IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
Albany Division

MATTHEW AVITABILE	)
	)
Plaintiff,	)**NOTICE OF OPPOSITION AND REPLY**
	) **TO DEFENDANT'S CROSS-MOTION FOR**
v.	) **SUMMARY JUDGMENT**
	) Civil Action No. 1:16-cv-1447 (DNH/CFH)
	)
LT. COL. GEORGE BEACH, in his Official capacity as Superintendent of the New York State Police	)
	)
Defendant.	)
_____	)

PLEASE TAKE NOTICE, that upon the accompanying Memorandum of Authorities in Support of Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment and Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment; the Declaration of Stephen D. Stamboulieh with its annexed exhibit; and the Plaintiff's Response to Defendant's Statement of Material Facts, Plaintiff Matthew Avitabile, by and through his attorneys of record, will move this Court, pursuant to the Text Order Adjourning Dispositive Motions, on November 9, 2018, for an Order granting Plaintiff's Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure as there is no genuine issue of material fact and that the Plaintiff is entitled to judgment as a matter of law, and for such other and further relief as this Court deems just and proper.

Dated: September 17, 2018.

Respectfully submitted,

/s/ Stephen D. Stamboulieh
Stephen D. Stamboulieh

Stamboulieh Law, PLLC
P.O. Box 4008
Madison, MS 39130
(601) 852-3440
stephen@sdslaw.us
MS Bar No. 102784
NDNY Bar Roll# 520383

Alan Alexander Beck
Law Office of Alan Beck
4780 Governor Drive
San Diego, CA 92122
(619) 905-9105
Alan.alexander.beck@gmail.com
*Admitted pro hac vice

Certificate of Service

I, Stephen D. Stamboulieh, hereby certify that I have caused to be filed a true and correct copy of the foregoing document or pleading via the Court's CM/ECF system which sent a notice and copy of the foregoing to all counsel of record.

Dated: September 17, 2018.

/s/ *Stephen D. Stamboulieh*
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
Albany Division

MATTHEW AVITABILE Plaintiff, v. LT. COL. GEORGE BEACH, in his Official capacity as Superintendent of the New York State Police Defendant.	) Civil Action No. 1:16-cv-1447 (DNH/CFH)

DECLARATION OF STEPHEN D. STAMBOULIEH

STEPHEN D. STAMBOULIEH, an attorney duly admitted to practice before this Court, declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am counsel for Plaintiff, Matthew Avitabile, in the above-captioned action.

2. I submit this declaration in support of Mr. Avitabile's Opposition to Defendant's Cross-Motion for Summary Judgment and Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment, for the limited purpose of providing the Court with true and accurate copies of the following documents contained in the annexed Appendix, and referenced in the accompanying Memorandum of Law, dated September 17, 2018 and Plaintiff's Statement of Undisputed Material Facts, submitted herewith in support of Plaintiff's motion:

Exhibit	Description of Exhibit
Exhibit "A"	Unpublished Memorandum & Order: *James Maloney v. Madeline Singas*, 03-cv-786 (PKC) (July 23, 2017)

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Madison, Mississippi, this the 17th day of September, 2018.

Dated: **Madison, Mississippi**
September 17, 2018

Respectfully submitted,

/s/ Stephen D. Stamboulieh
Stephen D. Stamboulieh
Stamboulieh Law, PLLC
P.O. Box 4008
Madison, MS 39130
(601) 852-3440
stephen@sdslaw.us
MS Bar No. 102784
NDNY Bar Roll# 520383

Certificate of Service

I, Stephen D. Stamboulieh, hereby certify that I have caused to be filed a true and correct copy of the foregoing document or pleading via the Court's CM/ECF system which sent a notice and copy of the foregoing to all counsel of record.

Dated: September 17, 2018

/s/ *Stephen D. Stamboulieh*
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JAMES M. MALONEY,

Plaintiff,

- against -

MADELINE SINGAS, in her official capacity as Acting District Attorney of Nassau County,

Defendant.

----------x

NOT FOR PUBLICATION

MEMORANDUM & ORDER
03-CV-786 (PKC)

PAMELA K. CHEN, United States District Judge:

Plaintiff James M. Maloney, an attorney and martial arts practitioner, filed this action in 2003, seeking a declaration that New York's ban on the possession of chuka sticks or nunchakus is unconstitutional.[1] Though the Honorable Arthur D. Spatt dismissed Maloney's constitutional claims in 2007, and was affirmed on appeal in 2010, the United States Supreme Court vacated the judgment and remanded the case later that year for further consideration in light of its decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *See Maloney v. Rice*, 561 U.S. 1040 (2010). Following remand and the completion of discovery, both Plaintiff and Defendant moved for summary judgment. (Dkt. Nos. 131–141.)

On May 22, 2015, the Court dismissed two of Maloney's three claims, leaving only his Second Amendment challenge to the statute, as to which the Court denied both parties' summary

[1] Under New York law, possession of chukka sticks constitutes a class A misdemeanor. *See* N.Y. Penal Law § 265.01 ("A person is guilty of criminal possession of a weapon in the fourth degree when: (1) He or she possesses any . . . chuka stick . . . ."); *id.* at § 265.00(14) (defining chuka stick "as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking"). Chuka Sticks are also known as nunchakus. The Court shall refer to chukka sticks and nunchakus interchangeably.

judgment motions. (Dkt. No. 146 at 2.) In analyzing Maloney's Second Amendment claim, the Court held that the relevant factors were whether "chuka sticks are 'in common use' for 'lawful purposes' and thus eligible for protection under the Second Amendment." (*Id*. at 17 (citing *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008).) The Court also held that an "intermediate" level of scrutiny applies to Second Amendment challenges. (*Id*. at 16.)

A bench trial was held between January 9 and 12, 2017. At the conclusion of the trial, a post-trial briefing was set for the submission of Proposed Findings of Fact and Conclusions of Law. The parties filed their submissions between March 2, 2017, and March 14, 2017. (Dkt. Nos. 184–187.)

A review of the trial record and the parties' post-trial submissions reveals that both parties (1) are unaware of the Second Circuit's leading case on Second Amendment challenges, *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo* ("*NYSRPA*"), 804 F.3d 242, 254 (2d Cir. 2015), which was decided after the Court's summary judgment ruling, but before trial; (2) mistakenly believe that *Plaintiff* has the burden of proving that the challenged New York statute regulates conduct protected by the Second Amendment, *i.e.*, proving that nunchakus are "in common use" and "typically possessed by law-abiding citizens for lawful purposes"; and (3) failed to address the appropriate level of constitutional scrutiny, let alone analyze or argue that the challenged statute does or does not survive constitutional scrutiny. Given what appears to be the parties' current failure to understand the relevant legal standards that apply to Plaintiff's Second Amendment claim, especially regarding which party bears the burden of proof, the Court can only assume that the parties were similarly operating under the same misconceptions at trial.

A. Neither Party's Proposed Findings Of Fact And Conclusions Of Law Address Governing Second Circuit Law On Second Amendment Challenges

In *NYSRPA*, 804 F.3d at 254, the Second Circuit laid out the two-step analysis for determining the constitutionality of firearm restrictions:

> First, we consider whether the restriction burdens conduct protected by the Second Amendment. If the challenged restriction does not implicate conduct within the scope of the Second Amendment, our analysis ends and the legislation stands. Otherwise, we move to the second step of our inquiry, in which we must determine and apply the appropriate level of scrutiny.

Id.

With respect to step one, a court determines whether the Second Amendment applies by determining whether the weapon at issue is "(1) 'in common use' and (2) 'typically possessed by law-abiding citizens for lawful purposes.'"[2] *Id.* at 254–55. Significantly, in *NYSRPA*, the Second Circuit explained that:

> *Heller* emphasizes that the "Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Heller*, 554 U.S. at 582, 128 S.Ct. 2783. In other words, it identifies a presumption in favor of Second Amendment protection, which the *State* bears the *initial* burden of rebutting.

Id. at 257 n.73 (emphasis added). Based on this interpretation of *Heller*, the *NYSRPA* panel found that "[b]ecause the State . . . has failed to make any argument that [a non-semiautomatic pump-action rifle] is dangerous, unusual, or otherwise not within the ambit of Second Amendment

[2] When this Court denied the parties' summary judgment motions on May 22, 2015, the Second Circuit had not yet decided *NYSRPA*. Thus, the Court's analysis adopted the three-part inquiry framework articulated by the Western District of New York in *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 990 F. Supp. 2d 349, 362–63 (W.D.N.Y. 2013). The Court noted that the threshold question was whether nunchakus are "in common use" *and* whether their "common use [is] a lawful one." *Maloney v. Singas*, 106 F. Supp. 3d 300, 310 (E.D.N.Y. 2015). While the specific language used by this Court to articulate the threshold question is somewhat different from the test articulated by the Second Circuit in *NYSRPA*, the Court finds the difference is not substantive. Nonetheless, going forward, the parties should use the precise legal framework and terminology used by the Second Circuit in *NYSRPA*.

protection, the presumption that the Amendment applies remains unrebutted."[3] *Id.* In discussing the State's initial burden of rebutting the presumption in step one, the Second Circuit cited *Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011), which stated, "if the *government* can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment . . . then the analysis can stop there . . . ." *Id.* (emphasis added).[4]

Here, the parties do not dispute that nunchakus constitute a "bearable arm," *Heller*, 554 U.S. at 582. Thus, in keeping with the Second Circuit's reading of *Heller*, a presumption in favor of Second Amendment protection applies, and the government, *i.e.*, Nassau County, has the burden of producing evidence that nunchakus are *not* "in common use" or *not* "typically possessed by law-abiding citizens for lawful purposes." *See NYSRPA*, 804 F.3d at 257 n.73; Fed. R. Evid. 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption.").

[3] The Court interprets the panel's use of the term "dangerous" to be a proxy for not "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 624.

[4] The Second Circuit's recognition of a rebuttable presumption that the State bears the initial burden of rebutting is consistent with the approaches of the Third, Sixth, and Seventh Circuits. *See United States v. Marzzarella*, 614 F.3d 85, 99 (3rd Cir. 2010) ("[A] court presumes the law [violates the Second Amendment], and the government bears the burden of rebutting that presumption." (emphasis added)); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) ("If the Government demonstrates that the challenged statute 'regulates activity falling outside the scope of the Second Amendment right . . . then the analysis can stop there . . . . If the government cannot establish this . . . then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights.'" (emphasis added) (quoting *Ezell*)); *Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011). *See also Tyler v. Hillsdale Cnty. Sheriff's Dept.*, 837 F.3d 678, 686 (6th Cir. 2016) ("[U]nless the conduct at issue is categorically unprotected, the government bears the burden of justifying the constitutionality of the law under a heightened form of scrutiny." (emphasis added)).

B. There Is Insufficient Evidence For The Court To Issue A Declaratory Judgment

1. Defendant Has Failed To Meet Its Burden Of Production With Respect To Rebutting The Presumption In Favor Of Second Amendment Protection

The parties' failure to recognize and address *NYSRPA* has resulted in Defendant's failure to meet its burden of production to rebut the presumption that the Second Amendment applies. In other words, Defendant has defaulted by failing to present evidence that nunchakus are *not* "in common use" or *not* "typically possessed by law-abiding citizens for lawful purposes." Instead, Defendant has argued that *Plaintiff's* evidence is insufficient to meet *his* burden of establishing that nunchakus are "commonly used." Under *NYSPRA*, this is not enough. "Of course, as in all civil cases, the ultimate risk of non-persuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials," *Harris v. O'Hare*, 770 F.3d 224, 234 n.3 (2d Cir. 2014) (citations and internal quotation marks omitted). Here, however, because of the Second Amendment right at issue, Defendant must meet its initial burden of presenting evidence to rebut the presumption that the Second Amendment covers nunchakus. *See NYSPRA*, 804 F.3d at 257 n.73; Fed. R. Evid. 301.

Even assuming *arguendo* that the rules of evidence are abandoned and Defendant was allowed to utilize evidence submitted by Plaintiff, Defendant cannot succeed in rebutting the presumption. The evidence Plaintiff relied on, in his attempt to establish that nunchakus are commonly used for legal purposes, consists of manufacturing and sales data of nunchakus by Asian World of Martial Arts, Inc. ("AWMA")—a small closely held family-operated company—and a martial arts teacher's testimony estimating the number of martial arts studios that teach nunchakus. (*See* Dkt. No. 182, Tr. 355:5 (Testimony of AWMA's representative); Dkt. No. 181, Tr. 282:13–283:2 (Testimony of Chris Pellitteri).) The manufacturing and sales data introduced by Plaintiff

cannot be used by Defendant to demonstrate that nunchakus are *not* in common use because there is no evidence that AWMA's manufacturing and sales data reliably encompasses the majority of, let alone all of, the nunchakus used or possessed in the United States. In other words, there is no evidence that other nunchakus manufacturers or sellers do not exist. Thus, even if the manufacturing and sales statistics Plaintiff submitted could be considered "low," based on some specified standard, at most the Court can conclude that Plaintiff failed to show that they *are* in common use. Such data, however, does not support the finding that nunchakus are *not* in common use, as there could be other companies that manufacture and sell nunchakus.

2. Neither Party Has Addressed The Level Of Scrutiny To Be Applied

Neither party has provided the Court with any relevant evidence, nor made any argument, regarding the level of scrutiny that should be applied in determining whether the nunchakus ban, N.Y. Penal Law § 265.01, passes constitutional muster. *See NYSRPA*, 804 F.3d at 254 (noting that where challenged restriction implicates conduct within Second Amendment's scope, court "must determine and apply the appropriate level of scrutiny"). Given the likelihood that the Court will have to assume that N.Y. Penal Law § 265.01 falls within the scope of the Second Amendment,[5] the parties will be required to address the appropriate level of scrutiny in the supplemental briefing discussed below.

Notwithstanding Defendant's failure to properly defend its case, given the principles of equity, comity, and federalism, the Court declines to grant declaratory judgment in Plaintiff's favor based on the current record and without allowing Defendant an opportunity to supplement the

[5] *See NYSRPA*, 804 F.3d at 254 ("In the absence of clearer guidance from the Supreme Court or stronger evidence in the record . . . [we] assume for the sake of argument that these 'commonly used' weapons and magazines are also 'typically possessed by law-abiding citizens for lawful purposes.'").

record. The Court, therefore, directs the parties to supplement the record with additional briefing and evidence to address the issues and deficiencies identified in this Memorandum & Order. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) (noting that "district courts have the inherent authority to manage their dockets and courtrooms" and finding that a district court properly rescinded a discharge order to recall a jury); *id.* ("[T]he exercise of an inherent power must be a 'reasonable response to the problems and needs' confronting the court's fair administration of justice."); *see also Halper v. Browning, King & Co.*, 325 F.2d 644, 645 (D.C. Cir. 1963) (per curiam) (holding that the district court should open judgment and receive additional testimony where "the case was tried under misapprehension by the parties as to their respective burdens of proof").

By August 18, 2017, Defendant shall indicate, in writing, whether it intends to offer additional evidence to rebut the presumption in favor of Second Amendment protection. If Defendant indicates an intention to offer additional evidence, the Court will set a conference to discuss scheduling with respect to the discovery and presentation of any additional evidence. If the Defendant indicates that it does not so intend, it shall file, by September 22, 2017, a supplemental brief discussing the issues raised in this Memorandum & Order, including, but not limited to: (1) the application of *NYSRPA* to the instant Second Amendment challenge; (2) evidence that rebuts the presumption in favor of Second Amendment protection, *i.e*. evidence that nunchakus are either *not* "in common use" or *not* "typically possessed by law-abiding citizens for lawful purposes"; (3) the level of scrutiny applicable to this case; and (4) whether the nunchakus ban, N.Y. Penal Law § 265.01, survives constitutional muster, including all evidence supporting Defendant's position on this issue. By October 22, 2017, Plaintiff shall submit a brief in response.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: July 23, 2017
Brooklyn, New York

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
Albany Division

MATTHEW AVITABILE	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:16-cv-1447 (DNH/CFH)
	)	
LT. COL. GEORGE BEACH, in his Official capacity as Superintendent of the New York State Police	)	
	)	
Defendant.	)	
_____	)	

PLAINTIFF MATTHEW AVITABILE'S RESPONSE TO DEFENDANT LT. COL GEORGE BEACH'S STATEMENT OF MATERIAL FACTS

Plaintiff Matthew Avitabile, by and through his attorneys of record, submits his Response to Defendant Lt. Col. George Beach's Statement of Material Facts as follows:

The New York State Legislature's Ban on Tasers and Stun Guns

1. The Taser ban enacted in New York as a crime-fighting measure in 1976 because Tasers had been used in "holdups and robberies" within the State. Declaration of Michael G. McCartin, Exhibit 1, p. 4 (The Bill Jacket for Senate Bill 7151-A/Assembly Bill 9187-A).

Response: Admitted to the extent that the legislative history of the Taser ban uses the words "holdups and robberies" but given the sparse legislative history with no citation to actual cases, Plaintiff cannot admit that the ban on Tasers was a "crime-fighting measure" and therefore denies.

2. Also, at that time, New York State law enforcement and public officials determined that Tasers were hazardous if used against police officer and members of the general public. *Id*., Exhibit 1, pp. 7-8, 19-20.

Response: Admitted to the extent that the legislative history references that it would take "little imagination to realize that such weapon employed unsuspectingly on a police officer would not only leave the police officer at the mercy of the perpetrator but also would leave him vulnerable to the loss of his service weapon". Otherwise denied because the claim that a Taser would be "hazardous if used against … the general public" is not how the legislative history on the referenced pages demonstrate, but only a "menance (sic) to many, particularly those with heart conditions." See exhibit referenced by Defendant, Exhibit 1, pp. 7-8, 19-20.

3. The ban against stun guns was enacted in New York State in 1990 as another public-safety measure; it was supported by New York State law enforcement and public officials, at least in part, because stun guns were "show[ing] up" in "domestic disputes." *Id*., Exhibit 2, pp. 7, 10-11 (the Bill Jacket for Senate 5301/Assembly 5398-A).

Response: Admitted that the legislative history states as quoted, however, Plaintiff notes that on p. 7 of that same exhibit, the justification for the ban is that a "county worker shocked two fellow female co-workers with an electrical stun gun." Admitted that New York State law enforcement and some public officials supported banning stun guns.

Plaintiff Matthew Avitabile

4. Plaintiff Matthew Avitabile owns three (3) bolt-action rifles and a .12 gauge, pump-action shotgun. Avitabile Depo., pp. 13-14.

Response: Admitted.

5. When asked if he would ever use one of these firearms to defend his home, plaintiff testified, "… if the situation ever occurred that I felt it necessary, I would do so in compliance with state law." *Id*., p. 15.

Response: Admitted.

6. Plaintiff further testified that he would also like to purchase a Taser, but the purchase of a stun gun was still, "depending on how things shake out, … on the table." *Id*., p.19.

Response: Admitted.

7. Plaintiff further testified: "… [I]f I could place any additional barriers between myself and using lethal force, I think it would – it would make me more comfortable." *Id*., p. 20.

Response: Admitted.

8. Plaintiff does not own any pepper spray, nor has he given the purchase of it any serious consideration, as plaintiff testified:

Q: Do you presently own any type of what I'll generally refer to as pepper spray?

A: No.

Q: And why is that?

A: I don't know where I would purchase it, for starters. And beyond that, it hasn't come to mind very much.

Q: Well you have a desire to have a form of non-lethal self defense in your home. Would you agree that pepper spray is a form of non-lethal self defense?

A: I would say that it is a form of non-lethal self-defense, yes.

***

Q: But to date, you haven't even basically researched where you could purchase pepper spray?

A: I've given it no serious consideration.

Id., pp. 25-26.

Response: Admitted that the testimony states that, but Defendant leaves out a portion of the testimony that pepper spray in New York is "diluted. It's not as powerful as, let's say, something I might be able to buy over the state border… And something that is less effective, while New York State Law also bars me from getting something that I might consider a better fit for my home, makes it less likely that I would purchase it." *Id*.

9. Plaintiff was well aware of less lethal forms of ammunition like "rubber bullets" and "also different shotgun ammunition that includes almost like beanbags," which plaintiff described as being used to "more disperse[] a crowd or push[] someone back rather than potentially kill[] them." *Id*., p. 27.

Response: Admitted that plaintiff was "aware" as he testified he had "heard of them" but denies that he was "well aware" of less lethal forms of ammunition.

10. During his deposition, plaintiff was shown two short videos that depicted law-enforcement officials demonstrating less lethal forms of ammunition, more particularly beanbag rounds being shot out of a shotgun. *Id*., p. 29-30, Exhibit B.

Response: Admitted.

11. After reviewing those videos, the plaintiff testified as follows:

Q: Okay. I just have a few questions for you to follow up on those videos. It seems to me that you have a – a goal in mind in this – in defending your home. One is to minimize the likelihood that you would use deadly force if someone were to break into your home,

for instance. Would you agree with me that the forms of non – or less lethal ammunition that you've seen in the videos there would be one alternative means of achieving that goal?

A: Based upon what I saw, I think that it – in certain circumstances, it could be.

Id., p. 30.

Response: Admitted.

12. Later, the plaintiff testified with regard to those videos:

Q: So would you agree that beanbag rounds like you've seen on the videos today in Exhibit B, and different forms of non-lethal ammunition, are alternatives to lethal forms of ammunition that you presently own?

A: It could be under different circumstances.

Id., 32.

Response: Admitted.

13. Plaintiff also admitted that non-lethal ammunition is permitted in New York State and that he would certainly consider using it even though it is possible that a beanbag round shot from a .12 gauge shotgun could still be lethal. *Id*. pp. 34, 40.

Response: Objection to the extent that Plaintiff is not a lawyer and admitted that Plaintiff stated on p. 33 of the deposition that "…. One on the last page state[d], cannot ship to New York. That obviously would be a consideration." Admitted that Plaintiff agreed that "there are forms of non-lethal ammunition that are permitted in New York." *Id*., p. 34. Also admitted Plaintiff would consider using non-lethal ammunition despite the warning "that less lethal ammunition can still be lethal." *Id*., p. 40.

Axon Enterprises, Inc.

14. Axon Enterprises, Inc. is the name of the company that manufacturers Tasers, only 300,000 of which have been sold to civilians in the United States. Brave Decl., p. 2, ¶ 3.

Response: Denied as stated. Brave's Declaration states that Axon (formerly TASER International, Inc.) "has sold over 300,000 civilian version Conducted Electrical Weapons (CEWs) to civilians." Brave Decl., p. 2, ¶ 3. Admitted as to being sold to civilians in the United States.

15. On Axon's Form 10-K filed with the United States Securities and Exchange Commission, which was signed on March 1, 2018 by plaintiff's expert, Mark W. Kroll (among others), Axon states the following: "Our CEW [Taser Conducted Electrical Weapons] products are often used in aggressive confrontations that may result in serious, permanent bodily injury or death to those involved. Our CEW products may be associated with these injuries." Avitabile Deposition, Exhibit E, p. 2.

Response: Admitted that Axon's Form 10-K states what it states.

16. Plaintiff was asked about this in his deposition:

Q: Okay. So having read that, do you understand that the manufacturer of Tasers has basically stated that Tasers can lead to permanent bodily injury or death on occasion?

A: Yes, that there is a potential that that could occur.

***

Q: Well, a home invasion would be an aggressive confrontation. Would you agree?

A: Yes.

Q: So it is possible, based on Taser's own manufacturer warning, that could lead to death if you were to ever defend your home with a Taser? Would you agree with that statement?

A: To the best of my knowledge regarding their statement, yes.

Id., pp. 44-47.

Response: Admitted as to the testimony of Plaintiff.

17. Indeed, Axon's Taser warning state as much: "Can cause death or serious injury."; [A]ny use of force, including the use of a CEW, involves risks that a person may get hurt or die due to the effects of the CEW, physical incapacitation, physical exertion, unforeseen circumstances, or individual susceptibilities."; "In some individuals, the risk of death or serious injury may increase with cumulative CEW exposure." *Id*., Exhibit F, p. 1; *see also* McCartin Decl., Exhibit 4, p. 1 (same warning related to civilian use of Tasers).

Response: Admitted that Axon's Taser warning states what it states.

New York State Trooper Philip Shappy

18. New York State Trooper Philip Shappy has been a Trooper with the New York State Police since 2002, and he is the Defendant's expert. Affidavit of Trooper Philip Shappy, ¶ 1.

Response: Admitted.

19. Since 2012, Trooper Shappy has been assigned in a full-time capacity to the State Police Academy in Albany where he is a Senior Defensive Tactics instructor involved in the daily training operations that take place at the Academy. *Id*., ¶ 2.

Response: Admitted.

20. Trooper Shappy's duties include training new State Police recruits and current State Police members in use of force and defensive tactics. *Id*.

Response: Admitted.

21. Trooper Shappy asserts that, in his professional expert opinion, based upon his many years of experience, Tasers are best used as strictly a "law enforcement tool" by trained officers in order

to "deescalate a precarious situation for purposes of controlling and gaining compliance of actively resistant and violent subjects. A Taser is only an intermediate and temporary solution, which if used inappropriately could have grave and deadly consequences." *Id*., ¶ 18.

Response: Admitted that this is the opinion of Trooper Shappy. Denied as to Trooper Shappy's opinion that they are "best used strictly as a 'law enforcement tool'…" because electric arms are "widely owned and accepted as a legitimate means of self-defense across the country." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (J. Alito, concurring). Admitted that Taser's are effective at deescalating a precarious situation.

22. Trooper Shappy further asserts that for "civilian self-defense purposes, Oleoresin Capcisum (OC) spray," which is usually referred to as pepper spray, "is an easier to use and more effective alternative to a Taser. While use of a Taser requires robust training and understanding of the inherent safety considerations and operational limitation, the dispersal of OC spray requires little, if any, training and experience." *Id*., ¶ 19.

Response: Admitted that this is Trooper Shappy's opinion, but denied as to the conclusion that OC spray "is an easier to use and more effective alternative to a Taser" because Trooper Shappy testified he always received blowback from his OC deployment (*See* Deposition of Shappy, Exhibit "2" to Plaintiff's Motion for Summary Judgment, 18:6-11) and OC for civilians in New York is limited in strength, whereas Trooper Shappy can carry 10% OC with a size volume of 1.8 ounces. *Id*. at 16:14-21. *See also* N.Y. Penal Law §265.20(a)(14), (15) N.Y. Comp. Codes R. & Regs. Tit. 10 § 54.1–54.3. Even so, Trooper Shappy does not carry his

OC off-duty. *Id*. at 76:9-10. Instead, he sometimes carries his firearm. *Id*. at 76:19-22.

23. Further, Trooper Shappy asserts, "OC spray has a wide area of impact when dispersed, thereby alleviating the need for precision accuracy that is required for deployment of a Taser." *Id*., ¶ 20.

Response: Admitted that OC spray has a wide area of impact when dispersed. This is why Trooper Shappy testified he received blowback from using his OC spray. *See* Deposition of Shappy, Exhibit "2" to Plaintiff's Motion for Summary Judgment, 18:6-11.

24. Also, Trooper Shappy asserts that "OC spray does not require direct impact on a subject, nor is the user's accuracy severely impacted by the target's mobility." *Id*.

Response: Admitted this position was assert by Trooper Shappy but Plaintiff denies this assertion as too broad and overgeneralized. For instance, Trooper Shappy testified that there are different OC sprays than what he carries: foam, gel and stream. *See* Deposition of Shappy, Exhibit "2" to Plaintiff's Motion for Summary Judgment, 61:9-10. Some are non-aerosol and he testified that the "gel… sticks to the target that it hits." *Id*. at 61:17-19.

25. Additionally, Trooper Shappy asserts that:

OC spray has a longer lasting impact with greater temporary incapacitation, with only minimal risk of injuries or death. OC spray significantly impacts a subject's senses and abilities to fight back or resist, with the effects generally lasting for up to 45 minutes after exposure, if not longer depending on the extent of the exposure and the susceptibility of

the subject. On the other hand, a Taser's utility ceases once the Taser runs through its full cycle and/or detaches from the subject's body.

Id., at ¶ 21.

Response: Admitted that OC spray has a long lasting impact and that the effects can last up to 45 minutes after exposure. Plaintiff denies that a Taser's utility ceases after it runs a "full cycle and/or detaches from the subject's body" as a Taser can be utilized in drive-stun mode. Trooper Shappy even states in his affidavit that drive-stun "is intended to cause only localized pain to achieve compliance by the subject" See ¶ 14 of Trooper Shappy's Affidavit [Docket No. 58-12].

Dated: September 17, 2018.

Respectfully submitted,

/s/ Stephen D. Stamboulieh
Stephen D. Stamboulieh
Stamboulieh Law, PLLC
P.O. Box 4008
Madison, MS 39130
(601) 852-3440
stephen@sdslaw.us
MS Bar No. 102784
NDNY Bar Roll# 520383

Alan Alexander Beck
Law Office of Alan Beck
4780 Governor Drive
San Diego, CA 92122
(619) 905-9105
Alan.alexander.beck@gmail.com
*Admitted pro hac vice

Certificate of Service

I, Stephen D. Stamboulieh, hereby certify that I have caused to be filed a true and correct copy of the foregoing document or pleading via the Court's CM/ECF system which sent a notice and copy of the foregoing to all counsel of record.

Dated: September 17, 2018

/s/ *Stephen D. Stamboulieh*
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
Albany Division

MATTHEW AVITABILE Plaintiff, v. LT. COL. GEORGE BEACH, in his Official capacity as Superintendent of the New York State Police Defendant.	) Civil Action No. 1:16-cv-1447 (DNH/CFH)

PLAINTIFF'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

/s Stephen D. Stamboulieh
Stamboulieh Law, PLLC
P.O. Box 4008
Madison, MS 39130
(601) 852-3440
stephen@sdslaw.us
MS Bar No. 102784
NDNY Bar Roll# 520383
Counsel for Plaintiff, Matthew Avitabile

Alan Alexander Beck
Law Office of Alan Beck
4780 Governor Drive
San Diego, CA 92122
(619) 905-9105
Alan.alexander.beck@gmail.com
*Admitted pro hac vice

Dated: September 17, 2018

TABLE OF CONTENTS

Page

The Defendant, Superintendent George P. Beach, II, as the Superintendent of the New York State Police, responded to Plaintiff's motion for summary judgment and filed his cross-motion for summary judgment. The Defendant essentially raised two points. The first point is that the Plaintiff does not have a Second Amendment right to possess a Taser because Taser's are not in "common use" in the United States. Defendant's second point is that even if this Court assumed stun guns (and Tasers) are in "common use", Plaintiff has "adequate alternatives" (including rifles, handguns and shotguns) and pepper spray. For the foregoing reasons, Defendant's positions are misguided, contrary to Supreme Court and this Circuit's precedent, and does not demonstrate that New York has justified its burden in banning electric arms.

The Defendant's position is foreclosed by Circuit precedent and conflicts with several other courts. In doing so, the Defendant has failed to address most of the authority raised by Plaintiff including the only two Courts to deal with the merits of the question presented to the Court. Further, the Defendant has failed to present any evidence that maintaining a ban on electric arms will enhance public safety. For the reasons stated below and in Plaintiff's motion for summary judgment, this Court should deny the Defendant's motion for summary judgement and grant Plaintiff motion and enjoin the State of New York's ban on both stun guns and electric dart guns.

I. Electric Arms are a Class of Arms

Here, the Defendant sidesteps a preliminary question: what is a class? The Defendant appears to assume without argument that stun guns and Tasers are two separate classes of arms. The handgun at issue in *District of Columbia v. Heller*, 554 U.S. 570 (2008), was a High Standard 9-shot revolver in .22 with a 9.5" Buntline-style barrel. The Court did not analyze whether this brand of handgun is in common use. Nor did it analyze whether revolvers are in common use. Rather it broadly found handguns are a "class" of arms despite their being differences between

various types of handguns in both form and function. And further, the handgun as a class receives Second Amendment protection because handguns are in common use for lawful purposes.

Similarly, electric arms are also a class of arms. While there are functional differences between an electronic dart gun and a stun gun, these differences do not make them more dissimilar than a revolver and a semi-automatic handgun. And both types of handguns (revolvers and semi-automatic handguns) are included in the class of handguns. An electronic dart gun and a stun gun both have the same basic function which is to utilize an electronic charge to incapacitate an attacker. Furthermore, a Taser can be used in both "electronic dart gun" mode and "drive-stun" mode. A Taser in "drive-stun" mode is functionally identical to a stun gun.[1] As such, both are included in the same class of arms: electric arms. The Defendant makes no argument as to why they should be separated into distinct sub-classes and thus, this Court should apply the combined number of 300,000 Tasers and 4,478,330 stun guns (totaling 4,778,330) to find that these arms, as a part of the same class, are protected by the Second Amendment.

Even if this Court were to find that electronic dart guns and electronic stun guns operate as two independent classes of arms, this Court should find both are in common use. Tasers are only a brand of electronic dart guns and the State has presented no evidence that electronic dart guns as a class are not in common use. In addition, as stated previously, a Taser in drive-stun mode is functionally an "ordinary stun gun." As argued in Plaintiff's motion for summary judgment per Circuit precedent, the burden is on the Defendant to demonstrate that electric dart guns are not in common use. The State appears to concede that stun guns are in common use, so Plaintiff will not belabor this point and will instead focus on electronic dart guns.

[1] See Affidavit of Trooper Shappy [Docket No. 58-12], ¶ 14. "In drive-stun mode, a Taser operates similar to an ordinary stun gun…"

The Defendant cites to *Maloney v. Singas*, 106 F. Supp. 3d 300, 310 (E.D.N.Y. 2015) which was an order denying summary judgement to both parties to support its contention that Tasers are not in common use. However, it ignores the fact two years later the Maloney Court ruled in *Maloney v. Singas*, No. 03-CV-786 (PKC) (AYS), (E.D.N.Y. Jul. 23, 2017) (unpublished) (attached as Exhibit "A") in deciding a trial in that case:

> … because of the Second Amendment right at issue, Defendant must meet its initial burden of presenting evidence to rebut the presumption that the Second Amendment covers nunchakus. *See NYSPRA*, 804 F.3d at 257 n.73; Fed. R. Evid. 301.
>
> Even assuming arguendo that the rules of evidence are abandoned and Defendant was allowed to utilize evidence submitted by Plaintiff, Defendant cannot succeed in rebutting the presumption. The evidence Plaintiff relied on, in his attempt to establish that nunchakus are commonly used for legal purposes, consists of manufacturing and sales data of nunchakus by Asian World of Martial Arts, Inc. ("AWMA")—a small closely held family-operated company—and a martial arts teacher's testimony estimating the number of martial arts studios that teach nunchakus. (See Dkt. No. 182, Tr. 355:5 (Testimony of AWMA's representative); Dkt. No. 181, Tr. 282:13– 283:2 (Testimony of Chris Pellitteri).) The manufacturing and sales data introduced by Plaintiff cannot be used by Defendant to demonstrate that nunchakus are not in common use because there is no evidence that AWMA's manufacturing and sales data reliably encompasses the majority of, let alone all of, the nunchakus used or possessed in the United States. In other words, there is no evidence that other nunchakus manufacturers or sellers do not exist. *Id*. at *5-6.

Here, Defendant cannot rely on the manufacturing and sales data submitted by Plaintiff to argue that electronic dart guns are not in common use for the same reasons held by Judge Chen in *Maloney*. The burden is on the Defendant to produce evidence which would rebut the presumption that the Second Amendment applies to an electronic dart gun. While Taser is a popular brand of electronic dart gun, there are other companies that produce electronic dart guns. PhaZZer

Electronics appears to be Taser's leading U.S. competitor. There are also other companies around the world that appear to ship their electronic dart guns to the U.S. [2]

As Judge Chen stated in *Maloney*, the burden is on the Defendant to put forth his own evidence to prove that electronic dart guns are not in common use. Defendant attempts to use the United States' "325,000,000 civilian population" as a backdrop for his calculation that "only about 0.09%" of the civilian population owns a Taser. See Defendant's Motion, p. 13. This is inaccurate because Defendant has failed to take into account that New York, Rhode Island and Hawaii all ban electric arms; both stun guns and Tasers. Further, New Jersey, Washington, D.C. and a host of other counties/municipalities have only just recently rescinded their respective electric arms bans. But in attempt to provide a better statistical inquiry, Plaintiff would show as follows using data that is judicially noticeable found at the United States Census webpage: https://www2.census.gov/programs-surveys/popest/tables/2010-2017/state/totals/nst-est2017-01.xlsx (State Population Totals and Components of Change: 2010-2017).

In 2017, New York is shown to have approximately 19,849,339 citizens who are banned from owning or possessing electric arms. Rhode Island shows approximately 1,059,639 citizens who are banned from owning or possessing electric arms. Hawaii shows approximately 1,427,538 citizens that are banned from owning or possessing electric arms. Combining these numbers totals

[2] A review of google using the search term "shooting stun guns" and "dart firing stun guns" demonstrates that there are many more companies that sell electronic dart guns. Listed below is not a comprehensive list, but instead a few electronic dart guns sold by other companies. E.g. the PhaZZer® Dragon Shooting Stun Gun Black 80Khttps://www.thehomesecuritysuperstore.com/self-defense-stun-guns-low-voltage-stun-guns-phazzer-dragon-shooting-stun-gun-855700001-dblk-p=3964 https://www.thehomesecuritysuperstore.com/self-defense-stun-guns-shooting-stun-guns-sub=252 The SYRD-5M https://bailongan.en.made-in-china.com/product/GBRxpgSjgNcm/China-High-Quality-Shooting-Self-Defence-Taser-Stun-Guns-SYRD-5M-.html ; The Red Devil http://www.russianstungun.com/item/Taser-Stun-Gun-PDG-S5-RED-DEVIL; https://bntonline.co.za/shop/shoot-out-taser/

approximately 22.3 million citizens who should be excluded from Defendant's calculations and further, Defendant's calculation should include the total number of electric arms. In doing so, the Defendant's calculation would materially change as follows. Utilizing a total population of 302,663,484 and the bare minimum of electric arms Plaintiff has proven to be in use in the United States, approximately 1.47% utilize electric arms in the United States. While handguns may far outnumber the percentage of electric arms in circulation, the fact, as Justice Alito, with whom Justice Thomas joined, stated, "[w]hile less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1032-33 (2016) (Alito, J. Concurring). Further, both current Justices agreed that "people may have reservations about using deadly force, whether for moral, religious, or emotional reasons…" and were "not prepared to say that a State may force an individual to choose between exercising that right and following her conscience, at least where both can be accommodated by a weapon already in widespread use across the Nation." *Id.*at 1033.

But even if the Court were to assume that there are only three-hundred thousand electronic dart guns in private hands, they are in still common use. Even though Defendant states that "there is no court in the United States that has ever found that a weapon is 'in common use' based upon the fact that there are 300,000 of them found in the Nation", this assertion is incorrect. See Defendant's Motion, p. 13.[3] In fact, this is the position taken by the only two Courts to grapple with this issue despite being presented with a smaller number of arms. Strangely, the Defendant

[3] In a strange footnote, Defendant cites to Judge Kavanaugh's confirmation hearing testimony where the Judge answered a question posed by Senator Dianne Feinstein about semi-automatic rifles. It is curious that Defendant states that *Caetano* can be largely cast aside yet somehow believes that confirmation hearings of a potential Supreme Court Justice should be given more weight than two sitting United States Supreme Court Justices' concurrence…

does not cite to either of these cases despite Plaintiff citing to them in his principle brief. In *People v. Yanna*, 824 N.W.2d 241 (Mich. Ct. App. 2012) the Court held:

> [t]he prosecution also argues that tasers and stun guns "unusual" or rare weapons. However, they are legal in forty-three states, and in Michigan are routinely used by law enforcement officers. They have been in use for several decades. Though far less prevalent than handguns, we do not think that stun guns or tasers may be fairly labeled as unusual weapons. *Id.*

This was followed by *Ramirez v. Commonwealth* No. SJC-12340, 2018 Mass. LEXIS 237 (Apr. 17, 2018) which struck Massachusetts' ban on Tasers and stun guns. The Defendant does cite to *Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016) for the proposition that electric arms are not in common use. However, the Defendant ignores the relevant portion of *Hollis* which expressly distinguishes *Caetano*:

> [m]ore recently, two Supreme Court justices observed that the "relevant statistic" involves the counting of jurisdictions. In addressing whether stun guns are in common use, Justice Alito, joined by Justice Thomas, implied that the number of states that allow or bar a particular weapon is important: [T]he number of Tasers and stun guns is dwarfed by the number of firearms. This observation may be true, but it is beside the point. . . . The more relevant statistic is that [200,000] . . . stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States. . . . While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country. *Caetano*, 136 S. Ct. at 1032–33 (citations and quotation marks omitted). These two justices suggested that the 200,000 absolute number, plus that 45 states have "accepted [stun guns] as a legitimate means of self-defense," …. For purposes of the present case, we conclude it does not matter which set of numbers we adopt. None of them allow a conclusion that a machinegun is a usual weapon.

Hollis' application of *Ceatano* would be even stronger now, as the jurisdictions banning electric arms are even further reduced after litigation (New Jersey, the District of Columbia and a variety of municipalities/cities have had their bans overturned since *Caetano*, and only Rhode Island, Hawaii and New York ban electric arms). Further, *Caetano* was limited in number to 200,000 stun guns and the numbers Plaintiff demonstrates establishes the minimum number of electric arms in civilian hands in the United States at almost 4.8 million. Thus, this Court should

follow the lead of the cited courts and find that both stun guns and electronic dart guns are protected by the Second Amendment. If so, under any level of scrutiny this Court should rule in Plaintiff's favor because the Defendant has not presented evidence that banning electric arms enhances public safety.

II. The Defendant Failed to Present Evidence that Electric Arms are not "Typically Possessed by Law-Abiding Citizens for Lawful Purposes"

The Defendant appears to conflate two different prongs of the *N.Y. State Rifle & Pistol Ass'n v. Cuomo* analysis. The Second Circuit held that "[t]he Second Amendment protects only 'the sorts of weapons' that are (1) 'in common use' and (2) 'typically possessed by law-abiding citizens for lawful purposes.'" *N.Y. State Rifle*, 804 F.3d at 254-255 (emphasis added). As shown above, the common use prong is at least in part a numerical analysis. That is not the case as to the second prong. It appears that once a bearable arm is deemed to be in common use, the burden again shifts to the Defendant to show an arms typical use is for unlawful purposes. *Id*. at 257 n.73. The Defendant has made no argument that of those electric arms that are owned, that their typical use is for anything other than lawful purposes. Thus, this Court must find that electric arms survive this portion of the Second Circuit's test.

III. The Laws at Issue are not Long Standing

In *District of Columbia v. Heller*, 554 U.S. 570 the Supreme Court made clear, "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions" *Id. at 626-27*; *see also McDonald, 561 U.S. at 786*. The electric arm laws challenged are not long standing. The laws were put in place in 1976 and 1990 respectively. *See* State Memorandum of Law in Support of Summary Judgement at 1. This cannot qualify to be longstanding because the law successfully challenged in *Heller* was the Firearms Control Regulations Act of 1975 which was enacted by the District of Columbia city council on September 24, 1976. *See McIntosh v. Washington*, 395 A. 2d 744, 746

(D.C. 1978)(Unsuccessful equal protection to the same law at issue in *Heller*). Laws signed the same year or later than the one at issue cannot qualify to be longstanding.

Further, in a recent Fifth Circuit Court of Appeals case, *Mance v. Sessions*, 896 F.3d 699 (5th Cir. 2018), the Fifth Circuit assumed without deciding that a law enacted in 1968 was not a "longstanding regulatory measure" and "not presumptively lawful regulatory measure[]." *Id*. at 704. Plaintiff addresses this because Defendant made a passing remark that there is a "four-decade ban against Tasers, as well as an almost three-decade ban against stun guns…" See Defendant's Cross-Motion, pp. 1-2. Defendant states that *Caetano* is of "*zero assistance*" (emphasis in original) and this Court can "largely lay *Caetano* aside", but this is incorrect. *Id*. at p.2. The Defendant is only correct in that the Supreme Court did not state that stun guns were protected by the Second Amendment in *Caetano*. However, it seems to strain credulity that the Supreme Court would go through all the trouble of granting *certiorari*, writing a unanimous per curiam opinion, and then remanding it back down to the lower court if stun guns were not protected by the Second Amendment. As such, while *Caetano* did not explicitly hold stun guns protected by the Second Amendment, it at least inferred constitutional protection and for that reason is not of "zero assistance" to this Court.

IV. <u>There is no Legitimate Adequate Alternative</u>

Defendant points to what he believes would be adequate alternatives to an electric arm. See Defendant's Motion, p. 15. Plaintiff has disposed with the argument regarding pepper spray as briefed in Plaintiff's Motion for Summary Judgment and Plaintiff incorporates his arguments and authorities responding to Defendant's argument in his brief regarding pepper spray. To put it simply, it is a watered-down version of what is available in other states and is inadequate.

But Defendant points to other alternatives. For instance, Defendant believes that "handguns, rifles and shotguns" are adequate alternatives and they can be loaded with "less lethal" ammunition if Plaintiff so desires. *Id*. Defendant's "evidence" of the less lethal ammunition was provided by way of two videos showing law enforcement shooting bean bag rounds and a bean bag sock round fired out of a twelve-gauge shotgun. First, a deadly weapon (shotgun, rifle, handgun) is not a serious adequate alternative to a less-than-lethal or non-lethal electric arm. This is because, as Trooper Shappy testified, if you point a handgun at a person, it would be considered deadly force. *See* Deposition of Trooper Shappy, Docket 52-4, 70:8-13. That then must also be true for a shotgun and a rifle. So, we are left with the proposition that Plaintiff's shotgun, even if loaded with a bean bag round, will still constitute deadly force.

It is true, as depicted in the videos Defendant placed into evidence, that law enforcement use bean bag rounds fired through dedicated firearms which are only used for non-lethal round purposes.[4] It also looks apparent that the bean bag rounds identified and fired in the video labeled "Toronto Police Chief Mark Saunders Demonstrates New Sock Gun" require hearing protection and eye protection when being fired. This makes sense because it is ammunition which uses an explosive to expel the projectile which would be expected to make some amount of noise. In order to demonstrate that ear and eye protection is used, Plaintiff has taken a screenshot directly from the video:

[4] The reason for the color variation is so that law enforcement officers do not mistakenly grab "lethal" firearms when reaching for "less lethal" loads, or mistakenly load "lethal" rounds into a specially colored shotgun, as happened in *William Kyle Monroe v. City of Portland, et al*, In the United States District Court for the District of Oregon, Civil Action No. 3:13-cv-00625-HA. In that case, Officer Dane Reister mistakenly loaded "lethal" rounds in his specially marked bean bag shotgun and shot the plaintiff.

Notice that the firearm being utilized is orange and that the law enforcement officer firing the weapon is wearing hearing protection. In Defendant's exhibit attached to his Cross-Motion as Document 58-6 which lists various "12 Gauge Less Lethal", the warning on the front states that: "ALL LESS LETHAL AMMO HAS THE POTENTIAL TO BE FATAL. NEVER USE LESS LETHAL AMMO AS A JOKE OR A PRANK. EVEN A BLANK HAS THE ABILITY TO HARM OR KILL." The listing claims that some of the rounds cannot be shipped into New York. But these are not legitimate adequate alternatives to a Taser or a stun gun.

For instance, the first listing on that same document, the Beehive, states that it has "38 6mm .12g balls come together to give you the power to protect yourself without the worry of imminent death…" It looks very similar to buckshot and being fired out of a regular shotgun, one would assume that the pellets would spread accordingly. Compare this with the case cited by Defendant on p. 17 of his Brief, *People v. MacCary*, 173 A.D.2d 646 (2d Dep't 1991), for the proposition that a stun gun is a dangerous instrument. In that case, while there does not appear to include an allegation that the defendant used a stun gun on the person's eye, the court held that a

stun gun, if "applied to the eye, [would cause] loss or impairment of the functioning of the eye." Certainly, if one was shot with a bean bag round or a Beehive round to the eye, it would cause "loss or impairment of the functioning of the eye" as well.

Further, a shotgun or rifle, even loaded with a less-lethal round, is not as portable, maneuverable or concealable as a Taser or a stun gun. The Plaintiff testified that a Taser would be an effective tool to defend his home because "portability plays a large factor … even within one (sic) home – one's home, how much portability has to do with keeping yourself and … any potential family members safe." *See* Docket 52-3, Deposition of Matthew Avitabile, 18:15-22. As such, a shotgun with a bean bag round or plastic/rubber pellets is not an adequate alternative for Plaintiff.

And while this is not a handgun case, Defendant alleges in his brief that Plaintiff has an adequate alternative in a handgun. First, Plaintiff does not own a handgun and has never owned a handgun. *Id*. at 13:2-6. Plaintiff does not have a pistol permit which is required under New York law for him merely to possess a handgun in his home. Plaintiff testified that New York State "has made it, relative to the other states, onerous for an average person, law abiding individual, to purchase one, compared to the large majority of the states in the union." *Id*. at 35:9-14. As a matter of state law, New York forbids its residents to possess handguns in their homes without a license. N.Y. Penal Law §265.01. To exercise this core Second Amendment right, residents must apply for a license "to the licensing officer in the city or county … where [he or she] resides." *Id.* Further, Schoharie County, New York requires two applications, a residence in Schoharie County, be at least 21 years of age, and among other things, four character references who are residents of

Schoharie which cannot be the applicants relatives, related to each other or employees of any law enforcement agency -- just to apply for a pistol license.[5]

This application is simply to have a handgun in your residence. One would think that post-*Heller* and *McDonald*, this would not be necessary to exercise an enumerated right, yet this is what average citizens must do in order to merely possess a handgun within the confines of his or her own home in New York. In any event, Plaintiff does not have this permit and has no handgun, so this is not an adequate alternative. Further, Plaintiff would face the same safety issues if he were to mis-load lethal handgun ammunition into his handgun meant for non-lethal usage. Or, perhaps Plaintiff would be required to keep two handguns when he does not even have one: one to load non- or less-than-lethal ammunition and another to keep regular or "lethal" ammunition loaded. Both of those scenarios are inadequate and not an adequate alternative to having a Taser or a stun gun readily available to him.

V. The Defendant has not Produced Evidence Needed to Survive Heightened Scrutiny

As a preliminary matter, the Defendant has failed to respond to Plaintiff's argument that per Second Circuit precedent this Court should apply strict scrutiny. Plaintiff maintains that this is the correct level of scrutiny to apply. Further, the Defendant has made no argument defending the electric arms ban under strict scrutiny. Thus, if strict scrutiny applies the ban must be declared unconstitutional.

But even if intermediate scrutiny applies, the Defendant has not effectively defended the ban. Applying intermediate scrutiny, as the Second Circuit cautioned, "on intermediate scrutiny review, the state cannot 'get away with shoddy data or reasoning.' To survive intermediate scrutiny, the defendants must show 'reasonable inferences based on substantial evidence' that the

[5] http://www.schohariecounty-ny.gov/CountyWebSite/Sheriff/pistolpermits.html

statutes are substantially related to the governmental interest." *NYSR&PA*, 804 F.3d at 264 (citations omitted) (striking down New York State's 7-round magazine load limit).

The Defendant has not done that. The Defendant argues that New York has an interest in promoting public safety. There is no dispute there. Then it argues that electric arms can potentially be misused. Again, there is no dispute because as common sense would dictate, any item or tool has the potential to be misused in the wrong hands. But, where the argument fails to connect is that based on such a flimsy analysis, New York concludes that it can justify a complete prohibition on electric arm ownership because this might enhance public safety.

The Ninth Circuit has already rejected such cursory analysis in *Young v. Hawaii*, No. 12-17808, 2018 U.S. App. LEXIS 20525 (9th Cir. July 24, 2018). In *Young*, the Court first explained that:

> "Although we do 'accord substantial deference to the predictive judgments' of the legislature" when conducting intermediate scrutiny, "the [State] is not thereby 'insulated from meaningful judicial review.'" *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1259 (D.C. Cir. 2011) (quoting *Turner II*, 520 U.S. at 195 & *Turner I*, 512 U.S. at 666). Quite the contrary, a court must determine whether the legislature has "base[d] its conclusions upon substantial evidence." *Turner II*, 520 U.S. at 196. Indeed, despite the deference owed, the State bears the burden "affirmatively [to] establish the reasonable fit we require." S*ee Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). *Id* at * 56.

Based on this standard, it later went on to explain that the evidence offered by the County and State of Hawaii to defend its ban on handgun carry was insufficient:

> [m]ere citation is an inadequate application of intermediate scrutiny, even according deference to the predictive judgment of a legislature, and *Turner Broadcasting* itself shows why. There, the Supreme Court extensively analyzed over the course of twenty pages the empirical evidence cited by the government, and only then concluded that the government's "policy [was] grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." *See Turner II*, 520 U.S. at 196–224. *Id* at * 57.

Here, the Defendant has failed to justify its position with evidence that banning electric arms will enhance public safety. The State of New York has been made aware of the need for

evidence by the Second Circuit in *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) ("New York has failed to present evidence that the mere existence of this load limit will convince any would-be malefactors to load magazines capable of holding ten rounds with only the permissible seven.")[footnote omitted]. *Id*. at 264.

To be fair, Defendant did provide the Court with evidence of the legislative record when the bills were enacted with the electronic dart gun ban being enacted in 1976 and the stun gun ban enacted in 1990. In 1976, Taser's were actually considered firearms by the federal government because it used an explosive charge to fire the barbs from the Taser itself which classified it as a firearm under the Gun Control Act of 1968.[6] Beginning in the early 1990's, Taser removed the explosive charge and replaced it with compressed nitrogen and thus are no longer regulated as firearms. Defendant's legislative history provides that New York originally wanted to ban the electronic dart gun, naming Taser as the "most popular" device being manufactured, because "it has already been used in holdups and robberies, and it is apparent that its use must be controlled." See Docket 58-2, p.4. The "pertinent considerations" provided further that "the penal law must be amended to specifically outlaw their unregulated use." *Id*. at p. 5. Then the proposed regulation becomes a total ban on possession. *Id*. at p. 7. Then the New York State Police argued that the electronic dart guns may be used on them and "would leave him [or her] vulnerable to the loss of his [or her] service weapon." *Id*. at p. 8.

Interestingly, Taser Systems, Incorporated, the manufacturer of Tasers at that time, commented after the Senate Bill was passed, that argument made in support of the ban was incorrect and that Tasers are "meaningfully less dangerous than any other self-defense weapon heretofore created." *Id*. at 15. Besides Taser Systems, Incorporated, the Association of the Bar of

[6] https://www.atf.gov/firearms/docs/ruling/1976-6-tasers-firearms/download

the City of New York on Criminal Courts Law and Procedure disapproved of the Bill because it made "the mere possession of an electronic dart gun, without criminal intent, a crime equivalent to the unlicensed possession of a firearm." *Id*. at 17. The Association also stated that: "[r]ecognizing the fact that large numbers of people in New York City possess illegal weapons, not with intent to commit crime but because of understandable fear, it would be at least a relative improvement if they would arm themselves with 'stun guns' as opposed to the firearms so many now possess." *Id*. Eventually, instead of merely controlling its use, New York moved to ban the devices completely.

As to stun guns, in 1988 the issue came up about the misuse of a stun gun and they were banned in 1990. *See* Docket No. 58-3, p. 10. Ironically, the reason for the rush to ban them is that an "Albany county worker shocked two girls with an electrical stun gun. Police arrested Mark L. Rooney at his office at the Albany County Real Property Tax Service in mid-afternoon after two female workers complained that Rooney had given them shocks and burns on their hips and buttocks." *Id*. Further, it states that the "stun gun delivers about 1200 volts of electricity, an amount which is painful, but not often too harmful." *Id*. So, we are left with the proposition that stun guns were made illegal in New York because a government official misused a stun gun. Twice. Again, this ban proscribed mere possession of the device, even possession without criminal intent.

Given the paucity of evidence to support the electric arms ban, it fails intermediate scrutiny because there is no showing that the banning of electric arms will promote public safety. Had New York regulated instead of banned these instruments, that would present a much different question. Instead, New York has a categorical ban on an entire class of arms despite *Heller*'s admonition "… that the enshrinement of constitutional rights necessarily takes certain policy

choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, 636, 128 S. Ct. 2783, 2822 (2008).

One simply has to return to *Caetano* for the proposition that electric arms are good tools for self-defense. Justice Alito's dissent recounts facts from Ms. Caetano's trial:

> After a "bad altercation" with an abusive boyfriend put her in the hospital, Jaime Caetano found herself homeless and "in fear for [her] life." Tr. 31, 38 (July 10, 2013). She obtained multiple restraining orders against her abuser, but they proved futile. So when a friend offered her a stun gun "for self-defense against [her] former boy friend," 470 Mass. 774, 776, 26 N.E.3d 688, 690 (2015), Caetano accepted the weapon.
>
> It is a good thing she did. One night after leaving work, Caetano found her ex-boyfriend "waiting for [her] outside." Tr. 35. He "started screaming" that she was "not gonna [expletive deleted] work at this place" any more because she "should be home with the kids" they had together. *Ibid.* Caetano's abuser towered over her by nearly a foot and outweighed her by close to 100 pounds. But she didn't need physical strength to protect herself. She stood her ground, displayed the stun gun, and announced: "I'm not gonna take this anymore. . . . I don't wanna have to [use the stun gun on] you, but if you don't leave me alone, I'm gonna have to." *Id.*, at 35-36. The gambit worked. The ex-boyfriend "got scared and he left [her] alone." *Id.*, at 36.

Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (Alito, J. Concurring). Thankfully, Ms. Caetano lived through her ordeal and Massachusetts' ban on stun guns has recently been struck down. New Yorker's deserve the same option to defend themselves.

VI. Conclusion

Plaintiff respectfully asks this Court to deny Defendant's cross-motion for summary judgment and to grant Plaintiff's motion for summary judgment and permanently enjoin the State of New York's ban on electric arms.

Respectfully submitted, this the 17th day of September, 2018.

/s/ Stephen D. Stamboulieh
Stephen D. Stamboulieh

Certificate of Service

I, Stephen D. Stamboulieh, hereby certify that I have caused to be filed a true and correct copy of the foregoing document or pleading with the Court's ECF system, which generated a Notice and delivered a copy of same to all counsel of record.

Dated: September 17, 2018.

/s/ *Stephen D. Stamboulieh*
Counsel for Plaintiff