DOCKET NO. KNL-CV13-6016992-S	:	
DISABLED AMERICANS FOR FIREARMS RIGHTS, LLC, BY AND THROUGH ITS FOUNDER AND MANAGING MEMBER, SCOTT A. ENNIS, and SCOTT A. ENNIS INDIVIDUALLY,	:	JUDICIAL DISTRICT OF NEW LONDON
V.	:	AT NEW LONDON
DANNEL P. MALLOY, GOVERNOR OF THE STATE OF CONNECTICUT	:	JULY 24, 2013

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

The plaintiffs object to the defendant's Motion to Dismiss for the reasons that they have standing and their claims are not barred by sovereign immunity.

I. INTRODUCTION & FACTUAL BACKGROUND

This action for declaratory judgment and injunctive relief is brought by Scott A. Ennis of New London, CT individually and on behalf of his organization, Disabled Americans for Firearms Rights, LLC ("DAFR"). Mr. Ennis founded DAFR, which now has a national membership of about 15,000, including 3,500 in Connecticut, with the goal of providing opportunities for disabled Americans, including disabled veterans returning from Iraq and Afghanistan, to engage in recreational and competitive shooting events. DAFR's mission also includes the education of the public and elected officials concerning the unique needs of disabled individuals when exercising their fundamental rights in the lawful use of firearms.

Among those unique needs are certain features and accessories that some disabled shooters require in order to be able to use a rifle, such as pistol grips, forward vertical grips, and adjustable stocks. These features, while convenient and useful, particularly for disabled persons such as the plaintiff, are cosmetic, promote ease of use, and do not make

a rifle more dangerous than it would be otherwise. By expanding the "assault weapons" ban ("AWB"), which bans guns based on their appearance rather than function, Connecticut lawmakers and the defendant have made it more difficult for all responsible, law-abiding citizens to exercise their fundamental right to self-defense, and in the case of certain disabled individuals, they have effectively trampled the right altogether.

Connecticut has had an AWB since 1993. Over the course of the last 20 years, there is no evidence that the AWB has done anything to reduce crime in general or murder in particular. In fact, crime in Connecticut actually went up in 1993 and again 1994 before gradually declined, which is also true for crime rates across the country. There is also no evidence that the federal AWB, which was enacted in 1994, did anything to reduce crime or murder rates nationally. See Exh. 1.[1] Notably, the federal ban did not prevent at least 35 multiple-victim shootings during the 10 years it was in place.[2] Nor have crime and murder rates increased after the expiration of the federal AWB in 2004. In fact, "[s]ince the federal ban expired, murder and overall violent crime rates have actually fallen."[3]

Since "assault weapons" are rarely used by criminals, it is not surprising that federal or state AWBs have no discernible impact on crime. Connecticut State Police statistics show that rifles of any type are almost never used in crime. Prior to the

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[1] Koper, et al, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, § 9.4 at 96 ("we cannot clearly credit the ban with any of the nation's recent drop in gun violence.").

[2] Doug Giles, "The Assault Weapons Ban Didn't Work Then and It Won't Work Now," 12/30/12, available at www.Townhall.com; see also, List of School Shootings in the United States, at en.wikipedia.org.

[3] John R. Lott, Jr., *At the Brink: Will Obama Push Us Over the Edge?* (2013) at 129. See also U.S Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Firearm Violence, 1993-2011," May 2013, NCJ 241730 (Exh. 2).

Newtown tragedy, where the shooter reportedly used a Bushmaster .223 semi-automatic rifle, long guns of any type (not necessarily "assault weapons") were used in only a small fraction of Connecticut murders between 1985 and 2011. See Exh. 3. According to FBI data available online, rifles were known to have been used in crimes only twice from 2003-2011 in Connecticut (once each in 2008 and 2011), during which time there were 907 murders recorded.[4]

Despite media coverage that would suggest otherwise, guns (including those defined as "assault weapons") are overwhelmingly used for legal purposes rather than criminal violence. While the exact number of privately owned firearms in the United States is unknown, a conservative estimate is about 250 million. Data from the Centers for Disease Control and Prevention indicates there were 11,078 gun homicides in 2010, while the total number of deaths from firearms, including suicides, accidents, and use by law enforcement, was 31,672. These numbers mean that less than .000127% of privately owned guns resulted in any type of death. This tiny fraction of a percent is likely even smaller, however, because there are probably at least 300 million privately owned guns in this country. A November 2012 report by the Congressional Research Service "found that, as of 2009, there were approximately 310 million firearms in the United States: 114 million handguns, 110 million rifles, and 86 million shotguns."[5]

It is difficult to determine the vast numbers of guns in the nation or in any particular state, including so-called "assault weapons." One commentator has estimated that "there are somewhere around 3,750,000 AR-15-type rifles in the United States today.

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[4] http://www.fbi.gov/stats-services/crimestats

[5] See; Krouse, William J., *Gun Control Legislation*, pp. 8-9. Washington DC: United States Congressional Research Service. 14 November 2012 (Exh. _); see also Peters, "How Many Assault Weapons Are There in America?," at: http://www.slate.com/blogs/crime/2012/12/20/assault_rifle_stats_how_many_assault_rifles_are_there_in_america.htm.

If there are around 310 million firearms in the USA today, that means these auto-loading assault-style rifles make up around one percent of the total arsenal."[6]

According to the website GunPolicy.org, the rate of private gun ownership in the United States is 101.05 firearms per 100 people.[7] Assuming that to be accurate, if there are about 3.5 million people in Connecticut, there are approximately 3,536,750 firearms in this state. If one percent represents weapons like the AR-15, there are about 35,000 "assault weapons" in Connecticut.[8] Again, taking these estimates as true, an enormous number of lawful gun owners are negatively impacted by the new legislation, while the semi-automatic "assault weapon" used at Newtown, which was the impetus for the new law, represents just 0.0028 % of "assault weapons" in Connecticut, or 0.000028 % of all guns in the state.

It is well established that as private gun ownership has grown in this country, crime has fallen. Scholars such as economist John Lott, author of numerous peer-reviewed articles and books including *More Guns, Less Crime*, now in its third edition, have shown that while "assault weapons" bans do not reduce crime, expanded private ownership of firearms by law-abiding citizens, and the increased adoption by states of

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[6] Peters, *supra* note 4.

[7] See http://www.gunpolicy.org/firearms/region/united-states, citing GunPolicy.org. 2011. 'Calculated Rates – United States.' Historical Population Data – USCB International Data Base. Suitland, MD: US Census Bureau Population Division. 1 April.

[8] Even if we assume 35% of all guns in Connecticut are rifles (1,237,862.5) and that just 1% of these rifles are "assault weapons," there are still over 12,000 of them.

laws mandating issuance of concealed carry permits, has the positive and unmistakable effect of dramatic reduction in crime, including homicides.[9]

In addition to research such as Lott's, two recently released studies also demonstrate that as gun ownership has increased significantly in America, gun crimes have fallen sharply. In May of this year, the federal Bureau of Justice Statistics ("BJS") released its report, "Firearm Violence, 1993-2011," which found that gun-related homicides declined 39% in that period, from 18,253 in 1993 to 11,101 in 2011, while nonfatal firearm crimes dropped 70%, from 1.5 million incidents in 1993 to 467,300 victimizations in 2011. See Exh. 2.[10] Firearm-related violence accounted for about 70% of all homicides, but about 70-80% of gun homicides, and 90% of nonfatal gun crimes, were committed with handguns. Notably, in 2004, 40% of state prison inmates who used guns during their crimes obtained their weapons from an illegal source, while less than 2% bought them at a gun show or flea market. *Id.* This BJS report also found that only 2% of state inmates and 3% of federal inmates who used guns during the commission of their crimes were armed with "a military-style semiautomatic or fully automatic firearm." *Id.* (Table 13 at page 13). This is consistent with a 2004 report to the Department of Justice that found a similar rate of criminal use of assault weapons before and after the federal ban, in which "the most common assault weapons continue to be used in up to 1.7% of gun crimes."[11]

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[9] Lott, John, *More Guns, Less Crime* (3d ed. 2010); Lott, Straight Shooting: Firearms, Economics and Public Policy (2006) at 3-4; Lott, *The Bias Against Guns: Why Almost Everything You've Heard About Gun Control Is Wrong* (2003), at 207-215.

[10] U.S Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Firearm Violence, 1993-2011," May 2013, NCJ 241730.

[11] Koper, et al, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, § 6.4 at 52 (Exh.1).

Also in May 2013, the Pew Research Center released a report concluding not only that the rate of gun homicide in America was down 49% since 1993, but that much of the public was unaware of this substantial decrease, probably due to extensive mass media coverage of gun crimes, particularly mass shootings, with scant mention of defensive gun uses. See Exh. 5.[12] The study used the CDC's finding that there were 11,078 gun homicide deaths in 2010, compared to 18,253 in 1993. The study also found that 56% of Americans believed gun crime is higher than 20 years ago while only 12% thought it was lower.

The researchers noted that mass shootings such as the Newtown incident are but a very small share of shootings overall, and that according to an analysis by the Bureau of Justice Statistics, "homicides that claimed at least three lives accounted for less than 1% of all homicide deaths from 1980 to 2008." Also, a Congressional Research Service report, which defined mass shootings as resulting in four deaths or more, found 547 deaths from mass shootings in the United States from 1983 to 2012, *id.*, all tragic, yet exceedingly rare. Also, the statistical likelihood of a child being killed in a school shooting is incredibly small. Note that approximately 55 million children went to school on the day 20 were killed at Newtown.[13]

School shootings are not a new phenomenon. The first recorded incident occurred on July 26, 1764, known as the Pontiac's Rebellion school massacre, when four armed Indians entered a schoolhouse near Greencastle, PA, murdered the schoolmaster,

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[12] Pew Research: Social & Demographic Trends, "Gun Homicide Rate Down 49% Since 1993 Peak; Public Unaware."

[13] http://schoolsofthought.blogs.cnn.com/2012/09/04/back-to-school-by-the-numbers (54.7 million students in U.S. elementary and secondary schools in 2011).

and killed nine or ten children.[14] What appears to be a newer phenomenon is that of dangerously mentally ill people who specifically target schools, malls, and other "soft targets," typically so-called "gun-free" zones, in order to kill as many innocent people before they (often) kill themselves or are killed by responding law enforcement officers. To cite just a dozen representative examples: Santee, CA (Mar. 5, 2001); Red Lake, MN (Mar. 21, 2005); Nickel Miles, PA (Oct. 2, 2006); Blacksburg, VA (Apr. 16, 2007); DeKalb, IL (Feb. 14, 2008); Chardon, OH (Feb. 27, 2012); Oakland, CA (Apr. 7, 2012); Aurora, CO (July 20, 2012); Newtown, CT (Dec. 14, 2012); St. Louis, MO (Jan. 15, 2013); Orlando, FL (Mar. 18, 2013); Cincinnati, OH (April 29, 2013). The worst school massacre in history appears to be a bombing that occurred on May 18, 1927 in Bath, MI (38 children and six adults killed).[15]

The defendant would have us believe--but cannot explain how or why--the Act's additional restrictions on ownership of certain semi-automatic weapons will have any impact on these types of incidents; the conduct at issue is already illegal, and there are innumerable other guns that may be potentially misused by dangerous people who manage to obtain them. Dr. Greg Ridgeway, Deputy Director of the National Institute of Justice, has stated that "Since assault weapons are not a major contributor to U.S. gun homicide and the existing stock of guns is large, an assault weapon ban is unlikely to have an impact on gun violence," and that even the "complete elimination of assault

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[14] List of School Shootings in the United States, at en.wikipedia.org (citing David, Dixson, *Never Come to Peace Again: Pontiac's Uprising and the Fate of the British Empire in North America*, Univ. of Oklahoma Press (2005)).

[15] See *id.* (citations omitted).

weapons would not have a large impact on gun homicides" (emphasis added).[16] Under these circumstances, eroding the ability of law-abiding citizens to defend themselves from violent crime in the name of violence prevention is ineffective, unreasonable and unjustifiable.

A. Privately Owned Firearms Are a Deterrent to Crime

According to researchers who have studied crime data, privately owned firearms, including guns that would qualify as "assault weapons" in Connecticut, are used as a deterrent to crime far more often than they are misused by criminals—a fact that has gone completely unacknowledged by the defendant and other anti-gun politicians in their zeal to ban guns in the wake of the December 2012 tragedy.

A 1995 study by Professor Gary Kleck found that each year in the United States, there are about 2.2 to 2.5 million defensive gun uses of all types by civilians against humans, with about 1.5 to 1.9 million involving use of handguns. Kleck, Gary, et al, "*Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*," J. Crim. Law and Criminology, 1995 (Vol. 86, No. 1). At a time when there were probably about 220 million privately owned firearms, 2.2 to 2.5 million incidents of defensive gun use represented about 1% of the guns in private hands. Accurate measurement of this phenomenon is difficult because many of these incidents are not likely to be reported to police or the National Crime Victimization Survey. *Id.* Kleck noted, however, that "in a ten state sample of incarcerated felons interviewed in 1982, 34% reported having been 'scared off, shot at, wounded or captured by an armed victim.' From a criminals'

[16] Ridgeway, "Summary of Select Firearm Violence Prevention Strategies," Jan. 4, 2013 (Exh. 6, at 7).

standpoint, this experience was not rare." *Id.* (citing James Wright & Peter Rossi, Armed and Considered Dangerous (1986), at 155).

If we assume that 1% of the nation's 300 million privately owned firearms are used for lawful self-defense, this equates to three million defensive gun uses in this country every year. Even if only one percent of those incidents saved a life, this would amount to 30,000 lives saved, which far exceeds the actual number of lives taken each year by gun homicides.

As Professor Kleck stated, "[M]easures that effectively reduce gun availability among the noncriminal majority also would reduce defensive gun uses that otherwise would have saved lives, prevented injuries, thwarted rape attempts, driven off burglars, and helped victims retain their property." *Id.*

Focusing only on criminal misuse of guns, while ignoring the social benefit of widespread private ownership of firearms by law-abiding citizens, leads policymakers to further regulate guns--or more precisely, legal gun owners--while effectively doing nothing to prevent events like school shootings by disturbed homicidal and/or suicidal killers. Only law-abiding citizens obey gun laws, and since they use guns for lawful self-defense more than criminals use guns to commit crimes, further burdens on law-abiding citizens have a negative effect on individuals who would be victims, and on society at large. At the same time, further regulatory burdens on gun ownership and use has a disproportionately negative impact on those law-abiding persons who are most vulnerable to criminal attack, such as disabled persons.

B. Crimes Against the Disabled

According to the Bureau of Justice Statistics, disabled Americans are far more likely than non-disabled citizens to be victims of crime. A December 2012 report by the

Bureau of Justice Statistics found that people with disabilities experienced an annual average of about 923,000 nonfatal violent crimes (rape, sexual assault, robbery, aggravated assault and simple assault) during the 2010-2011 period. See Exh 7.[17] Among the troubling findings:

- The average annual age-adjusted rate of violent victimization for persons with disabilities (48 per 1,000 persons with disabilities) was more than twice the rate among persons without disabilities (19 per 1,000 persons without disabilities) in 2011;

-The average annual age-adjusted rate of serious violent victimization for persons with disabilities (22 per 1,000) was more than three times higher than the rate for persons without disabilities (6 per 1,000) in 2011;

- In 2011, the rate of violence for females with disabilities was 53 per 1,000, compared to 17 per 1,000 for non-disabled females;

- for males with disabilities, the rate of violence was 42 per 1,000 in 2011, compared to 22 per 1,000 for males without disabilities.

Id. These numbers show that disabled Americans are significantly more vulnerable to violence than persons without disabilities. Accordingly, legislative action that restricts the ability of disabled persons to adequately defend themselves from violence is of particular concern to the plaintiff and members of DAFR.

DAFR's membership exploded after the Newtown tragedy, as calls for increased gun control and renewal of the federal "assault weapons" ban became a national legislative priority. In Connecticut, it quickly became clear that the Governor and certain legislators were determined to "strengthen" the State's AWB in order to "do

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[17] U.S Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Crime Against Persons with Disabilities, 2009-2001-Statistical Tables," Dec. 2012, NCJ 240299.

something" about guns, which the plaintiff and others understood would likely include a ban on additional semi-automatic firearms, despite the general consensus that a "stronger" gun ban would not have prevented the tragedy, and the lack of any evidence that the existing AWB was effective in preventing gun crime in general or mass shootings in particular. The plaintiff became concerned that the AWB would be expanded to prohibit rifles such as those built on the popular AR-15 platform, which are lightweight, low recoil weapons that are easy to use, and one the plaintiff needs to be able to shoot safely and effectively, given his inability to rotate his elbow or wrist in the manner required to shoot a rifle without a pistol grip.

The plaintiff posted relevant information on the DAFR website and traveled to Hartford numerous times to meet with individual lawmakers and to testify before the legislature as to the needs of disabled shooters and the adverse effect certain proposed measures would have on disabled shooters. In the end, it did not matter, and the AWB was expanded dramatically with passage of Public Act 13-3 ("the Act"), which bans over 150 semiautomatic guns by make and model, and others by reference to various features that, as explained below, do not affect the functioning or lethality of the firearm, but actually make the guns safer and easier to use, and promote greater accuracy.

As explained below, the AR-15, due to its ease of handling, low recoil, adjustable features, and customizability, is particularly suited for disabled persons in order to engage in lawful use of firearms, whether for hunting, recreational and competitive shooting, or personal self-defense. The Connecticut Supreme Court has held that self-defense is the only constitutionally-protected aspect of the right to bear arms under Art. 1 § 15 of the State constitution. *Benjamin v. Bailey*, 234 Conn. 455, 464 (1995).

C. What are "Assault Weapons"?

True "assault weapons are, by military procurement definition, 'selective fire (full auto continuous or burst fire plus autoloading) arms of sub caliber.'" Symposium: Violent Crime Control and Law Enforcement Act of 1994: The Great Assault Weapon Hoax, 20 Dayton L. Rev. 619, 621 (1995). Fully automatic and selective fire weapons have been severely restricted in this country since 1934. *Id.* The weapons targeted by the AWB are primarily "semi-automatic," meaning a single trigger pull is required for each shot. A fully automatic "machine gun" will continue to fire for as long as the trigger is depressed, until the ammunition is exhausted. Semi-automatics are not fully automatic weapons, even if legislators or the defendant do not recognize the differences.

"Semi-automatic" means the user need not physically manipulate some part of the firearm (such as a bolt or lever mechanism) to put a new round in the chamber after firing a shot. Semi-autos do not "spray bullets" or fire continuously with one trigger pull and they are not "designed to kill a lot of people quickly."[18] A rifle like the modern AR-15 has less power (about half) than a WWII semi-automatic rifle like the M-1 Garand. See Exh. 9.[19] The semi-automatic firearms prohibited by various AWBs, including Connecticut's ban, were invented over one hundred years ago and "are indistinguishable in operation from other semi-automatic firearms used for self-defense, pest and vermin

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[18] See Exh. 8, "Stag Arms says new rifle may pass strict Connecticut gun law," New Haven Register (05/09/2013) ("[Michael Lawlor, criminal justice liaison for Gov. Dannel P. Malloy], said the goal [of P.A. 13-3] was to prohibit sale of guns to civilians designed to kill a lot of people quickly.").

[19] See David Hardy, Esq., "The 'Assault Rifle' Conundrum," A letter to Hon. Ted Cruz, Feb. 10, 2013 (noting that the M-1 garand used in WWII fired a .30-06 cartridge with about 2,400 foot/pounds of energy, whereas the AR-15 platform rifle shoots a .223 caliber (5.56mm) cartridge with about 1,250 foot/pounds of energy).

control, sport hunting and recreational shooting since the turn of the [20th] century." Symposium, 20 Dayton L. Rev. at 621-22.[20]

Any reliable statistics concerning firearms and crime indicate that over the last several decades through the present, the firearms erroneously referred to as "assault weapons" are almost never used in crime. AWBs are not "common sense measures" as the defendant keeps insisting but instead are a tried-and-failed policy choice based on ignorance, deception and false promises. In 1988, anti-gun activist Josh Sugarmann released a strategy paper decrying the failure to date to ban handguns but encouraging activists to target so-called "assault weapons:"

> Assault weapons—just like armor-piercing bullets, machine guns, and plastic firearms—are a *new* topic. The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons. In addition, few people can envision a practical use for these weapons.

Symposium, 20 Dayton L. Rev. at 623.[21] Today, the same confusion apparently exists among large numbers of people who know little about firearms, including the defendant. The almost daily news reporting since December 2012 relating to the Newtown tragedy, as well as written commentary in traditional media and social media postings, suggest a large part of the general public, a majority of our legislators, and the defendant all believe semi-autos like the .223 Bushmaster supposedly used by the Newtown gunman are exotic

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[20] See also Koper, et al, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence*, 1994-2003, § 2.5 at 11 ("The [federal] ban provision targets a relatively small number of weapons based on outward features or accessories that have little to do with the weapons' operation. ... In other respects (e.g., type of firing mechanism, ammunition fired, and the ability to accept a detachable magazine), AWs do not differ from other legal semiautomatic weapons.") (Exh. 1).

[21] Josh Sugarmann, "Assault Weapons and Accessories in America: a strategy paper," Sept. 1988 (also available at http://www.vpc.org/studies/awaconc.htm).

or unusual firearms that are somehow more dangerous than other guns and that ordinary civilians do not "need" them for any legitimate purpose.

Several months after Josh Sugarmann suggested that anti-gun activists take advantage of "the public's confusion" over semi-automatic "assault weapons" to further their agenda, on January 17, 1989, a deranged criminal with multiple felony convictions shot up a schoolyard full of children in Stockton, CA. This tragic and highly publicized event was, like Newtown, completely random and quite rare. Even by mid-1993, "there was still no evidence in the United States or elsewhere that the so-called assault weapons posed any special threat to the public or law enforcement." Despite this fact, Connecticut enacted its first AWB in 1993.[22] Today, there is still no evidence that so-called "assault weapons" are a threat to public safety, or that the 1993 AWB did anything to reduce crime in general or gun crime in particular. It certainly did not prevent the Newtown tragedy or two other highly publicized multiple victim shootings in Connecticut, namely, the Connecticut lottery shooting in Newington on March 6, 1998 (one semi-automatic handgun, five killed, one injured) and the Hartford Beer Distributor shooting in Manchester on August 3, 2010 (two semi-automatic handguns, nine killed, two injured).[23] Yet the legislature's and Governor's response to Newtown was an expansion of the failed AWB.

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[22] The legislature enacted the ban despite a report by the Connecticut State Police showing that "the guns listed in the legislation represented less than two percent of all the firearms seized by police from 1988 to 1992." Symposium, 20 Dayton L. Rev. at 631 (citing report by Maj. Kenneth H. Kirschner dated Mar. 11, 1993).

[23] See U.S. Mass Shootings, 1982-2012: Data From Mother Jones' Investigation (available at www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data).

The same familiar litany of false claims that were used to justify Connecticut's original AWB are still being repeated by the Governor and certain legislators, with the help of much of the mainstream media, as reasons why we need a "stronger" AWB, for example:

> They claim "these guns are the choice of criminals; these are guns that have no sporting purpose; these are guns that put police lives at special risk." They claim the guns fire faster than they really do, that they account for an inordinate amount of crime and homicides, that they are more powerful than other guns, and that nobody needs an assault weapon.

Symposium, 20 Dayton L. Rev. at 636 (citations omitted). Members of the Legislature went even further with some of their exaggerated, emotionally charged rhetoric, as noted in the Attorney General's Memorandum of Law, i.e., Senator Donald Williams stated the Newtown shooter used "a weapon of war ... originally designed for the battlefield and for mass killings" and that the weapons "can kill mass amounts of children or adults in our schools and in our communities;" Senator Martin Looney called the firearms banned by the Act "excessively dangerous weapons;" Senator Beth Bye stated that the banned large capacity magazines are "what enables mass destruction, the number of bullets that can be fired so quickly;" and Senator Carlo Leone referred to "assault weapons with high-capacity rounds [sic] that can shoot multiple rounds in a minute, weapons that are meant for war to defend our country." See Defendant's Memo. of Law at 3. None of these claims are remotely true, and they are not magically transformed into "facts" just because they were uttered in a legislative chamber.

"Assault weapons" are rarely used by criminals; they fire just one bullet with each pull of the trigger; they are functionally identical to every other semi-auto on the market, including those that are owned by millions of law-abiding Americans for all legitimate and lawful purposes; and are no more powerful—and are, in fact, less powerful—than

many other commonly owned rifles and pistols, such as common big-game hunting rounds like the .30-06 and .300 Winchester, to name just two examples.

D. The New Ban on Assault Weapons

The Act broadly defines as "assault weapons" various commonly owned rifles, shotguns, and handguns that are semi-automatic, which means they fire only one round with each trigger pull, as noted above. Conn. Gen. Stat. § 53-202a. The Act adds dozens of "specific" semiautomatic firearms identified by manufacturer and/or model name to the previous list of firearms designated as "assault weapons." Conn. Gen. Stat. § 53-202a(1)(A)(i), (B), (C), (D). Also, the Act replaces the "two-features" test under the prior AWB with a "one-feature" test, thereby dramatically expanding the definition of banned "assault weapons" based on the presence of certain features that generally make guns easier to use, particularly for disabled people. A semi-automatic, centerfire rifle that accepts a detachable magazine is not an "assault weapon" unless it also has one additional, specified feature such as a pistol grip or adjustable stock, in which case the "one-feature" test now makes these commonly owned rifles fall under the definition of an "assault weapon." Under the Act, Conn. Gen. Stat. § 53-202a(1)(E) defines an "assault weapon" to include:

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

(I) A folding or telescoping stock;

(II) Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing;

(III) A forward pistol grip;

(IV) A flash suppressor; or

(V) A grenade launcher or flare launcher; or

(ii) A semiautomatic, centerfire rifle that has a fixed magazine with the ability to accept more than ten rounds; or

(iii) A semiautomatic, centerfire rifle that has an overall length of less than thirty inches;

...

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

(I) An ability to accept a detachable magazine that attaches at some location outside the pistol grip;

(II) A threaded barrel capable of accepting a flash suppressor, forward pistol grip or silencer;

(III) A shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to fire the firearm without being burned, except a slide that encloses the barrel; or;

(IV) A second hand grip; or

(v) A semiautomatic pistol with a fixed magazine that has the ability to accept more than ten rounds.

(vi) A semiautomatic shotgun that has both of the following:

(I) A folding or telescoping stock; and

(II) Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing; or

(vii) A semiautomatic shotgun that has the ability to accept a detachable magazine; or

(viii) A shotgun with a revolving cylinder; ...

Conn. Gen. Stat. § 53-202a.

Under the Act, a rifle qualifies as an "assault weapon" based on the presence of certain features or accessories, which, generally speaking, promote accuracy, safety, stability, and ease of use. None of them makes a firearm more powerful or deadly. A pistol grip under the action of the firearm helps users stabilize and hold the rifle safely; folding or telescoping stock allows users to adjust the length of the rifle, which is particularly useful for some disabled shooters, as well as people who are smaller in stature, to safely balance and utilize the firearm with accuracy; a flash suppressor partially protects the operator's eyes from momentary blindness by reducing the flash effect when a rifle is discharged, especially in a low-light situation that may be part of a home invasion scenario; a forward grip is extremely useful in helping to stabilize the firearm and safely and accurately discharge it. See Fields affidavit (Exh. 12). These features are common on many modern sporting rifles and police-issue firearms. Similar provisions regarding these features are made with respect to ordinary and commonly

owned pistols that are now designated as "assault pistols" under § 53-202a(1)(E)(iv), and with respect to semiautomatic shotguns, see § 53-202a(1)(E)(vii). Prohibiting features that make guns safer, more accurate, more comfortable, and more reliable defensively, is completely irrational and unjustifiable.

An "assault weapon" is now defined to also include over 160 specific semiautomatic firearms that are commonly owned and used for lawful purposes including self-defense, "or copies or duplicates thereof with the capability of any such [firearms], that were in production prior to or on the effective date of this section." Conn. Gen. Stat. § 53-202a(1)(A)-(D). The definition of "assault weapon" is also expanded to include a "part or combination of parts designed or intended to convert a firearm" into an "assault weapon," or "a combination of parts from which" an "assault weapon" may be assembled, whether "rapidly" or not, depending on the type of "assault weapon," if those parts are in the possession or control of the same person. Conn. Gen. Stat. § 53-202a(1)(A)(ii) & (F).

Effective April 4, 2013, with certain exceptions, any person who "distributes, transports or imports into the state, keeps for sale, or offers or exposes for sale, or who gives any assault weapon," commits a Class C felony, and "shall be sentenced to a term of imprisonment of which two years may not be suspended or reduced by the court." Conn. Gen. Stat. § 53-202b(a)(1). Possession of a so-called "assault weapon" is a Class D felony. Conn. Gen. Stat. § 53-202c(a). Possession of an "assault weapon" may be "grandfathered" if the owner lawfully possessed the firearm on April 3, 2013 and submits an application to the Department of Emergency Services and Public Protection for a certificate of possession of the firearm by January 1, 2014, among other things. Conn. Gen. Stat. § 53-202d(a)(2), (f).

A person who obtains a certificate of possession for a weapon now defined by the Act as an "assault weapon" may continue to possess the weapon under limited circumstances. Conn. Gen. Stat. § 53-202d(f). A non-military person who moves into Connecticut while lawfully possessing a newly-redefined and banned "assault weapon" must render it permanently inoperable, sell it to a licensed gun dealer, or remove it from the State, within 90 days. Military persons who move here, however, may declare possession and keep the firearms. Conn. Gen. Stat. § 53-202d(d).

E. The Ban on Large Capacity Magazines

The Act also now bans, with limited exceptions, standard magazines that are commonly possessed and used by classifying them as "large capacity magazines" ("LCMs"), generally defined to include devices that have "the capacity of, or can be readily restored or converted to accept, more than 10 rounds of ammunition." Conn. Gen. Stat. § 53-202p(a)(1). Since the effective date of April 4, 2013, the purchase, sale, transfer distribution or importation into the State of a so-called LCM is a Class D felony. Conn. Gen. Stat. § 53-202p(b). Beginning January 1, 2014, possession of a standard magazine that is now defined to be a LCM is a Class D felony. If a magazine now banned by the Act was obtained before the Act's passage, a first offense for possessing it is an infraction subject to a fine, while subsequent offenses are made Class D felonies. Conn. Gen. Stat. § 53-202p(c).

These provisions of the Act notwithstanding, employees or members of the Department of Emergency Services and Public Protection, the Department of Correction, police departments, or the military forces (State or federal) may possess, purchase, or import the otherwise banned LCMs regardless of whether such possession or acquisition is for use in the course of their official duties or for personal use. Conn. Gen. Stat. § 53-

202p(d)(1). Also, persons who, prior to January 1, 2014, lawfully possessed a now-banned LCM and who, by that date, apply to declare possession of the magazine to the Department of Emergency Services and Public Protection, may continue to possess the newly banned LCMs subject to certain conditions. Conn. Gen. Stat. § 53-202p(e)(3). The conditions imposed by the Act restrict possession of the magazines to various narrowly-defined places where, in certain circumstances, they may contain "not more than 10 bullets." Conn. Gen. Stat. § 53-202q(f)-(g).

In addition, non-military persons who move into Connecticut while lawfully possessing a newly-redefined and banned LCM must render it permanently inoperable, sell it to a licensed gun dealer, or remove it from the State, all within 90 days. Military persons, however, may declare possession and keep their LCMs. Conn. Gen. Stat. § 53-202q(d).

Magazines with a capacity of more than ten rounds are commonly possessed and used by law-abiding citizens across the country and throughout this State for all lawful purposes including self-defense. Many firearms are designed, manufactured, and sold with magazines that accept more than ten rounds of ammunition. For many firearms, magazines holding ten or fewer rounds are not available, particularly for guns no longer manufactured or sold. These guns will become unusable by members of DAFR who fail to meet the January 14, 2014 deadline to possess and declare possession and who must rid themselves of their magazines, in which case the ban on so-called "large capacity magazines" becomes, in effect, a ban on those guns that were designed and manufactured to be used with these magazines.

Leaving aside the obvious fact that criminals will not obey the ban on LCMs any more than they follow any other gun law, the National Institute of Justice has

acknowledged that regulations on large capacity magazines will not have any effect on their availability, at least not for decades, by which time they will have degraded or become incompatible with guns then in circulation. See Exh. 6 at 3 ("An exemption for previously owned magazines would nearly eliminate any impact [of the restrictions]").[24]

F. What is the AR-15 and Why Does the Plaintiff Need One

Among the now-banned firearms is "the AR-15," a term which refers to both a specific gun (the original Armalite Rifle Model 15) and more generically to similar firearms made by many different arms manufacturers, including Colt's Manufacturing Company in Connecticut since 1959. The AR-15 is one of the most commonly owned firearms in America, widely owned by law-abiding citizens throughout the State of Connecticut and the nation. Recent estimates suggest there are approximately 4 million AR-15s in America, which would include perhaps 35,000 in Connecticut. The AR-15 "accounts for an estimated 60 percent of all civilian rifle sales in the United States and perhaps a quarter of all firearms sold, according to the National Shooting Sports Foundation, an industry group based in Newtown." See Exh. 10.[25]

The plaintiff Scott A. Ennis is a disabled individual who suffers from a medical condition known as Hemophilia A, a bleeding disorder that has caused him severe joint damage, thereby impairing his physical strength, flexibility and range of motion of his limbs, particularly his upper extremities. Ennis affidavit (Exh. 11). As a result, he cannot rotate his elbow or wrist in order to hold a rifle in the traditional manner (left arm extended with hand holding the underside of the barrel). A pistol grip and forward

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[24] Ridgeway, "Summary of Select Firearm Violence Prevention Strategies," Jan. 4, 2013.

[25] Dan Haar, "America's Rifle: Rise of the AR-15," in The Hartford Courant, Mar. 9, 2013.

vertical grip under the barrel allow him to compensate for his disability and safely, comfortably, and effectively hold and use a rifle. He brings this action on behalf of himself and other similarly situated disabled persons who are members of DAFR, including those with joint, muscle, or connective tissue problems who were able to use semi-automatic weapons before the passage of the Act and who are now restricted or prohibited from doing so.

While there may be other firearms that are suitable for self-defense available to members of the general public, certain disabled people like the plaintiff have unique needs that are not a consideration for non-disabled individuals. AR-15 type rifles are ideally suited for defensive uses for all users but particularly disabled shooters who benefit from the available grips and contact points that promote balance, stability and comfort. See Fields affidavit (Exh. 12). Semi-automatic rifles like the AR-15 are much easier to aim and shoot than pistols and do not produce recoil like large-caliber pistols or shotguns. *Id.*

Other members of DAFR require the same type of firearm on account of their own distinct disabilities. For example, Jeffrey J. Merli, a resident of East Granby, CT, is a disabled Marine veteran who legally owns firearms for lawful purposes including self-defense. See Merli affidavit ¶ 2-3 (Exh. 13). On November 29, 2012, he was medically retired as a Corporal after serving 5 1/2 years in the United States Marine Corps as a Scout Sniper, having deployed twice to Afghanistan. On his last deployment, he was shot three times in the left arm, severing an artery, shattering bone and resulting in major nerve and muscle damage. He underwent thirteen surgeries due to these injuries, but ultimately lost the use of his left arm from the elbow down, and was forced to retire from the service. *Id.* ¶ 4.

Mr. Merli enjoys precision shooting and owns a custom .308 bolt-action precision rifle which, due to his injury, he can fire only from a supported position, such as in the prone position with bipods on the rifle. "For obvious reasons, this weapon is not suitable for home defense due to my disability. I also own a 1911 semi-automatic pistol, but now am unable to rack the slide, load or disassemble it for cleaning one handed." *Id.* ¶ 5.

Shortly after being wounded, Mr. Merli purchased an M4/AR semi-automatic rifle. "The pistol grip enables me to maintain positive control of the weapon system while in unsupported positions, making it ideally suited to my disability. The rifle also breaks down easily for cleaning. On top of the superior controllability with the pistol grip and adjustable stock, I also prefer the ability to use a 30 round magazine, because I am unable to reload." *Id.*

Mr. Merli states in his affidavit that

> The M4/AR is my choice for home defense. Having a weapon system that I can still safely manipulate with my injury makes me feel much more secure in my home and this particular gun is my only viable self-defense option. Like many disabled citizens, I feel somewhat helpless if someone was to break into my house, and require a lightweight, low-recoil weapon such as the M4 in order to safely and effectively defend myself and my home should the need arise.

Id. ¶ 6. His predicament relative to use of firearms is typical of those with a wide variety of injuries or conditions that affect one's ability to use a limb. Disabled individuals like Mr. Merli deserve to be able to select suitable arms to defend themselves and their families. While Mr. Merli may be able to continue to keep his AR-15 rifle under the Act, he would be subject to the restrictions and limitations set forth in the Act, and cannot buy another one or even buy parts for his legally-owned rifle. These restrictions are unfair as applied to him and other similarly situated disabled persons.

Jonathan Stanco of Plainville, CT suffers from paraplegia, which confines him to a wheelchair. His disability is the primary factor that influences his selection of suitable firearms for both recreation and self-defense. Stanco affidavit, ¶ 4 (Exh. 14). He has found that the AR-15 modern sporting rifle is most suitable for his needs in light of his disability. "The rifle's pistol grip under the action of the firearm (near the trigger) helps me stabilize and safely and properly hold the firearm, and shoot it with accuracy. A forward vertical grip also promotes stability and accuracy." *Id.* ¶ 5. Mr. Stanco explains: "Being confined to a wheelchair limits my ability to retreat or escape in my own house in the event of a home invasion, so I must depend on myself and a suitable defense weapon should the need arise. The newly enacted gun ban will prevent me from acquiring another suitable weapon in the future." *Id.* ¶ 6. He also states that the Act's ban on so-called "large capacity magazines" also limits his ability to protect himself. "My training has taught me that 10 rounds in not sufficient for home defense, particularly in the case of multiple attackers." *Id.* ¶ 7. Many other members of DAFR have similar disabilities and similar needs with respect to using firearms.

The AR-15 is suitable for home defense and often used for that purpose. See Fields affidavit (Exh. 12). While defensive uses of firearms are almost never covered by the mainstream national media, numerous examples have been reported by local media. For example, a 15-year-old used his father's AR-15 to defend himself and his 12-year-old sister after two armed men invaded their Texas home (07/04/2010).[26] A Pennsylvania man used an AR-15 to shoot and kill an intruder who forced his way into the man's

[26] See http://gunssavelives.net/self-defense/video/son-uses-dads-ar-15-to-defend-home

apartment and threatened him and his wife (04/23/2013).[27] An RIT student recently used an AR-15 to defend himself and his roommate from two armed robbers (no shots were fired).[28] Also, the AP reported (05/01/2013) that a northern Michigan gas station owner thwarted a robbery by pointing his AR-15 at two would-be robbers, causing them to flee with no shots fired.[29] Semiautomatic weapons, including the AR-15, protect people and save lives.

The same can be said for "large capacity magazines." A position paper by the County Sheriffs of Colorado (CSOC) states that "law enforcement officers carry high capacity magazines because there are times when 10 rounds might not be enough to end the threat. County Sheriffs of Colorado believe the same should hold true for civilians who wish to defend themselves, especially if attacked by multiple assailants." See Ex. 15. The CSOC paper notes the recent case of a young mother in Georgia who needed all six bullets in her .38 caliber handgun to defend herself and her two young children from one intruder. "She hit him five times and still he was able to get in his car and drive away." *Id.* Had there been more than one attacker, she and the children likely would have been victimized in some fashion. The SCOC also states that "in high-pressure, high-adrenaline situations, people may not be as accurate with their shots" and therefore need more ammunition to stop an attack. *Id.*

Disabled persons including the plaintiffs and members of DAFR require adjustable or customizable firearms built on the AR-15 platform, or other semi-automatic

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[27] See http://gunssavelives.net/self-defense/pa-resident-uses-ar15-to-defend-himself-and-his-wife-from-intruder-who-may-have-been-on-drugs.

[28] See http://www.freerepublic.com/focus/f-bloggers/2981222/posts.

[29] See http://www.foxnews.com/us/2013/05/01/iraq-war-vet-armed-with-rifle-thwarts-gas-station-break-in-police-say/?test=latestnews#ixzz2S2nevHRv.

weapons with certain of the prohibited features, such as pistol grips, forward grips, folding or telescoping stocks, and standard magazines holding more than 10 rounds, in order to safely and effectively exercise their fundamental right to bear arms for lawful self-defense from criminal attack. See Exhs. 11-14 (affidavits). The provisions of the Act unfairly and arbitrarily deny these fundamental rights to the plaintiffs, because they operate to the disadvantage of certain disabled people like the plaintiff and other members of DAFR. This discrimination is unfair and constitutionally impermissible. Accordingly, the plaintiffs object to the defendant's Motion to Dismiss.

II. STANDARD

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court ... A motion to dismiss tests, *inter alia,* whether, on the face of the record, the court is without jurisdiction." *R.C. Equity Group, LLC v. Zoning Commission,* 285 Conn. 240, 248, 939 A.2d 1122 (2008) (internal quotation marks omitted). "In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." *DaimlerChrysler Corp. v. Law,* 284 Conn. 701, 711, 937 A.2d 675 (2007) (internal quotation marks omitted).

III. ARGUMENT

The defendant erroneously maintains that the plaintiffs' action for declaratory judgment should be dismissed for lack of standing and because of sovereign immunity. The defendant's position is wrong and should be rejected.

The plaintiffs claim violations of Connecticut constitutional and statutory provisions, including (a) Art. I § 15 of the State constitution, which guarantees that all citizens have a right to bear arms in defense of themselves and the State; (b) Conn. Gen. Stat. § 27-2, which affirms the rights of all citizens to bear arms as members of the unorganized militia of the State; (c) Art. I §1 of the State constitution, which guarantees equality of rights of all citizens of the State; (d) Article I § 20 of the State constitution, as amended by amendment XXI, which guarantees equal protection of the law, and prohibits discrimination in the exercise or enjoyment of civil or political rights based on physical disability; and (e) Conn. Gen. Stat. §46a-58(a), which prohibits the deprivation of civil rights on the basis of physical disability.

All of the protections contained in Art. I are fundamental civil liberties enjoyed by all Connecticut citizens. *Horton v. Meskill*, 172 Conn. 615, 641-42 (1977). Under Art. I, § 10, "all courts shall be open, and every person, for an injury done to him ... shall have remedy by due course of law...." An "injury" in this context means a legal injury, i.e. one violative of established law. *Lockwood v. Wilson H. Lee Co.*, 144 Conn. 155, 159 (1956). "The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration ...." Conn. Gen. Stat. § 52-29. In fact, it is the "duty" of the judiciary "under a constitutional government such as ours to decide a justiciable controversy as to the constitutionality of a legislative enactment." *Horton*, *supra*, at 625. The declaratory judgment procedure "is peculiarly well adapted to the

judicial determination" of constitutional rights and the constitutionality of state legislative or executive action. *Id.* at 626.

The doctrine of sovereign immunity cannot be invoked against a challenge to the constitutionality of a statute enacted by the legislature and implemented by the defendant. *Id.* at 624 ("the government cannot justifiably claim interference with its functions when the acts complained of are unconstitutional"). The suggestion that an individual citizen lacks standing to seek a declaratory judgment based on alleged violations of precious constitutional rights is simply absurd.

A. The Plaintiffs Have Standing

Standing is not a technical rule intended to keep aggrieved parties out of court or a test of substantive rights. *Canty v. Otto*, 304 Conn. 546, 556 (2012). "Standing does not hinge on whether the plaintiff will ultimately be entitled to obtain relief on the merits of an action, but on whether he is entitled to seek the relief." *Lewis v. Swan*, 49 Conn. App. 669, 675 (1998). "Standing concerns the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* Standing is that doctrine which affords a party the right to request an adjudication of issues that affect him and his rights in particular. *Kaplan v. Ellis*, 1 Conn. App. 368, 370 (1984). In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. *Macedonia Church v. Lancaster Hotel Ltd. Partnership*, 498 F.Supp.2d 494, 496 (D.Conn. 2007) (citations omitted). Standing "requires no more than a colorable claim of injury; a plaintiff ordinarily establishes his standing by *allegations* of injury." *Johnson v. Rell*, 119 Conn. App. 730, 737 (2010) (quoting *Maloney v. Pac*, 183 Conn. 313, 321 n.6 (1981) (emphasis in

original)). Under these well established principles, both Mr. Ennis and DAFR have standing to assert their claims of constitutional and statutory violations.

1. Even if Plaintiff May Lawfully Possess an AR-15, His Constitutional Rights are Still Infringed

The defendant suggests that Mr. Ennis suffers no injury because he can continue to possess his AR-15 rifle so long as he adheres to the provisions of the Act. However, a constitutional violation is not precluded by the fact that plaintiff's rifle may be "grandfathered" under the Act. He cannot buy another similar weapon, and in fact he cannot even buy replacement parts or accessories for his current rifle. Conn. Gen. Stat. § 53-202a(1)(A)(ii) & (F).[30] This is a serious concern of the plaintiff and countless others that are burdened by the Act, regardless of whether they own a banned weapon. Those who do not own a now-banned weapon but who would buy one but for the Act are even more disadvantaged.

As explained below (Section B), the provisions of the Act described above prohibit the plaintiff and members of DAFR from exercising constitutional rights and limiting or impairing their right to bear arms in self-defense. Violations of the new law, even unintentional or inadvertent, would subject the plaintiffs to arrest, prosecution, felony convictions, fines, imprisonment, forfeiture of property, loss of the right to keep and bear arms, and deprivation of civil rights. Implementation of the Act by the defendant has caused and will continue to cause irreparable harm to the plaintiffs. These allegations of injury are more than sufficient to provide standing.

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[30] Section 53-202a(1)(F) states that an "assault weapon" is defined to include "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 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. DAFR Has Standing

There is no requirement that each individual member of DAFR be made a named party to this suit in order for their claims to be asserted. While the defendant correctly identifies the *Hunt* test for associational standing, the defendant's citation to *Connecticut Assn. of Health Care Facilities, Inc. v. Worrell*, 199 Conn. 609, 616 (1986), overlooks or ignores critical language of the case and a key part of the Court's analysis. Quoting the United States Supreme Court in *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 337, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), our Supreme Court held:

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Id., 343; see *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976); *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974); *Sierra Club* v. *Morton*, 405 U.S. 727, 739, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). Representational standing "depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth* v. *Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). "Associational standing is particularly appropriate . . . where the relief sought is . . . a declaratory judgment. . . ." *Peick* v. *Pension Benefit Guaranty Corporation*, 724 F.2d 1247, 1259 (7th Cir. 1983).

Worrell, supra, 199 Conn. at 616 (emphasis added). Here, as in *Worrell*, DAFR satisfies the three prerequisites for associational standing set forth in *Hunt*. *Id.* at 616-17. The individual members of the plaintiff corporation "claim to have been adversely affected by" the defendant's action in implementing the new law. "The members would,

therefore, have standing to seek declaratory judgments because they allege direct, personal injury from the [defendant's] actions." *Id.* at 617. "The stated organizational purposes" of DAFR include providing opportunities for disabled Americans to engage in recreational and competitive shooting events and promoting the unique needs of disabled individuals when exercising their fundamental rights in the lawful use of firearms. The declaratory judgment action is "germane to this purpose because the relief requested will improve the quality and availability" of shooting opportunities and services provided by the organization. *Id.* "Finally, neither the claim asserted nor the relief requested requires the participation of the individual members of [the] association. The relief sought by the declaratory judgment action[] will 'inure to the benefit' of all members" of the group." *Id.* The Court also noted that "Because money damages are not sought for alleged injuries to the individual members, proof relating solely to the variant experiences of each health care provider resulting from the department policy at issue will not be necessary." *Id.* (citations omitted).

The Court further stated:

> Certain policy reasons, not expressly embodied in the *Hunt* test, also favor recognition of association standing. Allowing associations to represent their members' interests in appropriate cases may promote judicial economy and efficiency. One plaintiff can, in a single lawsuit, adequately represent, and perhaps vindicate, the interests of many members, thus avoiding repetitive and costly independent actions. "Permitting the association or organization to sue to protect the interests of its members avoids multiplicity of suits by similarly situated plaintiffs involving the same or similar causes of action and provides an efficient and expeditious method of adjudicating disputes."

Id. at 617-18 (quoting *Snyder* v. *Callaghan*, 284 S.E.2d 241, 251 (W. Va. 1981)). For these reasons, all of which apply equally herein, the Court held that associational standing was appropriate. *Id.* at 618. This Court similarly should find that DAFR meets the requirements for standing here.

3. Plaintiffs Have Standing to Allege Violations of §§ 27-2 and 46a-58

This is not an action for damages for the State's failure to adhere to Conn. Gen. Stat. §§ 27-2 (the militia statute) and 46a-58 (prohibition on civil rights violations relating to disabilities), but instead for a declaratory ruling that the defendant's implementation of the Act has violated these statutes along with the other listed constitutional provisions. As such, these statutory provisions need not provide for a private right of action or specific remedy in order for the plaintiff to allege violations of the same. *Horton v. Meskill, supra.* Even if the Court agreed with the defendant that the plaintiff may not allege violations of §§ 27-2 and 46a-58, the key underlying issues are subsumed under the plaintiffs' claims relating to Art. I, § 15 and § 20 as amended by amendment XXI.

B. The Plaintiffs' Claims Not Barred by Sovereign Immunity

1. Plaintiffs Allege Substantial Constitutional Violations

Sovereign immunity is not a defense to claims of constitutional violations, several of which are alleged by the plaintiffs. It is well established that Art. I, § 15 is a statement of a fundamental individual right of law-abiding citizens in Connecticut. *Rabbitt v. Leonard*, 36 Conn. Supp. 108 (1979); *Horton, supra*, 172 Conn. at 641-42 (all protections in Art. I are fundamental civil liberties); *Benjamin, supra.* As further discussed below, *Benjamin* does not answer the question presented in this case. The plaintiff's claims herein are factually and legally distinguishable from the situation presented in *Benjamin v. Bailey.* In short, the plaintiffs herein allege that certain provisions of the Act operate so as to unfairly discriminate against disabled legal gun owners, by denying them features and accessories they need to bear arms in self-defense; that Connecticut law prohibits

deprivation of fundamental rights on the basis of physical disability; and that the Act violates both Art. I § 15 and § 20 as amended by Art. XXI.

This is an issue of tremendous importance. The right of self-defense is derived from natural law. It has long been established in this country that there is a divine right of self-preservation, *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588, 2 Otto 542 (1875) ("The rights of life and personal liberty are natural rights of man."); *Logan v. United States,* 144 U.S. 263, 12 S.Ct. 617; 36 L. Ed. 429 (1892) ("the rights of life and liberty were not granted by the [federal] Constitution, but were natural and inalienable rights of man"); and our federal courts recognize that an individual's right of self-defense is strongest at or within one's home. *See Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) ("What we know from [D*istrict of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) and *McDonald v. City of Chicago*, _ U.S. _, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010)] is that Second Amendment guarantees are at their zenith within the home.").[31] The right to bear arms under Art. I § 15 is at least as strong as the right to arms under the Second Amendment. Federal law provides the minimum constitutional standards for individual rights that must be protected by the State, while Connecticut law often provides even greater protections.

2. The Act Violates Article I § 15 of the Connecticut constitution

The Act is unconstitutional, notwithstanding the case of *Benjamin v. Bailey*, *supra*. The *Benjamin* Court did not hold that any "assault weapons ban" would meet constitutional scrutiny under any circumstances. While plaintiffs concede that the right to bear arms under Connecticut law is not unlimited, *Benjamin* is easily distinguishable

[31] The recently filed case of *Shew, et al. v. Malloy, et al*, 3:13-cv-00739-AVC, now pending in the District of Connecticut, seeks a declaratory ruling that the Act violates the Second Amendment to the federal Constitution.

from the case at bar. Unlike here, *Benjamin* was brought by individuals and a weapons manufacturing corporation in a challenge to the 1993 ban. The right to bear arms is simply not implicated in a claim by firearms manufacturers or sellers, and the *Benjamin* Court held the assault weapons ban did not even infringe constitutionally protected interests. To the extent the individual plaintiffs claimed a right to possess any weapons without restrictions, the Court held that the 1993 AWB did not infringe the right to bear arms under the circumstances presented in that case.[32]

Our case is different, however. None of the individual plaintiffs in *Benjamin* claimed, as here, that the ban on certain weapons and certain features of weapons, and in particular the adoption of the "one-feature test" under the Act, had the effect of precluding certain disabled individuals from bearing arms in self-defense. The Court said in *Benjamin* that so long as there are other firearms available "of reasonably sufficient firepower to be effective for self defense," the right to bear arms is not infringed. Here, the plaintiffs claim that the Act, particularly the "one-feature test," essentially rules out their options for safe and effective firearms and leaves them without suitable alternatives for self-defense, thereby denying them the fundamental right. See Exhs. 11-14.

The *Benjamin* court noted that "the trial court found as a factual matter that assault weapons pose an increasing risk to society." Even after Newtown, there is no way a fact finder could reasonably conclude in 2013 that so-called "assault weapons" pose an "increasing risk" to society, let alone a substantial risk. The numbers simply do

[32] The holding of *Benjamin* appears to be at odds with recent Second Amendment jurisprudence, given the Court's citation to federal precedents that predate and are inconsistent with the Supreme Court's decisions in *Heller* and *McDonald*. See *Benjamin*, 234 Conn at 466-67.

not permit such an exaggerated claim. The State's own police statistics cannot and will not support such an unfounded conclusion.

The Court acknowledged that "[t]he constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the basis of a mere rational reason for restricting legislation." 234 Conn. at 469. "To determine whether a particular arms control statute infringes on the constitutional right to bear arms courts in other states have looked to several factors[:]" (1) the characteristics of the particular weapon(s) restricted; (2) the typical use for the proscribed weapons; and (3) the number and nature of the weapons that remain available for vindication of the right. *Id.* at 469. Examining these factors in 2013 we can easily see that why the Act does in fact "frustrate the core purpose of article first, § 15." *Id.* at 471.

First, the semi-automatic weapons banned by the Act are no more dangerous than non-banned semi-automatic weapons. They do not shoot any faster, require the user to pull the trigger to discharge one shot at a time, and typically shoot a smaller, less powerful cartridge than many common hunting rifles. Second, they are typically used for all lawful purposes, including self-defense and defense of others. See, e.g., Fields affidavit. Third, as described above, the AR-15 rifle is the most popular modern semi-automatic rifle on the market today, with three to four million in private hands, and many more owned by law enforcement and other governmental agencies. While so-called "assault weapons" make up a small percentage of the total number of privately held weapons, it does not follow that a large number of weapons are available to the plaintiffs to vindicate their right of self-defense. By enacting the Act's "one-feature" test, the reasonable options for the plaintiffs and millions of other law-abiding Americans across the country are severely limited or denied altogether. Features like grips and adjustable

stocks, which promote stability, accuracy and ease of use, are beneficial to gun owners and society at large, and to the extent they are required by disabled individuals, the elderly and the infirm, the Act frustrates the core purpose of Art. 1 § 15.

Accordingly, this case, unlike *Benjamin*, provides the requisite infringement of a constitutionally protected interest, so the Act must meet strict judicial scrutiny. Notably, *Benjamin* did not answer what level of scrutiny would be required for a law that burdened the constitutionally protected right to bear arms. In this case, because the Act infringes the fundamental right, and applies in such a manner as to have a disparate impact on a group that Connecticut jurisprudence defines as a suspect classification, the Act must meet strict scrutiny. *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 159 (2008); *Daly v. Delponte*, 225 Conn. 499, 515 (1993) (concluding "that amendment twenty-one's protection for those possessing physical and mental disabilities identifies the members of this class as a group especially subject to discrimination and requires the application of the highest standard of review to vindicate their constitutional rights. ... [namely] strict scrutiny of the challenged government action.")).

Here, the State cannot show that the Act is necessary to the achievement of a compelling state interest. There is no compelling interest in banning certain guns that are almost never used in crime when those same guns are no more deadly (and in many cases are less lethal) than non-banned guns, and are overwhelmingly used by law-abiding citizens, particularly disabled citizens such as the plaintiff, to exercise their constitutionally protected right to self-defense. While crime control in general, and preventing school massacres in particular, is a compelling state interest, the provisions of the Act, particularly the "one-feature" test and related provisions that prevent or severely

limit the plaintiffs from bearing arms in self-defense, are not necessary to the achievement of that end.

3. The Act Violates Plaintiffs' Rights to Equal Protection

The defendant erroneously asserts that there is no equal protection violation because the Act applies to everyone equally. Even if all persons were treated the same, mistreatment of everyone does not transform governmental mistreatment into "equal protection" of the law. But everyone is not treated equally under the plain language of the Act.

As noted above, a non-military person who moves into Connecticut while lawfully possessing a newly-banned "assault weapon" must make it permanently inoperable, sell it to a licensed gun dealer, or remove it from the State, within 90 days. Military persons who move here, however, may declare possession and keep the firearms, for any purpose, even if unconnected to their military service obligations. Conn. Gen. Stat. § 53-202d(d). The Act also unfairly discriminates with respect to so-called LCMs. Employees or members of the Department of Emergency Services and Public Protection, the Department of Correction, police departments, or the military forces (State or federal) may possess, purchase, or import the otherwise banned LCMs regardless of whether such possession or acquisition is for use in the course of their official duties or for personal use. Conn. Gen. Stat. § 53-202p(d)(1). In addition, military persons may declare possession and keep their LCMs while non-military persons who move into Connecticut while in possession of a newly-banned LCM must, within 90 days, make it permanently inoperable, sell it to a licensed gun dealer, or remove it from the State. Conn. Gen. Stat. § 53-202q(d).

Such blatant discrimination in favor of government employees prevents ordinary law-abiding citizens from keeping and bearing arms in defense of themselves, their families and their homes, and denies the equal protection of the laws of this State. Off-duty military and law enforcement personnel have no greater need for semi-automatic weapons than ordinary civilians who wish to protect themselves and their families from crime.

The fact that standard magazines holding more than ten rounds of ammunition are issued to federal, state and municipal law enforcement officers underscores their usefulness in lawful self-defense and defense of others. Ordinary citizens have the same needs as law enforcement officers when it comes to armed resistance to criminals and it is not rational or fair to allow one group to possess certain weapons while the other may not. Arguably, ordinary citizens require larger magazines than law enforcement to effectively defend against criminals because they typically face their attackers alone and without "back up" that a police officer may have in confronting armed suspects. The law-abiding citizen certainly would be at a serious disadvantage in facing an armed criminal who uses whatever weapon he wants and who is not in compliance with the 10-round magazine limit, or has multiple magazines, or even multiple weapons with multiple magazines. A law that disarms only law-abiding citizens while doing nothing to prevent offenders from misusing available weapons is, at a minimum, a poor public policy choice, and detrimental to both liberty and security. Here, it is unconstitutional discrimination.

The Act clearly causes harm to law-abiding citizens in the above respects, while running roughshod over cherished constitutional rights. It is foolish to expect that criminals, let alone violently mentally ill persons, will obey the terms of the Act. It is not

reasonable or even realistic to expect that ordinary citizens--whether disabled or not--will never "need" more than 10 rounds in any armed confrontation. It is also unreasonable and unrealistic to expect ordinary citizens, particularly disabled citizens, to own multiple magazines and be able to quickly change magazines in the midst of a sudden and unexpected home invasion, armed robbery or other attack by one or more armed attackers.

As noted above, there are commonly owned weapons for which additional magazines are no longer available. More important, however, is the fact that the plaintiff and other disabled members of DAFR lack the ability to quickly change magazines or reload under any circumstances, let alone a surprise criminal attack, whether it be due to injury, physical disability, arthritis, connective tissue disease, muscle weakness, or even old age. The reasonable answer to this problem is the use of a semi-automatic firearm and accompanying magazine that holds more than ten rounds of ammunition, which has been considered normal, lawful behavior for generations in this country.

Under the Act, however, honest, law-abiding citizens are treated like criminals to be registered and monitored. The plaintiff Ennis has joint damage and severely reduced range of motion; Mr. Merli lacks the use of an arm due to service-related gunshot wounds; Mr. Stanco is confined to a wheelchair. Each of them has problems loading and changing magazines, and using the firearms associated with the magazines. This disparate impact on disabled citizens may be an unintended consequence of the Act, but it is real and must not be allowed to stand uncorrected.

Contrary to the defendant's assertion, the Supreme Court has "opened the door" to disparate impact challenges. The *Benjamin* court itself made reference to disparate impact claims in its equal protection analysis. *Benjamin*, 234 Conn. at 476-77 ("Even if

the plaintiffs' argument were construed as an allegation that *people* who possess a listed firearm are treated differently from *people* who possess an unlisted firearm, and that this disparate treatment violates principles of equal protection, the plaintiffs would not prevail on the merits of the claim.") (emphasis in original). The Court stated:

> When a statute is challenged on equal protection grounds, whether under the United States constitution or the Connecticut constitution, the reviewing court must first determine the standard by which the challenged statute's constitutional validity will be determined. If, in distinguishing between classes, the statute either intrudes on the exercise of a fundamental right or burdens a suspect class of persons, the court will apply a strict scrutiny standard wherein the state must demonstrate that the challenged statute is necessary to the achievement of a compelling state interest. . . . If the statute does not touch upon either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge.

Id. at 477 (citations omitted); see also *Daly v. DelPonte*, 225 Conn. 499, 513-14 (1993) (applying strict scrutiny to classification on basis of physical disability under Art. 1, § 20 as amended). While *Benjamin* held that rational basis review was appropriate for a statute that did not burden a suspect class or infringe a fundamental right, the Court stated that strict scrutiny applies in an appropriate case involving a disparate impact on a suspect class or intrusion on a fundamental right. *Id.*

Also, the State has long recognized the disparate or adverse impact theory in the context of employment discrimination claims. *Levy v. Commission on Human Rights & Opportunities*, 236 Conn. 96, 103-04 (1996) (examining federal precedent when construing Connecticut's own anti-employment discrimination statutes and concluding that under federal law, there are four general theories of employment discrimination: disparate treatment, adverse or disparate impact, perpetuation into the present of the effects of past discrimination, and failure to make a reasonable accommodation.). "The disparate impact theory applies to patterns and practices that are facially neutral but

discriminatory as applied, and does not require evidence of subjective intent to discriminate." *Id.* n.11. It simply does not make sense to provide disabled persons a remedy for discrimination in the context of employment while at the same time disallowing those same individuals a remedy for unlawful discrimination resulting from governmental regulation or legislation that impairs fundamental constitutional rights. Such action itself would be discriminatory. See also *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008) (statutory scheme governing marriage and civil unions treated all men and women the same but had a disparate impact depending on whether that individual wished to marry a person of the same or opposite sex).

The Act's unjustifiable discrimination against law-abiding citizens, particularly disabled citizens, denies the plaintiff and members of DAFR the equal protection of the law, in violation of Art. I §1 of the State constitution, which guarantees equality of rights of all citizens of the State; and Art. I § 20, as amended, which guarantees equal protection of the law, and prohibits discrimination in the exercise or enjoyment of civil or political rights that is based on physical disability. Accordingly, the Act must be subject to strict scrutiny, and the State cannot show that the statute is necessary to the achievement of a compelling state interest.

Even assuming (and we agree) the State has a compelling interest in preventing school massacres or other multiple-victim public shootings, the Act is not necessary to the achievement of that end--in fact, it is not even rationally related to crime control or the prevention of mass shootings. Certainly, to the extent the "one-feature" test and other related provisions of the Act prevent or severely limit the plaintiffs from the lawful exercise of their right to bear arms in self-defense, such disparate impact can never be said to be "necessary" to the achievement of a compelling state interest. Effectively

disarming some of the most vulnerable people in society does not make anyone safer from random gun violence, and if the Act is allowed to stand, history shows it will not be long before crime rates increase.[33]

Contrary to the circumstances in *Benjamin*, where the Court found there was "no evidence whatsoever suggesting the legislature knew that any of the unproscribed weapons posed as a great a threat to the welfare of the residents of this state as do the proscribed weapons," 234 Conn. at 479, the legislature and the defendant know better today. In the twenty years since *Benjamin*, with all of the federal and state crime data that has been generated in that time, there is simply no credible way for the defendant or the legislature to remain blissfully ignorant of the undeniable fact that handguns, usually stolen or otherwise illegally obtained, are overwhelmingly used in crime, while so-called "assault weapons" are used in no more than a tiny fraction of crimes. The Act does nothing to improve public safety, and will likely endanger it. It will almost certainly operate to endanger the plaintiffs, who are already more vulnerable to criminal attack than non-disabled persons. The rule of law requires that this adverse disparate impact be corrected and the law invalidated.

4. Act Cannot Survive Constitutional Scrutiny

a. The Act Cannot Meet Strict Scrutiny

The provisions of the Act must be subjected to strict scrutiny because this case involves not only intrusion of a fundamental right but also the effect of discrimination based on physical disability. As the Supreme Court explained in *Daly v. DelPonte*, *supra*,

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[33] *See, e.g.*, Lott, *supra* note 8; Joyce Lee Malcolm, "Two Cautionary Tales of Gun Control," Wall Street Journal Op-ed, Dec. 26, 2012 (Exh. 16).

> We have held, in accordance with the federal frame of analysis, that state action concerning social and economic regulation will survive an equal protection challenge if it satisfies a rational basis test. ... If, however, state action invidiously discriminates against a suspect class or affects a fundamental right, the action passes constitutional muster under the state constitution only if it survives strict scrutiny. ... In appropriate circumstances, we have interpreted the equal protection provisions of the state constitution differently than that contained in the federal constitution, particularly when the distinctive language of our constitution calls for an independent construction. ... Turning to amendment twenty-one, we conclude that its explicit prohibition of discrimination because of physical disability defines a constitutionally protected class of persons whose rights are protected by requiring encroachments on these rights to pass a strict scrutiny test.

Daly, 225 Conn. at 513-14 (internal citations omitted). "Strict scrutiny analysis requires state action resulting in unequal treatment to be justified in two particulars. State action can survive constitutional scrutiny only if it (1) serves a compelling state interest, and (2) is narrowly tailored to serve that interest." *Id.* at 515-16 (citing *Horton v. Meskill*, 172 Conn. 615, 640 (1977)). There is no question the state has a compelling interest in reducing the likelihood that a deranged individual will commit mass murder with a gun, or any other weapon. But the Act is not narrowly tailored to serve that interest. It dramatically expands the definition of "assault weapons" to encompass a large number of previously legal semi-automatics, and imposes the "one-feature" test that precludes many disabled people from being able to use a firearm equipped with one of the features that allow them to use the weapon for constitutionally protected purposes.

Nor is there any exception for the disabled or anyone else that might legitimately have a need for one or more of the banned features. It is difficult to understand why the State would make special accommodations for disabled hunters when hunting is not constitutionally protected, see Conn. Gen. Stat. §§ 26-29b, 26-74 and Reg. 22-66-1(b), yet make no allowance for disabled persons relative to so-called "assault weapons" needed for self-defense, when the right to self-defense is constitutionally protected.

Accordingly, the Act cannot meet strict scrutiny. Should the Court conclude that only the rational basis test applies, the plaintiffs submit that the Act cannot be justified even under the rational basis test, as explained below.

b. The Act Cannot Pass the Rational Basis Test

Not only is the rational basis test the wrong standard to apply in this case, as well as being "redundant with the separate constitutional prohibitions on irrational laws," *Kachalsky*, *supra* at 93 (citing *Heller*, 554 US at 629 n.27, 128 S.Ct. 2783), but if left to the State, it would be wrongfully applied here. It is overly simplistic to assert that crime control is a legitimate governmental purpose and that the Act is reasonably related to this purpose and, therefore, permissible. The Act needs to be a rational solution, or at least reasonably related, to the problem it purports to address. The Act is anything but a rationally related response to gun crime, for the reasons already discussed herein.[34]

The rational basis test "is not a toothless one." *Mathews v. De Castro*, 429 U.S. 181, 185 (1976). "Equal protection of the laws requires that statutory classifications be based on differences that are real in fact." *People v. Montoya*, 647 P.2d 1203, 1205-06 (Colo. 1982). The Act's definition of "assault weapons" is not based on any differences that are real in fact. It is based on external features that improve the user's accuracy and overall shooting experience.

The Act is impermissibly inconsistent in its language and application because it prohibits certain semi-automatic firearms but not others, allowing the prohibited firearms and banned magazines to remain in circulation, which places law-abiding citizens at a

[34] At the same time, the Act cannot pass intermediate scrutiny either. Intermediate means it must be "substantially related to the achievement of an important government interest." *Kachalsky*, 701 F.3d at 96-7. The legislature did not consider, or draw reasonable inferences, from any substantial evidence showing that the existing AWB was effective in any way, because there is no such evidence.

disadvantage to criminals, who do not obey laws and will use whatever weapons they want, with as many large capacity magazines that they want. "Assault weapons" do not shoot any faster than non-banned semi-automatic weapons and lack the power of other commonly possessed firearms.[35] The Act does not take anything "off the streets" and prohibits scores of commonly owned semi-automatic firearms based on characteristics that make the guns easier to use, safer, and more accurate. The rational basis test prohibits "discriminations which are entirely arbitrary," and so the Act's designation of physical characteristics of "assault weapons" fails rational basis review. See Kopel, "Rational Basis Analysis of 'Assault Weapon' Prohibition," 20 J. Contemp. L. 381, 404 (1994) (quoting *State v. Reed*, 473 A.2d 775, 781 (1984)).

Also, "blind deference is not appropriate for application of the rational basis test." Kopel, *supra*, at 405 (citing *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447-50 (1985) (risks alleged by city were irrational because the purported harms had been "insufficiently demonstrated")). See also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (where rational basis for challenged legislation depends on certain facts, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."). So-called "assault weapons" comprise about 1% of guns; they are used in about 1-2% of gun crimes; and only about 2% of gun criminals surveyed used a semi-automatic weapon in the commission of their crimes. There is not even "credible evidence that the guns in question could become increasingly used in crime.... semiautomatics are more than a century old, and large capacity magazines are older still." Kopel, *supra*, at 413-14 (citing

[35] A News 8 reporter found an AR-15 shot three rounds in 1.53 seconds while a semiautomatic handgun took 1.46 seconds; compared to a machine gun that shot 30 rounds in 1.56 seconds. Exh. 17.

Fafarman, "State Assault Rifle Bans and the Militia Clauses of the Unites States Constitution," 67 Ind. L.J. 187, 189 (1991) (first Winchester semiautomatic made in 1903 and first Remington semi-automatic in 1906); Williamson, Winchester: The Gun That Won the West (1952) at 13 (Volcanic Co. produced carbines capable of firing 30 rounds without reloading in 1856)). If these weapons and magazines are still rarely used in crime after more than a century on the market, it would be irrational to ban them because they might someday become crime guns. Kopel, *supra*, at 414.

Finally, it is improper to ban guns used for legitimate and lawful self-defense, and the exemption for police and off-duty military members underscores the irrationality of banning weapons that have valid defensive qualities.

> [T]he only reason for police to possess firearms is for protection activities. It is irrational to ban firearms on the grounds that they are not suitable for protection, and to simultaneously allow the police to use them. Unlike police officers, ordinary citizens cannot make a radio call for backup .... The lives of ordinary citizens are just as valuable as the lives of police officers, and ordinary citizens are just as entitled to use the best firearms available for protection.
>
> Conversely, are "assault weapons" only useful for massacring the innocent? If so, then such weapons have no rational place in the hands of domestic law enforcement. Unlike the security forces in other, less free countries, the American police do not need highly destructive weapons allegedly designed for killing large numbers of people at once.

Kopel, *supra*, at 416-17. No matter how you look at it, the Act's gun ban is irrational.

> The prohibition is no more rational than a prohibition on beer based on legislative "findings" that beer grows on trees, that a single sip always causes instant physical addiction, and that beer is more dangerous than other alcohol because it is stored in aluminum containers. If the rational basis test means anything, it means that an "assault weapon" prohibition is unlawful.

Kopel, *supra*, at 417. Accordingly, the challenged provisions of the Act must be invalidated.

5. The Act's "Large Capacity Magazine" Prohibition is Unconstitutionally Vague

The Act, Section 23(a)(1) also bans, with certain exceptions, "large capacity magazines", which are defined 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 excluding a "feeding device that has been permanently altered so that it cannot accommodate more than ten rounds of ammunition. Conn. Gen. Stat. § 53-202p(a)(1). This provision is vague and ambiguous, and does not permit persons of ordinary intelligence to determine whether a particular magazine is a prohibited "large capacity magazine."

"The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. Wilchinski*, 242 Conn. 211, 219 (1997) (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) and citing *State* v. *DeFrancesco*, 235 Conn. 426, 443 (1995); *State* v. *Indrisano*, 228 Conn. 795, 802 (1994)). "In order to be constitutional, the statute must contain some core meaning within which the defendant's actions clearly fall." *Wilchinski*, 242 Conn. at 220-21. "A statute that is completely lacking in any core meaning or standard by which the public and law enforcement officers may guide their actions is 'perfectly vague' and therefore void." *Id.* at 221 (citing L. Tribe, American Constitutional Law (2d Ed. 1988) § 12-32, p. 1036).

An ordinary person has no way of knowing whether a magazine "has the capacity of...more than ten rounds," at least not without loading it, in which case the possessor risks violation of law by exceeding the limit in order to determine whether more than 10 will fit in the magazine. The plaintiff has no idea how to convert a magazine that accepts more than ten rounds into one that holds no more than ten rounds, even if there was a way to do it and he had the tools and/or parts to accomplish it. Also, even if the plaintiff could so alter a magazine, he has no way to know whether it could be "readily restored or converted" to accept more ammunition. How would any reasonable person know if a magazine could be "restored or converted to accept" more than 10 rounds, let alone "readily restored or converted?" There is no possible way for the ordinary reasonable person to know what "readily" means in this context.

Fairness and due process require more than such impossibly vague and unworkable terms in a criminal statute that subjects people to felony prosecution and imprisonment. The language of this provision is impermissibly vague, and unfairly and arbitrarily deprives law-abiding disabled citizens, including the plaintiffs and members of DAFR, of their fundamental right to bear arms with necessary standard magazines now classified as "large capacity magazines."

IV. CONCLUSION

It is a well established principle of Connecticut law that sympathy and emotion make for bad legal outcomes. However horrible and terrifying was Newtown, the constitution and laws of our state require--and our citizens deserve--more than a knee-jerk, feel-good emotional legislative reaction, one that was poorly thought out, not debated, hastily passed and implemented, and which does nothing to keep people safe

from homicidal/suicidal sociopaths who perpetrate random acts of violence that were already illegal before the Act.

We know from our own experience in Connecticut, as well as nationally, that the AWBs do not work to reduce violence, we know that American cities with the strictest gun control laws have the highest gun murder rates (i.e., Chicago), and we know that highly restrictive gun laws in other countries like Australia and Great Britain have not made those societies any safer, or prevented mass shootings there.[36] At some point we have to admit that these laws do not accomplish their stated purposes. They only infringe the rights of honest people.

The AWB is a misguided, ill-considered distraction from the real issue of gun violence in this country and this state. It is already illegal to kill one's mother, steal her lawfully-owned guns, drive them to a school, and murder students and staff inside. None of the laws against these activities prevented the Newtown incident, and there is nothing in the Act that will prevent another homicidal maniac from attacking another school or other "gun-free zone" with a legal pistol and a dozen 10-round magazines.

Incidents like Newtown are among the most isolated and rare crimes in this country. Sadly, crimes against the disabled happen with much more frequency and regularity. Sane, law-abiding citizens, particularly disabled ones who are among the most vulnerable in our society, deserve the ability to defend themselves with appropriate arms that are suitable for personal and home defense. The language of P.A. 13-3, particularly the expansion of the "assault weapons" ban and limitation on "large capacity magazines," deprives disabled persons such as the plaintiffs of the right to bear suitable

[36] Joyce Lee Malcolm, "Two Cautionary Tales of Gun Control," Wall Street Journal Op-ed, Dec. 26, 2012 (Exh. 16).

arms in self-defense. For these reasons, the said provisions of the Act should be declared unconstitutional.

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CERTIFICATION

I hereby certify that a copy of the foregoing has been mailed on July 24, 2013 to the following counsel of record:

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