidence. *Moore* was not determined on summary judgment; no evidentiary record existed, and the "legislative facts" were not disputed. Here, to the contrary, Defendants have compiled a sizable record including experts which Plaintiffs neither objected to nor

Appendix E

countered with their own experts. Instead, Plaintiffs now seek to introduce expert opinion and data claiming they are legislative facts which are automatically admissible. Moore does not support such conduct. Plaintiffs' reliance on *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), is likewise mistaken as there was no discussion of "legislative facts" and the decision is pre-*Bruen* and its two-step analysis. Further, *Ezell*'s reference to historical and secondary sources is distinguishable from a party ignoring discovery rules and attempting to introduce evidence which his opponent had no notice or opportunity to contradict.

Bruen instructs courts to construct a historical record just like any other factual record in our adversarial system of adjudication—by following standard evidentiary principles, rules, and practices. *Bruen*, at 2130 n.6. Like an antitrust or toxic-tort case, district courts are best suited to resolve any factual uncertainty in the requisite historical inquiry under the Second Amendment by using longstanding evidentiary rules and principles. *See Id.*, citing to W. Baude & S. Sachs *Originalism and the Law of the Past*, 37 L. & Hist. Rev. 810-811 (2019).

Whether a fact is adjudicative or legislative does not depend on the nature of the fact, but rather on the nature of its intended use. *See United States v. Bello*, 194 F.3d 18, 22 (1st Cir. 1999). The same fact can play either role depending on context. *Id.* Facts that are used to establish an element of a claim are adjudicative facts. *See Oriental Financial Grp. v. Cooperativa de Ahorro y Crédito*, 832 F.3d 15, 26-27 (5th Cir. 2016) (in trademark case, facts that tended to prove or disprove public perception

Appendix E

were adjudicative facts). Accordingly, to the extent that information is used to establish or contest a fact at issue in a case, it is an adjudicative fact. *Perry v. Brown*, 671 F.3d 1052, 1075 (9th Cir. 2012), vacated sub nom. *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (in case considering whether voters’ enactment of same-sex marriage ban was motivated by animus, facts concerning the nature of the messages communicated by the measure’s sponsors to voters were adjudicative facts). Judicial notice of adjudicative facts is subject to the strictures of Federal Rule of Evidence 201, including that the fact “cannot reasonably be questioned”; legislative facts are not.

The facts that plaintiffs seek to place before the Court are expressly intended to establish the essential elements of their Second Amendment claims. Plaintiffs seek to persuade the Court that assault weapons are commonly used for lawful self-defense purposes by invoking unsubstantiated, untested surveys and expert opinion. Rather than subjecting the individual behind these surveys and opinions to the regular evidentiary process—whereby the expert’s credibility and the accuracy of their research would be subjected to inquiry and challenged by Defendants—Plaintiffs seek to transform the untested survey into an unvarnished authority simply by characterizing it as legislative fact.

Plaintiffs’ discussion of *de novo* review and appellate courts not being limited by the record below when addressing legislative facts (ECF 111 at 6-7) is irrelevant as the facts asserted by Plaintiffs should not be considered legislative. Moreover, the cases relied upon by Plaintiffs

Appendix E

do not address *how* the legislative facts came before the district court, which is at issue here. It is unlikely that the surveys and studies at issue in those cases were introduced at the summary judgment stage and not through discovery. Therefore, the cases cited have no bearing on this case and Plaintiffs' failure to properly introduce this evidence.

Under *Bruen*, this Court must determine whether restrictions on semiautomatic firearms (or "assault weapons") "are consistent with the Second Amendment's text and historical understanding." *Bruen*, at 2131. To do so, the Supreme Court directed district courts to resolve those questions by relying on evidence furnished by the parties pursuant to evidentiary principles and default rules that are inherent in the adversarial system of adjudication. *Id.* at 2130 n.6. Thus, to the extent that a party presents evidence to establish that assault weapons are "commonly used firearms for self-defense," *id.* at 2138, that evidence is properly characterized as adjudicative, not legislative.

III. Plaintiffs' failure to comply with the rules governing discovery should likewise bar this evidence.

Plaintiffs did not disclose any expert witnesses during discovery yet improperly assert expert opinion in their *Response to SOF*. (Dkt. 37.) (Noting that Plaintiffs "will not disclose affirmative experts.") Fed. R. Civ. P. 26(a)(2) requires Plaintiffs to disclose any expert witnesses and opinions they will rely upon, (Fed. R. Evid. 702), the basis of the expert's opinions (Fed. R. Evid. 703), and the facts or data underlying the expert's opinions (Fed. R. Evid.

Appendix E

705). Plaintiffs cannot rely on expert opinions without having allowed Defendants an opportunity to examine the experts' qualifications and opinions. Plaintiffs cannot avoid their obligation to disclose expert witnesses or comply with L.R. 56.1 by claiming that their alleged experts' statements are "legislative fact."

Plaintiffs cannot simply evade evidentiary standards by characterizing facts that they wish the Court to consider as "legislative facts." As another district court observed when it held a trial to find legislative facts, "there are instances when access to the pertinent data is most appropriately received through live testimony presented by the parties" because doing so lessens "the risk of a poor decision by denying itself whatever help on the facts it can with propriety obtain." *O'Hanlon v. Hartford Acc. & Indem. Co.*, 457 F. Supp. 961, 963 (D. Del. 1978), *aff'd*, 639 F.2d 1019 (3d Cir. 1981) (quotation marks and citation omitted). While this Court may have no independent technical or historical knowledge pertinent to this case, it does have solid experience in resolving disputes between experts. Without any specific expertise itself, "courts regularly resolve factual disputes between expert witnesses, and they do so relying on tried-and-true, conventional considerations related to credibility and reliability." *Ocean State Tactical, LLC v. Rhode Island*, No. 22-CV-246 JJM-PAS, 2022 U.S. Dist. LEXIS 227097, at *15 (D.R.I. Dec. 14, 2022) (discussing the weighing of competing expert historical analysis, post-*Bruen*, in adjudicating Rhode Island's "Firearms Act" which was amended to regulate ghost guns, bump-fire stocks, and large-capacity magazines.)

JA254

Appendix E

Secondarily, the writings of Koper, DiMaio, and Halbrook (ECF 98-1, Exhs. 1-3) are each hearsay which violate Fed. R. Evid. 801, for which no exceptions apply (Fed. R. Evid. 803). Plaintiffs should not reap any benefits from their refusal to comply with discovery. Plaintiffs' failure to disclose is a discovery violation which is sanctionable by barring the witnesses' testimonies. Fed. R. Civ. P. 37(c)(1). Because we are at the summary judgment phase, the proper resolution is to strike Plaintiffs' facts.

WHEREFORE, Defendants respectfully request that this Honorable Court strike Plaintiffs' Local Rule 56.1(b)(3) Response and Exhibits, and in the alternative deem Defendants' facts admitted, and for all other appropriate relief.

Dated: June 5, 2023

Respectfully submitted,
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JA255

**APPENDIX F — DECISION OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF CONNECTICUT, FILED AUGUST 3, 2023**

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:22-1118 (JBA)

NATIONAL ASSOCIATION FOR GUN RIGHTS
AND TONI FLANIGAN

Plaintiffs,

v.

EDWARD M. LAMONT, JR., IN HIS OFFICIAL
CAPACITY, *et al.*,

Defendants.

Filed August 3, 2023

**DECISION ON PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

[TABLES INTENTIONALLY OMITTED]

Janet Bond Arterton, United States District Judge

I. Summary of Decision

On December 14, 2012, at Sandy Hook Elementary school,
a shooter armed with an AR-15 and two semiautomatic

Appendix F

pistols fired 154 shots in less than five minutes and killed 26 people. In response, the Connecticut State Legislature passed “An Act Concerning Gun Violence Prevention and Children’s Safety” in 2013. Two provisions of that law are Conn. Gen. Stat. § 53-202c(a) and Conn. Gen. Stat. § 53-202w(b) and (c) (the “Challenged Statutes”), which restrict the ability of individuals in the state of Connecticut to own, purchase, and use specific types of firearms and accessories, collectively defined as “assault weapons”, as well as large capacity magazines (“LCMs”), which are magazines with the capacity to hold more than ten rounds of ammunition.

Plaintiffs National Association for Gun Rights (“NAGR”) and Toni Theresa Spera Flanigan believe that by prohibiting them from purchasing the banned assault weapons and LCMs, the Challenged Statutes violate their Second Amendment right to keep and bear arms. Their view is grounded in the Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), that a complete ban on handguns violates the individual Second Amendment right to keep and bear arms, as well as the Supreme Court’s more recent holding in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022) that any law restricting the right to keep and bear arms under the Second Amendment is only justified if the government can demonstrate that it is consistent with this Nation’s history and tradition of firearm regulation. Plaintiffs’ suit against Defendants Connecticut Governor Ned Lamont, Chief State’s Attorney Patrick Griffin, and Sharmese Walcott, State’s

Appendix F

Attorney for the Hartford Judicial District seeks to have enforcement of the Challenged Statutes permanently enjoined as unconstitutional. Currently before the Court is Plaintiffs' motion for a preliminary injunction [Doc. # 28] seeking to temporarily enjoin enforcement of the Challenged Statutes until final disposition of this case.

For the reasons discussed below, the Court denies Plaintiffs' motion for a preliminary injunction because they have failed to meet their burden to demonstrate a likelihood of success on their claim that the challenged statutes unconstitutionally burden their Second Amendment right to keep and bear arms. Plaintiffs' proposed ownership of assault weapons and LCMs is not protected by the Second Amendment because they have not demonstrated that the specific assault weapons and LCMs in the Challenged Statutes are commonly sought out, purchased, and used for self-defense. Although this failure alone would have been fatal to Plaintiffs' claim, Defendants have submitted persuasive evidence that assault weapons and LCMs are more often sought out for their militaristic characteristics than for self-defense, that these characteristics make the weapons disproportionately dangerous to the public based on their increased capacity for lethality, and that assault weapons and LCMs are more often used in crimes and mass shootings than in self-defense. Defendants also show through the submission of historically analogous statutes and expert declarations that when a modern innovation in firearm technology results in a particular type of weapon or method of carrying being utilized for unlawful purposes to terrorize and endanger the public, the Nation has a longstanding history and tradition of regulating those

Appendix F

aspects of the weapons or manners of carry that correlate with rising firearm violence. The record shows that the Challenged Statutes are consistent with that purpose and impose a comparable level of burden to the relevantly similar historical analogues Defendants submitted.

II. Background**A. Parties to the Lawsuit**

Plaintiff NAGR is a nonprofit organization that “seeks to defend the right of all law-abiding individuals to keep and bear arms.” (Third Amended Complaint [Doc. # 69] ¶ 10). Plaintiff Toni Flanigan is a Connecticut resident, a US citizen, and member of NAGR who “is affected by State’s prohibition of commonly possessed arms.” (*Id.* ¶ 9.) She claims “a present intention of exercising her constitutionally protected right to acquire, keep and bear commonly possessed arms, and specifically commonly possessed firearms and magazines that fall with the definition of Banned Firearms and the Banned Magazines, without being subjected to criminal prosecution,” and “is presently ready, willing, able and eligible to acquire such arms and, but for her reasonable fear of criminal prosecution, would do so.” (*Id.*) “Specifically, she would acquire and keep an AR-15 or similar rifle and magazines that hold more than 10 rounds.” (*Id.*) Defendants are Ned Lamont, in his official capacity as the Governor of the State of Connecticut; Patrick Griffin, in his official capacity as the Chief State’s Attorney of the State of Connecticut; and Sharmese Walcott, in her official capacity as the State’s Attorney, Hartford Judicial District.

*Appendix F***B. Challenged Statutes**

The challenged statutes regulate certain—but not all—types of both fully automatic and semiautomatic firearms. Semiautomatic firearms fire “one round for each squeeze of the trigger.” (Defs.’ Ex. A, Decl. of Detective Brindiana Warendo¹ [Doc. # 37-10] ¶ 20.) After each discharge, another round is automatically loaded into the chamber for the next shot, permitting a faster rate of fire than a manually operated gun. (*Id.* ¶ 20.) Automatic weapons fire continuously as long as the trigger is held down. (*Id.* ¶ 21.) Selective fire weapons allow the operator “to choose between semiautomatic and fully automatic.” (*Id.* ¶ 22.) Prior to the passage of the Challenged Statutes, the Connecticut General Assembly passed an assault weapon ban in 1993, which prohibited firearms “‘capable of fully automatic, semiautomatic or burst fire at the option of the user,’ including 67 specifically enumerated semiautomatic firearms.” *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 248 (2d Cir. 2015) (quoting 1993 Conn. Pub. Acts 93-306, § 1(a)). In 2001, the Connecticut State Legislature passed Public Act 01-130, which expanded the definition of assault weapon to include semiautomatic rifles, pistols, and shotguns with certain features, and to include particular parts that could be used to convert a firearm into an assault weapon. (Warendo Decl. ¶ 12.) In 2013, Public Act 13-3, which includes Conn. Gen. Stat. §§ 53-202a-c and 53-202w, was passed as part of a “An Act Concerning Gun Violence Prevention and

1. Brindiana Warendo, a trooper with the Connecticut State Police and the primary detective serving in the Firearms Vault, was submitted as an expert in firearms by Defendants.

Appendix F

Children’s Safety” after “the 2012 massacre at Sandy Hook Elementary School.” (Defs.’ Mem. at 4.)

Conn. Gen. Stat. § 53-202a (a)(1) defines an “assault weapon” as:

- (A) (i) “Any selective-fire firearm capable of fully automatic, semiautomatic or burst fire at the option of the user or any of the following specified semiautomatic firearms: . . .”, [enumerating several dozen specific fully automatic, semiautomatic or burst fire selective-fire firearms];
- (ii) “A part or combination of parts designed or intended to convert a firearm into an assault weapon, as defined in subparagraph (A)(i) of this subdivision, or any combination of parts from which an assault weapon, as defined in subparagraph (A)(i) of this subdivision, may be rapidly assembled if those parts are in the possession or under the control of the same person”;
- (B) “Any of the following specified semiautomatic centerfire rifles, or copies or duplicates thereof with the capability of any such rifles, that were in production prior to or on April 4, 2013: . . .”, [enumerating a list of several dozen specified semiautomatic centerfire rifles, including the AK-47 and the AR-15];

Appendix F

- (C) “Any of the following specified semiautomatic pistols, or copies or duplicates thereof with the capability of any such pistols, that were in production prior to or on April 4, 2013: . . . ” [enumerating a list of several dozen specified semiautomatic pistols];
- (D) “Any of the following semiautomatic shotguns, or copies or duplicates thereof with the capability of any such shotguns, that were in production prior to or on April 4, 2013: All IZHMAASH Saiga 12 Shotguns;”
- (E) Any semiautomatic firearm regardless of whether such firearm is listed in subparagraphs (A) to (D), inclusive, of this subdivision, and regardless of the date such firearm was produced, that meets the following criteria: . . . ”, [enumerating further criteria for centerfire rifles, semiautomatic, centerfire rifles, semiautomatic pistols, semiautomatic shotguns, shotguns with revolving cylinders, or semiautomatic firearms generally that would qualify them as “assault weapons”]; or
- (F) “A part or combination of parts designed or intended to convert a firearm into an assault weapon, as defined in any provision of subparagraphs (B) to (E), inclusive, of this subdivision, or any combination of parts from which an assault weapon, as

Appendix F

defined in any provision of subparagraphs (B) to (E), inclusive, of this subdivision, may be assembled if those parts are in the possession or under the control of the same person.”²

A centerfire rifle is designed for “centerfire cartridges which are more powerful projectiles” because “they have a larger bullet, higher velocity, greater range, and more ‘foot pounds of energy’ or stopping power, than other cartridges such as rimfire or pistol ammunition.” (Warenda Decl. ¶ 29.) One example of a centerfire cartridge is the .223 round often used in an AR-15 type rifle. (*Id.*) A pistol is “any firearm that has a barrel under twelve inches in length” under Connecticut General Statute § 29-27. (*Id.* ¶ 30.)

Under Conn. Gen. Stat. § 53-202c (a), except as provided by statute, “any person who, within this state, possesses an assault weapon, except as provided in sections 53-202a to 53-202k, inclusive, and 53-202o, shall be guilty of a class D felony and shall be sentenced to a term of imprisonment. . . .” Some of the carveouts include provisions allowing various law enforcement agencies to possess assault weapons and a process by which persons who lawfully possessed assault weapons prior to the

2. On June 6, 2023, 2023 Conn. Legis. Serv. P.A. 23-53 (H.B. 6667) further expanded the definition of what constitutes an assault weapon by adding several new subsections; however, the sections of each statute challenged by Plaintiffs are not substantively changed, and no motion to amend has since been filed to include a challenge to the new subsections.

Appendix F

enactment of Connecticut’s assault weapon bans could apply for a certificate of possession to retain the firearm. Conn. Gen. Stat. § 53-202c (b)-(c). As of January 30, 2023, 81,982 Certificates of Possession had been issued to individuals lawfully permitted to possess assault weapons. (Warenda Decl. ¶ 18-19.)

Under Conn. Gen. Stat. § 53-202w(b), except as provided by statute, “any person who, within this state, distributes, imports into this state, keeps for sale, offers or exposes for sale, or purchases a large capacity magazine shall be guilty of a class D felony.” Section 53-202w(a)(1) defines a “large capacity magazine” as “any firearm magazine, belt, drum, feed strip or similar device that has the capacity of, or can be readily restored or converted to accept, more than ten rounds of ammunition, but does not include: (A) A feeding device that has been permanently altered so that it cannot accommodate more than ten rounds of ammunition, (B) a .22 caliber tube ammunition feeding device, (C) a tubular magazine that is contained in a lever-action firearm, or (D) a magazine that is permanently inoperable.”

C. Assault Weapons**1. Firearms**

The AR-15 originated in response to the U.S. military’s request for an improved infantry weapon in the 1950s and was initially manufactured as a selective-fire machine gun by ArmaLite Corporation. (Warenda Decl. ¶ 24.) The ArmaLite AR-15, which was the predecessor

Appendix F

of the modern AR-15, went into mass production in June 1959; it was adopted as the M-16 machine gun during the Vietnam War. (*Id.*) Colt Manufacturing Company obtained the trademark for the AR-15 semiautomatic version, without the fully automatic fire option, and began selling to the civilian market in the early 1960s. (*Id.* ¶ 25.) The AK-47 was created by Mikhail Kalashnikov with the intent that it would replace rifles and submachine guns carried by Soviet forces at the end of World War II, was officially adopted by the Soviet Army in 1949, and has been used by countries “throughout the world.” (*Id.* ¶ 26.)

Based on her firearms expertise, Warenda’s opinion is that “the majority of the firearms specifically named in the statutes are semiautomatic versions of the original selective-fire AR-15/M-16, the AK-47, or variants of these weapon platforms in an assortment of calibers.” (*Id.* ¶ 23.) Specifically, of the 49 assault rifles listed by name in Conn. Gen. Stat. § 53-202a, nineteen are AK-47 variants, thirteen are AR-15 or M-16 variants, and three are HK 91 or FN type variants. (*Id.* ¶ 27.) The remaining rifles are “unique” rather than falling into a “type”. (*Id.* ¶ 28.) The rifles are all semiautomatic centerfire rifles except for the Remington Tactical 7615, a “pump action” rifle using detachable magazines that “can accept more than ten rounds of ammunition.” (*Id.* ¶ 29, 32.) The Second Circuit declared the ban on the Remington Tactical 7615 was unconstitutional in *Cuomo*, 804 F.3d 242, because it was a non-automatic or semi-automatic firearm. Conn. Gen. Stat. § 53-202a also bans certain semiautomatic pistols; six are AK-47 variants and seven are M-16/AR-15 variants, with the remaining nine not falling into “a type.”

Appendix F

(Warenda Decl. ¶ 30.) The one shotgun specifically listed in Public Act 13-3 is the IZHMAISH SAIGA 12, which is “based on an AK-47 platform.” (*Id.* ¶ 31.)

2. Firearm Parts and Accessories

A magazine is a “container that holds ammunition for a firearm,” typically by holding bullets and feeding the ammunition into the firearm, but does not contain a firing mechanism. (*Id.* ¶¶ 39, 40.) A detachable magazine may be removed and replaced with another fully loaded magazine; fixed magazines are typically reloaded by reloading bullets into the magazine attached to the firearm. (*Id.* ¶ 39.) Ordinary ammunition magazines “extend perpendicularly from the frame of the firearm and are fed with one round on top of the other,” while tubular magazines are generally “fixed magazines that run horizontally along the length of the barrel and are fed with cartridges end to end” and are typically only for “lever action rifles, rimfire rifles and shotguns.” (*Id.* ¶ 41.) Large capacity magazines have been manufactured for a variety of firearms, and most firearms that accept large capacity magazines “can also function using a magazine that has a capacity of under ten rounds.” (*Id.* ¶¶ 42, 43.)

Other accessories to firearms banned by Conn. Gen. Stat. § 53-202a include telescoping stocks, flash suppressors, and forward pistol grips. A telescoping stock, also known as a collapsible stock, is “a stock that can retract into and shorten itself to make a firearm more compact.” (*Id.* ¶ 15.) A flash suppressor is “a device attached to the muzzle of a firearm that reduces its visible

Appendix F

signature while firing.” (*Id.* ¶ 16.) A forward pistol grip, also known as a second pistol grip, is a “grip on the front of the firearm or simply a second grip on a firearm.” (*Id.* ¶ 17.)

D. Procedural Background

Plaintiffs filed suit in September 2022 under 42 U.S.C. § 1983 claiming violations of their Second Amendment rights. An amended complaint was filed on September 13, 2022, and a second amended complaint was filed on October 25, 2022; Plaintiffs filed their motion for a preliminary injunction on November 3, 2022, and Defendants filed their motion to dismiss the complaint on November 18, 2022. After new standing arguments were raised in Defendants’ reply brief, Defendants’ motion to dismiss was denied without prejudice and Plaintiffs were granted leave to file a third amended complaint to address the arguments, which they filed on March 7, 2023. Defendants filed an answer, rather than moving again to dismiss. The Court granted leave to file three amici briefs by Everytown for Gun Safety [Doc. # 78], the Brady and March for Our Lives groups [Doc. # 80], and the Giffords Law Center to Prevent Gun Violence [Doc. # 75].

III. Legal Standard**A. Preliminary Injunctions**

To obtain a preliminary injunction against the Defendant, “the movant has to demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success

Appendix F

on the merits, and (3) public interest weighing in favor of granting the injunction. The movant also must show that the balance of equities tips in his or her favor.” *Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020).³ When “the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,” the injunction will only be granted if both irreparable harm and a likelihood of success on the merits are shown. *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989).

If the injunction is prohibitory in nature, seeking only to maintain the status quo, the likelihood of success standard requires a demonstration of a “better than fifty percent” probability of success. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985), *disapproved on other grounds*, *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349, n.2, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987). The status quo is measured as “the last actual, peaceable uncontested status which preceded the pending controversy.” *Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (per curiam). However, if the injunction seeks to “alter the status quo by commanding some positive act,” *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35, n.4 (2d Cir. 2010) then a preliminary injunction is “mandatory” in nature and “the standard is [more] exacting: a district court may enter a mandatory preliminary injunction against the government only if it determines that, in addition to demonstrating irreparable

3. Unless otherwise indicated, this opinion omits internal quotation marks, alterations, citations, and footnotes in text quoted from court decisions.

Appendix F

harm, the moving party has shown a clear or substantial likelihood of success on the merits.” *Libertarian Party of Conn. v. Lamont*, 977 F.3d 173, 176-77 (2d Cir. 2020). This heightened standard also applies if the requested injunction “(1) would provide the plaintiff with all the relief that is sought and (2) could not be undone by a judgment favorable to defendants on the merits at trial.” *Mastrovincenzo v. City of New York*, 435 F.3d. 78, 90 (2d Cir. 2006).

Defendants submit that this is a mandatory injunction, and that Plaintiffs must “carry the burden of persuasion by a clear showing for each factor,” but submit nothing demonstrating that positive action by them would be required. *Bergamaschi v. Cuomo*, No. 20 CIV. 2817 (CM), 2020 WL 1910754, at *6 (S.D.N.Y. Apr. 20, 2020) (citations omitted). Plaintiffs maintain that they need show only a likelihood of success on the merits, which they characterize as a “probable” success on the merits. District courts in this circuit have split on whether injunctions enjoining enforcement of gun regulations are mandatory or prohibitive. *Compare Christian v. Nigrelli*, No. 22-CV-695 (JLS), 642 F.Supp.3d 393, 403-04 (W.D.N.Y. Nov. 22, 2022) (currently on appeal) (finding that injunction enjoining enforcement of a regulation prohibiting firearms on private property without permission was prohibitory because it would “restore the status that existed before implementation of the private property exclusion”) *with Frey v. Nigrelli*, No. 21 CV 05334 (NSR), 661 F.Supp.3d 176, 183-84 (S.D.N.Y. Mar. 13, 2023) (currently on appeal) (injunction enjoining enforcement of several New York City gun laws would require “altering,

Appendix F

rather than maintaining, the status quo.”). However, *Mastrovincenzo v. City of New York*, 435 F.3d. 78, 90 (2d Cir. 2006) held that an injunction which “enjoined” the defendants “from enforcing” a city code provision “clearly prohibits, rather than compels, government action by enjoining the future enforcement of § 20-453 against plaintiffs” and that it “clearly” did not command defendants “to perform any specific tasks.” The language of the requested injunction here is similarly prohibitory, and nearly indistinguishable from *Mastrovincenzo*; the status quo that the injunction of the statute would return the state to would be the status quo pre-1993, before semiautomatic and automatic firearms were subject to the 1993, 2001, and 2013 restrictions enacted through the statutory sections now being challenged. Thus, the lower standard for likelihood of success on the merits applies.

B. Facial vs. As-Applied Challenge

Although Plaintiff Flanigan submits that she would seek to own an LCM and AR-15-type firearm, Plaintiffs nevertheless seek an injunction that will enjoin enforcement of *all* provisions of each of the statutes, including provisions that apply to non-AR-15-type firearms; as such, this challenge is a facial one. The Supreme Court has held that “[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Because “[t]he fact that [a statute] might operate unconstitutionally under some

Appendix F

conceivable set of circumstances is insufficient to render it wholly invalid,” litigants bringing facial challenges must meet a “heavy burden.” *Id.*

Defendant views the distinction between facial and as-applied challenges as important because “the challenged statutes restrict ownership and possession of a range of weapons and features,” and that Plaintiffs must show “that the statute is [un]constitutional in all aspects, which means here that every weapon and feature merits Second Amendment protection and that the challenged restrictions fail to meet the *Bruen* test,” to succeed. (Defs.’ Opp’n Mem. [Doc. # 37] at 10.) Defendants point to the fact that some of the restricted weapons in Conn. Gen. Stat. § 53-202(a) are grenade launchers, Uzis, and certain shotguns, all of which have been found dangerous or unusual by other courts and which do not fall within the Second Amendment’s protection. (*Id.* at 11.) Because Plaintiffs do not contend that these particular firearms are constitutionally protected, Defendants aver that Plaintiffs fail to carry their “unconstitutional in all” applications burden required for a facial challenge. (*Id.*)

Plaintiffs claim that *Bruen* created an exception to the Second Circuit’s “no set of circumstances” standard. (Pls.’ Reply [Doc. # 64] at 44.) In Plaintiffs’ view, “if the Second Amendment covers the Plaintiffs’ conduct, and the government cannot ‘demonstrate that the regulation is consistent with the Nation’s historical tradition of firearm regulation,’ then the regulation is invalid” because *Bruen*’s standard would be meaningless if a statute “inconsistent with history and tradition” could be “saved by the one

Appendix F

possible application that may be constitutional.” (*Id.* at 44-45.) *Bruen* aside, Plaintiffs also argue that *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), *abrogated on other grounds*, *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022), and *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016), *abrogated on other grounds in Dobbs*, established a “large fraction” exception to the general “no set of circumstances” rule by allowing a facial challenge to a statute when the statute would unconstitutionally impact a “large fraction” of the cases to which it would be applied. (*Id.*)⁴

District courts have taken a variety of approaches to resolving the issue of facial challenges; while one court

4. Plaintiffs argue further that the “no set of circumstances” rule does not apply to cases involving the loss of “fundamental rights” because the “rules are different” for fundamental rights, such as the general rule disfavoring facial vagueness challenges outside the First Amendment context. (Pls.’ Reply at 45) (quoting *Farrell v. Burke*, 449 F.3d 470, 496 (2d Cir. 2006)). However, *Farrell* does not stand for the sweeping proposition that the rules go out the window for fundamental rights, and instead recognizes that “that the Supreme Court ha[s] not spoken clearly as to whether a facial challenge outside the First Amendment context had to show that a statute was impermissibly vague in all applications, or merely that the statute was ‘permeated’ with vagueness” declining to adopt or express a preference for either analysis, and that at best, prior Second Circuit precedent “arguably suggests” that “at least some facial vagueness challenges may be brought outside the First Amendment context” despite other “suggestion to the contrary.” *Id.* at n. 11.

Appendix F

held that “[o]utside of the First Amendment context, a facial challenge generally must show that ‘no set of circumstances exists under which the [law] would be valid,’ ” *Copeland v. Vance*, 230 F. Supp. 3d 232, 248 (S.D.N.Y. 2017), another court used the less demanding “plainly legitimate sweep” portion of the facial challenge test for a Second Amendment claim. *See Christian*, 642 F.Supp.3d at 409-10. Yet another court found that, as Plaintiff maintains, *Bruen* essentially created a binary in which either the regulation itself is or is not inconsistent with the nation’s tradition of firearm regulation, and so necessarily requires permitting facial challenges that invalidate statutes as unconstitutional even if there might theoretically be certain constitutional applications of them. *See Antonyuk v. Hochul*, No. 122CV0986GTSCFH, 639 F.Supp.3d 232, 303-05 (N.D.N.Y. Nov. 7, 2022), *reconsideration denied sub nom. Antonyuk v. Nigrelli*, No. 122CV0986GTSCFH, 2022 WL 19001454 (N.D.N.Y. Dec. 13, 2022).

Nothing in *Bruen* suggests that plaintiffs now may challenge a statute implicating Second Amendment rights without being held to the higher facial challenge standard, and the Second Circuit’s most recent holding on the issue of the standard for facial challenges in *Cnty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 548 (2d Cir. 2023) (petition for certiorari filed) settles the question in this Circuit. There, the Second Circuit rejected arguments by a group of landlords challenging a statute under the 14th Amendment that the stricter *Salerno* standard no longer applied, holding instead that while “a different, more challenge-friendly standard has developed

Appendix F

in the context of statutes affecting First Amendment rights,” “*Salerno* provides the prevailing standard for facial challenges to statutes outside the context of the First Amendment.” *Id.* at 549. However, Plaintiffs fail to meet their burden under either standard because they cannot show even that a “large fraction” of the regulated firearms and accoutrements are unconstitutionally restricted.

C. Second Amendment Jurisprudence

Under the Second Amendment, “[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Both the Second Circuit and the Supreme Court have issued cases over the last two decades interpreting that right that are critical to the Court’s analysis, beginning with *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

1. *District of Columbia v. Heller*

Until *Heller*, the scope of the Second Amendment was largely unexplored territory, last addressed by the Supreme Court in *United States v. Miller*, 307 U.S. 174, 179, 59 S.Ct. 816, 83 L.Ed. 1206 (1939). As *Heller* noted, the matter went “judicially unresolved” for so long because “for most of our history,” the question of whether the Second Amendment could invalidate firearms regulations “did not present itself.” *Heller*, 554 U.S. at 625-26, 128 S.Ct. 2783. When the issue of the Second Amendment’s protections came before the Supreme Court in *Heller*,

Appendix F

the litigants posed two questions: whether “the Second Amendment protects an individual right to possess firearms,” and whether a “total ban on handguns” violated the Second Amendment. *Id.* at 576, 128 S.Ct. 2783.

a) Scope of the Right

Given the “very different interpretations” by the parties of the right conferred by the Second Amendment, the *Heller* court embarked on a comprehensive analysis of the Second Amendment’s meaning, beginning with its textual analysis of the prefatory and operative clauses. *See id.* at 577-79, 128 S.Ct. 2783. *Heller* divided the operative clause into two parts: the holder (“the people”) and the substance (“to keep and bear arms.”) *Id.* at 579, 128 S.Ct. 2783. When interpreting the latter, *Heller* relied on dictionaries from the Founding era defining “arms” as “[w]eapons of offence, or armour of defence,” or as “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” *Id.* at 581, 128 S.Ct. 2783. Although it adopted these definitions, *Heller* cautioned that the scope of the right is not limited to only the embodiments of that definition that might have existed in the 1700s: “[j]ust as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* at 582, 128 S.Ct. 2783.

After reviewing additional Founding era sources and documents to determine both the textual definition

Appendix F

of and the contextual use of the phrase “keep” and “bear” arms, the Supreme Court concluded that the Second Amendment guarantees “the individual right to possess and carry weapons in case of confrontation,” as “confirmed by the historical background of the Second Amendment.” *Id.* at 592, 128 S.Ct. 2783; *see also* 601-03, 128 S.Ct. 2783 (discussing state constitutions codifying Second Amendment analogues that secured “an individual right to bear arms for defensive purposes”). This history demonstrated that the Second Amendment did not *create* a right, but codified a pre-existing right to “protect[] against both public and private violence,” including “to keep arms for their own defense.” *Id.* at 593-94, 128 S.Ct. 2783. While the fear that the citizens’ militias would be disarmed by the government might have been the primary reason for the Second Amendment’s codification, as evidenced by the prefatory clause, *Heller* stressed that self-defense is the “*central component* of the right.” *Id.* at 599, 128 S.Ct. 2783 (emphasis in original). A review of relevant history and case law, *Heller* found, confirmed that its interpretation of the Second Amendment was consistent with public understanding and interpretation of the right from “immediately after its ratification through the end of the 19th century.” *Id.* at 605-06, 606-19, 128 S.Ct. 2783.

Constitutional rights, *Heller* explained, are “enshrined with the scope they were understood to have when the people adopted them,” including the historical limitations that were part of that understanding, *id.* at 634, 128 S.Ct. 2783. The Second Amendment is subject to those same limitations and has never been understood as conferring the right “to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at

Appendix F

626, 128 S.Ct. 2783. One of the most explicitly recognized limitations came from *Miller*, which held that “the ***type of weapon at issue***,” a short-barreled shotgun, was “not eligible for Second Amendment protection” *id.* at 622, 128 S.Ct. 2783 (emphasis in the original), because it did not “have some reasonable relationship to the preservation or efficiency of a well-regulated militia.” *Id.* (quoting *Miller*, 307 U.S. at 178, 59 S.Ct. 816.) *Heller* characterized *Miller* as standing for the proposition that the Second Amendment “extends only to certain types of weapons,” *id.* at 622-23, 128 S.Ct. 2783; weapons “used in defense of person and home” are constitutionally protected, but “weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barred shotguns,” are not. *Id.* at 624-25, 128 S.Ct. 2783. The historical tradition of “prohibiting the carrying of ‘dangerous and unusual weapons’ ” as discussed in 18th and 19th century treatises, *Heller* held, supported *Miller*’s restriction on the scope of the Second Amendment, which *Heller* described as an “important limitation on the right.” *Id.* at 627, 128 S.Ct. 2783.⁵ Despite the fact that developments

5. *Heller* also pointed to 19th century case law and Founding era commentary such as Blackstone as defining several (“although not an ‘exhaustive’ list”) of further limitations on the “scope of the Second Amendment,” including “prohibitions on carrying concealed weapons,” “longstanding prohibitions on the possession of firearms by felons and the mentally ill,” laws “forbidding the carrying of firearms in sensitive places such as schools and government buildings,” and “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27, 128 S.Ct. 2783. In a footnote, Justice Scalia cautioned that its list of “presumptively lawful regulatory measures” was meant “only as examples” and that the “list does not purport to be exhaustive.” *Id.* at n. 26.

Appendix F

in warfare like the invention of modern-day bombers and tanks, may render militias without “highly unusual” and “sophisticated arms” less than effective against a standing army, *Heller* nevertheless held that “weapons that are most useful in military service—M-16 rifles and the like—may be banned.” *Id.* at 627-28, 128 S.Ct. 2783.

b) Constitutionality of the Handgun Prohibition

Once the scope of the right had been determined, *Heller* reached the challenged statute at issue, and held that the “prohibition of an entire class of ‘arms’ ” such as handguns that were “overwhelmingly chosen by American society” for the lawful purpose of self-defense” and were “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” where “the need . . . is most acute,” would “fail constitutional muster” under “any of the standards of scrutiny.” *Id.* at 628-29, 128 S.Ct. 2783. *Heller* explained that it was not “permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed” because the handgun was the “quintessential self-defense weapon,” “possessing characteristics making it well-suited for self-defense.” *Id.* at 629, 128 S.Ct. 2783. “Whatever the reason,” *Heller* found, “handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.” *Id.* at 629, 128 S.Ct. 2783.

In rejecting the idea that a complete ban on a category of commonly used firearms was constitutional,

Appendix F

Heller cited to other cases⁶ that had reached similar conclusions regarding laws that impermissibly burdened the right to self-defense. *Heller* also distinguished laws that the government had argued were comparable, like gunpowder storage laws and a 1783 law that permitted seizure of any loaded firearm found in a house, stable, shop, or other similar building. *Id.* at 631-32, 128 S.Ct. 2783. *Heller* found that the purpose of these laws was to limit danger to firefighters, not to prevent loading a gun or accessing gunpowder for self-defense, and neither did the laws “remotely burden the right of self-defense as much as an absolute ban on handguns.” *Id.* Similarly, laws punishing the discharge of a gun at certain times or in certain areas were meant to prevent “indiscreet” firing of guns, not their use for self-defense, and came with only minor fines or penalties as opposed to a significant prison sentence. *Id.* at 632-33, 128 S.Ct. 2783. Because none of these regulations “c[a]me close” to the level of restriction imposed by the challenged statute, *Heller* concluded that there was no historical evidence contradicting its holding that such a prohibition was constitutionally impermissible.

6. These cases included *Nunn v. State*, 1 Ga. 243, 251 (1846), which struck down a prohibition on open carry of pistols while upholding a prohibition on concealed carry prohibitions; *Andrews v. State*, 50 Tenn. 165, 183-84 (1871), which struck down a prohibition on open carry of pistols that was “without regard to time, place, or circumstances”; and *State v. Reid*, 1 Ala. 612, 616-17 (1840), which held that “[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.”

*Appendix F***2. *McDonald v. City of Chicago, Ill.***

Two years later, the Supreme Court in *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 749, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) held that the Second Amendment right is fully applicable to the states because it was incorporated through the Fourteenth Amendment. *Id.* at 750, 130 S.Ct. 3020. The Supreme Court explained that the right to self-defense by bearing arms was “deeply rooted in this Nation’s history and tradition,” dating back centuries, and was considered fundamental by those who drafted and ratified the Bill of Rights. *Id.* at 767-69, 130 S.Ct. 3020. *McDonald* reaffirmed, however, the ability of the states to continue devising “solutions to social problems that suit local needs and values,” including to limit firearm violence, so long as they were “reasonable” firearms regulations that complied with the limits of the Second Amendment. *Id.* at 784-85, 130 S.Ct. 3020. It further reiterated language from *Heller* that there were “longstanding regulatory measures” that remained valid, and that “incorporation does not imperil every law regulating firearms.” *Id.* at 786, 130 S.Ct. 3020.

3. *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*

Like *Heller*, *McDonald* cast doubt on the idea of interest-balancing as a method of evaluating firearm regulations but offered no alternative method or test for determining whether a regulation “infringed” on Second Amendment rights. As a result, circuit courts differed as to what the exact scope of the Second Amendment

Appendix F

right to bear arms was, and how to evaluate regulations that applied to conduct within the scope of the Second Amendment. *See, e.g., Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012). A number of circuits eventually coalesced around a “two step” where courts asked (1) whether the regulated activity fell inside or outside the scope of the right as originally understood, and if it fell within that scope, (2) applied either strict or intermediate scrutiny depending on how close the law came to the “core” of the Second Amendment right, and how severe the burden was on that right. *See id.*

In 2015, the Second Circuit used this same two-step analysis to reject a challenge to the same statutes at issue in this case, as well as analogous statutes passed in New York, in *Cuomo*, 804 F.3d 242. The Second Circuit acknowledged that *Heller* established the Second Amendment right as an individual one to possess and carry weapons for self-defense, at least in the home, but found that it stopped “well short” of extending its rationale to other firearms restrictions beyond handgun bans by endorsing “the historical tradition of prohibiting the carrying of dangerous and unusual weapons,” *id.* at 253. However, the Second Circuit lamented that “[n]either *Heller* nor *McDonald* [] delineated the precise scope of the Second Amendment or the standards by which lower courts should assess the constitutionality of firearm restrictions,” leaving unresolved which tier of scrutiny might apply. *Id.* at 254.

In the absence of “more detailed guidance” from the Supreme Court, the Second Circuit followed the two-

Appendix F

step test adopted in *Kachalsky*, asking at the first step “whether the challenged legislation impinges on conduct protected by the Second Amendment.” *Id.* at 254. The Second Circuit explicitly divided the step one inquiry into two questions: whether the weapons were in “common use”, and whether they were “typically possessed by law-abiding citizens for lawful purposes.” *Id.* at 254-55. *Cuomo* defined “common use” as being an inquiry into whether the weapons were “commonly owned” by “law-abiding Americans,” and considered arguments from both sides about what the statistics showed regarding the ownership of the challenged firearms. *Id.* at 255. Without identifying a specific metric that would satisfy the threshold for common use, *Cuomo* found that “Americans own millions of the firearms that the challenged legislation prohibits,” as well as LCMs, meaning that they were “in common use” as that term was used in *Heller*. *Id.* While *Cuomo* viewed the “common use” requirement as meaning “the weapons must actually be used lawfully,” it determined that the court “need not consider” any evidence related to lawful use because the mere possession of assault weapons was the proscribed conduct under the statute. *Id.* at n. 52.

While the Second Circuit viewed common use as an “objective and largely statistical inquiry,” it found that typical possession by law-abiding citizens for a lawful purpose required looking into “both broad patterns of use and the subjective motives of gun owners.” *Id.* at 256. *Cuomo* rejected the idea that use in crime, as opposed to lawful purposes, could deprive the firearms of constitutional protection because the handguns in *Heller* were also often used in violent crime, and the “evidence of

Appendix F

disproportionate criminal use did not prevent the Supreme Court from holding that handguns merited constitutional protection.” *Id.* Instead of considering only a weapon’s association with crime, the Second Circuit also decided it must consider “more broadly whether the weapon is ‘dangerous and unusual’ in the hands of law-abiding civilians,” distinguishing “weapons that are most useful in military service” from civilian weapons. *Id.* *Cuomo* candidly acknowledged that the analysis is “difficult to manage in practice” because the fact that an AR-15 is “the civilian version of the military’s M-16 rifle” could either mean it should be treated as equally dangerous and unusual as an M-16, or that its role as the civilian alternative made it constitutionally protected where the M-16 was not. *Id.* at 256-57.

The Second Circuit concluded that “neither the Supreme Court’s categories nor the evidence in the record cleanly resolves the question of whether semiautomatic assault weapons and large-capacity magazines are ‘typically possessed by law-abiding citizens for lawful purposes.’” *Id.* Because there was a “dearth of evidence” that “law-abiding citizens typically use these weapons for self-defense,” *id.* at 263, the Second Circuit decided in lieu of ruling on the typical possession question that “[i]n the absence of clearer guidance from the Supreme Court or stronger evidence in the record,” it would “proceed on the assumption that these laws ban weapons protected by the Second Amendment” because “the statutes at issue nonetheless largely pass constitutional muster” under step two of the analysis—tiers of scrutiny. *Id.* at 260.

Appendix F

Cuomo noted that the “instant bans are dissimilar from D.C.’s unconstitutional prohibition of ‘an entire class of ‘arms’ that is overwhelmingly chosen by American society for [the] lawful purpose’ of self-defense” because “New York and Connecticut ban only a limited subset of semiautomatic firearms, which contain one or more enumerated military-style features,” and “[a]s *Heller* makes plain, the fact that the statutes at issue do not ban ‘an entire class of ‘arms’ ” makes the restrictions substantially less burdensome.” *Id.* at 260. Based on this distinction and because “numerous ‘alternatives remain for law-abiding citizens to acquire a firearm for self-defense’ ”, *Cuomo* found that the bans did not “effectively disarm individuals or substantially affect their ability to defend themselves” and so imposed a burden that was “real” but not “severe.” *Id.* In evaluating the purpose of the statutes, *Cuomo* also held that the legislation was “tailored” to address “particularly hazardous weapons” and the dangers that many of the “military-style features” posed. *Id.* at 262. The legislation, the Second Circuit found, was “specifically targeted to prevent mass shootings like that in Newtown,” and to reduce “circulation of assault weapons among criminals.” *Id.*

4. *New York State Rifle & Pistol Association, Inc. v. Bruen*

In *Bruen*, the Supreme Court invalidated the majority of circuit court decisions addressing the Second Amendment post-*Heller* by definitively rejecting the tiers-of-scrutiny “two-step” approach to Second Amendment claims and introducing a new test:

Appendix F

When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s unqualified command.

142 S. Ct. at 2129-30. While “[s]tep one” of the previous “two-step” framework was “broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, as informed by history,” the Supreme Court held that the second step was “one step too many,” and that “[i]nstead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Id.* at 2127. *Heller*’s methodological approach, *Bruen* explained, began with textual analysis and a review of the historical background of the Second Amendment, followed by a review of the public understanding of the right based on post-enactment sources, to confirm whether the right was an individual one to self-defense and to “demark the limits on the exercise of that right” such as the “historical tradition” of prohibiting dangerous and unusual weapons, and protecting only weapons that were “in common use.” *Id.* at 2128. This methodology, centered on “constitutional text and history,” *id.*, did not allow for balancing the interest protected by the statute with other government interests under traditional means-end scrutiny—instead, courts should respect the fact that

Appendix F

the Second Amendment “is the very *product* of an interest balancing by the people” and look to the balance “struck by the traditions of the American people” in evaluating the legitimacy of any regulation of firearms. *Id.* at 2130-31.

New York’s licensing scheme prohibited the possession of any firearm without a license and required applicants to show a “special need for self-protection distinguishable from the general community” in order to obtain a general carry license. *Id.* at 2123. Neither side contested that petitioners had demonstrated that they were part of “the people” protected by the Second Amendment, and that handguns were “‘in common use’ today for self-defense,” and so the only preliminary question under the first question of *Bruen*’s newly enunciated test was “whether the “plain text of the Second Amendment” protected “carrying handguns publicly for self-defense.” *Id.* at 2134. *Bruen* had “little difficulty concluding that it does” because the “textual elements” of the Second Amendment guarantees “the individual right to possess and carry weapons in case of confrontation,” which “naturally encompasses public carry” based on the definition of “keep” and “bear.” *Id.*

Because petitioners had met their burden, *Bruen* next turned to determining whether the regulation had a proper historical analogue such that it was consistent with the Nation’s traditions of firearm regulation. *Bruen* embarked once more on a journey through history, reviewing sources from “the late 1200s to the early 1900s” submitted by the respondents and concluding that “apart from a handful of late-19th-century jurisdictions, the historical record

Appendix F

compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense.” *Id.* at 2135-2136, 2138. *Bruen* distinguished a number of pre-19th century regulations directed to the carry of firearms as inapposite, *see, e.g., id.* at 2141-45 (discussing how the Statute of Northampton and successor statutes’ prohibition on riding “armed by night nor by day” only prohibited bearing arms in a way that spread “fear” or “terror” rather than representing a broad prohibition on all forms of public carry) or outliers, *see, e.g., id.* at 2143-44 (finding that a regulation preventing a farmer or plantation owner who settled new territory from carrying any kind of pistol, and more broadly prohibited the concealed carry of pocket pistols or unusual or unlawful weapons, was not meaningful because it only appeared to have been in effect for 8 years). Regarding the latter, *Bruen* held that even if there had been a statute prohibiting handguns as “dangerous and unusual” during the colonial period, handguns are “indisputably in ‘common use’ for self-defense today,” and so could provide no justification for restricting “the public carry of weapons that are unquestionably in common use today.” *Id.* at 2143.

Bruen found after a review of the historical record that the government could regulate “the intent for which one could carry arms,” (such as prohibiting carrying of a firearm in a way that would cause fear and terror,) “the manner by which one carried arms” (such as prohibiting either open or concealed carry so long as the other form of carry remained open) or the “exceptional circumstances under which one could not carry arms” (such as in the case of dangerous or unusual weapons), but it could not broadly

Appendix F

prohibit the public carry of commonly used firearms for personal defense by requiring individuals to demonstrate a need for a handgun beyond the generalized desire to possess it for self-defense. *Id.* at 2156. Thus, *Bruen* held that New York’s licensing scheme violated the Second and Fourteenth Amendments. *Id.*

IV. Discussion**A. Analytical Framework for Second Amendment Challenges**

Ruling on the merits of the parties’ arguments first requires determining what framework for analyzing Second Amendment claims the Supreme Court has left lower courts with post-*Bruen*, including what the various terms of art used by the Supreme Court mean for purposes of their application, and whose burden it is to produce evidence on each point.

At oral argument, both sides agreed that because there is a degree of overlap between the analyses for ‘common use,’ ‘typical possession,’ and ‘dangerous and unusual’ in the context of the Second Amendment, the structural organization of how the Court addresses each phrase is less important than what the core of the inquiry is. However, the parties’ positions diverge sharply on what that core might be. Plaintiffs’ position is that whether a weapon is “common use,” whether the firearms are “typically possessed by law-abiding citizens for lawful purposes,” and whether the firearms are “dangerous or unusual weapons” are the “flip side of one another.” (June

Appendix F

5, 2023 Oral Argument Tr. [Doc. # 83] at 39). In their view, common use is an inquiry focused on “the choices commonly made by contemporary law-abiding citizens” to purchase and possess certain weapons and is meant only to distinguish commonly used civilian weapons from “specialized weapons employed by a standing army.” (Pls.’ Mem. at 10.) Broadly, Defendants view the three different phrases as ultimately getting at whether the firearms at issue are suitable and used for self-defense, or for some other purpose—lawful or unlawful—unprotected by the Second Amendment. Defendants maintain that after *Bruen*, Plaintiffs must show not only that the weapons and accoutrements are commonly owned, but that they are commonly possessed and used *for self-defense* based on *Bruen*’s repeated use of the phrase “‘common use’ for self-defense.” (Defs.’ Mem. at 24.) Amici Brady, March for Our Lives, and Giffords Law Center join that position, highlighting that both *Heller* and *Bruen* heavily emphasize that “individual self-defense” is the central component of the Second Amendment, not mere possession of firearms for lawful purposes generally. (Brief for Brady as Amicus Curie, supporting Defendants (“Brady Amicus”) [Doc. # 80] at 4-5); (Brief for Giffords Law Center as Amicus Curie, supporting Defendants (“Giffords Amicus”) [Doc. # 75] at 8, 10.)⁷ Defendants interpret the phrase “typical possession by law-abiding citizens for lawful purposes”

7. Giffords Law Center further argues that the Second Circuit’s discussion of common use and typical possession in *Cuomo* has limited weight given that the court recognized “that reliable empirical evidence of lawful possession for lawful purposes was ‘elusive,’ ” and primarily relied on its analysis under means-end scrutiny to come to the holding. (Giffords Amicus at 10.)

Appendix F

to require the Court to determine what the weapon is “useful” for and how it is “used” in practice. (Defs.’ Mem. at 20.)

The first step requires deciding whether *Cuomo*’s holding on these two questions is still binding post-*Bruen*. *Cuomo* interpreted the “common use” analysis as a purely statistical inquiry into ownership, and the “typical possession” analysis as a more qualitative examination “into both broad patterns of use and the subjective motives of gun owners.” *Cuomo*, 804 F.3d at 256. *Cuomo* held that because “Americans own millions of the firearms that the challenged legislation prohibits,” they should be considered “in common use” as that term was used in *Heller* and assumed without deciding that the plaintiffs would succeed on the issue of typical possession. *Cuomo*, 804 F.3d at 255-57. If *Cuomo*’s holding on common use remains good law, then the Court’s task is merely to apply it. However, because *Cuomo* preceded *Bruen*, the Court must determine to what extent *Cuomo* has been abrogated; while the parties agree that the “two-step” and the means-end scrutiny analyses used in *Cuomo* are no longer applicable law⁸, their positions diverge on whether discrete portions of *Cuomo*’s “step one” analysis on common use and typical possession remain binding.

8. While the Second Circuit’s findings regarding means-end scrutiny may no longer constitute a binding holding, its findings as to the level of burden imposed by the Challenged Statutes provides useful guidance to this Court in determining whether the Challenged Statutes impose a similar level of burden to a historical analogue under the *Bruen* test.

Appendix F

Plaintiffs’ arguments as to *Cuomo*’s applicability are built upon ever-shifting sands, making their precise position difficult to pin down. Plaintiffs devote an entire section of their opening brief, titled “[t]he Second Circuit’s decision in *Cuomo* is no longer good law,” (capitalization omitted), to arguing that both the “mode of review” and “holding” were overturned by *Bruen*, (Pls.’ Mem. at 11-13). This position is consistent with their argument that common use and typical possession are part of the same overlapping inquiry, and that no inquiry into whether the weapons are used for self-defense is required. However, it is fundamentally *inconsistent* with their assertion at oral argument that *Cuomo* is binding on this Court to the extent it held that assault weapons are commonly used, because the method of analysis with which *Cuomo* reached that conclusion divided common use and typical possession into two questions. (See Oral Argument Tr. at 11.) Plaintiffs cannot have it both ways—either *Cuomo*’s common use analysis survived *Bruen* and is thus binding, or common use and typical possession are terms meant to be interchangeably used as part of one analysis, in which case that portion of *Cuomo*’s holding giving the terms distinct meanings is inconsistent with *Bruen* and it is no longer good law.

The Court views the latter option interpretation as the better one. *Cuomo* openly acknowledged that *Heller* provided lower courts with little guidance on what phrases like “common use” or “typically possessed by law-abiding citizens for lawful purposes” meant and how they should be applied; while *Cuomo* strove to faithfully apply the analysis as *Heller* appeared to set it out, continued analysis

Appendix F

of the question in other circuits revealed that defining the “common use” factor articulated in *Cuomo* leads to a problem of application:

[R]elying on how common a weapon is at the time of litigation would be circular to boot. Machine guns aren’t commonly owned for lawful purposes today because they are illegal; semi-automatic weapons with large-capacity magazines are owned more commonly because, until recently (in some jurisdictions), they have been legal. Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn’t commonly owned. A law’s existence can’t be the source of its own constitutional validity.

Friedman v. City of Highland Park, Illinois, 784 F.3d 406, 409 (7th Cir. 2015).

Bruen, perhaps recognizing the shortcomings of a purely statistical inquiry into possession, avoided that pitfall by framing the relevant inquiry as being whether the weapons are “‘in common use’ today *for self-defense*.” *Bruen*, 142 S. Ct. at 2134 (emphasis added); *see also Heller*, 554 U.S. at 594, 128 S.Ct. 2783 (discussing the origins of the pre-existing right codified by the Second Amendment as the “right of self-preservation” permitting a citizen to “repel force by force” when “the intervention of society in his behalf, may be too late to prevent an injury.”) While only a handful of district courts post-*Bruen* have had the occasion to grapple with the question of what common

Appendix F

use means, at least one has reached the conclusion that *Bruen* requires that common use to be specifically for self-defense. See *Oregon Firearms Fed’n, Inc. v. Brown*, No. 2:22-CV-01815-IM, 644 F.Supp.3d 782, 799-800 (D. Or. Dec. 6, 2022), *appeal dismissed*, No. 22-36011, 2022 WL 18956023 (9th Cir. Dec. 12, 2022) (noting that the relevant inquiry was whether the weapons were in common use “for lawful purposes *like self-defense*”) (quoting with emphasis *Heller*, 554 U.S. at 624, 128 S.Ct. 2783). As such, this Court reads *Bruen* to abrogate *Cuomo* to the extent it treated common use as a solely statistical question.

Plaintiffs next insist that because the Second Amendment guarantees an “individual right to *possess* and carry weapons *in case of confrontation*,” that necessarily means firearms need not be commonly “used” for self-defense—only possessed. (Pls.’ Reply at 36) (quoting with emphasis *Bruen*, 142 S. Ct. at 2134.) The reason for which the firearms are possessed is certainly part of the analysis; however, *Bruen* recognized that the “limitation” on “the sorts of weapons protected” by the Second Amendment to those in common use stems from “the historical tradition of prohibiting the *carrying*” of dangerous and unusual weapons, intrinsically linking the contours of constitutionally protected weapons to how those weapons are used, rather than merely possessed. *Heller*, 554 U.S. at 627, 128 S.Ct. 2783 (emphasis added). Further, to adopt Plaintiffs’ proposal would mean allowing the analysis to be driven by nebulous subjective intentions such that if enough individuals filled out a survey stating that they owned high powered shotguns or niche sniper rifles for the purpose of self-defense, that would satisfy

Appendix F

the common use test regardless of how the weapons were actually used, a result that the Supreme Court does not indicate in the slightest that it intended.

The Supreme Court’s holding in *Miller* that “the sorts of weapons protected” by the Second Amendment are those that were “in common use at the time,” *Miller*, 307 U.S. at 179, 59 S.Ct. 816, was interpreted in *Heller* to mean that the weapons protected by the Second Amendment were “the sorts of lawful weapons” that are typically “possessed at home,” and not “dangerous and unusual” weapons. *Heller*, 554 U.S. at 627, 128 S.Ct. 2783. *Caetano v. Massachusetts*, 577 U.S. 411, 411, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016) explicitly rejected the idea that a firearm is dangerous and unusual merely because it did not exist at the time of the Founding, and *Bruen* further explained that the tradition of prohibiting “dangerous and unusual” weapons is not meant to prohibit guns that might have been dangerous and unusual during the colonial period if they are now “the quintessential self-defense weapon,” *id.* at 2143. All three precedents point towards the inquiry into whether the Second Amendment protects a particular firearm focusing not on whether it was commonly kept and used or would have been considered dangerous and unusual at the time of the Founding, but instead on both the characteristics of the firearm and how the firearm is used by everyday citizens. *See also id.* at 2128 (characterizing the limitation on dangerous and unusual weapons as part of the “the historical understanding of the Amendment to demark the *limits on the exercise of* [the Second Amendment] right.”) (emphasis added).

Appendix F

The Court views the three phrases—common use, typical possession, and dangerous and unusual—as meant to get at both the “how” and the “why” of how a particular weapon is used. Thus, the Court proceeds by seeking to answer two questions: Do law-abiding citizens buy the weapons at issue for the purpose of defending themselves, or because the weapons’ characteristics are well-suited for some unlawful purpose? And once those firearms are purchased, are they actually used for self-defense, or are they more often utilized to achieve unlawful ends? In order to prevail, the answer to both must be that the weapons are obtained and used for self-defense.

Having settled that *Bruen* requires the Court to determine both how and why the firearms are commonly used and possessed, whether it be for self-defense or for some unlawful end that makes the weapons dangerous and unusual, the Court must now decide whose burden it is to provide evidence as to each element. Plaintiffs argue “the Second Amendment’s plain text covers Plaintiffs’ conduct in seeking to acquire bearable arms” and that as such, Plaintiffs’ conduct “is **presumptively** protected by the Second Amendment”; based on the language in *Bruen* stating that “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms,” Plaintiffs maintain that no more is required from them. (Pls.’ Mem. at 4-5) (emphasis in original); (Pls.’ Reply at 5.)

Defendants view Plaintiffs’ burden in both *Heller* and *Bruen* to require threshold showings that (1) Plaintiffs are members of “the people”, (2) the regulated instrument is a “bearable arm” under the Second Amendment, (3) the

Appendix F

arms are not “dangerous or unusual,” (4) such arms are in “common use” for “lawful purposes like self-defense” and that (5) the weapons are “typically owned by ‘law-abiding citizens for lawful purposes.’” (Defs.’ Mem. at 11-12.) They acknowledge that if Plaintiffs meet their burden, the burden to justify their regulation by demonstrating that it is relevantly similar to historical analogues in the nation’s history and tradition of firearm regulation lies with them. (*Id.*)

Bruen’s mandate provides that *if* the Second Amendment’s plain text creates the presumption, “*then*” the government must justify its regulation. *Bruen*, 142 S. Ct. at 2130 (emphasis added). Similarly, the section of *Bruen* in which the Supreme Court applied its newly enunciated test considered whether handguns were arms that were “ ‘in common use’ today for self-defense” and whether the “plain text” of the Second Amendment covered the petitioner’s “proposed course of conduct” of carrying handguns publicly for “self-defense” *before* shifting the burden to respondents to justify the regulation. *Id.* at 2134. Thus, *Bruen* and *Heller* make clear that Plaintiffs have the burden of making the initial showing that they are seeking to possess or carry firearms that are “ ‘in common use’ today for self-defense” and are typically possessed by law-abiding citizens for that purpose. *Id.* *Heller* may have discussed the common use test as part of the “historical tradition” of prohibiting dangerous and unusual arms, rather than the “plain text” of the Second Amendment, but *Heller* stressed that text and history are inextricably intertwined; the constitutional right is defined by the text used to immortalize it, but *Heller*

Appendix F

also teaches that the text itself is defined by its original meaning, including the history and tradition behind it. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1459-51 (2009). In short, *Heller* made extensive use of history to define *both* the scope of the right and the types of regulations that, despite burdening the right, are constitutionally permissible; the requirement that the arms be in common use for self-defense falls into the former category, not the latter.

Plaintiffs strenuously contest this interpretation of *Heller* and *Bruen*, maintaining at oral argument that neither case imposes any obligation on plaintiffs to offer empirical evidence on how the arms are used and for what purpose.⁹ In support, they rely on *Bruen*'s acknowledgment that the First Amendment was "repeatedly compared" to the Second Amendment in *Heller* for the purpose of analyzing whether the Supreme Court's holding was consistent with its treatment of other constitutional rights, and *Bruen*'s subsequent comparison of the government's burden in a Second Amendment challenge to First Amendment cases where the government "bears the burden of proving the constitutionality of its actions" when

9. Both *Heller* and *Bruen* also dealt with a type of firearm that neither side disputed was commonly used for self-defense by average citizens, and thus no conclusions can be drawn from the fact that plaintiffs in those cases were not required to provide empirical support for their arguments.

Appendix F

it restricts speech. *Bruen*, 142 S. Ct. at 2130.¹⁰ However, the quoted language stands only for the well-established principle that when Plaintiffs bring any constitutional challenge, whether in the context of the First or the Second Amendment, the burden shifts to the government to justify its actions once the plaintiffs have satisfied their own preliminary burden. *See, e.g., Kennedy v. Bremerton School District*, 597 U.S. 507, 142 S. Ct. 2407, 2421, 213 L.Ed.2d 755 (2022) (explaining that “a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses,” and it was only “[i]f the plaintiff carries these burdens” that the burden “*then* shifts to the defendant to [justify] . . . its actions[.]”) (emphasis added).

Nothing in *Bruen* or any of the other cases that Plaintiffs cite grants them an automatic presumption that their conduct is constitutionally protected which Defendants are then required to affirmatively rebut.

10. Plaintiffs seize on language from *Bruen* in which the Supreme Court justifies its burden-shifting framework by reference to First Amendment cases where the government bears the burden of “showing whether the expressive conduct falls outside the category of protected speech.” *Bruen*, 142 S. Ct. at 2130. However, the cases *Bruen* cites in support make clear that the Supreme Court is referring to situations where the government seeks to justify its regulation by demonstrating that certain types of speech fall into a new categorically unprotected category akin to fighting words or libel. *See, e.g., United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). Such a burden might be applicable in, for example, a case in which the government seeks to establish a new category of sensitive place in which firearms can be banned, but has no applicability here.

Appendix F

Plaintiffs must bear the burden of producing evidence that the specific firearms they seek to use and possess are in common use for self-defense, that the people possessing them are typically law-abiding citizens, and that the purposes for which the firearms are typically possessed are lawful ones.

To the extent that Defendants seek to demonstrate that the regulated firearms are instead dangerous and unusual weapons that are not protected by the Second Amendment, Defendants must demonstrate either that the weapons are unusually dangerous, or that they are not commonly used or possessed for self-defense. Plaintiffs protest, urging that Defendants be required to show both that the assault weapons and LCMs are not commonly used *and* that they are unusually dangerous, because the “dangerous and unusual” test is a conjunctive one. However, it cannot be the case that a grenade launcher or a flamethrower becomes constitutionally protected even if it becomes “common[ly] used” for self-defense if it is also commonly used by military combatants. Further, all firearms are “dangerous” in the sense that they are lethal, and so the Court reads the term “unusual” as implying that there must be some level of lethality or capacity for injury beyond societally accepted norms that makes it especially dangerous. *Heller’s* use of the phrase “dangerous and unusual” does not state that it must be conjunctive, but instead cites to several sources—including 4 Blackstone 148-49 (1769), *State v. Lanier*, 71 N.C. 288, 289 (1874), and *Eng. v. State*, 35 Tex. 473, 476 (1871)—all of which use the phrase “dangerous *or* unusual weapons” (emphasis added). *See also* Volokh, *supra*, 1481 (noting that some

Appendix F

of the sources *Heller* cites to use the phrase “dangerous and unusual” while others use “dangerous or unusual”.) At least one district court has made the same observation and rejected a conjunctive interpretation. See *United States v. Reyna*, No. 3:21-CR-41 RLM-MGG, 2022 WL 17714376, at *3 (N.D. Ind. Dec. 15, 2022) (finding that a weapon can be banned if it is “uncommon or unusually dangerous”).¹¹

Delaware State Sportsmen’s Ass’n, Inc. v. Delaware Dep’t of Safety & Homeland Sec., No. CV 22-951-RGA, 664 F.Supp.3d 584, 594-96 (D. Del. Mar. 27, 2023) held to the contrary, finding that even if “dangerous or unusual” was more accurate as a matter of history, the “great weight” of precedent required it to interpret the “dangerous and unusual” test to require the checking of “both boxes.” *Id.* For this “great weight” of authority, however, the court cited to only two cases in support: *Bruen*, and Justice Alito’s concurrence in *Caetano*. *Id.* However, the section of *Bruen* that *Delaware State Sportsmen’s Ass’n* cites to immediately follows the phrase “dangerous and unusual”

11. Other courts have reached the same conclusion—that unusually dangerous weapons may be banned by the government—but have done so under the history and tradition prong of the *Bruen* test. See *Herrera v. Raoul*, No. 23 CV 532, 670 F.Supp.3d 665, 672-73 (N.D. Ill. Apr. 25, 2023); *Bevis v. City of Naperville, Illinois*, No. 22 C 4775, 657 F.Supp.3d 1052, 1072-73 (N.D. Ill. Feb. 17, 2023). As addressed *infra*, pp. 111-12, even if a weapon must be dangerous *and* unusual to fall under the already enumerated Second Amendment exception from *Heller*, the Court also finds that it is consistent with the nation’s tradition and history of firearm regulation to regulate narrow and specific categories of unusually dangerous weapons resulting from developments in firearm technology.

Appendix F

with a citation to the Blackstone commentaries that uses “dangerous *or* unusual,” (emphasis added) and providing such disproportionate weight to the concurrence in *Caetano* is unwarranted given that the majority opinion in *Caetano* holds only that the lower court erred in finding that whether a firearm is in common use or is dangerous and unusual turned on whether the firearm existed during the time of the Founding and was useful in warfare. *Id.* at 412, 136 S.Ct. 1027. Justice Alito’s concurrence was joined only by Justice Thomas, and no citation to his concurrence appears in the majority opinion in *Bruen*. The Court declines to follow the analysis of *Delaware State Sportsmen’s Ass’n*.

Thus, the Court finds that the purpose of the “dangerous and unusual” exception to the Second Amendment is to determine whether the firearm’s character is such that it is commonly used and typically possessed for self-defense, or instead for the purpose of causing unlawful or excessive harm or fatalities. This interpretation of the test is also consistent with the interplay between common use, typical possession, and dangerous and unusual; a weapon must be both possessed for the purpose of and actually used for self-defense in order to fall within the Second Amendment’s protection, meaning that if it is either unusual for it to be possessed for self-defense or if it is used in a way that makes it particularly dangerous, the weapon does not fall within the Second Amendment’s purview.

Finally, Plaintiffs must also show that the conduct they seek to engage in is covered by the right to “keep and bear

Appendix F

arms,” which includes “the right to ‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’” *Bruen*, 142 S. Ct. at 2134. To prevail on this question, Plaintiffs must show that carrying both a firearm defined as an “assault weapon” and that possessing and using an LCM in conjunction with an assault weapon are part of keeping and bearing arms. If Plaintiffs establish each of those elements, the burden shifts to Defendants to justify their regulation based on *Bruen*’s requirements for establishing relevant similarity to history and tradition.

B. Likelihood of Success on the Merits**1. Whether Plaintiffs’ Proposed Conduct Falls Within the Scope of the Second Amendment**

It is undisputed that Plaintiff Flanigan is a “law-abiding citizen of the United States,” and that she has a valid permit to carry a pistol or revolver. (Third Amend. Compl. ¶¶ 4, 6.) Defendants also do not contest that the firearms defined in Conn. Gen. Stat. § 53-202a(1) are “arms,” or that Plaintiff Flanigan seeks to “keep and bear” those arms. The remaining disputes are (1) whether LCMs and firearm accessories are bearable arms, (2) whether assault weapons and LCMs are in common use for self-defense, and (3) whether they instead are dangerous and unusual weapons not typically possessed by law-abiding citizens for lawful purposes.

Appendix F

Before delving into the specifics of each prong of the *Bruen* test, the Court notes that many of Plaintiffs' arguments as to the applicability of the Supreme Court's precedent employ the logic that if a broader category of something is constitutional, then the smaller parts within it must also be constitutional. The problem with such a logical fallacy, however, is that even if such generalizations are true of the whole, they cannot account for circumstances that distinguish the individual parts. Plaintiffs attempt to apply this logic at multiple turns, beginning with their interpretation of *Staples v. United States*, 511 U.S. 600, 610, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), in which the Supreme Court sought to determine whether guns *generally* should be considered "highly dangerous devices that should alert their owners to the probability of regulation" such that owning an unregistered rifle with prohibited characteristics could be classified as a public welfare offense. The Supreme Court explained that while it might classify categories of guns including "the machineguns, sawed-off shotguns, and artillery pieces" as having a "quasi-suspect character", other guns "traditionally have been widely accepted as lawful possessions" and so did not put gun owners sufficiently on notice of the likelihood of regulation" simply based on the fact that guns are dangerous possessions. *Id.* at 611-12, 114 S.Ct. 1793. Thus, because *Staples* characterized guns other than machine guns, sawed off-shotguns, and artillery pieces as generally lawful possessions, and the assault weapons in the challenged statutes here are guns that do not fall into one of those categories, Plaintiffs conclude that assault weapons must be generally lawful possessions. However, this generalization ignores the

Appendix F

broader context of *Staples*, such as the fact that the phrase “traditionally have been widely accepted as lawful possessions” was written decades before *Bruen* in 1994, without exhaustive historical analysis, and to answer an entirely different question. *Id.* at 612, 114 S.Ct. 1793.

Plaintiffs employ similar logic in their arguments regarding whether use in crimes, military characteristics, or use in mass shootings makes firearms dangerous and unusual, *infra*, Sections IV(B)(1)(b)(2)-(4). However, nothing so clearly illustrates the flaw in Plaintiffs’ logic as *Bruen* itself which acknowledged that traditionally, governments have been permitted to “lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.” *Bruen*, 142 S. Ct. at 2150. In other words, the government cannot ban individuals from carrying firearms, but it can ban different types of carry so long as others are left available. The same principle applies here. The Challenged Statutes do not ban handguns, or all semiautomatic rifles, or even all semiautomatic handguns, but *specific* firearms of enumerated models and features. Because the statutes are not complete bans of the “quintessential self-defense” weapon, Plaintiffs’ arguments directed to general common use of firearms broadly or of similar firearms made throughout their briefing will not suffice, nor will evidence regarding common use of firearms generally satisfy Plaintiffs’ burden to present evidence regarding the *specific* assault weapons enumerated in the Challenged Statutes.

*Appendix F***a) Whether LCMs are Bearable Arms**

Bruen and *Heller* held that “arms” is not limited to only those arms existing in the 18th century, but that the “general definition” of arms fixed according to the historical understanding of it in the 18th century “covers modern instruments that facilitate armed self-defense.” *Bruen*, 142 S. Ct. at 2132. Defendants insist that the LCMs as defined in Conn. Gen. Stat. § 53-202w(a)(1) do not fall within the historical definition of “arms” but are instead analogous to “Founding-era cartridge boxes” that would have been considered “accoutrements” beyond the scope of the Second Amendment’s definition.¹² (Defs.’ Mem. at 12-13.) Defendants rely on an expert declaration maintaining that because ammunition was manually fed into weapons, and kept in cartridge boxes, “magazine” at the time of the Founding would mean “a building designated for storing gunpowder,” and the use of “magazine” as a “bullet storage container” only first appeared in the late 1880s. (Defs.’ Ex. E, Decl. of Prof. Dennis E. Baron¹³ [Doc. # 37-5] ¶ 24.)

12. Defendants make the same argument as to the firearm accessories in Conn. Gen. Stat. § 53-202a(1). However, because the accessories or features enumerated are banned only in conjunction with use as part of a banned firearm, rather than in isolation, there is no need to conduct a separate analysis of whether the accessories warrant Second Amendment protection; whether the underlying firearm itself is constitutionally protected will resolve both questions.

13. Dennis Baron is the Professor Emeritus and Research Professor at the University of Illinois and has served as a member of both the English and Linguistics departments; he has a Ph.D. in English language and literature, and publishes widely on “matters of historical use, in addition to topics related to language and law.” (Baron Decl. ¶ 5.)

Appendix F

Linguistically, Baron argues that the cartridge boxes that held the ammunition, which would have been the closest analogue to modern day magazines, were described as “accoutrements” and were considered separate from “arms” by those in the Founding Era. (Baron Decl. ¶¶ 24, 38, 78).¹⁴ Thus, Defendants contend that LCMs are not ammunition but an “ammunition feeding device” that would qualify as an accoutrement.

Plaintiffs maintain that magazines are covered by the Second Amendment because they are essential to the operation of semi-automatic firearms, and thus are an integral part of the firearm itself. (Pls.’ Reply at 19.) In Plaintiffs’ view, whether LCMs can be banned even if magazines generally are constitutionally protected is a separate question that should be considered under the second step—the historical analysis—rather than the first. If magazines generally are necessary to make semi-automatic rifles effective, then Plaintiffs maintain that magazines generally constitute bearable arms “that are prima facie protected by the Second Amendment.” (*Id.* at 25.)

14. As corroborating evidence that two separate terms were used for each category, Defendants submit a resolution passed by the 1778 Continental Congress, *Congress Undertakes to Raise a Cavalry Corps.*, in 2 Public Papers of George Clinton, First Governor Of New York 827, 828 (Wynkoop Hallenbeck Crawford Co. ed., 1900); Connecticut militia regulations during the Founding, 1799 Conn Acts 511, *An Act For The Militia*, § 4; and *Miller*, 307 U.S. at 182, 59 S.Ct. 816 (1939) (citing militia regulations passed by the General Assembly of Virginia in October 1785), all of which use “accoutrements” in addition to the word “arms”.

Appendix F

Plaintiffs rely on the declaration of Mark Passamaneck¹⁵ to support their proposition that without detachable magazines, “semi-automatic firearms are inoperable” because the “feed angle, magazine spring pressure, and feed ramps” are all features that are meant to ensure the magazine and firearm function together as intended, making the magazine a “dynamic component” necessary to the firearm’s operation. (Pls.’ Reply Ex. 2, Decl. of Mark Passamaneck [Doc. #64-2] ¶¶ 6-7). Without the magazine, there “is no ability to fire a subsequent cartridge due to a subsequent pull of the trigger,” which is the “defining characteristic of a semi-automatic weapon.” (*Id.* ¶ 7.) Even if it is “technically possible” to fire a semi-automatic weapon without a magazine by “manually opening the action each time the weapon is fired and manually inserting a single round into the chamber,” to do so would make the firearm “unreliable, unsafe, and subject to being damaged.” (Pls.’ Reply at 24.)¹⁶

15. While Plaintiffs did not provide any details on Passamaneck’s credentials beyond his declaration, which states that he has designed magazines, barrels, muzzle devices, gas blocks, and complete firearms for manufacturers, and that he has been admitted in court cases as a firearms expert, Defendants did not challenge his qualifications, and it appears from Westlaw that he was accepted as a firearms expert in *Rocky Mountain Gun Owners v. Hickenlooper*, No. 2013CV33879, 2017 WL 4169712, at *4 (Colo. Dist. Ct. July 28, 2017). The Court is thus satisfied that it may consider his testimony as expert testimony.

16. Plaintiffs also find support in a case from the Southern District of California that held that magazines were arms; however, given the procedural posture of that case, which was vacated and remanded repeatedly and most recently for further

Appendix F

Heller noted that the “18th-century meaning” of arms “is no different from the meaning today,” and extends to “all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Heller*, 554 U.S. at 581-82, 128 S.Ct. 2783. Several courts have found that components of firearms that are necessary to their operation, such as ammunition, are covered by the Second Amendment. *See Miller*, 307 U.S. at 179-80, 59 S.Ct. 816 (citing seventeenth-century commentary recognizing that “[t]he possession of arms also implied the possession of ammunition”); *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (“[W]ithout bullets, the right to bear arms would be meaningless.”) Plaintiffs point to Passamaneck’s declaration as evidence that magazines are similarly necessary to the operation of semiautomatic firearms and are thus entitled to Second Amendment protection as a form of “arms,” and note that the Ninth Circuit has reached the same conclusion. *See Fryock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (“to the extent that certain firearms capable of use with a magazine . . . are commonly possessed by law-abiding citizens for lawful purposes, our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable”).

proceedings consistent with *Bruen*, the case has minimal usefulness. *See Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019), *aff’d*, 970 F.3d 1133 (9th Cir. 2020), *reh’g en banc granted*, *opinion vacated*, 988 F.3d 1209 (9th Cir. 2021), and *on reh’g en banc sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *cert. granted*, *judgment vacated*, — U.S. —, 142 S. Ct. 2895, 213 L. Ed. 2d 1109 (2022), and *vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022).

Appendix F

Defendants’ position is that even if there may be some right to magazines under the Second Amendment, the question is whether an LCM *specifically* is integral to a firearm, because a “firearm can be used for self-defense without a large capacity magazine—any ammunition feeding device of lesser capacity will do the job.” (Defs.’ Mem. at 14.) They point to cases like *Ocean State Tactical, LLC v. State of Rhode Island*, No. 22-CV-246 JJM-PAS, 646 F.Supp.3d 368, 385-87 (D.R.I. Dec. 14, 2022)¹⁷ and *Oregon Firearms*, 644 F.Supp.3d at 798 in support, but these cases ignore that under *Bruen*, a “modern instrument[] that facilitate[s] armed self-defense” is an arm entitled to the “prima facie” protection of the Second Amendment. 142 S. Ct. at 2132.

The fact that magazines as a general category constitute bearable arms does not automatically render them protected by the Second Amendment; it means, however, that whether an LCM specifically is necessary for self-defense is better addressed in the section of the inquiry focused on the “common use” of LCMs. The

17. In *Oregon Firearms*, 644 F.Supp.3d at 798-99, the district court found that LCMs are not “arms” within the Second Amendment’s protection because they “are neither weapons themselves nor necessary to the use of weapons.” *Id.* at 798. Defendants’ evidence was that “all firearms that can accept a detachable large-capacity magazine can also accept a magazine that holds 10 or fewer rounds and function precisely as intended.” *Id.* *Ocean State Tactical*, 646 F.Supp.3d at 385-87 reached a similar conclusion, noting that the plaintiffs could not carry their burden by “simply assert[ing]” that magazines are “arms” without supporting expert opinion, historical or textual sources.

Appendix F

Court concludes that LCMs are “arms” for purposes of the Second Amendment as defined in *Bruen* and *Heller*. Plaintiffs have met their burden in this part of the analysis.

b) Determining the Purpose for Which Assault Weapons and LCMs are Commonly Purchased and how they are Commonly Used

(1) Ownership for and Use in Self-Defense

Plaintiffs maintain that the metric used to determine common use should be the percentage of “gun owners” who have an assault weapon and LCM, rather than a percentage of the general population, (Pls.’ Reply at 37), as measured by manufacturing data. They submit that semiautomatic rifles are in common use because the AR-15 is the “best-selling rifle type in the United States” and semiautomatic rifles and semiautomatic handguns are the two most popular types of firearms that are sold. (Pls.’ Reply at 29).¹⁸ According to Plaintiffs, about thirty-five percent of all newly manufactured guns sold in America as of 2018 were modern semiautomatic rifles¹⁹, and 24.6

18. Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue*, 60 HASTINGS L.J. 1285, 1296 (2009) and National Shooting Sports Foundation, Inc., *2021 Firearms Retailer Survey Report*, 9, available at <https://bit.ly/3gWhI8E> (last visited Jan. 30, 2023)).

19. Bloomberg, *Why Gunmakers Would Rather Sell AR-15s Than Handguns*, FORTUNE (June 20, 2018), available at <https://bit.ly/3R2kZ3s>,

Appendix F

million Americans have owned AR-15 or similar rifles.²⁰ As for LCMs, Plaintiffs' expert reports that "[a]t least 150 million magazines with a capacity greater than ten rounds" are owned by law-abiding American citizens, (Pls.' Mot. Ex. 3, Decl. of James Curcuruto²¹ [Doc. # 28-4] ¶ 7), and many handguns, including the Glock 17 pistol (the most popular handgun in America, and legal to own under the Challenged Statutes) come standard with magazines greater than 10 rounds. (Pls.' Mem. at 21).

Plaintiffs also rely on the 2021 National Firearms Survey, which reported that recreational target shooting, home defense, and hunting were the primary reasons for possessing a firearm among the survey participants; specifically, 61.9% of the survey participants reported that they possessed an AR-style firearm for home defense. *See* 2021 National Firearms Survey at 33-34, 23. The same survey found that "[o]f the 25.3 million Americans who have defended themselves with a firearm, 13.1% (3.3 million) have used a rifle." (*Id.*) For LCMs, the survey reported that out of 16,708 gun owners, 48% (which the

20. *See* William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* ("2021 National Firearms Survey") at 1 (May 13, 2022), available at <https://bit.ly/3yPfoHw>.

21. James Curcuruto was the Director of Research and Market Development at the National Shooting Sports Foundation from 2009-2021 and was responsible for both internal and external research on industry topics and trends including firearms, ammunition, target shooting, and hunting. Curcuruto has also published and contributed to articles in trade magazines on the subject. (Curcuruto Decl. ¶¶ 2-5.)

Appendix F

survey estimates represents 39 million people when measuring 48% of gun owners as a whole) “have owned magazines that hold over 10 rounds,” including the “most popular semi-automatic rifles” which are “manufactured with standard magazines holding more than ten rounds.” (Pls.’ Reply at 29.)²² According to the survey, of those who owned LCMs, 41% reported owning them for the purpose of defense outside the home, and 62.4% reported owning them for the purpose of home defense. *See* 2021 National Firearms Survey at 23.

Defendants argue that manufacturing or ownership statistics alone shed only limited light on the question of how assault weapons and LCMs are used. *See, e.g., Heller v. District of Columbia (“Heller II”)*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (holding that although 4.7 million LCMs had been imported into the United States between 1995 and 2000, statistics alone did not reveal whether they were “commonly used or are useful” for self-defense.) Professor Donahue²³ reflects that “gun ownership is becoming more concentrated in a declining portion of the population,” and that “ownership of private firearms is highly concentrated

22. The 2021 National Firearms Survey simply asks if the participants have *ever* owned a large capacity magazine without specifying the time period, not whether they currently own one.

23. Professor John Donahue is the C. Wendell and Edith M. Carlsmith Professor of Law at Stanford Law School, and teaches a course on empirical law and economics issues involving crime and criminal justice that evaluates the nature of gun regulation in the United States and its impact on crime, a topic on which he is also published. He has served as an expert in several gun regulation-related and Second Amendment cases. (Donahue Decl. ¶¶ 3-20.)

Appendix F

among a small percentage of gun owners.” (Defs.’ Ex. B, Decl. of Prof. John Donahue [Doc. # 37-2] ¶ 131.) The average “assault weapons owner” has “three or more of the guns”, meaning that far more assault weapons are sold than there are individual owners of such guns. (*Id.* ¶ 92); (*see also* Defs.’ Ex. C, Decl. of Prof. Louis Klarevas²⁴ [Doc. # 37-3] ¶ 27); (Defs.’ Mem. at 24.)²⁵ Donahue also reports that “the vast majority of the time that an individual in the United States is confronted by violent crime, they do *not* use a gun for self-defense,” and that between 2007-2011, 99.2 percent of victims of violent crimes did not defend with a gun. (*Id.* ¶ 150.)²⁶

24. Professor Louis Klarevas is a security policy analyst and current Research Professor at Teachers College, Columbia University. He authored the book *Rampage Nation* as a study of gun massacres in America, and his current research is on the nexus between American public safety and gun violence; he is published on the topic of gun regulation and gun violence, and has served as an expert in court cases on the topic as well. (Klarevas Decl. ¶¶ 2-8.)

25. Defendants cite to a 2015 survey finding that 8% of individual gun owners “collectively account[] for 39% of the American gun stock,” and that 20% of gun owners possessed about 60% of the nation’s guns. (Donahue Decl. ¶ 132.) AR-15 rifles “make up approximately 5% of privately owned guns, compared to 50% for handguns,” and most Americans who do own guns do not own assault weapons.” (Klarevas Decl. ¶ 27.)

26. Assault weapons are also rarely used defensively in mass shootings; of the 406 active shooter incidents since 2000 documented by the FBI, only one involved an armed civilian intervention with an assault weapon. (Klarevas Decl. ¶ 25.)

Appendix F

Defendants, supported by Amici Brady and March for our Lives, contend that “the overwhelming body of case law and empirical data demonstrate that LCMs are not needed for ‘armed self-defense,’ ” nor are assault weapons commonly used in self-defense. (Brady Amicus at 2.)²⁷ Defendant’s expert Lucy Allen’s²⁸ research on incidents documented by The Heritage Foundation’s database, which is meant to “highlight” stories of successful self-defense, shows only 51 of the 2714 incidents, or 2%, involving any kind of rifle, with no further breakdown indicating whether those rifles were “assault weapons.” (Defs.’ Ex. D, Decl. of Lucy Allen [Doc. # 37-4] ¶¶ 21-23.)²⁹ In reported instances of self-defense involving firearm use from 2011-2017, Allen submits evidence that only 2.34 shots are fired in self-defense on average, with individuals firing 5 shots or fewer in 97.3% of all incidents nationally, and in Connecticut specifically, no individual

27. While Defendants claim there are 3.8 million LCMs lawfully owned in Connecticut by only 41,000 individuals, i.e., about 1% of the state’s population, that statistic has limited relevance given the fact that LCMs are largely illegal under the Challenged Statutes in Connecticut, and thus few individuals are likely to own them. (Defs.’ Mem. at 24.)

28. Lucy Allen is Managing Director of the National Economic Research Associates Economic Consulting (“NERA”), a member of NERA’s Securities and Finance Practice, and Chair of NERA’s Product Liability and Mass Torts Practice. She has previously been qualified as an expert and testified in both federal and state courts on economic and statistical issues relating to the flow of guns into the criminal market. (Allen Decl. ¶¶ 1-3.)

29. That statistic remained consistent when excluding incidents in states that restrict assault weapons. (*Id.* ¶ 24.)

Appendix F

fired more than 10 rounds in self-defense in reported incidents between 2011-2017. (Allen Decl. ¶¶ 10, 16-17.)³⁰ Donahue concludes that in light of those statistics, the fact that “[a]ll firearms that can accept high-capacity magazines can also accept magazines that hold fewer rounds” and the firing rate of a semi-automatic firearm would be irrelevant if only brandishing it was necessary to deter threats, it “cannot be seriously maintained that assault weapons and high-capacity magazines play any important role in furtherance of the Second Amendment goal of self-defense.” (Donahue Decl. ¶ 153.)

“[W]hether a weapon is in common use depends a lot on how generally one defines the weapon; for instance, as a handgun generally, or as a Glock 17 in particular.” See Volokh, *supra*, at 1481. Because *Heller* focused on handguns being “the most popular weapon chosen by Americans for self-defense in the home,” the Court views the correct inquiry to be how many Americans actually own and use assault weapons for self-defense. *Heller*, 554 U.S. at 629, 128 S.Ct. 2783. The data relied on by both sides, unfortunately, is unhelpfully general in nature to the

30. Donahue notes that “NRA-affiliated and pro-gun experts” have repeatedly argued that “about 98 percent” of defensive gun uses “involve people brandishing a gun and not using them.” (Donahue Decl. ¶ 151) (quoting John R. Lott testifying on behalf of the NRA in the State of Nebraska’s Committee on Judiciary.) Amici Brady and March for our Lives also point to studies of the NRA’s database of “armed citizen” accounts demonstrating that use of more than ten rounds of ammunition for self-defense is “extremely rare” and the average shots fired by civilians in self-defense was only about two. (Brady Amicus at 6.)

Appendix F

extent that it divides the statistics only by categories such as handgun or rifle, rather than semiautomatic or non-semiautomatic. Given those limitations, this Court cannot determine whether assault weapons are in “common use” because, importantly, the challenged statute does not ban *all* rifles, pistols, or shotguns; statistics that do not differentiate between assault weapons and other firearms within those categories are thus of limited assistance. Even if the Court were to credit Plaintiffs’ statistics on the common use of rifles, the fact that 13.1% of self-defense incidents involve a rifle of some kind does not assist this Court in determining whether the specific semiautomatic rifles covered by this statute are used commonly for self-defense. As for semiautomatic handguns and the banned shotguns, Plaintiffs offer no evidence regarding the possession or use statistics of either.

Plaintiff’s single survey on the reason for which the survey respondents reportedly bought their assault weapons does not demonstrate that assault weapons and LCMs possess characteristics that make them well-suited for self-defense. To the contrary, Donahue explains that because “[b]ullets fired by assault weapons or a modern weapon with an LCM will easily penetrate walls,” their use threatens family members or occupants of occupied dwellings, as illustrated by one instance in which a concealed carry permit holder accidentally fired his gun in a gun safety class, and the bullet passed through a wall to kill the gun store owner in the next room. (Donahue Decl. ¶ 154.) Donahue notes that experts “consider handguns clearly more suitable than assault weapons for

Appendix F

self-defense.” (*Id.* ¶ 158.)³¹ *Cf. Heller*, 554 U.S. at 629, 128 S.Ct. 2783 (noting that handguns have particular features that make them preferable as a home defense tool).

In the absence of persuasive evidence that the assault weapons or LCMs listed in the statutes are commonly used or are particularly suitable for self-defense, Plaintiffs have failed to carry their burden.

(2) Possession for Use in and Actual Use of Assault Weapons and LCMs in Non-Mass Shooting Crimes

The Second Circuit recognized that after *Heller*, handguns cannot be constitutionally banned despite being disproportionately used in murders and violent crimes as compared to other firearms. *Cuomo*, 804 F.3d at 256. Plaintiffs reason therefore that use in crime alone cannot be enough to find that the assault weapons and LCMs are not protected by the Second Amendment. They also dispute the premise that assault rifles are often used in crime, asserting that “evidence indicates” that under 1% of guns used in crimes were “assault rifles” as of

31. For example, Maryland Police Superintendent Marcus Brown submitted a declaration in *Kolbe v. O'Malley*, 42 F. Supp. 3d 768 (D. Md. 2014) stating that “in many home defense situations assault weapons are likely to be less effective than handguns because they are less maneuverable in confined areas.” (Donahue Decl. ¶ 158.)

Appendix F

1997.³² Plaintiffs claim that more recent FBI statistics demonstrate that rifles (with no breakdown between semiautomatic rifles and non-semiautomatic rifles) were used in only 315 murders per year between 2015 and 2019, whereas 669 murders are committed by hands, fists, and feet in that time period.³³

Defendants maintain that assault weapons and LCMs are often used to perpetrate “unlawful violence” and are “particularly popular weapons for drug traffickers and gang members both in the U.S. and Mexico,” citing to Donahue’s assertion that “lost or stolen” guns are “one of the most important sources of weapons for criminals in the United States.” (Donahue Decl. ¶ 115.)³⁴ Donahue concludes that the 364 killings with rifles is likely an undercount as there were also 3281 murders with “firearms, type not stated” where no information about

32. Gary Kleck, *Targeting Guns: Firearms And Their Control* 112 (1997).

33. U.S. Dept. of Just., *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015-2019, Crime in the United States, 2019*, FBI, available at <https://bit.ly/31WmQ1V>. Donahue also argues that Plaintiffs’ claims are of limited helpfulness because they inaccurately cite the statistics from the FBI; for example, he states that, there were actually 16,425 murders reported by the FBI in 2019, rather than 13,927 as claimed by Plaintiff. (Donahue Decl. ¶¶ 177-79.)

34. According to Donahue, roughly 400,000 guns move “into the hands of criminals” through theft or lost guns every year, making it “orders of magnitudes more likely that a criminal will steal a gun of a law-abiding citizen than a law-abiding citizen will fire an assault weapon in lawful self-defense.” (*Id.*)

Appendix F

the type of firearm was available, and the data reported by the FBI does not capture whether any of those murders were committed with semiautomatic pistols—some of which are also defined as assault weapons. (Donahue Decl. ¶¶ 178-79.) Donahue also points out that police departments are not required to report data to the FBI on firearm homicides, and that the figures do not account for shootings committed with assault rifles that did not result in death. (*Id.* ¶ 179.) Because these statistics do not track what types of firearms are used with enough precision to determine whether they are assault weapons as defined by the Challenged Statutes, this data provides limited relevant insight.

Donahue further posits that “[a]ssault weapons pose particular dangers and problems to law enforcement” beyond those of an average handgun because “the types of rounds typically fired by assault weapons as well as the muzzle velocities they tend to have” make them “‘capable of penetrating the soft body armor customarily worn by law enforcement.’”³⁵ Additionally, the “ability to fire rapidly allows criminals to more effectively engage with responding police officers, even from a significant distance,” and despite the “relative rarity” of assault weapons used in crime generally, “ ‘one in five law enforcement officers slain in the line of duty was killed with an assault weapon’ ” and assault weapons “‘accounted for 13.2% of the firearms used in [police murders]’ ” from

35. (Donahue Decl. ¶ 44) (quoting the declaration of Colonel Marcus Brown, then-Superintendent of the Maryland State Police, submitted in *Kolbe v. O'Malley*, 42 F. Supp. 3d 768 (D. Md. 2014)).

Appendix F

2009-2013.³⁶ (*See also* Defs.’ Ex. F, Decl. of Prof. Randolph Roth [Doc. # 37-6] ¶ 51) (assault weapons “maintain parity with law enforcement in a standoff, which is why many police and sheriff departments across the United States have purchased semiautomatic rifles and armored vehicles to defend themselves and decrease the likelihood that officers are killed or wounded.”)³⁷

Plaintiffs do not rebut the point that assault weapons and LCMs are substantially more lethal and prone to causing injury when utilized in crime than a non-semi-automatic handgun or rifle, and the Second Circuit has observed that assault weapons are “disproportionately used in crime . . . [and] to kill law enforcement officers: one study shows that between 1998 and 2001, assault weapons were used to gun down at least twenty percent of officers killed in the line of duty.” *Cuomo*, 804 F.3d at 262. As a result, law enforcement officers and agencies require additional time and resources preparing for

36. (Donahue Decl. ¶ 44) (quoting Violence Policy Center, *Officer Down: Assault Weapons and the War on Law Enforcement*, May 2003, available at <http://www.vpc.org/studies/officer%20down.pdf> (last visited Oct. 12, 2018) at 5) and (Christopher S. Koper et al. 2017, Finding at 317).

37. Professor Randolph Roth is the Arts and Sciences Distinguished Professor of History at The Ohio State University, and is the author of *American Homicide*, a comparative study of homicide in the United States from colonial times to the present. He has published on the topic of violence and the use of firearms in the United States and has served as an expert witness in at least eight cases concerning the constitutionality of state and municipal gun laws. (Roth Decl. ¶¶ 1-9.)

Appendix F

encounters with individuals wielding assault weapons, and the consequences when law enforcement are—either as a matter of perception or reality—not timely equipped to confront an individual with an assault weapon may play out tragically. (Donahue Decl. ¶ 44.)

The semi-automatic nature of the assault weapons banned by the Challenged Statutes and the increased danger to law enforcement have led to their increased use in crime, and the evidence as to the suitability of these weapons for crime outweighs the limited evidence Plaintiffs presented on the use of these weapons for self-defense. However, mindful of the fact that the commonality of a particular firearm or weapon's use in crime was not enough to find in either *Heller* or *Cuomo* that the firearms at issue were not typically used for law-abiding purposes, the Court additionally considers the Defendants' other rebuttal evidence regarding the typical use of such weapons.

(3) Possession for Use in and Actual Use of Assault Weapons and LCMs in Mass Shootings

Assault weapons have been used to perpetuate approximately one-third of the high fatality mass shootings in the past 32 years, and between 2014 and the end of 2022, that number has increased to approximately half. (Klarevas Decl. ¶ 23).³⁸ When assault weapons and

38. For assault weapons, examples include the 2021 Atlanta spa shooting; the 2022 Buffalo, New York supermarket shooting;

Appendix F

LCMs were used in active shooter incidents, “deaths and injuries were substantially higher for the 61 active shooter incidents using a semiautomatic rifle versus the 187 episodes using some other firearm,” and the average number killed or wounded with a semiautomatic rifle was 9.72, higher than the average 5.47 killed or wounded when some other firearm was used. (Donahue Decl. ¶ 48.)³⁹ The ten deadliest mass shootings in American history were all carried out using either an assault weapon or a firearm equipped with an LCM. (*Id.* ¶ 49, Table 1.) The trend of increased use of assault weapons and LCMs in mass shootings also shows “a growing preference for using assault weapons and LCMs” to perpetrate attacks, particularly in high-fatality mass shootings. (Klarevas Decl. ¶ 12-13.)

the 2022 Robb Elementary school shooting in Uvalde, Texas shooting; and the 2022 Highland Park, Illinois’ Fourth of July parade shooting. (Donahue Decl. ¶¶ 42-43); *see also* (Allen Decl. ¶ 36) (LCMs have been used in 73 out of 115, or 63%, of mass shootings). For LCMs, examples include the 12 people killed in May 2019, at Virginia Beach by a shooter using LCMs; the 23 people killed on August 2019, in El Paso, Texas by a shooter using LCMs, and the nine people killed and 27 wounded just hours later in Dayton, Ohio by another shooter using LCMs; later in August 2019, 7 were killed and 25 were wounded by a shooter using LCMs in Odessa, Texas. (Donahue Decl. ¶ 37.) Defendants’ opposition was filed on January 31, 2023, and so the reports of both sides’ experts make no reference to mass shootings that occurred after that date.

39. The study Donahue relies on excluded the Las Vegas shooting in which 50 were killed and 500 were wounded with semiautomatic rifles, as an extreme outlier.

Appendix F

Plaintiffs offer no evidence that assault weapons and LCMs are not disproportionately used in mass shootings⁴⁰, and the Court finds the evidence weighs in favor of Defendants’ arguments that the use of such weapons in mass shootings demonstrates that the weapons are commonly used for reasons other than lawful self-defense.

(4) Possession and Use of Assault Weapons and LCMs for their Military Characteristics

Defendants submit that the challenged firearms and LCMs are military style weapons that are “built for killing large numbers of people rapidly in open spaces[;]” “more shots fired, more victims wounded, and more wounds per victim” translates to “more injuries, more lethal injuries, and higher rates of death than incidents involving more conventional firearms.” (Defs.’ Mem. at 16.) Detective Warenda’s opinion is that the assault weapons in the challenged statutes are essentially civilian versions of “the most prolific military firearms in the world”: the M-16/AR-15 and the AK-47. (Warenda Decl. ¶ 22.) The

40. Plaintiffs argue that “the fact that a weapon can be used in mass shootings does not disqualify it from Second Amendment protection.” (Pls.’ Reply at 3.) In support, Plaintiffs point to the fact that briefs filed in both *Heller* and *Bruen* drew attention to the fact that the Virginia Tech shooting, “the worst mass shooting in U.S. history” at the time of *Heller*, had been committed with semiautomatic handguns, and *Heller* nevertheless found that handgun bans are unconstitutional. These arguments rehash Plaintiffs’ prior misreading of *Heller* and warrant no further discussion. *See supra*, pp. 90-92.

Appendix F

injuries caused by AR-15s are also particularly severe; the designers have stated that the AR-15 was engineered to generate “maximum wound effect.” Doctor Peter Rhee, a trauma surgeon who saved the life of Congresswoman Gabby Giffords after she was shot in the head with a handgun, said that “[a] handgun [wound] is simply a stabbing with a bullet. It goes in like a nail. [But with the AR-15,] it’s as if you shot somebody with a Coke can.” (Donahue Decl. ¶ 109.)

Defendants also argue that LCMs are uniquely dangerous and deadly because they “allow a shooter to fire more than ten rounds without having to pause to reload.” *Kolbe v. Hogan*, 849 F.3d 114, 125 (4th Cir. 2017), *abrogated by Bruen*. The Fourth Circuit found that this was a “uniquely military feature” intended to “enable a shooter to hit multiple human targets very rapidly.” *Id.* at 137. LCMs were originally designed for military use in World War I and did not become widely available for civilian use until the 1980s. (Roth Decl. ¶¶ 49-51.) The other accessories that are banned in conjunction with certain firearms are also meant to enhance the effectiveness of the weapons and ultimately “enhance the death toll” in mass shooting events; “pistol grips and thumbhole stocks enable easier spray-firing; a collapsible or folding stock allows the weapon to be shortened and more easily concealed; and barrel shrouds are essential for mass shooters to continuously fire their weapons without suffering discomfort from an overheated barrel.” (Donahue Decl. ¶ 65.)

The U.S. Army chose to adopt the M-16 as a military rifle due to its “phenomenal lethality” and reliability, as

Appendix F

well as its increased ability to penetrate helmets and body armor. (*Id.* ¶¶ 103-06.) Although its progeny, the AR-15, is semiautomatic rather than fully automatic, Donahue notes that the civilian AR-15 “retains all other aspects that made it such a valuable lethal weapon for deadly combat,” and that the Army’s own field manual states that semi-automatic fire is “the most important firing technique during fast-moving, modern combat” given how “devastatingly accurate rapid semi-automatic fire can be.” (*Id.* ¶ 107.) According to Retired Army Maj. Gen. Paul D. Eaton, “[f]or all intents and purposes, the AR-15 and rifles like it are weapons of war. . . . It is a very deadly weapon with the same basic functionality that our troops use to kill the enemy.” (*Id.* ¶ 170.)

The marketing of assault weapons reflects these military roots. Smith & Wesson sells a “Military & Police” (M&P) AR model, which was used in the Aurora, Colorado movie theater shooting. (*Id.* ¶ 111.) A 2016 shooting in Baton Rouge, Louisiana, involved a TAVOR assault rifle, described by the manufacturer as “the ultimate weapon of the 21st century,” and described on the page for Israel Weapon Industries as having been developed in co-operation with the Israeli Defense Forces in response to “dynamic changes in the modern battlefield, the threats of global terrorism and the demands of ever-changing combat situations.” (*Id.* ¶ 112.) Assault weapons have been advertised using phrases such as “[t]he closest you can get without having to enlist,” or as being “for the ‘warrior’ in you.” (*Id.* ¶¶ 91, 101.) The Bushmaster assault rifle used in the Newtown massacre was advertised with the slogan “Forces of opposition, bow down,” and another

Appendix F

advertisement depicted the Bushmaster rifle with the phrase “consider your man card reissued,” stating that “[i]f it’s good enough for the professional, it’s good enough for you.” (*Id.* ¶¶ 93, 97.) The firearms industry itself sometimes referred to AR-style rifles as “assault rifles.” (*Id.* ¶ 96.)

Plaintiffs assert that *Heller* forecloses any argument that a firearm’s relationship to use in the military bears on its constitutionality based on its conclusion that *Miller*’s use of the phrase “part of ordinary military equipment” meant only that the Second Amendment was supposed to protect arms in common use at the time for self-defense, such as firearms that would have been brought to militia service when men were called up for it, rather than weapons “not typically possessed by law-abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 624-25, 128 S.Ct. 2783. Plaintiffs read *Heller* and *Miller* to mean that because “[w]eapons in common use brought to militia service by members of the militia” are protected by the Second Amendment, and militia members “fight wars,” then states cannot ban “all weapons useful for fighting wars.” (Pls.’ Reply at 32.) They reason that only machineguns, bombers, and tanks, aka specialized weapons used by a standing army, can be constitutionally banned. (*Id.* at 33.)

In short, Plaintiffs divide weapons into two categories: “the type of weapons that a nation-state uses in its armed forces,” which are unprotected by the Second Amendment, and “weapons in common use,” which are protected by the Second Amendment regardless of the

Appendix F

“relative dangerousness” of the firearm, which Plaintiffs view as “irrelevant.” (Oral Argument Tr. at 19-20.) Plaintiffs openly acknowledge that under this logic, even if a gun manufacturer began producing and selling the most dangerous weapon on earth for the military, “if the legislatures of the American people decided to deregulate a particular weapon and over the centuries that weapon became owned by tens of millions of people, it would not be dangerous and unusual[.]” (*Id.* at 21.) The Court rejects this logic; while constitutional protections adapt to the constant evolution of societal norms and technology, no other constitutional right waxes and wanes based solely on what manufacturers choose to sell and how Congress chooses to regulate what is sold, and the Second Amendment should be no exception.

In addition to being built upon flawed logic, Plaintiffs’ argument is also contradicted by history. During the time of the Founding, there *was* a distinction between the guns people typically owned at home and those that were most useful in fighting the Revolutionary War. “Killing pests and hunting birds were the main concern of farmers, and their choice of firearm reflected these basic facts of life. Nobody bayoneted turkeys, and a pair of polished dueling pistols were of limited utility for anyone outside of a small elite group of wealthy, powerful, and influential men.” (Defs. Ex. G, Decl. of Prof. Saul Cornell⁴¹ [Doc. #

41. Professor Saul Cornell is the Paul and Diane Guenther Chair in American History at Fordham University, where he teaches constitutional history to undergraduate and graduate students; he also teaches constitutional law at Fordham Law School. He has written on the topic of the Second Amendment

Appendix F

37-7] ¶ 19.) Instead, “the guns most Americans owned and desired were those most useful for life in an agrarian society: fowling pieces and light hunting muskets.” (*Id.*) It was because of this discrepancy between militia weapons and weapons typically kept and used at home that it was difficult to equip militias with weapons such as working, battle-suited muskets, and laws “requiring” people to be armed with particular kinds of weapons were passed as a result. (*Id.*) Thus, the Second Amendment’s meaning cannot be read to equate the weapons people had at home with weapons useful for fighting war, because weapons useful for fighting war were not those that men were likely to have lying around the house. (*Id.* ¶)

Finally, Plaintiffs’ cherry-picked quotations of *Heller* disregard the portion of the opinion stating that in banning “dangerous and unusual” weapons, “[i]t may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large,” but that nevertheless, “weapons of war” such as M-16 rifles “and the like” may be banned. 554 U.S. at 627-28, 128 S.Ct. 2783. Plaintiffs claim that the distinction between the fully automatic M-16 and semi-automatic weapons such as the AR-15 is legally significant based on *Staples*, but *Staples* does not mention the AR-15, nor does it opine on whether the distinction between an M-16 and AR-15 is significant for the purpose of the Second Amendment.

and gun regulation both in the context of his scholarship and has provided expert declarations and portions of joint briefs in notable Second Amendment cases. (Cornell Decl. ¶¶ 2-4.)

Appendix F

In sum, the fact that a modern American citizen might want to possess a military-grade weapon that would be effective in warfare is irrelevant given *Heller*'s acknowledgment that "modern developments have limited the degree of fit between the prefatory clause and the protected right" in the Second Amendment; whether a weapon would be useful or necessary for an effective militia is a concern now "completely detached" from the actual right itself. *Heller*, 554 U.S. at 627, 128 S.Ct. 2783. Plaintiffs offer no rebuttal for the substantive point that assault weapons and LCMs are more suitable for military use than civilian self-defense. Thus, the Court finds this record to support the conclusion that the militaristic character of assault weapons weighs in favor of finding that they are not typically possessed by the average citizen for self-defense.

c) Overall Conclusion on Plaintiffs' Burden

The foregoing analyses of the record and case law demonstrate Plaintiffs' failure to meet their burden to show that the statutorily defined assault weapons and LCMs are protected by the Second Amendment, and there is thus no likelihood Plaintiffs can succeed on the merits.

2. Whether the Firearm Regulations are Consistent with the Nation's Historical Tradition of Firearm Regulation

Even if Plaintiffs had met their burden under the first part of the test, there is another independent reason

Appendix F

for denying the preliminary injunction: Defendants have demonstrated under step two of the *Bruen* analysis that the Challenged Statutes pose a comparable burden to relevantly similar historical analogues for comparably justified reasons.

When evaluating Defendants' justifications under the second part of the *Bruen* analysis, courts "assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Bruen*, 142 S. Ct. at 2131. Some inquiries, *Bruen* said, would be "straightforward":

For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

Id. However, *Bruen* also recognized that "other cases implicating unprecedented societal concerns or dramatic

Appendix F

technological changes may require a more nuanced approach” because “[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868.” *Id.* at 2132. *Bruen* explained that “history guide[s] our consideration of modern regulations that were unimaginable at the founding,” and that the “historical inquiry . . . will often involve reasoning by analogy.” *Id.* *Bruen* pointed to *Heller* as an example of how “fixed” meanings of terms based on the “understandings of those who ratified it” could be applied to new circumstances, referring to its finding that “arms” applied to more than those arms existing in the 18th century because its “general definition” also covers “modern instruments.” *Id.*

Recognizing the need for some guidance on “which similarities are important and which are not” for purposes of identifying relevantly similar historical analogues, *Bruen* provided two metrics: (1) “how” and (2) “why” the regulations burden a law-abiding citizen’s right to armed self-defense,” with the central inquiry being “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.” *Id.* at 2132-33. *Bruen* noted that “analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check,” cautioning courts against upholding any law that only “remotely resembles” an analogue or striking laws down which do not have a historical “twin.” *Id.* at 2133.

*Appendix F***a) Whether Violence Perpetrated through Use of Assault Weapons is an Unprecedented Societal Concern**

Defendants submit that the Challenged Statutes address an unprecedented societal concern and dramatic technological change that requires a more nuanced analogical inquiry to determine if the regulation is consistent with firearms regulation in America. Amici Brady and March for Our Lives support Defendants' position that because semi-automatic firearms were not introduced until "more than half a century after ratification of the Fourteenth Amendment," the lack of a historical tradition of regulating them dating back to the Second and Fourteenth Amendments' enactments is "meaningless," and the Court should instead take a broader view of what may be a comparable analogue. (Brady Amicus at 17.) Plaintiffs rejoin that because lawmakers in the Founding era were familiar with mass casualty and mass murder, mass shootings are instead a "general societal problem that has persisted since the 18th century."⁴² (Pls. Reply at 7) (quoting *Bruen*, 142 S. Ct. at 2132.)

42. Plaintiffs also argue that *Heller* and *Bruen* characterized handgun violence as a problem persisting since the Founding, rather than an unprecedented societal concern; because mass shootings are a form of handgun violence, Plaintiffs interpret *Bruen* and *Heller* to thus hold that mass shootings are not a new societal development because modern handguns are "the product of exactly the same sort of technological innovation" as assault weapons, producing "the same societal problem identified by the State" of mass shootings. (Pls.' Reply at 5, 8.) Neither *Heller* nor *Bruen* held mass shootings are not a modern societal phenomenon that could justify a complete ban of a category of gun, and in fact, neither *Heller* nor *Bruen* even used the words "mass shooting" in the majority opinions.

*Appendix F***(1) History of Firearm-Related Homicides in America**

To determine whether Defendants are correct that mass shootings are a modern societal development, the Court will examine the history of firearm violence in America, and the modern rise of mass shootings in America. Cornell submits that “there was no comparable societal ill to the modern gun violence problem for Americans to solve in the era of the Second Amendment,” primarily because of “the nature of firearms technology and the realities of living life in small face to face and mostly homogenous rural communities that typified many parts of early America.” (Cornell Decl. ¶ 18.) Roth explains that the reason for rare regulation of possession of firearms by colonists of European ancestry, in contrast to heavy regulation of firearm usage and ownership by Native Americans and African Americans between 1688 and 1763, was primarily because Native Americans and African Americans were feared, and because there was a “surge in patriotic fellow feeling” between European-originating colonists as well as “greater trust in government.” (Roth Decl. ¶ 14.)

Around the time of the Founding, fifty to sixty percent of households owned a working firearm, usually a musket or another muzzle-loading gun designed to hunt birds or control vermin. (Roth Decl. ¶ 15.) Firearm use in homicides was “generally rare” because muzzle-loading firearms were “lethal and accurate enough at short range, but they were liable to misfire,” most often could not fire multiple shots without reloading and could

Appendix F

not be used impulsively unless they were already loaded for some purpose. (*Id.* ¶ 16). Guns were “not the weapons of choice in homicides that grew out of the tensions of daily life,” but firearm use became more common during times of “anticipated violence or during times of political instability,” when American colonists anticipated armed hostile encounters with Native Americans, or when slave catchers were searching out runaway slaves. (*Id.* ¶¶ 17-18.)

(2) Modern Mass Shootings

As Roth explains, while “[m]ass murder has been a fact of life in the United States since the mid-nineteenth century,” it was “a group activity through the nineteenth century because of the limits of existing technologies.” (*Id.* ¶ 41.) “The only way to kill a large number of people was to rally like-minded neighbors and go on a rampage with clubs, knives, nooses, pistols, shotguns, or rifles—weapons that were certainly lethal but did not provide individuals or small groups of people the means to inflict mass casualties on their own.” (*Id.*)

It was only in the late nineteenth and early twentieth century “with the invention and commercial availability of new technologies that gave individuals or small groups of people the power to kill large numbers of people in a short amount of time” that the “character of mass murder began to change.” (*Id.* ¶ 44.) According to Klarevas, “there is no known occurrence of a mass shooting resulting in double-digit fatalities at any point in time during the 173-year period between the nation’s founding in 1766 and 1948,” with the first shooting that resulted in 10 or

Appendix F

more deaths occurring in 1949. (Klarevas Decl. ¶ 18.) Further, Donahue states that mass shootings first came into public consciousness almost two decades later in 1966, when Charles Whitman used “scoped hunting rifles” from the top of the University of Texas memorial tower to kill 14 and wound 32; he was an “expert Marine marksman perched in a very protected space,” and carried out his assault over 90 minutes. (Donahue Decl. ¶ 84.) Donahue notes that this incident stands in contrast to the November 5, 2009 shooting at Fort Hood, where an inexperienced shooter “was able to fire 214 times” in less than ten minutes to kill nine people and wound 17 others. (*Id.*)

According to Donahue, Americans did not move towards the “pervasive possession of modern weaponry” until the 1980s, during which time the Glock 9 mm semiautomatic pistol was introduced to the market and assault rifles were being advertised more heavily. (*Id.* ¶ 85.) The early 1980s was also when the distribution of double-digit-fatality mass shootings began to increase sharply and was the period during which “assault weapons were used to perpetrate mass shootings resulting in 10 or more deaths” for the first time. (Klarevas Decl. ¶ 20.) In 1994, Congress passed the Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. § 921(a)(30), otherwise known as the Federal Assault Weapons Ban, to “address the problem” of mass shootings and “restrict[] mass shootings” by curtailing the purchase and sale of new assault weapons and high-capacity magazines. The legislation had a sunset provision which took effect in 2004 and Congress did not renew the legislation, at which point gun massacre incidents and fatalities began to increase

Appendix F

substantially. (Donahue Decl. ¶¶ 85-89; Klarevas Decl. ¶¶ 20-21.)

High-fatality mass shooting violence is “on the rise” and poses a “significant—and growing—threat to American public safety.” (Klarevas Decl. ¶ 11.) Donahue states that mass shootings, which are typically measured by whether at least four individuals are killed excluding the shooter, occurred at an average rate of 2.7 public mass shootings per year in the 1980s, rising to 4.5 events per year from 2010 to 2013, and continuing to rise with 30 mass shootings in 2017 alone, and 61 mass shootings in 2021. (Donahue Decl. ¶¶ 36, 40 n. 13 and Figure 1.)⁴³

Donahue takes the position that the lethality of assault weapons and their use in mass shootings is a unique and modern problem separate from the general issue of gun violence. To illustrate, he points to the attempted assassination of President Ronald Reagan, in which the assassin fired six shots with a .22 caliber revolver before his gun was emptied and he was tackled. (*Id.* ¶ 56.) All four shooting victims survived. However, a semiautomatic pistol with 15 or more bullets “would have enabled the assassin to fire off many more rounds, hitting many more victims” and both the typical caliber of a pistol round used

43. Four gun massacres resulting in double-digit fatalities occurred between October 2017 and May 2018: 60 people were killed at a concert in Las Vegas; 26 at a church in Sutherland Springs, Texas; 17 at a high school in Parkland, Florida; and 10 people at a high school in Santa Fe, Texas. (*Id.* ¶ 37.) Mass school shootings have resulted in more deaths or injuries so far in the 21st century than in the entire 20th century. (*Id.* ¶ 50.)

Appendix F

in semi-automatic pistols and the use of an LCM to inflict wounds would have increased the chances of lethality. (*Id.* ¶ 57.) Defendants document the increase in the lethality of firearms; a Founding-era flintlock muzzleloader could kill 43 people per hour, and a Civil War-era rifle could kill 102 people per hour; a 1903 bolt-action rifle with a magazine, however, could kill 495. Darrell A.H. Miller & Jennifer Tucker, *Common, Use, Lineage, and Lethality*, 55 U.C. Davis L. Rev. 2495, 2508 (2022).

The psychological impact of mass shootings on the psyche of law-abiding Americans is also new and unique. Mass shootings cause “significant emotional and mental health harms” to survivors, but also cause “broad social damage” such as increased stress in the surrounding community and general population at large.⁴⁴ (Donahue Decl. ¶¶ 58-63.) Donahue notes that “[r]estrictions on weaponry have historically followed growing criminal abuse and social harm, rather than at the time these weapons are first introduced” because “it is not always clear at the outset which inventions will lead to adverse impacts on public safety. Frequently, the dangers of

44. Plaintiffs argue that the “availability heuristic,” or the psychological phenomenon where dramatic incidents influence judgments in such a way that even when rare, people tend to overestimate the likelihood of events like mass shootings and feel less safe as a result, cannot be used to justify a burden on constitutional rights. (Pls.’ Reply at 42.) However, Defendants are instead arguing that the newness of this phenomenon and the lack of such fears at the time of the Founding suggest that mass shootings committed by assault weapons are a new societal phenomenon.

Appendix F

products and practices fly below the radar until their proliferation generates sufficient social damage to enable the public and the scientific community to become aware of the full extent of their social harm.” (*Id.* ¶ 136.)

“Connecticut’s assault weapons ban was not primarily enacted to address gun crime generally, but rather was adopted in response to the growing mass shooting problem in the United States” and specifically, the Sandy Hook Elementary school shooting. (*Id.* ¶¶ 145-46).⁴⁵ Thus, the record supports the conclusion that mass shootings carried out with assault weapons and LCMs that result in mass fatalities are a modern societal problem; the development of semiautomatic fire has led to a level of casualties and injuries from firearm violence previously unseen in American history and has been spurred by factors and advances in technology that would have been unimaginable to the Founding Fathers. While this conclusion does not automatically dictate that Defendants’ regulation will be upheld, it does mean that the absence of regulations of semiautomatic firearms at the time of the Founding is not dispositive evidence against Defendants’ position, and that a more “nuanced” view is required considering whether particular statutes and traditions of regulation are analogous to the challenged statutes at issue using the guiding principles that both *Heller* and *Bruen* set out for how to evaluate specific time periods and types of historical sources.

45. (See also Klarevas Decl. ¶ 38) (“The legislative intent of Connecticut . . . [in banning] assault weapons and LCMs is to reduce the frequency and lethality of mass shootings . . . associated with the increased kill potential of such firearm technologies.”)

*Appendix F***b) Methodology for Evaluating
Historical Sources**

In *Heller*, the Supreme Court looked to “analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment” to support the proposition that the right was understood as “an individual right to use arms for self-defense,” but cautioned that it was “dubious to rely on” the “drafting history of the Second Amendment” such as the “various proposals in the state conventions and the debates in Congress” to interpret the Second Amendment’s meaning. *Heller*, 554 U.S. at 603, 128 S.Ct. 2783. To interpret public understanding of the right “from immediately after its ratification through the end of the 19th century,” the Supreme Court considered writings from “important founding-era legal scholars,” state and federal court cases during that period, and records of public discussion of the right by antislavery advocates. *Id.* at 605-10, 128 S.Ct. 2783. While *Heller* cautioned that the “outpouring of discussion of the Second Amendment in Congress and in public discourse” in the aftermath of the Civil War does “not provide as much insight into [the] original meaning [of the right] as earlier sources,” the Supreme Court nevertheless determined that the public’s “understanding of the origins and continuing significance of the Amendment” during that period is “instructive.” *Id.* at 614, 128 S.Ct. 2783. It also noted that it “would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence.” *Id.* at 632, 128 S.Ct. 2783.

Appendix F

Bruen also provided several general principles to guide lower courts in evaluating the historical record. Historical evidence that “long predates” either 1791 when the Second Amendment was adopted or in 1868 when the Fourteenth Amendment was adopted “may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years”, and courts should take caution in evaluating English practices and common law to determine whether they “prevailed up to the period immediately before and after the framing of the Constitution” or whether they had become “obsolete in England at the time of the adoption of the Constitution” and were never “acted on or accepted in the colonies.” *Bruen*, 142 S. Ct. at 2136. Evidence of the public understanding of the Second Amendment from immediately after its ratification through the end of the 19th century can provide clarity on whether a court’s interpretations of earlier history are consistent with how the right was understood; “where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision”, but “to the extent later history contradicts what the text says, the text controls.” *Id.* at 2136-37.⁴⁶ “Post-Civil War

46. However, the Supreme Court noted that it had “generally assumed” that the scope of the protection applicable to both the Federal Government and States was “pegged to the public understanding of the right when the Bill of Rights was adopted in 1791,” but that there “is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope.” *Id.* at 2138. It declined to resolve

Appendix F

discussions of the right to keep and bear arms” can be relevant to a limited extent, but do “not provide as much insight into its original meaning as earlier sources,” and are “secondary” to the text of the Second Amendment and state constitutions. *Id.* at 2137.

Bruen also cautioned against giving disproportionate weight to isolated examples or historical outliers; for example, statutes applying only to territories, as opposed to states, deserve “little weight” because they were “consistent with the transitory nature of territorial government” and “short lived”; and a “single state statute”, “pair of state-court decisions”, or statute that “governed less than 1% of the American population” could not be used to uphold a challenged statute if the “overwhelming weight” of the other evidence suggested that the statutes were outliers. *Id.* at 2153-55.

With these principles of interpretation in mind, the Court turns to the historical evidence submitted by Plaintiffs and Defendants.

that debate because for the purposes of the law at issue, the public understanding of the right in 1791 and 1868 was “for all relevant purposes, the same[.]” As discussed *infra*, pp. 107-11, the same applies here; the conclusion remains unchanged regardless of which period the Court views as more determinative.

Appendix F

c) Whether the Burden imposed by the Statutes is a Comparable Burden to that of Historically Analogous Regulations and is Comparably Justified

Defendants submit that there are three relevant categories of restrictions analogous to the challenged statutes: regulations on new and dangerous weapon technology, concealed weapon regulations, and gunpowder regulations.

(1) New and Dangerous Weapon Technology

Regardless of whether the guns are “dangerous and unusual” as that term was used in *Heller*, Defendants maintain that there is a longstanding tradition of governments “using their police powers to regulate new weapons that posed an unprecedented risk to public safety,” such as folding knives, dirk knives, Bowie knives, and percussion-cap pistols (which could be carried loaded for longer periods of time due to advancements in firearm manufacturing) being banned or taxed prohibitively after being used in an “alarming proportion of the [post-Revolutionary War] era’s murders and serious assaults.” (Defs.’ Mem. at 33.) Roth explains that the first prohibitions against many of these “certain concealable weapons” were passed in Kentucky, Louisiana, Indiana, Arkansas, Georgia, and Virginia between 1813 and 1838, meaning that several were enacted “during the lifetimes

Appendix F

of Jefferson, Adams, Marshall, and Madison.”⁴⁷ (Roth Decl. ¶¶ 26-27.) For example, Georgia’s 1837 law⁴⁸ passed banned Bowie knives as well as pistols “as arms of offense or defence” in response to a rise in those weapons “being used in crime by people who carried them concealed on their persons.” (Roth Decl. ¶¶ 26-27).⁴⁹

The need for further regulation once more became apparent from surging homicide rates and the invention of firearms like the Colt revolver and the Smith and Wesson rimfire revolver in the 1840s and 1850s, as well as the Colt double-action commercial revolver in 1889. (*Id.* ¶¶ 28-33.) Colt’s cap-and-ball revolver, invented in 1836, quickly gained popularity; it still had to be loaded one chamber at a time, and could not be loaded quickly or indefinitely, but the two rotating cylinders allowed a person to fire five or six shots in rapid succession and reload quickly with the second cylinder. (*Id.* ¶ 31.) States responded by passing various restrictions, like the time-place-manner restriction in Texas passed in 1870, and the pocket pistol and revolver bans by Tennessee and Arkansas in 1871 and

47. Thomas Jefferson and John Adams died on July 4, 1826, John Marshall on July 6, 1835, and James Madison on July 28, 1836. (*Id.* n. 54.)

48. The law was overturned in part by *Nunn v. State*, 1 Ga. 243 (1846), which allowed for the ban of concealed carry of certain weapons but held that it could not simultaneously ban open carry.

49. *See also* Defs.’ Mem. at 33, citing similar statutes from Alabama, Tennessee, Florida, Virginia, Alabama, North Carolina, and Massachusetts in effect from the 1830s to the 1870s.

Appendix F

1881. (*Id.* ¶ 36.)⁵⁰ When dynamite was invented in 1866, and the Thompson submachine gun in 1918, legislatures responded with ammunition magazine restrictions in 1927 and 1934, the National Firearms Act of 1934 and 1938 restricting ownership of machine guns and submachine guns, and the Organized Crime Control Act of 1970s restricting ownership of explosives by building on the Federal Explosives Act passed in 1917. (*Id.* ¶¶ 44-47.)⁵¹

Defendants maintain that this pattern demonstrates a tradition of governmental regulation of weapons

50. *See also Andrews v. State*, 50 Tenn. 165, 171, 186, 188-89 (1871) (upholding the constitutionality of a statute making it unlawful for any person to publicly or privately carry a dirk, swordcane, Spanish stiletto, belt or pocket pistol or revolver” because “[a]dmitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good.”)

51. Plaintiffs argue that any laws from the late 19th century after the Civil War have only minimal relevance, and that laws from the 20th century are irrelevant under *Bruen*. However, Defendants do not submit 19th and 20th century regulations in a vacuum, but as part of their broader purported explanation of why this regulation is part of a “governmental practice” that has been “open, widespread, and unchallenged since the early days of the Republic,” which *Bruen* explicitly permitted; it chose not to address the 20th century evidence submitted because it “contradicts earlier evidence,” not because 20th century evidence is *per se* irrelevant. *See Bruen*, 142 S. Ct. at 2137, 2154 n. 28. Nowhere does *Bruen* forbid consideration of any regulations or history after the end of the 19th century, and the Court will consider evidence from this period as it relates to, either confirming or contradicting, earlier Founding, antebellum, and Reconstruction-era evidence.

Appendix F

“that posed a new danger or concern” as behaviors and technologies changed beginning shortly after the founding and continuing through the Reconstruction era and then modern eras. (Defs.’ Mem. at 34.) Thus, in Defendants’ view, regulations on assault weapons are consistent with the kind of laws that states have passed “to address new and evolving societal concerns presented by technologically advanced weapons throughout history.” (*Id.*) Plaintiffs challenge this conclusion, referencing some firearms that could fire more than 10 rounds without reloading that have been available for centuries without being regulated. (Pls. Mot. at 23, 25). However, amici Brady and March for Our Lives point out that many of those weapons were often malfunctioning, were relatively uncommon, and were not widely used by civilians; for example, the Girandoni air rifle, which Plaintiffs refer to as an example of a multi-shot gun in existence at the time of the Second Amendment, required a “wagon-mounted pump filled with water to sustain the pressure needed to operate” or “1500 manual hand pumps.”⁵² There was no need to regulate many of these firearms because they were neither commonly used nor widely accessible; however, the firearms that *did* pose new dangers to the public based on their use of advanced technology *were* regulated.

Plaintiffs also insist that Defendant’s “handful of isolated examples and outliers” are not relevantly similar

52. See Brady Amicus at 13-14, also discussing the rarity, unreliability, and lack of popularity of the 16-round wheel lock shooter, the Jennings Flintlock, the Pepperbox-style pistol, and the Winchester repeating rifles, all of which were invented between 1580 and 1873.

Appendix F

historical regulations that impose a comparable burden but are instead “localized restrictions” that do not show a tradition of regulation like the statutes at issue. (Pls.’ Reply at 9; *see also* Pls.’ Reply Ex. 1.) However, beyond objecting to the relevance of each analogue based on their same strained readings of *Heller* and *Bruen*’s holdings and methodology the Court has previously rejected, Plaintiffs produce no evidence or data to undermine Defendants’ core premise, which is that governments have been passing regulations targeting specific types or characteristics of weapons that have proved problematic or dangerous since the time of the Founding, demonstrating that there is a longstanding tradition of the government exercising its power to regulate new and dangerous weapon technology. *See Bevis v. City of Naperville, Illinois*, No. 22 C 4775, 657 F.Supp.3d 1052, 1073 (N.D. Ill. Feb. 17, 2023) (holding that “governments enjoy the ability to regulate highly dangerous arms (and related dangerous accessories)” and that “assault weapons and large-capacity magazines fall under this category.”)

(2) Concealed Weapon Regulations

Defendants also contend that restrictions on concealed carry, which have been enacted by American legislatures for over two centuries, are evidence of a nationwide tradition of regulating the dangers posed by specific weapons and firearms. (Defs.’ Mem. at 35.) After the Revolution, Roth submits that there was “little interest in public officials in the North” for restricting the use of firearms during the period after ratification of the Second Amendment because “[p]olitical stability returned, as did faith in government and a strong sense of patriotic

Appendix F

[comraderie].” (Roth Decl. ¶¶ 21-22.) However, in the South, discord remained as poor and middle-class whites were frustrated by their inability to rise in society, and tensions grew between enslaved African-Americans and whites. (*Id.* ¶ 23.) Homicide rose, and public officials in the South recognized that concealable weapons like pistols and certain knives were being used disproportionately in murders and serious assaults. (*Id.* ¶ 24.) As a result, laws banning or restricting the carrying of concealed weapons were enacted in Kentucky, Louisiana, Indiana, Arkansas, and Virginia between 1813 and 1838. (*Id.* ¶ 26.)

After homicide rates continued to rise during the period from the Mexican War through Reconstruction, and weapons like the Smith and Wesson rimfire revolver “superseded knives and black powder handguns as the primary weapons used in interpersonal assaults” because they were increasingly lethal and “[e]asily concealed,” states responded with increasing degrees of firearm regulation, including time-place-manner restrictions, prohibitions of open or concealed carry of particular firearms, and the sale of particular firearms such as easily concealable pistols. (*Id.* ¶¶ 32-36.) By the early twentieth century, “every state either banned concealed firearms or placed severe restrictions on their possession” in response to the surge in homicide rates and the invention of new firearms. (*Id.* ¶ 21.) Several courts upheld these concealed carry restrictions as constitutional because they restricted only a “particular mode” of bearing arms, rather than infringing on a person’s Second Amendment right. *State v. Jumel*, 13 La. Ann. 399, 399-400 (1858).⁵³

53. See also *State v. Mitchell*, 3 Blackf. 229, 229 (Ind. 1833) (rejecting a Second Amendment challenge to a state concealed

Appendix F

Plaintiffs contend that concealed weapon regulations are not analogous because they prohibit a method of carry, not a type of weapon, and that *Heller* found them non-analogous to D.C.’s ban on “commonly held arms.” (Pls.’ Reply at 13.) However, *Heller* and *Bruen* were not considering a modern and unprecedented societal problem, which warrants a more nuanced analysis; both cases also found only that a prohibition on concealed weapons did not impose the same level of burden as a complete ban or proper-cause requirement for the “quintessential self-defense weapon,” not that concealed weapon prohibitions may never be an analogue for other types of restrictions imposing only comparable burdens. *See Heller*, 554 U.S. at 629, 128 S.Ct. 2783; *Bruen*, 142 S. Ct. at 2143-44, 2150. Defendants have produced sufficient evidence demonstrating that concealed carry statutes were part of a broader tradition of targeting specific dangers posed by the characteristics and unlawful use of particular weapons, and that those regulations were considered constitutional because they left available sufficient avenues of carrying firearms for self-defense. The Challenged Statutes do the same; they are tailored to address problems of mass shootings and mass casualties that employ the firearms at issue with increasing frequency, and still leave open

carry law); *State v. Reid*, 1 Ala. 612, 614, 621 (1840) (upholding a concealed carry conviction under a state right to bear arms because “[t]here was no evidence . . . that the defendant could not have defended himself as successfully, by carrying the pistol openly, as by secreting it about his person.”) *Bruen* itself recognized that “States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.” *Bruen*, 142 S. Ct. at 2150.

Appendix F

alternative avenues for exercise the Second Amendment right to self-defense, including through possession of the “quintessential” self-defense weapon: a handgun or revolver.

(3) Overall Conclusion on Whether Defendant’s Historical Analogues are Relevantly Similar to the Challenged Statutes

Plaintiffs insist that the Founders would never have tolerated a ban of a particular kind of gun because free, white male citizens were required to have firearms and ammunition, indicating that early Founding-era regulations were meant to require gun ownership rather than restrict it. (Pls.’ Reply at 15.) Mass killings, Plaintiffs maintain, were a problem that existed at the time of the Founding, and the Founding generation’s solution was for law-abiding citizens to engage in self-help by defending themselves and their neighbors, rather than broadly disarming the populace of particular weapons to prevent the unlawful from utilizing them. (*Id.* at 16).

Defendants respond that the Founders saw the right to self-defense as existing in harmony with and being further enabled by reasonable regulation of the right to keep and bear arms in order to maintain peace. (Cornell Decl. ¶¶ 7-9, 52-53.) In Defendants’ view, the Challenged Statutes “do not prohibit or impact an entire class of firearms,” or even “all semiautomatic firearms, long guns, rifles, or fully automatic firearms,” but instead “a small subset of unusually dangerous military-style weapons,

Appendix F

features, and magazines” that “are not actually useful or used for any such lawful self-defense purposes in practice.” (Defs.’ Mem. at 20-21.) The rationale behind the Defendants’ submitted historical regulations is the same one that drove the enactment of the Challenged Statutes: to respond to growing rates of violence and lethality caused by modern innovations in technology and changing patterns of human behavior by regulating the particular kinds of weapons or modes of carry that were being most often employed by those causing the violence, while leaving open alternative avenues for lawful possession of firearms for purposes of self-defense.

As for the level of burden imposed, *Heller* did not foreclose any kind of restriction on the types of firearms that can be possessed and carried, or even restrictions on firearms that are commonly owned by lawful citizens—only a ban on firearms that are so pervasively used for self-defense that to ban them would “infringe,” or destroy, the right to self-defense.⁵⁴ Unlike the broader category of handguns at issue in *Heller* and *Bruen*, the record developed here demonstrates that assault weapons and LCMs are suboptimal for self-defense. A set of statutes that bans only a subset of each category of firearms that possess new and dangerous characteristics that make them susceptible to abuse by non-law abiding citizens wielding them for unlawful purposes imposes a comparable burden to the regulations on Bowie knives,

54. (See Cornell Decl. ¶ 14) (explaining that “infringe” during the time of the Founding era meant to “violate” or “destroy”, as opposed to phrases like “abridge” as used in the First Amendment, which mean to “reduce.”)

Appendix F

percussion cap pistols, and other dangerous or concealed weapons, particularly when “there remain more than one thousand firearms that Connecticut residents can purchase for responsible and lawful uses like self-defense, home defense, and other lawful purposes such as hunting and sport shooting.” (Warenda Decl. ¶ 33.)⁵⁵

V. Conclusion

Plaintiffs have failed to show their likelihood of success on the merits, and so the Court need not reach the remaining preliminary injunction factors. The motion for preliminary injunction is DENIED.

IT IS SO ORDERED.

/s/ Janet Bond Arterton
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut
this 3rd day of August, 2023

55. Because Defendants have already identified two historical analogues and given the *Bruen* and *Heller* courts’ skepticism of the applicability of gunpowder regulations to firearm regulation, the Court declines to address the parties’ arguments regarding whether gunpowder regulations are relevantly similar analogues.