

STATE OF NEW YORK
ERIE COUNTY SUPREME COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

NOTICE OF MOTION

[REDACTED]

YOUR HONOR:

Please take notice that at 10:30 a.m. on [REDACTED] or as soon thereafter as counsel can be heard, the defendant will move to dismiss the indictment on the ground that Penal Law § 265.03(3), as applied to this case, violates his personal right to keep and bear arms (US Const Amends II, XIV). By this motion, the defendant is also notifying the New York Attorney General as required by CPLR 1012(b).

Respectfully submitted,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DATED:

[REDACTED]
Buffalo, NY

TO:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

STATE OF NEW YORK
ERIE COUNTY SUPREME COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

SUPPORTING AFFIRMATION

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

_____, an attorney licensed to practice in the courts of this State, affirms the truth of the following statements under penalties of perjury.

1. I am counsel for the defendant, who is charged in this indictment with _____
_____ for his alleged possession of a loaded
firearm, an AR-15 style rifle, at his home on _____.
2. I make this affirmation in support of my motion to dismiss the indictment. This affirmation is made upon information and belief, the source of which is my review of the indictment and the discovery provided by the prosecution.
3. Upon a defendant's motion, the Court may dismiss the indictment on the ground that it is defective within the meaning of CPL 210.25 (CPL 210.20[1][a]). An indictment is defective, in relevant part, when "[t]he statute defining the offense is unconstitutional" (CPL 210.25[3]).
4. The statute defining the offense charged, Penal Law § 265.03(3), is unconstitutional as applied to this case because it prohibits a class of arms that are commonly possessed for lawful purposes.
5. In relevant part, a firearm is an "assault weapon," and an assault weapon is "a semiautomatic rifle that has an ability to accept a detachable magazine" and at least one banned feature,

- including “a pistol grip that protrudes conspicuously beneath the action of the weapon” (Penal Law §§ 265.00[3][e], 265.00[22][a][ii]).
6. As alleged, the pistol grip qualifies the defendant’s rifle as an assault weapon.
 7. Penal Law § 400.00 is the exclusive mechanism for the licensing of firearms in New York, and the only provision for the lawful possession of “assault weapons” by civilians is for those possessed prior to January 15, 2013 and registered within one year of that date (Penal Law §§ 400.00[16-a], 265.00[22][g][v]).
 8. In other words, New York maintains a near-total ban on AR-15 style rifles with at least one banned feature, including the pistol grip. The ban extends to possession in the home, “where the need for defense of self, family, and property is most acute” (*District of Columbia v. Heller*, 554 US 570, 628 [2008], Scalia, J.).
 9. “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed” (US Const Amend II).
 10. The Second Amendment confers “a personal right to keep and bear arms for lawful purposes,” a right that is fully applicable to the States by way of the Fourteenth Amendment (*McDonald v. City of Chicago, Ill.*, 561 US 742, 780 [2010]).
 11. The Second Amendment applies to “all instruments that constitute bearable arms, even those that were not in existence at the time of the founding” (*Heller*, 554 US at 582). A class of arms is protected by the Second Amendment if the arms are “typically” or “commonly possessed by law-abiding citizens for lawful purposes” (*id.*, at 625; *Caetano v. Massachusetts*, 577 US 411, 420 [2016], Alito, J., concurring).
 12. In *Heller*, the U.S. Supreme Court held handguns to be a class of arms protected by the Second Amendment (554 US at 628).

13. In evaluating the constitutionality of a firearm regulation, courts are not free to engage in interest-balancing analysis. Rather, “when the Second Amendment’s plain text covers an individual’s conduct, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation” (*New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct 2111, 2126 [2022], Thomas, J.).
14. The defendant’s rifle is in a class of arms protected by the Second Amendment, and New York’s near-total ban on these arms is unconstitutional.

AR-15 style rifles are commonly possessed for lawful purposes, and therefore in a class of arms protected by the Second Amendment.

15. AR-15 style rifles are commonly possessed.
16. In 2021, according to the sales data they submitted to the U.S. House of Representatives, three of the Nation’s largest firearms manufacturers combined to sell over 500,000 AR-15 style rifles (Rep. Carolyn Maloney, Memorandum to Members of the Committee on Oversight and Reform, July 27, 2022, pp. 7-8). The estimated number of AR-15 style rifles owned by Americans – as calculated by “rifle production plus imports less exports” from 1990 through 2020 – is over 24 million (National Shooting Sports Foundation, “Commonly Owned,” July 20, 2022, <https://www.nssf.org/articles/commonly-owned-nssf-announces-over-24-million-msrs-in-circulation/>).
17. AR-15 style rifles are overwhelmingly possessed for lawful purposes.
18. According to FBI statistics, rifles – including those built on the AR-15 platform – were confirmed to be responsible for 1,573 homicides between 2015 and 2019, while handguns were confirmed to be responsible for 33,075 homicides (Federal Bureau of Investigation, Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015-2019, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8.xls/>). Even the

U.S. Court of Appeals for the Seventh Circuit, in upholding a similar ban, conceded that “handguns ... are responsible for the vast majority of gun violence in the United States” (*Friedman v. City of Highland Park, Ill.*, 784 F3d 406, 409 [7th Cir. 2015]).

19. If handguns are protected by the Second Amendment, and they are, then AR-15 style rifles – commonly owned and less commonly used in crime – must be as well.
20. It is true that not all AR-15 style rifles are banned in New York, only those with a banned feature – in this case, a pistol grip. But “[t]his is the typical grip for an AR-15,” and removing it is considered a modification (“Best Featureless AR-15 Parts & Builds,” Firearm Review, September 23, 2022, <https://www.firearmreview.com/ca-featureless-ar-15/>). “The major purpose of a pistol grip on a long gun is to stabilize the firearm while firing from the shoulder ... [t]he defensive application is obvious, as is the public safety advantage in preventing stray shots” (David Kopel, “Rational Basis Analysis of ‘Assault Weapon’ Prohibition,” 20 Journal of Contemporary Law 381, 396 [1994]).
21. In other words, the presence of a pistol grip on an AR-15 style rifle does not change the character of the weapon as being commonly possessed for lawful purposes.
22. Because the plain text of the Second Amendment covers the defendant’s conduct, the burden shifts to the prosecution to prove that New York’s near-total ban is consistent with the Nation’s historical tradition of firearm regulation.

A near-total ban on a class of arms protected by the Constitution is not consistent with the Nation’s historical tradition of firearm regulation.

23. New York’s near-total ban on AR-15 style rifles is comparable to the total ban on handguns that the Supreme Court struck down in *Heller*. In fact, it is a **total** ban on all such rifles manufactured since January 15, 2013, as well as those not registered within one year of that date. It leaves

law-abiding citizens – including the defendant, who has no criminal record – virtually no ability to lawfully possess these weapons.

24. The prosecution will not find any historical analogue to a near-total ban on constitutionally protected weapons (Duke Center for Firearms Law, Repository of Historical Gun Laws, <https://firearmslaw.duke.edu/repository/search-the-repository/>).
25. There is no question that AR-15 style rifles are dangerous. “But their ability to project large amounts of force accurately is exactly why they are an attractive means of self-defense. While most persons do not require extraordinary means to defend their homes, the fact remains that some do. Ultimately, it is up to the lawful gun owner and not the government to decide these matters” (*Friedman*, 784 F3d at 413, Manion, J., dissenting).
26. Possession and ownership of AR-15 style rifles, like handguns, may be regulated. The State may amend Penal Law §§ 400.00 to subject them to the same licensing requirements as pistols and revolvers. But a near-total ban does not withstand constitutional muster.

Because the statute defining the offense charged is unconstitutional, the indictment must be dismissed.
