STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

APPEALS AND OPINIONS

Telephone (518) 473-4321

March 22, 2013

Hon. Robert D. Mayberger
Clerk of the Court
Appellate Division, Third Department
P.O. Box 7288
Capitol Station
Albany, New York 12224

Re: *Schulz v. State of New York*
Appellate Division Docket No. 516341
Albany County Index No. 1232-13

Dear Mr. Mayberger:

This office represents respondents in the above-referenced matter. Enclosed is an affirmation, with exhibits and proof of service, in opposition to appellant's motion for an expedited appeal and a preliminary injunction pending the appeal.

Respectfully yours,

VICTOR PALADINO
Assistant Solicitor General

cc:

Mr. Robert L. Schulz
2458 Ridge Rd.
Queensbury, NY 12804

NEW YORK SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

ROBERT L. SCHULZ,

Plaintiff-Appellant,

-against-

STATE OF NEW YORK EXECUTIVE, ANDREW CUOMO, Governor; STATE OF NEW YORK LEGISLATURE; SHELDON SILVER, Speaker of the New York State Assembly; DEAN SKELOS, Temporary President and Republican Coalition Leader, JEFFREY KLEIN, Temporary President and Democrat Coalition Leader,

Defendants-Respondents.

Affirmation in Opposition

App. Div. Docket No. 516341

Albany Co.
Index No. 1232-13

VICTOR PALADINO, an attorney licensed to practice in New York, affirms the following subject to the penalties of perjury:

1. I am an Assistant Solicitor General in the office of Eric T. Schneiderman, Attorney General of the State of New York and attorney for defendants-respondents Governor Andrew Cuomo; the New York State Legislature; Sheldon Silver, Speaker of the New York State Assembly; Dean Skelos, Temporary President and Republican Coalition Leader; and Jeffrey Klein, Temporary President and Democrat Coalition Leader (collectively "the State" or "respondents").

2. I make this affirmation in opposition to the motion of plaintiff-appellant Robert L. Schulz ("plaintiff") for an expedited appeal and a preliminary injunction pending appeal enjoining respondents from "taking any action in furtherance of any provision of the NY SAFE Act [L. 2013 ch. 1] . . . pending determination of the appeal from the order of Supreme Court dated March 14, 2013." *See* Order to Show Cause, dated March 15, 2013, signed by Hon. Edward O. Spain. A copy of Supreme Court's March 14, 2013 order is attached as Exhibit A. That order denied plaintiff's motion for a preliminary injunction, the very relief plaintiff now seeks from this Court.

3. As explained below, plaintiff has failed to satisfy any of the requirements for an injunction pending appeal. The motion for an injunction pending appeal should therefore be denied. Respondents do not oppose an expedited appeal, but request 30 days from entry of the order deciding this motion to file and serve their brief.

Background – The SAFE Act

4. Following the horrific mass shooting deaths of 20 schoolchildren and six adults in Newtown, Connecticut, on December 14, 2012, and the murder of two first responders in Webster, New York, on December 24, 2012, the Governor and the Legislature acted to put in place a comprehensive legislative package, the SAFE Act, Chapter 1 of

the Laws of 2013. The SAFE Act enacts significant reforms to prevent gun violence, from increasing the safety of New York's schools by regulating the possession of firearms on school property and forming a statewide team of specialists to review and assist schools in developing school safety plans, to providing for greater safety for families in New York by allowing judges to temporarily remove firearms from those subject to a protective order where the court finds a substantial risk of violence against the person protected by the order.

5. The SAFE Act, among other things, toughens regulations to limit access to firearms by those with a disqualifying mental health condition; requires federal background checks for most private sales of guns; advances a statewide database and greater uniformity in licensure; and provides a variety of other protections and enhancements to gun use licensure. Several sections of the SAFE Act provide for new and enhanced penalties for illegal gun use, including, for example, increased penalties for the murder of certain first responders, *see* §§ 33-36, and the adoption of a new Penal Law § 460.22 addressing the threat to public safety of certain organized violent gangs and their illegal purchases of weapons in their enterprise.

6. The SAFE Act also amended the existing ban on assault weapons, enacted in 2000, by broadening the definition of assault

weapons, immediately banning their sale and purchase but permitting the continued possession of those lawfully owned as of the effective date of the law if such weapons are registered within fifteen months of the effective date of the Act. Indeed, owners of such grandfathered assault weapons are authorized to sell them out of state or through an in-state federal firearms licensee. Section 38 of the SAFE Act amended the existing law on large capacity ammunition feeding devices, banning the acquisition of certain large capacity magazines while allowing for a year to transfer magazines lawfully possessed prior to the enactment of the law.

7. By letters, the Legislature requested that the Governor issue a message of necessity enabling it to advance the SAFE Act (Exhibit B). On January 14, 2013, the Governor certified the necessity for an immediate vote on Assembly Bill No. 2388/Senate Bill No. 2230, noting, *inter alia*:

> Some weapons are so dangerous, and some ammunition devices so lethal, that New York State must act without delay to prohibit their continued sale and possession in the State in order to protect its children, first responders and citizens as soon as possible. This bill, if enacted, would do so by immediately banning the ownership, purchase and sale of assault weapons and large capacity ammunition feeding devices, and eliminate them from commerce in New York State. For this reason, in addition to enacting a comprehensive package of measures that further protects the public, immediate action by the Legislature is imperative.

(Exhibit C). The Legislature adopted the SAFE Act the next day and it was signed into law as Chapter 1 of the Laws of 2013.

This Action

8. Shortly after the enactment of the SAFE Act, pro se plaintiff Robert L. Schulz commenced this action in Supreme Court, Albany County challenging the SAFE Act primarily on procedural grounds. The complaint asserts that plaintiff and others are owners and intended owners of firearms that have been classified as "assault weapons" and high-capacity magazines regulated under the New York SAFE Act. The action is styled as a hybrid plenary action and Article 78 proceeding, and it seeks to have the SAFE Act invalidated because it was passed in such an expeditious manner (Complaint ¶ 19(c) and (f)). Plaintiff argues that the enactment of the SAFE Act under a message of necessity by the Governor violated Article III, § 14 of the New York State Constitution (providing for issuance of a message of necessity allowing the Legislature to immediately act on legislation). In his complaint, plaintiff also makes passing reference to, or asserts in conclusory fashion, that the SAFE Act violates plaintiff's rights under the Second Amendment to the United States Constitution, Article XII, § 1 of the New York State Constitution (obligating the Legislature to

provide for a regulated militia), New York Civil Rights Law § 4, property law and State Finance Law § 123.

9. By Order to Show Cause dated March 1, 2013, plaintiff moved for a preliminary injunction enjoining the State from enforcing the SAFE Act. Defendants opposed the motion. Supreme Court (McNamara, J.) denied the motion by order dated March 14, 2013 (Exhibit A), and plaintiff filed and served a notice of appeal the same day.

10. Plaintiff now moves for an expedited appeal and a preliminary injunction pending the appeal.

The Court should deny the motion for an injunction pending appeal

11. CPLR 5518 authorizes the Court to grant a preliminary injunction pending an appeal. To obtain relief under CPLR 5518, the moving party must show (1) likelihood of success on the merits of the appeal, (2) irreparable harm if relief is not granted, and (3) a balance of the equities in its favor. *See Haines v. Olszewski*, 59 A.D.2d 638 (3d Dep't 1977); Davis, Stecich & Gold, *New York Civil Appellate Practice*, § 9.4, 9.7.

12. The purpose of an injunction pending appeal is "not to reach a determination of the ultimate merits of the action, but to

'maintain the status quo' pending such resolution." *New York Auto. Ins. Plan v. New York Sch. Ins. Reciprocal*, 241 A.D.2d 313, 314 (1st Dep't 1997); *see also Zheng v. City of New York*, 92 A.D.3d 412 (1st Dep't 2012) (discussing this principle).

13. The preliminary injunction requested here, however, would not simply maintain the status quo. It would shut down ongoing governmental operations put into place by the SAFE Act for purposes of public safety. And the injunction would effectively grant plaintiff the ultimate relief sought, "a practice which is generally eschewed." *Times Square Stores Corp. v. Bernice Realty Co.*, 107 A.D.2d 677, 682 (2d Dep't 1985). Plaintiff's motion should be denied on this ground alone.

14. Alternatively, the Court should deny plaintiff's motion because he fails to establish any of the three elements required for a grant of preliminary injunctive relief.

A. Plaintiff is not likely to succeed on the merits

15. Plaintiff cannot establish that he is likely to succeed on the merits of his appeal. Where, as here, a plaintiff asserts that the statute in issue violates the New York State Constitution, he faces additional burdens in his effort to establish a likelihood of success. Courts are mindful that enactments of the Legislature – a coequal branch of government – may not casually be set aside by the Judiciary. The

SAFE Act enjoys a strong presumption of constitutionality, grounded in part on "an awareness of the respect due the legislative branch." *Dunlea v. Anderson*, 66 N.Y.2d 265, 267 (1985). On the merits, plaintiff will bear the heavy burden of establishing the statute's unconstitutionality "beyond a reasonable doubt." *Matter of E.S. v. P.D.*, 8 N.Y.3d 150, 158 (2007). Plaintiff has not shown any likelihood that he will be able to satisfy this heavy burden.

16. In support of his motion for an injunction pending appeal, plaintiff argues that the enactment of the SAFE Act under a message of necessity by the Governor violated Article III, §14 of the New York State Constitution. But under settled law, this claim is nonjusticiable and thus provides no basis for the extraordinary remedy plaintiff seeks.

17. Article III, § 14 provides that:

> No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor . . . shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon . . . .

18. Plaintiff claims that the message of necessity certified by the Governor was improper because there was no need for an immediate vote, the facts stated in support of an immediate vote were

false, and the Legislature needed more time to consider the matter given the issues at stake.

19. While plaintiff's allegations are mistaken and the message's statements were entirely proper, plaintiff's allegations nonetheless provide no basis for relief. The Court of Appeals has squarely held that a message of necessity is *not* subject to judicial review on the grounds that plaintiff raises here. *Maybee v. State of New York*, 4 N.Y.3d 415, 418 (2005). In *Maybee*, the plaintiff contended that the bill at issue was not validly passed because the facts the Governor certified did not support the conclusion that an immediate vote was necessary. The Court rejected this contention, holding that "as long as the Governor's certificate contains some factual statements, the sufficiency of the stated facts to support the Governor's conclusion may not be challenged." *Id.* at 417.

20. In reaching this conclusion, the Court stated that the "Constitution on its face makes the Governor's judgment of the facts determinative; he or she is to state facts that 'in his or her opinion' necessitate prompt action. Whether a court's opinion is or is not the same as the Governor's does not matter." *Id.* at 419; *see Dalton v. Pataki*, 5 N.Y.3d 243, 272 (2005) (reaffirming *Maybee*).

21. Plaintiff cites no authority for his claim that the Governor's certification of a message of necessity becomes subject to judicial review when the Legislature adopts a statute with potential constitutional import. A nonjusticiable claim under Article III, § 14, does not become justiciable simply because a litigant alleges that the statute violates a constitutional provision; if an enactment raises constitutional concerns, courts safeguard those interests when evaluating whether the statute complies with the constitutional provision at issue.

22. The message of necessity certified by the Governor for the SAFE Act, quoted above at paragraph 7, satisfied the requirements of Article III, §14. To the extent plaintiff asserts that he, or the Court, might have differing opinions, such claims are not justiciable. *Maybee*, 4 N.Y.3d at 419.

23. Contrary to plaintiff's assertions, the Court's holding in *Maybee* respects the separation of powers and does not render Article III, § 14 meaningless. Indeed, the Governor's issuance of a message of necessity does not in any way compel the Legislature to act. If the Legislature "does not think the Governor's reasons are good ones, it is not required to act in fewer than three days – or even to consider the bill at all." *Id.* at 420. The message is an authorization, not a command. The Legislature's power to disregard the message of

necessity provides an institutional check on potential misuse of the Governor's authority under Article III, § 14. Here, however, legislative leaders affirmatively asked the Governor to issue a message of necessity, thus evincing their agreement with him that an immediate vote on the SAFE Act bill was warranted (Exhibit B).

24. Plaintiff's motion asserts in a conclusory fashion that the SAFE Act violates his rights under property law and State Finance Law § 123. His underlying complaint references not only these claims but also possible claims under the Second Amendment to the United States Constitution, Article XII, § 1 of the New York State Constitution (obligating the Legislature to provide for a regulated militia), and New York Civil Rights Law § 4. With no showing that any of these claims is likely to succeed, none can provide a basis for a preliminary injunction. For the reasons set forth in defendants' memorandum of law filed in Supreme Court in opposition to plaintiff's motion for a preliminary injunction (Exhibit D), these claims lack merit in any event.

B. Plaintiff cannot demonstrate irreparable harm if the injunction is withheld

25. Because plaintiff has failed to establish any likelihood of success on his constitutional claim, there is no constitutional or other injury to the plaintiff that would support injunctive relief. It follows

that plaintiff cannot demonstrate any harm, much less an irreparable one.

26. Plaintiff's demand for a sweeping, immediate injunction makes no sense. Some sections of the SAFE Act are not effective until specified dates after its enactment, some of them as long as a year later. *See* L. 2013, ch. 1, § 58(a),(c),(d),(e). Indeed, plaintiff contends the SAFE Act "allows current owners to keep their assault weapons provided they register them between April 15, 2013 and April 15, 2014" (Cmplt ¶ 71). He also asserts that he may keep certain high-capacity magazines until January 2014 (*Id.* ¶ 72). Plaintiff's own assertion in support of his message-of-necessity claim that "There Is No Emergency; Nothing Has Changed" (Cmplt, Argument E), belies his claim that there is any immediate need for an injunction to avoid irreparable injury.

27. Relying on *Elrod v. Burns,* 427 U.S. 347 (1976), plaintiff asserts that the alleged violation of a constitutionally protected right constitutes irreparable injury (plaintiff's mem. at 7). Unlike this case, *Elrod* involved First Amendment rights, and in that context the court expressly noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 373. It is simply not true, as plaintiff asserts, that all

constitutional injuries are deemed irreparable, or that extraordinary judicial intervention in the form of an injunction is required upon the mere assertion of a constitutional claim. *See, e.g., Matter of Maron v. Silver*, 14 N.Y.3d 230, 261 (2010) (injunctive relief inappropriate where other relief will serve); *Campaign for Fiscal Equity, Inc. v. State of New York*, 8 N.Y.3d 14, 27 (2006) (same); *People v. Boyd*, 12 N.Y.3d 390, 392 (2009) (constitutionality of statute can be reviewed after resulting sentence); *Schulz v. State of New York*, 86 N.Y.2d 225, 232 (1995) (litigant may be required to pursue administrative remedies before seeking judicial relief).

C. The balance of the equities does not lie in favor of the injunction requested

28. Plaintiff also fails to establish that the balance of the equities tips in his favor. In this proceeding, he asserts the SAFE Act is unconstitutional and it should be stricken in its entirety. Plaintiff seeks a sweeping injunction that prohibits officials from enforcing every part of the SAFE Act (which includes numerous changes to the Penal Law, Mental Hygiene Law and Education Law, none of which are addressed or challenged in his petition), although he seemingly does not object to every part of the Act and does not address all of its particulars. In fact, as stated above, he has argued here that the SAFE

Act will not serve its intended purpose because it will not prevent every misuse of assault weapons and large capacity magazines. This argument hardly tips the balance of the equities in plaintiff's favor.

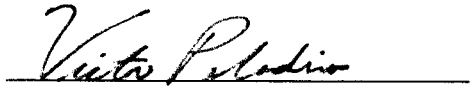
29. To the contrary, the equities weigh heavily against the injunction sought. Because of the breadth and public import of the underlying legislation, its implementation, intended to address serious public safety concerns, should not be enjoined. In the context of firearm regulation, the Legislature is "far better equipped that the judiciary" to make sensitive public policy judgments concerning the dangers in carrying firearms and combating the risks inherent therein. *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (citing *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 [1994]). The sad history of violence caused in this and other states by the over abundance of and ready accessibility to semi-automatic assault weapons and high-capacity magazines cannot escape judicial notice. Compelling governmental interests in public safety and crime prevention can be and are advanced by regulatory controls on the bearing of arms. *See Kachalsky v. County of Westchester*, 701 F.3d at 93; *see also Kwong v. Bloomberg*, 876 F. Supp. 2d 246, 259 (S.D.N.Y. 2012) ("[T]he governmental objectives promoted by New York's handgun licensing scheme are to promote public safety and prevent

gun violence and . . . these objectives are important and substantial ones."). In the SAFE Act, the Governor and Legislature have carefully crafted a balanced approach to provide for greater accountability, appropriate access, and additional protections satisfying the governmental interests in public safety and crime prevention, while nevertheless respecting Second Amendment rights.

30. The Legislature's considered effort to balance individual rights with public safety is in stark contrast to the plaintiff's proposed injunction. In addition to permitting the introduction of unlimited quantities of assault weapons and high-capacity magazines into the State of New York, the proposed sweeping injunction would, among other things, prohibit the prosecution of illicit aggravated enterprise corruption under the new Penal Law § 460.22, the criminalization of recklessly causing physical injury to a child by the intentional discharge of a firearm, rifle or shotgun as prohibited by § 32 of the Act, the increased penalties attendant to possessing firearms on school grounds and buses as established in § 41 of the Act, and a host of other public safeguards adopted in the legislation.

Wherefore, this Court should deny the motion for a preliminary injunction pending the appeal, grant respondents 30 days from entry of the order deciding this motion to file and serve their brief, and order any further relief it deems just and proper.

Dated: March 22, 2013
Albany, New York



VICTOR PALADINO

Reproduced on recycled paper

Exhibit A

PRESENT: THOMAS J. McNAMARA
Acting Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ROBERT L. SCHULZ, *et al.*,

Plaintiffs-Petitioners,

-against-

NEW YORK STATE EXECUTIVE, ANDREW CUOMO, Governor; STATE OF NEW YORK LEGISLATURE, SHELDON SILVER, Speaker of the New York State Assembly; DEAN SKELOS, Temporary President and Republican Coalition Leader, JEFFREY KLEIN, Temporary President and Democrat Coalition Leader,

Defendants-Respondents.

ORDER

Index No. 1232-13
March 13, 2013

McNamara, J.

Upon reading an Order to Show Cause issued by the Hon. Gerald W. Connolly, on March 1, 2013; the Complaint-Petition dated January 25, 2013, the supporting affidavit of Plaintiff-Petitioner Robert L. Schulz, sworn to February 28, 2013; the supporting Brief in Support of Motion for a Temporary Restraining Order and Preliminary Injunction of Plaintiff-Petitioner Robert L. Schulz dated February 26, 2013; with proof of service; the Defendants'-Respondents' Memorandum of Law in Opposition to the Request for a Preliminary Injunction dated March 11, 2013; the Affirmation of Assistant Attorney General James B. McGowan, in opposition to the application for an order to show cause, dated March 11, 2013; with proof of service; the Affidavit of Warren County Sheriff Nathan H. York, sworn to March 11, 2013; the affidavit of Warren County Clerk Pamela Vogel, sworn to March 11, 2013; the Affidavit of New York State Association of Counties Assistant Counsel Patrick Cummings sworn to March 11, 2013; the affidavit of Plaintiff-Petitioner Robert L. Schulz, sworn to March 12, 2013; the affidavit of New York State Sheriffs'

Association, Inc., Executive Director Peter R. Kehoe, sworn to March 12, 2013; the affidavit of Petitioner-Plaintiff Joseph R. McCoy, sworn to, March 12, 2013; the affidavit of David Petronis, sworn to March 12, 2013; the affidavit of Kevin Zacharewicz, sworn to March 12, 2013; the Reply Brief in Support of the Motion for a Preliminary Injunction of Plaintiff-Petitioner Robert L. Schulz, dated March 12, 2012; with proof of service; and upon all the pleadings and proceedings to date; and

Upon the parties being heard in open court before the undersigned on March 13, 2013, the return date hereof, and the Court having orally issued a decision herein on the record,

NOW IT IS:

ORDERED that the application for a preliminary injunction enjoining the enforcement of Chapter 1 of the Laws of the 2013, known as the New York SAFE Act, is denied in its entirety; and it is further

ORDERED that Defendants-Respondents have until April 12, 2013, to respond to the Complaint-Petition.

Dated: Saratoga Springs, New York
March 14, 2013

Thomas J. McNamara
Acting Supreme Court Justice

Exhibit B

NEW YORK
STATE
SENATE
ALBANY, NEW YORK 12247

Recieved: 1/14/13 @ 8:28 p.m.

NEW YORK
STATE
SENATE
ALBANY, NEW YORK 12247

January 14, 2013

Mylan Denerstein
Counsel to the Governor
Room 210, The Capitol
Albany, NY 12224

Dear Ms. Denerstein:

I am formally requesting a message of necessity pursuant to §14 of Article 3 of the Constitution on Senate bill # 2230 relating to suspension and revocation of firearms licenses.

Thank You.

/s/ Diane Burman
Diane X. Burman
Counsel to the Senate Majority

JAMES YATES
Counsel to the Speaker

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

Room 347 Capitol
Albany, New York 12248
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212-312-1410
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yatesj@assembly.state.ny.us

Recieved:
1/14/13 @
9:31 P.M.

January 14, 2013

Ms. Mylan Denerstein
Counsel to the Governor
Executive Chamber
The Capitol
Albany, New York

Dear Ms. Denerstein:

I am formally requesting a message of necessity pursuant to Article III, Section 14 of the Constitution on the following Assembly bill:

A. 2388

Sincerely,

James Yates
Counsel to the Speaker

JY:kt

Exhibit C

A message from the Governor was received and read in the words following

Ch. #2

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

TO THE LEGISLATURE:

Pursuant to the provisions of Section 14 of Article III of the Constitution and by virtue of the authority conferred upon me, I do hereby certify to the necessity of the immediate vote on Assembly Bill Number 2388 / Senate Bill Number 2230, entitled:

"AN ACT to amend the criminal procedure law, the correction law, the family court act, the executive law, the general business law, the judiciary law, the mental hygiene law, the penal law and the surrogate's court procedure act, in relation to suspension and revocation of firearms licenses; private sale or disposal of firearms, rifles or shotguns and establishing a minimum age to possess a firearm; to amend the family court act) the domestic relations law and the criminal to amend the criminal procedure law, the correction law, the family court act, the executive law, the general business law, the judiciary law, the mental hygiene law, the penal law and the surrogate's court procedure act, in relation to suspension and revocation of firearms licenses; private sale or disposal of firearms, rifles or shotguns and establishing a minimum age to possess a firearm; to amend the family court act, the domestic relations law and the criminal procedure law, in relation to providing for the mandatory suspension or revocation of the firearms license of a person against whom an order of protection or a temporary order of protection has been issued under certain circumstances, or upon violation of any such order; to amend the penal law, in relation to community guns and the criminal sale of a firearm and in relation to the definitions of aggravated and first degree murder; to amend chapter 408 of the laws of 1999 constituting Kendra's Law, in relation to extending the expiration thereof; and to amend the education law, in relation to the New York state school safety improvement teams; and in relation to building aid for metal detectors and safety devices"

The facts necessitating an immediate vote on the bill are as follows:

Some weapons are so dangerous, and some ammunition devices so lethal, that New York State must act without delay to prohibit their continued sale and possession in the State in order to protect its children, first responders and citizens as soon as possible. This bill, if enacted, would do so by immediately banning the ownership, purchase and sale of assault weapons and large capacity ammunition feeding devices, and eliminate them from

commerce in New York State. For this reason, in addition to enacting a comprehensive package of measures that further protects the public, immediate action by the Legislature is imperative.

Because the bill has not been on your desks in final form for three calendar legislative days, the Leaders of your Honorable bodies have requested this message to permit the immediate consideration of this bill.

G I V E N under my hand and the Privy Seal of the State at the Capitol in the City of Albany this fourteenth day of January in the year two thousand thirteen.

BY THE GOVERNOR

Counsel to the Governor

Exhibit D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ROBERT L. SCHULZ, *et al.*,

Plaintiffs-Petitioners,

-against-

NEW YORK STATE EXECUTIVE, ANDREW CUOMO, Governor; STATE OF NEW YORK LEGISLATURE, Speaker of the New York State Assembly; DEAN SKELOS, Temporary President and Republican Coalition Leader, JEFFREY KLEIN, Temporary President and Democrat Coalition Leader,

Defendants-Respondents.

Index No. 1232-13

Hon. Thomas J. McNamara
A.S.C.J.

Returnable March 11, 2013

DEFENDANTS'-RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE REQUEST FOR A PRELIMINARY INJUNCTION

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendants-Respondents
The Capitol
Albany, New York 12224-0341

James B. McGowan
Assistant Attorney General, of Counsel
Telephone: (518) 473-6522
Fax: (518) 473-1572 (Not for service of papers)

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PRELIMINARY STATEMENT

In the wake of a series of mass shootings and intolerable violence caused by persons armed with semi-automatic weapons and high-capacity detachable magazines such as those used in the Newtown, Connecticut elementary school tragedy and the Webster, New York shooting of first responders, the New York State Legislature enacted the Secure Ammunition and Firearms Enforcement Act (hereinafter, "the SAFE Act"). Chapter 1 of the Laws of 2013. The SAFE Act will protect New Yorkers by, inter alia, reducing the availability of assault weapons and high capacity magazines and deterring the criminal use of firearms while promoting a fair, consistent and efficient method of ensuring that sportsmen and other legal gun owners have full enjoyment of the guns to which they are entitled. In a range of reforms, the Act furthers the State's regulatory structure bringing additional safeguards to serve compelling governmental interests.

Pro se plaintiff Robert L. Schultz [1] challenges the SAFE Act primarily on procedural grounds. He asserts that he and others are owners and intended owners of firearms that have been classified as "assault weapons" and high-capacity magazines regulated under the SAFE

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1 As discussed in open Court when Mr. Schulz's application for a temporary restraining order was denied and the underlying Order to Show Cause was issued by the Hon. Gerald W. Connolly, Mr. Schulz is not admitted to practice law in the State of New York. He, of course, can only appear on his own behalf. Mr. Schulz and more than 1,000 others have filed what is styled as a hybrid article 78 Petition and Complaint in equity for declaratory and injunction relief. A proceeding pursuant to CPLR article 78 generally does not lie to challenge the facial validity of a statute, however. See, e.g., Matter of Save the Pine Bush, Inc. v City of Albany, 70 N.Y.2d 193, 202 (1987). We therefore use the term "plaintiff" herein and reference his initial pleading herein as a Complaint. Defendants further oppose Mr. Schulz's application for a preliminary injunction as asserted on his behalf alone, although the arguments asserted would apply equally to claims brought by other putative plaintiffs.

Act, and his action, styled as a hybrid plenary action and Article 78 proceeding, seeks to have the ***entire*** SAFE Act invalidated because it was passed in what plaintiff characterizes as an overly expeditious manner. Cmplt ¶ 19(c) and (f); Plaintiff's Brief, p. 11. His Complaint names as defendants Governor Andrew Cuomo; the New York State Legislature; Sheldon Silver, Speaker of the New York State Assembly; Dean Skelos, Temporary President and Republican Coalition Leader; and Jeffrey Klein, Temporary President and Democrat Coalition Leader.

By Order to Show Cause dated March 1, 2013, plaintiff seeks a preliminary injunction enjoining defendants and any others acting on their behalves from "taking any action in furtherance of" the SAFE Act. His motion asserts that the SAFE Act was passed too expeditiously to permit the Legislature to consider the interests at stake. Specifically, plaintiff argues that the enactment of the SAFE Act under a message of necessity by the Governor violated Article III, §14 of the New York State Constitution (providing for issuance of a message of necessity allowing the Legislature to immediately act on legislation). As demonstrated below, this claim is nonjusticiable and thus provides no basis for the extraordinary remedy that plaintiff seeks here. Plaintiff's motion also makes passing reference to, or asserts in a conclusory fashion, that the SAFE Act violates his rights under the Second Amendment to the United States Constitution, Article XII, § 1 of the New York State Constitution (obligating the Legislature to provide for a regulated militia), New York Civil Rights Law § 4, property law and State Finance Law § 123. With no showing that any of these claims is likely to succeed, none provides a basis for a preliminary injunction.

BACKGROUND

The SAFE Act

Following the horrific mass shooting deaths of 20 schoolchildren and six adults in Newtown, Connecticut on December 14, 2012, and the murder of two first responders in Webster, New York, on December 24, 2012, the Governor and the Legislature acted to put in place a comprehensive legislative package, the SAFE Act. The SAFE Act enacts significant reforms to prevent gun violence, from increasing the safety of New York's schools by regulating the possession of firearms on school property and forming a statewide team of specialists to review and assist schools in developing school safety plans, to providing for greater safety for families in New York by allowing judges to temporarily remove firearms from those subject to a protective order where the court finds a substantial risk of violence against the person protected by the order.

The SAFE Act, among other things, toughens regulations to limit access to firearms by those with a disqualifying mental health condition; requires federal background checks for most private sales of guns; advances a statewide database and greater uniformity in licensure; and provides a variety of other protections and enhancements to gun use licensure. Several sections of the SAFE Act provide for new and enhanced penalties for illegal gun use, including, for example, §§ 33-36, increased penalties for the murder of certain first responders and the adoption of a new Penal Law § 460.22 addressing the threat to public safety of certain organized violent gangs and their illegal purchases of weapons in their enterprise.

As is relevant to this action, the SAFE Act also amended the existing ban on assault weapons, enacted in 2000, by broadening the definition of assault weapon, immediately

banning their sale and purchase but permitting the continued possession of those lawfully owned as of the effective date of the law if such weapons are registered within fifteen months of the effective date of the Act. Indeed, owners of such grandfathered assault weapons are authorized to sell them out of state or through an in-state federal firearms licensee. Section 38 of the SAFE Act amended the existing law on large capacity ammunition feeding devices banning the acquisition of certain large capacity magazines while allowing for a year to transfer magazines lawfully possessed prior to the enactment of the law.

By letters, the Legislature requested that the Governor issue a message of necessity enabling it to advance the SAFE Act. See Affirmation of James B. McGowan, dated March 11, 2013, Exhibit A. On January 14, 2013, the Governor certified the necessity for an immediate vote on Assembly Bill No. 2388/Senate Bill No. 2230, noting, inter alia:

> Some weapons are so dangerous, and some ammunition devices so lethal, that New York State must act without delay to prohibit their continued sale and possession in the State in order to protect its children, first responders and citizens as soon as possible. This bill, if enacted, would do so by immediately banning the ownership, purchase and sale of assault weapons and large capacity ammunition feeding devices, and eliminate them from commerce in New York State. For this reason, in addition to enacting a comprehensive package of measures that further protects the public, immediate action by the Legislature is imperative.

See Governor's message to the Legislature, Cmplt Ex. D. The Legislature, in turn, adopted the SAFE Act the next day and it was signed into law as Chapter 1 of the Laws of 2013.

ARGUMENT

Point I

PLAINTIFF DEMONSTRATES NO LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS CHALLENGE TO THE MESSAGE OF NECESSITY.

Plaintiff cannot demonstrate any likelihood of success on his claim that the SAFE Act was enacted in violation of Article III, § 14, because under well-settled law, the claim is non-justiciable.

A preliminary injunction is a drastic remedy and may only issue when the party seeking such relief demonstrates by clear and convincing evidence: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor. See CPLR art. 63; Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988); W.T. Grant Co. v Srogi, 52 N.Y.2d 496, 517 (1981); Berkoski v. Board of Trustees of Inc. Vil. of Southampton, 67 A.D.3d 840, 844 (2d Dept. 2009).

Where, as here, a plaintiff asserts that the statute in issue violates the New York State Constitution, he faces additional burdens in his effort to establish a likelihood of success. Courts are mindful that enactments of the Legislature -- a coequal branch of government -- may not casually be set aside by the Judiciary. The applicable legal principles for finding invalidity are firmly embedded in the law: Statutes are presumed constitutional; while the presumption is rebuttable, invalidity must be demonstrated beyond a reasonable doubt. McGee v. Korman, 70 N.Y.2d 225, 230-231 (1987), citing Wiggins v. Town of Somers, 4 N.Y.2d 215, 218-219 (1958).

Plaintiff altogether fails to meet his heavy burden here with respect to his claim that the SAFE Act was voted on in violation of Article III, §14 of the New York State Constitution. That provision states, in relevant part:

> No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor . . . shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon . . . .

Plaintiff claims that the message of necessity certified by the Governor was improper because there was no need for an immediate vote, and the Legislature needed more time to consider the matter given the issues at stake. Thus plaintiff argues, essentially, that the Legislature should have ignored the message of necessity certified by the Governor and waited to vote on the chapter law until the bill had been on the legislators' desks in final form for at least three days in order to give sufficient time to consider the important issues at stake.[2] See Pltf. Brief in Support, 3-7; see also Cmplt ¶57 et seq. But disagreements about the adequacy or substance of a message of necessity are simply not justiciable.[3]

The Court of Appeals has squarely held that a message of necessity is not subject to judicial review on the grounds that plaintiff raises here. Maybee v. State of New York, 4 N.Y.3d 415, 418 (2005). In reaching this conclusion, the Court stated, "The Constitution on

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[2] Although one can only speculate, because of the conclusory nature of the assertions, it is possible that plaintiff's claims said to arise under the First Amendment and article I, § 9 of the New York State Constitution (see Cmplt ¶ 10), hinge on their right to petition the government. To the extent they rely upon the New York State Constitution's provisions for a message of necessity as in some way providing them an opportunity to petition, these conclusory claims fail for all the reasons set forth herein.

[3] In this case, although the content of a message of necessity is not justiciable, the banning of certain assault weapons and large capacity ammunition feeding devices was immediate; as of January 15, 2013, the further sale to or purchase by New Yorkers of such items was forbidden.

its face makes the Governor's judgment of the facts determinative; he or she is to state facts that 'in his or her opinion' necessitate prompt action. Whether a court's opinion is or is not the same as the Governor's does not matter." Id. at 419. In fact, the Court of Appeals reaffirmed Maybee in Dalton v. Pataki, 5 N.Y.3d 243, 272 (2005).[4] Plaintiff cites to no authority for a claim that the Governor's certification of a message of necessity becomes subject to judicial review because the Legislature, thereafter, adopts a statute with potential constitutional import.

The message of necessity certified by the Governor for the SAFE Act, set forth as Cmplt Ex. D, satisfied the requirements of Article III, §14.5. To the extent plaintiff asserts that he, or the Court, might have differing opinions, such assertions are not justiciable. Maybee, 4 N.Y.3d at 419.[5] Indeed, merely providing a message of necessity does not in any

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[4] In Dalton v. Pataki, the Appellate Division, Third Department, noted: "[i]t is the Governor who must express the opinion that an immediate vote is desirable. The facts on which [the Governor] forms that opinion must satisfy [him or her]" (Finger Lakes Racing Assn. v New York State Off-Track Pari-Mutuel Betting Commn., 30 N.Y.2d 207, 219 [1972], appeal dismissed 409 U.S. 1031 [1972]). Here, the message of necessity is reasonable and conforms to other such messages that have been upheld in the past (see Norwick v Rockefeller, 70 Misc. 2d 923, 931-934 [1972], affd without op 40 A.D.2d 956 [1972], affd without op 33 N.Y.2d 537[1973] [upholding a message of necessity that stated "(b)ecause the bill in its final form has not been on your desks three calendar legislative days the Leaders of your Honorable bodies have requested this message to permit its immediate consideration"]). Dalton v. Pataki, 11 A.D.3d 62, 66-67 (3d Dept. 2004), mod on other grounds, 5 N.Y.3d 243.

5 Although it is not clear from plaintiff's submissions if plaintiff intended to assert such a claim, the Secretary of the Senate's alleged failure to read all of the last section of the bill is not actionable. It is well settled that such procedural matters are "wholly internal" to the Legislature and thus beyond judicial review under the separation of powers. Heimbach v. State, 59 N.Y.2d 891, 893 (1983), app. dismissed,464 U.S. 956 (1983)(determining whether a legislative roll call was incorrectly registered is a legislative matter beyond judicial review); Urban Justice Ctr. v. Pataki, 38 A.D.3d 20, 27 (2006) (not the province of the courts to direct the Legislature on how to do its work, particularly where the internal practices of the Legislature are involved). The independence of the Legislature and judiciary compels that each must be "confined to its own functions and can neither encroach upon nor be made

way compel the Legislature to act. If the Legislature "does not think the Governor's reasons are good ones, it is not required to act in fewer than three days -- or even to consider the bill at all." Id. at 420. The message is an authorization, not a command.

The Governor's issuance of a message of necessity and the Legislature's decision to proceed (see Senate transcript and Assembly Clerk's Certification set forth as Cmplt Exhibit C [at pp. 6-7] and Cmplt Exhibit B [at last page]) thus causes no justiciable injury. Indeed, the evidence establishes that the certification of the message of necessity followed legislative requests for same. See McGowan Ex. A.

Point II

PLAINTIFF DEMONSTRATES NO LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS REMAINING CLAIMS, WHICH HE ASSERTS IN ONLY CONCLUSORY FORM.

As previously noted, plaintiff's motion papers also mention the Second Amendment, Article XII, § 1 of the New York State Constitution (obligating the Legislature to provide for a regulated militia), New York Civil Rights Law § 4, property protections, and State Finance Law § 123. Because plaintiff either makes only passing references to these claims or else asserts them in only conclusory form, the Court should reject them on the basis that plaintiff makes no showing that any of them is likely to succeed. Alternatively, the Court should find

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subordinate to" each other. Matter of Davies, 168 N.Y. 89, 102 (1901); Urban Justice Ctr., 38 A.D.3d at 27. To this end, the branches must "be free from interference, in the discharge of its own functions and particular duties, by either of the others." Matter of Gottlieb v. Duryea, 38 A.D.2d 634, 635 (1971), affd., 30 N.Y.2d 807 (1972), cert. denied, 409 U.S. 1008 (1972); see People ex rel. Burby v. Howland, 155 N.Y. 270, 282 (1898). Simply put, "[it] is not the province of the courts to direct the legislature how to do its work." Heimbach, 59 N.Y.2d at 893, quoting N.Y. Public Interest Research Group v. Steingut, 40 N.Y.2d 250, 257 (1976); People ex rel. Hatch v. Reardon, 184 N.Y. 431 (1906).

none of these remaining claims has any merit, and thus none warrants the injunctive relief sought.

Because plaintiff seemingly asserts that this statute is *facially* unconstitutional, he must demonstrate that it suffers from "wholesale constitutional impairment." People v. Davis, 13 N.Y.3d 17, 23-24 (2009), citing Matter of E.S. v P.D., 8 N.Y.3d 150, 159 (2007); Matter of Moran Towing Corp. v Urbach, 99 N.Y.2d 443, 448 (2003); see also People v. Stuart, 100 N.Y.2d 412, 421 (2003)

This extraordinarily high standard is well reflected in United States Supreme Court precedent. Facial challenges are disfavored for several reasons, because they often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." Sabri v. United States, 541 U.S. 600, 609 (2004) (internal quotation marks and brackets omitted). Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 [1885]).

Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 329 (2006) (quoting Regan v. Time, Inc.,

468 U.S. 641, 652 [1984] [plurality opinion]). See also Hightower v. City of Boston, 693 F.3d 61, 77 (1st Cir. 2012) (upholding the revocation of a firearms license without a hearing under a facial and as applied challenge under the Second Amendment).

A. Plaintiff has no likelihood of success on the merits of a claim under the Second Amendment.

Plaintiff's passing references to his rights under the Second Amendment provide no basis for injunctive relief here. First, plaintiff does not clearly assert any freestanding Second Amendment claim; instead, he invokes an "arguable" -- his word -- violation of the Second Amendment (Cmplt ¶ 50) as a reason for more closely scrutinizing the message of necessity (Cmplt ¶ 41). In any event, any claim under the Second Amendment necessarily fails.

In District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual's right to posses a *handgun* in his or her home for the purpose of self-defense, and in McDonald v. City of Chicago, 130 S. Ct. 3020 (2010), the Court found this right applicable against the States under the Fourteenth Amendment. But neither decision holds or even suggests that the Second Amendment protects a right to possess assault weapons or other military-style weapons. On the contrary, both decisions recognize that the Second Amendment does *not* guarantee a right to possess "any weapon whatsoever," Heller, 554 U.S. 626, McDonald, 130 S. Ct. at 3047 (same); instead Heller expressly states that weapons "most useful in military service" may be banned even if that would leave citizens with access only to "small arms." Id. at 628. The Court also noted that the historic tradition of prohibiting the carrying of "'dangerous and unusual weapons'" supports an important limitation on the right to keep and carry arms. Id. at 627 (quoting 4 Blackstone 148-149 [1769])

Indeed, post-Heller, it has been held that bans of assault weapons, large capacity magazines, and certain other dangerous firearms do not violate the Second Amendment and are lawful exercises of the government's police powers. In the Heller case itself, on remand, the D.C. Circuit upheld a statute restricting assault-weapons and large-capacity magazines. Heller v. District of Columbia, 670 F.3d 1244, 1264 (D.C. Cir. 2011). Similarly, a California appellate court upheld an assault weapon ban, explaining that under Heller "the Second Amendment right does not protect possession of a military M-16 rifle. . . . Likewise, it does not protect the right to possess assault weapons or .50-caliber BMG rifles." People v. James, 174 Cal. App. 4th 662, 676 (Cal. App. 3d Dist. 2009). So too, the federal courts of appeals have upheld under Heller prohibitions on the possession of machine guns and short-barreled rifles, United States v. Gilbert, 286 Fed. Appx. 383, 386 (9th Cir. 2008), cert. denied, 555 U.S. 1038 (2008), and handguns with obliterated serial numbers, United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010). Indeed, Marzzarella upheld the ban in question even as it applied to possession in the home, because it leaves individuals free to choose other, lawful firearms. Id.

Accordingly, even if plaintiff's papers were read to state an unambiguous and direct Second Amendment argument, they would fail.

B. Plaintiff cannot establish a violation of Article XII, § 1.

Plaintiff does nothing to demonstrate a likelihood of success on his claim that the Legislature's obligation to provide for the maintenance and regulation of an organized militia as set forth in section 1 of article XII of the New York State Constitution is impaired by the Legislature's adoption of the SAFE Act. Section 1 provides:

> The defense and protection of the state and of the United States is an obligation of all persons within the state. The legislature shall provide for the discharge of this obligation and for the maintenance and regulation of an organized militia.

No language in this provision may be read to confer personal rights or a private right of action. Rather, the provision refers to the *obligation* of all persons of the State to defend and protect the State and the United States, and it also assigns to the Legislature the duty to provide for the discharge of this obligation and the maintenance and regulation of organized militia. The particulars of fulfilling that duty are left to the Legislature's discretion and no private right of action is inferred. Cf., Brown v. State of New York, 89 N.Y.2d 172 (1996) (recognizing a narrow damage remedy in Court of Claims arising under the State Constitution). Plaintiff has certainly not provided clear and convincing evidence overcoming the presumption of constitutionality owed the SAFE Act here.

C. Plaintiff cannot establish a violation of Civil Rights Law § 4.

Plaintiff apparently argues that the SAFE Act is invalid because it conflicts with statutory rights under Civil Rights Law §4.[6] See, e.g., Cmplt ¶¶ 53-54. It is well established, however, that courts must "harmonize the various provisions of related statutes and . . . construe them in a way that renders them internally compatible." Matter of Aaron J., 80 N.Y.2d 402, 407 (1992). Moreover, the well-established rule of statutory construction provides that a "prior general statute yields to a later specific or special statute." See, e.g., Dutchess County Dep't of Soc. Servs. ex rel. Day v. Day, 96 N.Y.2d 149, 153 (2001); quoting Erie County Water Auth. v. Kramer, 4 A.D.2d 545, 550 (4th Dep't 1957), aff'd, 5 N.Y.2d 954 (1959).

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[6] Civil Rights Law § 4 provides: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed."

Plaintiff has not established that the specific provisions of the SAFE Act cannot be harmonized with the general provision of a right the bear arms in Civil Rights Law § 4. In this regard, statutes which relate to the same subject matter must be construed together unless a contrary legislative intent is expressed. See Dutchess County Dept. of Soc. Servs. ex rel. Day, 96 N.Y.2d at 153. In fact, New York has had an assault weapon ban in place since 2000 and has regulated firearms and related material for more than a century. Whatever the Legislature intended by adopting Civil Rights Law § 4, this Court should find that the broad language of that statute yields to the subsequent, specific mandates adopted in the SAFE Act. See id. Obviously the Legislature could, and did, determine that possession of certain semi-automatic assault weapons and high-capacity magazines was outside the ambit of the right to bear arms the Legislature granted in Civil Rights Law §4. Indeed, when enacting a statute the Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject. See, e.g., Matter of Jonathan EE. v. Barreiro, 86 A.D.3d 696, 698 (3d Dep't 2011). The statutes are readily harmonized and the Court is obliged to do so here, as there is no doubt that the Legislature so intended.

We also note that Civil Rights § 4 has been interpreted to align with the Second Amendment right. As discussed at Point II(A), supra, plaintiff can state no viable claim under the Second Amendment; he therefore similarly can state no viable claim under Civil Rights § 4. See People v. Perkins, 62 A.D.3d at 1161(rejecting challenge to gun law under Second Amendment and, "by extension," Civil Rights § 4); People v Hughes, 83 A.D.3d 960, 961 (2d Dep't 2011) (same).

D. There is no likelihood of success to plaintiff's property claim.

Plaintiff's motion papers refer to the provisions of the SAFE Act addressing the disposition of prohibited weapons and a purported violation of plaintiff's property rights. See Brief in Support, p. 8. To the extent plaintiff seeks to rely on this claim to support his request for injunctive relief, he fails to establish any likelihood of success on the merits, for several reasons.

First, the Supreme Court has stated that takings protections for personal property, as opposed to land, are narrow. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-28 (1992) ("[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [. . .] new regulation might even render [. . .] property economically worthless [at least if the property's only economically productive use is sale or manufacture for sale]."). It has long been held that the states, in lawfully exercising their police powers, may prohibit the possession and ownership of dangerous materials and instrumentalities without compensation and that this violates no property right. See, e.g., Samuels v. McCurdy, 267 U.S. 188 (1925) (Prohibition lawfully forfeits property without compensation). The law routinely bans items deemed dangerous by the Legislature and such regulation does not constitute an unconstitutional taking. See, e.g., Penal Law § 265.01 (banning incendiary devices, silencers, stun guns, certain knives, cane swords, bludgeons, chuka sticks, and sand bags); the Federal Hazardous Substances Act (15 USC §§1261 et seq.) (including materials dangerous to children); Penal Law § 225.00 (banning gambling devices).

Additionally, the SAFE Act, which amends definitions in the pre-existing weapons and large capacity ammunition device bans, provides for the sale of certain newly prohibited items. See, e.g., Chapter 1 of the Laws of 2013, §§ 37, 38. Courts have held a denial of one

property right does not amount to a taking when other property rights remains. Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). Plaintiff therefore fails to demonstrate a likelihood of success on his property claims on this record and, in particular, does not overcome the presumption of constitutionality the statute enjoys.

E. Plaintiff cannot maintain a citizen taxpayer claim.

Plaintiff's State Finance Law § 123-b claim fails because he is challenging a broad policy decision by the Legislature rather than a specific unlawful expenditure. Section 123-b(1) of the State Finance Law, in pertinent part provides:

> Notwithstanding any inconsistent provision of law, any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property . . . .

While plaintiff describes himself and others as "payers of state and federal taxes" (Cmplt ¶ 19[c]), and notes that the Governor presented a proposed budget for the next fiscal year that included an appropriation related to gun control (Cmplt ¶ 37), nothing in the Complaint asserts that the adoption of the SAFE Act causes a wrongful expenditure which is actionable under State Finance Law §123-b.

It is abundantly clear that the issues raised in the Complaint are not claims arising from the fiscal activities of the State, but rather are focused on non-fiscal activities of the

government made in the exercise of the State's police powers. Indeed, plaintiff objects not to particular funds spent by the State but to the policy decision to strengthen New York's existing assault weapons and large capacity ammunition feeding device laws. While a citizen-taxpayer may bring suit to prevent the unlawful expenditure of State funds, "courts have been inhospitable to plaintiffs who seek to challenge nonfiscal activities by invoking the convenient statutory hook of section 123-b." Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 813 (2003), cert. denied, 540 U.S. 1017 (2003) (citation omitted); see also Transactive Corp. v. New York State Dep't of Soc. Servs., 92 N.Y.2d 579, 589 (1998).

Nothing set forth in this record suggests that there are insufficient existing appropriations for the State and its agencies to implement the SAFE Act in the current fiscal year. Moreover, because of the presumption of constitutionality attendant to the statute, plaintiff's showing here is grossly inadequate to assert that implementation of the SAFE Act necessarily entails an unlawful expenditure. Plaintiff's proposition that the mere contemplation of new appropriations for the next fiscal year can in some way cause a justiciable taxpayer injury is meritless.

There is no likelihood of success, therefore, to any claim in this Complaint with respect to taxpayer standing. Indeed, there is no such viable claim pleaded in this Complaint.

F. There is in any event no likelihood of success as to plaintiff's claims against Defendant Governor and Legislators, because they are immune from suit under the Speech or Debate Clause.

The Speech or Debate Clause of the New York State Constitution provides: "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." The clause has been interpreted to afford a legislator immunity from any

proceeding challenging lawful action taken in his or her official capacity. Rivera v. Espada, 98 N.Y.2d 422 (2002) (Per curiam). As this Court has previously held, the Speech or Debate Clause of the New York State Constitution shields legislators and the Governor not only from the consequences of litigation, but also protects them from the burden of defending themselves in court as long as their actions fall within the "sphere of legitimate legislative activity." Matter of Maron v. Silver, 2007 N.Y. Misc. LEXIS 8086 (Sup. Ct. Albany Co. 2007) (McNamara, J.), aff'd in part and modified in part on other grnds, 14 N.Y.3d 230 (2010).[7]

To the extent plaintiff complains of the legislative activities of the Governor and legislative leaders in proposing and advancing legislation, therefore, they are entirely immune from suit and there is no merit to plaintiff's assertions against those individuals. Because the State Constitution's Speech or Debate Clause prevents plaintiff from haling defendant legislators and the Governor into court for their legislative actions, the Complaint, on its face, fails to state a cause of action against them that is likely to succeed. The fundamental purpose of the clause is to insure that the legislative function may be performed independently. Matter of Straniere v. Silver, 218 A.D.2d 80, 83 (3d Dep't), aff'd, 89 N.Y.2d 825 (1996). The clause not only shields legislators from the consequences of litigation, but also protects them from the burden of defending themselves in court. Id. (citing cases). Once it is determined that the subject matter of the suit is legislative activity, the privilege of

[7] The Speech or Debate Clause has been found to limit its protections to individual legislators and the Governor in his legislative capacity and does not immunize the State itself from suit. See, e.g., Matter of Maron. In Matter of Maron, this Court has found a complaint asserting a constitutional claim against the Legislature as effectively one against the State and dismissed the action against the individuals on the basis of the Speech or Debate Clause, allowing the complaint to proceed against the State alone. Id.

immunity from suit applies, even where the legislative activity is alleged to be unconstitutional. Id.

Similarly, when the Governor acts in his legislative capacity, whether signing or refusing to sign bills, or otherwise advancing legislation, deliberating, or performing other functions integral to the legislative process, the Governor is entitled to the same immunities as legislators. See Campaign For Fiscal Equity, Inc. v. State, 265 A.D.2d 277, 278 (1st Dept.1999)(Subsequent citations omitted), citing Bogan v Scott-Harris, 523 U.S. 44, 55. While plaintiff fails to state a cause of action demonstrating any wrongful conduct on the part of the Governor, the Governor is entitled to immunity in any event, because the underlying dispute deals with his role in adopting legislation.

In sum, the Governor and State legislators are not proper defendants here and the plaintiff fails to establish his claims against them have any merit, much less prove a likelihood of success on the merits. His request for preliminary relief accordingly should be denied.

Point III

PLAINTIFF CANNOT DEMONSTRATE IRREPARABLE HARM IF THE INJUNCTION IS WITHHELD.

Insofar as plaintiff has failed to establish any likelihood of success, there is no constitutional infringement or other injury to the plaintiff arising under the enactment of the SAFE Act which would support injunctive relief. It follows that plaintiff fails to demonstrate any harm, much less an irreparable one. Plaintiff's ability to petition the government, for example, is unimpaired and not remedied by the proposed preliminary injunction. Plaintiff does not establish any actual injury to property. While certain dangerous weapons have been

immediately banned in New York, limited sales of the same are permitted under § 37(h) of the SAFE Act, and there is no showing here that plaintiff personally has suffered any loss, or that his post-deprivation remedies are insufficient to seek redress.

As some sections of the SAFE Act are not effective until specified dates after its enactment, some of them as long as a year later (see Chapter 1, §58,[a],[c],[d],[e]), plaintiff's demand for a sweeping, immediate injunction makes no sense. Indeed, plaintiff contends the SAFE Act "allows current owners to keep their assault weapons provided they register them between April 15, 2013 and April 15, 2014." Cmplt ¶ 71. He also asserts that he may keep certain high capacity magazines until January 2014. Id. ¶ 72. To the extent plaintiffs urge that "**There Is No Emergency; Nothing Has Changed**" (Cmplt, Argument E), plaintiff fails to set forth clear and convincing evidence of a need for an immediate injunction to avoid irreparable injury.

Plaintiff asserts in his brief that the alleged violation of a constitutionally protected right unquestionably constitutes irreparable injury, citing Elrod v. Burns, 427 U.S. 347, 373 (1976). Elrod, however, involved First Amendment Rights, and the court expressly noted, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." It is simply not true, as plaintiff asserts, however, that all constitutional injuries are deemed irreparable, or that extraordinary judicial intervention in the form of an injunction is required upon the mere assertion of a constitutional claim. See, e.g., Matter of Maron v Silver, 14 N.Y.3d 230, 261 (2010)(injunctive relief inappropriate where other relief will serve); Campaign for Fiscal Equity, Inc. v. State of New York, 8 N.Y.3d 14, 27 (2006) (same); People v. Boyd, 12 N.Y.3d 390, 392 (2009)(constitutionality of statute can be reviewed after resulting sentence); Schulz v. State of New York, 86 N.Y.2d

225, 232 (1995) (litigant may be required to pursue administrative remedies before seeking judicial relief).

Indeed, far from making the remedy more appropriate, in New York State courts, the strong presumption of constitutionality of a statute makes plaintiff's burden when seeking preliminary injunctive relief to annul a statute even more difficult. Schulz v. State of New York, 217 A.D.2d 393, 396 (3d Dept 1995) (citing City of New York v. State of New York, 76 N.Y.2d 479, 485 [1990]; Matter of Van Berkel v. Power, 16 N.Y.2d 37, 40 [1965]).

Point IV

THE BALANCE OF THE EQUITIES DOES NOT LIE IN FAVOR OF THE INJUNCTION REQUESTED.

Plaintiff also fails to establish that the balance of the equities tips in his favor. In this proceeding he asserts the SAFE Act is unconstitutional and it should be stricken in its entirety. Plaintiff seeks a sweeping injunction that prohibits officials from enforcing every part of the SAFE Act (which includes numerous changes to the Penal Law, Mental Hygiene Law and Education Law, none of which are addressed or challenged in his petition), although he seemingly does not object to every part of the Act and does not address all of its particulars. See the Order to Show Cause. In fact, as stated above, he argues that the SAFE Act has no effect so that there is no emergency requiring relief, apparently asserting that because the Act might not prevent every misuse of assault weapons and large capacity magazines, the State should not try to reduce or limit the effects of gun violence. See Cmplt, Argument E. This argument hardly tips the balance of the equities in plaintiff's favor.

Instead, the equities weigh against the injunction sought. Because of the breadth and public import of the underlying legislation, its implementation, intended to address serious

public safety concerns, should not be enjoined. In the context of firearm regulation, the Legislature is "far better equipped that the judiciary" to make sensitive public policy judgments concerning the dangers in carrying firearms and combating the risks inherent therein. Kachalsky v County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012) (citing Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 665 [1994]). The sad history of mayhem caused in this and other states by the over abundance of and ready accessibility to semi-automatic assault weapons and high-capacity magazines cannot escape judicial notice. There simply is no doubt that compelling governmental interests in public safety and crime prevention can be and are advanced by regulatory controls on the bearing of arms. See Kachalsky v. County of Westchester, 701 F3d at 93; see also Kwong v. Bloomberg, 876 F. Supp. 2d 246, 259 (S.D.N.Y. 2012)("[T]he governmental objectives promoted by New York's handgun licensing scheme are to promote public safety and prevent gun violence and . . . these objectives are important and substantial ones."); Heller v. District of Columbia, 698 F.Supp.2d at 190 -191; United States v. Salerno, 481 U.S. 739, 748-50 (1987) (Government's interest in preventing crime is compelling); Schall v. Martin, 467 U.S. 253, 264 (1984). In the SAFE Act, the Governor and Legislature have carefully crafted a balanced approach to provide for greater accountability, appropriate access, and additional protections satisfying the governmental interests in public safety and crime prevention, while nevertheless ensuring the protections afforded by the Second Amendment.

The Legislature's considered effort to balance individual rights with public safety is in stark contrast to the plaintiff's proposed injunction. In addition to permitting the introduction of unlimited quantities of assault weapons and high-capacity magazines into the State of New York, the proposed sweeping injunction would, among other things, prohibit the prosecution

of illicit aggravated enterprise corruption under the new Penal Law § 460.22, the criminalization of recklessly causing physical injury to a child by the intentional discharge of a firearm, rifle or shotgun as prohibited by § 32 of the Act, the increased penalties attendant to possessing a firearms on school grounds and buses as established in §41 of the Act, and a host of other public safeguards adopted in the legislation.

The balance of the equities simply does not support injunctive relief.

CONCLUSION

For the reasons discussed above, defendants respectfully request that the application for a preliminary injunction be denied and the court issue such other and further relief as it deems just, proper and appropriate.

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