IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MICHAEL P. O'NEIL and NICOLA GRASSO Plaintiffs, v. PETER F. NERONHA, in his Official Capacity as Attorney General of Rhode Island and COLONEL JAMES M. MANNI, in his Official Capacity as the Superintendent of the Rhode Island State Police Defendants.	Civil Action No. 1:19-cv-00612-WES-PAS

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR REPLY AND OBJECTION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

I. Introduction

Defendants' introductory paragraph, in which they complain that this lawsuit "is an attempt to short circuit the democratic process" because, essentially, the Plaintiffs seek to uphold their Second Amendment rights, fundamentally mischaracterizes the legal process. On May 17, 2021, the Supreme Court granted certiorari in *Dobbs, MS Health Officer, et al. v. Jackson Women's Health, et al.*, 19-1392, Order List: 593 U.S, wherein a state legislature banned pre-viability elective abortions. Did the plaintiffs in that case "short circuit the democratic process"? Of course not. This is why we have three branches of government, each standing as a check and balance on the other. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Defendants' attempt to chastise the Plaintiffs for insisting upon an enumerated fundamental right should be ignored.

Further, it is telling that the Defendants fail to even mention the four courts that have struck down bans on electric arms which were cited to in Plaintiffs' moving papers. That is a concession that if this Court adopts the jurisprudence of any of those courts, Rhode Island's ban on electric arms must be held unconstitutional. Rather than blaze a novel path, this Court should follow the well-trodden road taken by every other court to rule on this issue and find that Rhode Island's ban on electric arms violates the Second Amendment.

II. Argument

a. Rhode Island Law Bans Both Tasers and Stun Guns

Defendants make the claim that Tasers are "firearms" under Rhode Island law. *See* State Opp. at 8-9. But Tasers are also stun guns because Tasers have a stun gun component that is integrated into their function. A Taser's "drive stun" mode is the same as any other stun gun.[1] Therefore, all Tasers are stun guns, in addition to being able to project electric barbs at a distance. The State's argument that Tasers are not stun guns because they also have another function does not hold water. Moreover, the State's argument that Tasers are already regulated as firearms simply does not make sense because there is no evidence that Rhode Island allows Tasers to be actually sold in Rhode Island.

The Defendants cite to two cases about statutory construction and reaching "absurd results". Plaintiffs agree with premise that this Court should not interpret the statute in a way which leads to an absurd result. *See* State Opp. at 7 (citing *W. Reserve Life Assurance Co.*, 116 A.3d at 798("[U]nder no circumstances will this Court construe a statute to reach an absurd result." (quotation marks omitted)); *Arvelo v. Ashcroft*, 344 F.3d 1, 8 (1st Cir. 2003) ("It is trite, but true, that courts are bound to interpret statutes whenever possible in ways that avoid absurd results.").

[1] *See* State Opp. at 3.

But, this case isn't about fly swatters and rolled up newspapers or smartphones-as-flashlights (*id.*), it is about a criminal statute that outright bans stun guns, and by extension, a Taser which has a built-in stun gun.

Reviewing Defendants' Exhibit "G" demonstrates why Defendants' interpretation leads to the absurd result it so desperately wants to avoid. In Exhibit "G" (PageID# 369), there are pictures of at least two flashlights which have the normal characteristics of a flashlight, yet which also have a stun gun component. Are these flashlights with a secondary stun gun component, and thus not banned under the statute or are they stun guns that just happen to have a flashlight and thus banned? Either way, they still have a stun gun component, just like a Taser.

The Defendants need this Court to believe several premises before it can rule in their favor. The first is that a Taser is not banned under current Rhode Island law because it is not named "stun gun".[2] The second premise is that a Taser is actually a firearm under Rhode Island law, and by extension, *already legal to own and possess*! And the third premise is that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) classifies Tasers as firearms, which would buttress Defendants' argument that a Taser is a firearm.

As Defendants pointed out in their moving papers (State Opp. at 8-9), the ATF did, at one point, classify a Taser as a firearm. However, Taser changed its propulsion mechanism,[3] and the ATF no longer regulates them as firearms. *See* Exhibit "1", Correspondence from ATF. Moving forward, the Defendants need this Court to believe that Tasers are not banned and thus, legal to

[2] Interestingly, when the ATF declared the "Taser" to not be a firearm, it referenced the "production version of Air Taser Model 34000 electronic stun gun." *See* Exhibit "1".

[3] The Defendants even provided, in discovery, documents stating that it uses compressed air to expel the projectiles and not an "explosive". *See* Exhibit "B" (attached to Plaintiffs' Motion for Summary Judgment, definition of "Air Cartridge – a detachable unit that is affixed to the muzzle end of a Taser that contains barbed probes attached to lengths of insulated wire, a compress air (nitrogen) charge used to the launch the probes towards a target…); *See also* Exhibit "2", RI000167 (demonstrating the inside of the air cartridge and the compressed nitrogen).

own and possess. If Tasers were legal, then, one would assume that one would be able to purchase a Taser in Rhode Island.[4] Even assuming arguendo that Tasers are considered "firearms" under Rhode Island law, Tasers still have the prohibited "stun gun" feature which renders them prohibited by law.

This concept is easily demonstrated in Rhode Island law. For instance, a legal "firearm" which has been modified to shoot rapidly with a trigger crank, bump fire stock or binary trigger becomes a prohibited "firearm" by operation of law. *See* R.I. Gen. Laws § 11-47-8.1. The same concept would apply to a Taser. Perhaps if Tasers lacked the integrated stun gun component, they would not be banned. The Rhode Island legislature clearly bans "stun guns". It would make no logical sense for the legislature to ban stun guns, but allow for a device to have an integrated stun gun feature and not consider it banned under the statute. As such, Tasers must also be considered stun guns, and thus banned under the statute banning stun guns.

b. Defendants Have Not Rebutted the Presumption that Electric Arms Are Constitutionally Protected

The State errs in arguing that "Plaintiffs must likewise prove their case" that stun guns receive Second Amendment protection. State Opp. at 12. "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence

[4] But if this were the case, then Axon (the manufacturer of Taser) has missed the memo. *See* https://taser.com/pages/state-requirements (showing that Rhode Island and Hawaii ban Tasers). This is not some outlier, as undersigned hasn't found one Taser retailer that ships Tasers to Rhode Island. The media also labors under the assumption that they are banned. *See* https://abcnews.go.com/Technology/newest-taser-fit-purse/story?id=36402424 (Tasers illegal in Rhode Island). Even a Rhode Island legislator believes Tasers are banned in Rhode Island. *See* https://www.valleybreeze.com/2021-02-17/woonsocket-north-smithfield/it-s-time-update-rhode-island-s-gun-laws ("First, while Rhode Islanders can own other firearms, they are not permitted to own stun guns or tasers." Sen. Jessica de la Cruz, Republican Senate Minority Whip, serving District 23 (Burrillville, Glocester, and North Smithfield)).

at the time of the founding." *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).[5] That is why in *NYSRPA I*, the Second Circuit struck a ban on a pump-action rifle because the state focused exclusively on semiautomatic weapons and "the presumption that the Amendment applies remain[ed] unrebutted." 804 F.3d at 257. Stun guns and Tasers are both bearable arms. Thus, the burden is on the State to prove that they do not receive constitutional protection. The State has failed to do so. Rather than demonstrate why stun guns are not constitutionally protected, the State simply argued Plaintiffs have not done enough to demonstrate stun guns and Tasers are constitutionally protected. That is not what the law requires. The State has failed its burden to rebut the presumption that stun guns and Tasers are protected by the Second Amendment. Thus, this Court should find that stun guns and Tasers are protected by the Second Amendment without any need to look to the numerical data provided by Plaintiffs. However, if it does consider the numerical data presented by the Plaintiffs, then it should find that there are at least 6.5 million stun guns owned by civilians in the United States.

c. <u>There Are At Least 6.5 Million Stun Guns in Civilian Hands</u>

The declarations provided by Plaintiffs (and filed under Seal in this Court) state the numbers of stun guns sold by only those retailers who would provide a declaration. One declaration specifically says those numbers to not include Tasers. Defendants try to confuse the issue of whether these sales figures comingle stun gun sales with Tasers to downplay the large numbers that Plaintiffs have produced to the Court. Tellingly, Defendants have made no attempt to try to get their own numbers to prove that stun guns and Tasers are not in common use. Tasers are technically called "electronic dart guns" but are colloquially known as Tasers because the

[5] In the State's Opp. at p. 15, fn. 3, Defendants state that "Plaintiffs repeatedly cite *Caetano*'s two-justice concurrence as the governing law … which of course it is not." As made clear in Plaintiffs' Memorandum, the citations to the concurrence in *Caetano* is clearly marked as the "concurring" opinion.

company Axon manufacturers virtually all electronic dart guns under the Taser brand.[6] In the electric arm market, there are simply not as many Tasers in existence as there are stun guns. In *Avitabile*, the parties agreed "there are at least 300,000 tasers and 4,478,330 stun guns owned by private citizens across the United States." *Avitabile v. Beach*, 368 F. Supp. 3d 404, 411 (N.D.N.Y. 2019). Michael Brave, Director, CEW, Legal, for Axon Enterprise, Inc., provided a declaration stating that Axon, from 2003 to May 25, 2021, has "manufactured approximately 286,780 TASER cartridge-deployable CEWs for the civilian market in the United States of America." *See* Exhibit "3". This Court should find based on the submitted declarations that there are at least 6.5 million stun guns in existence and should not conflate the numbers in the declarations to be both stun guns and Tasers unless otherwise specified as Taser sales.

But, even if it does not, the 1.9 million number that the State is willing to stipulate to is more than sufficient to demonstrate that stun guns are in common use. "Though far less prevalent than handguns, we do not think that stun guns or Tasers may be fairly labeled as unusual weapons." *People v. Yanna*, 297 Mich. App. 137, 145, 824 N.W.2d 241, 245 (2012).[7] The Fifth Circuit has cited approvingly the concurrence's reasoning in *Caetano*, finding 200,000 "stun guns" as legitimate for self-defense and "in common use" as well:

> 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:
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> > [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

[6] The term "Taser," although a trademark for a particular brand of device, is commonly applied to a device that delivers an electric charge through barbs that can be propelled several feet away and penetrate clothing or skin. By contrast, a stun gun must be held in direct contact with the target." *People v. Yanna*, 297 Mich. App. 137, 140 n.3, 824 N.W.2d 241, 243 (2012).

[7] Defendants cite to a Navy Surface Warfare Center article ostensibly to equate electric arms (available to the civilian market) with electric arms (including directed-energy weapons, electromagnetic launchers and what looks to be a missile) probably only available to the military. *See* Defendants' Exhibit "B", PageID283-292. These are fanciful distractions, but a Taser and a stun gun are not part of these.

> 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," was enough to determine that the stun gun is in common use.

Hollis v. Lynch, 827 F.3d 436, 449 (5th Cir. 2016). But far smaller numbers have sustained constitutional challenges. For instance, in *Maloney v. Singas*, 351 F. Supp. 3d 222, 237-38 (E.D.N.Y. 2018), that court stated:

> [*A*]*t least* 64,890 nunchakus have been sold over the past 23 years to private citizens, who may lawfully possess them in 48 states… The Court finds that based on this magnitude of sales—especially given the outright bans on nunchaku (in New York and Massachusetts), the other restrictions placed on nunchaku ownership and use in the states where they may be lawfully possessed, and the apparent incompleteness of Defendant's nunchaku sales data— and the relevant, albeit limited, case comparators, Defendant has failed to establish that nunchaku are not in common use.

The State devotes many pages of its Opposition to how many handguns are sold in the United States (168 million). *See* State Opp. at pages 3, 4, 13. But it doesn't matter how many handguns are sold. *Heller* acknowledged handguns are the most popular weapons for self-defense. But that doesn't mean other arms lose Second Amendment protection: "[i]t is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

The State also argues that stun guns are not typically used for lawful purposes. They produced twelve (12) individuals' arrest records and accompanying reports. In these documents, two arrests were from 2005, two from 2006, one from 2007, two from 2009, one from 2012, three from 2014 and one from 2015. Here, the Defendants cannot demonstrate that typical usage of a

stun gun is for unlawful purposes with only twelve arrests from 2005 to present. If Second Amendment protection for a weapon used in a few crimes could be eliminated, then *Heller* would have been decided the other way. "Handguns also appear to be a very popular weapon among criminals." *District of Columbia v. Heller*, 554 U.S. 570, 698 (Breyer, J., dissenting). Thus, the State's argument is analogous to the one that was rejected in *Maloney*. "[H]ere, there is virtually no evidence that nunchakus are associated with, or have been used to engage in, criminal conduct [and] Defendant presents no national data on the unlawful use of nunchaku." *Maloney v. Singas*, 351 F. Supp. 3d 222, 235 (E.D.N.Y. 2018). "Moreover, unlike a sawed-off shotgun, gun without a serial number, or pipe bomb—weapons that courts have found to be outside the ambit of Second Amendment protection—nunchaku have no special propensity for unlawful use." *Id.*

Despite the State's assertion that Plaintiffs produced nothing to show that electric arms are used for lawful purposes[8,9], Plaintiffs cited to four courts which have explicitly held that electric arms are used for lawful purposes.[10] That legal authority is more than sufficient to show stun guns and tasers are used for purposes of lawful self-defense—especially in light of the State's failure to rebut the holdings of any of those cases. "While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country." *Caetano v. Massachusetts*, 577 U.S. 411, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring).

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[8] Defendants appear to complain that there are no defensive uses of stun guns in Rhode Island. A State in which stun guns are banned. State Opp. at 14. ("Not once in this historical record going back approximately 20 years is there an incident where a stun (sic) was used in self-defense").

[9] This also begs the question: Was the use of a stun gun in *Caetano* a lawful or unlawful use of a stun gun for self-defense? At first, perhaps unlawful because Massachusetts banned the devices, but then, after the Supreme Court intervened, did that create a lawful use? Massachusetts eventually must have thought it was a lawful use, because it dropped the charges against Ms. Caetano after the Supreme Court overturned its opinion and formally exonerated her. *See* https://bit.ly/3fWyHDD (Google Webcache link to Eugene Volokh article in The Washington Post).

[10] Defendants' Exhibits demonstrate products that at least, by their rating, are also very popular: *See* Exhibit "F", PageID# 366 (3,306 4.5 star ratings); Exhibit "G" PageID# 369 (products with over 3,000 4.5 stars ratings; 22,802 4.5 star ratings; 12,978 4.5 star ratings; 16,861 4.5 star ratings, etc…).

The State's half-hearted attempt to argue Rhode Island's electric arm ban is longstanding should be disregarded as frivolous. There is no authority for this position. The electric arm ban is of modern vintage. That it was inserted into a preexisting 1896 law simply has no relevance. Recently, the Ninth Circuit, sitting en banc, stated in *Young v. Hawaii,* No. 12-17808, 2021 U.S. App. LEXIS 8571, at *104 (9th Cir. Mar. 24, 2021) that "[w]e are not inclined to review twentieth-century developments in detail, in part because they may be less reliable as evidence of the original meaning of the American right to keep and bear arms." Thus, the case the State relies on strongly suggests that a law must have an analog from the ratification of the Second Amendment in order to be longstanding.

Finally, the State radically misconstrues the passage it quotes to. That passage discusses restrictions on carrying certain arms. That is why the paragraph the State's cites to concludes as follows: "Although some states only prohibited concealed carry, many more states banned the carrying of concealable weapons whether actually concealed or not. The states broadly adopted restrictions on possessing arms in the public square, and they did so even in the face of the states' own constitutional provisions protecting the right to keep and bear arms." *Young v. Hawaii*, No. 12-17808, 2021 U.S. App. LEXIS 8571, at *119 (9th Cir. Mar. 24, 2021). The law at issue in this litigation is of modern vintage. And the case law the State relies on does not deal with possession. The electric arm ban is simply not longstanding. Even if this Court were to find the laws at issue are presumptively lawful, it should find Plaintiffs have rebutted that presumption. "Unless flagged as irrebuttable, presumptions are rebuttable. [citations omitted]" *Binderup v. AG of United States*, 836 F.3d 336, 350 (3d Cir. 2016).

This is in accord with the Sixth Circuit in *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) which found some people who have been involuntarily committed may have

Second Amendment rights. "As the Seventh Circuit has recognized, the *Heller* Court's observation regarding the presumptive lawfulness of longstanding bans is precautionary, not conclusive…." *Tyler*, 837 F.3d at 687 (citation omitted). Similarly, in *Heller II*, the D.C. Circuit "presume[d]" that "the District's basic registration requirement…does not impinge upon the right protected by the Second Amendment." *Heller v. District of Columbia*, 670 F.3d 1244, 1254 (D.C. Cir. 2011). It only upheld that presumption because it "[found] no basis in either the historical record or the record of this case to rebut that presumption" and because the "basic registration requirements are self-evidently de minimis." *Heller II*, 670 F.3d at 1255.

Most recently, the U.S. District Court for the Southern District of California adopted this approach and found "a longstanding regulation of commercial sales of arms is presumptively lawful, but a plaintiff may "'rebut this presumption by showing the regulation does have more than a de minimis effect upon his [Second Amendment] right.'" *Pena*, 898 F.3d at 1010 (quoting *Heller II*, 670 F.3d at 1253)." *Renna v. Becerra*, 2021 U.S. Dist. LEXIS 78634, at *14 (S.D. Cal. Apr. 23, 2021).

By analogy, this Court should find that Plaintiffs have rebutted the presumption of constitutionality if it finds the Rhode Island laws at issue are presumptively lawful. The restrictions are not de minimis. They are a substantial burden on Plaintiffs rights as demonstrated herein. And there is no historical justification for them. Therefore, this court should find like every other court has that electric arms are protected by the Second Amendment. And under any level of scrutiny, that ban is unconstitutional.

d. <u>The Electric Arm Ban is Unconstitutional Under Any Level of Scrutiny</u>

i. <u>This Court Should Apply Either A Categorical Approach or Strict Scrutiny</u>

This Court should apply either a categorical approach or strict scrutiny as argued in Plaintiffs' moving papers. Contrary to the State's argument, circuit precedent supports the application of at least strict scrutiny. In *Worman*, the First Circuit applied intermediate scrutiny to a ban on *"*semiautomatic assault weapons and LCMs" because the ban did "not heavily burden the core right of self-defense in the home". *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019). It did not because "the Act [did] not ban all semiautomatic weapons and magazines". *Id.*

And "the record shows that semiautomatic assault weapons do not share the features that make handguns well-suited to self-defense in the home". *Id*. Like a handgun, electric arms are easy "to store in a location that is readily accessible in an emergency"; "cannot easily be redirected or wrestled away by an attacker"; is easy to use for those without the upper-body strength to lift and aim a long gun"; and can be pointed at a burglar with one hand while the other hand dials the police")". *Id.* Finally, the First Circuit found that the ban did not burden self-defense greatly because there was no "indication that the proscribed weapons have commonly been used for home self-defense purposes".

Here, even if this Court construes Rhode Island law as a ban only on stun guns, this ban regulates an entire range of weapons rather than the fairly narrow set of semi-automatic rifles at issue in *Worman*. Stun guns constitute the vast majority of electric arms as demonstrated above. Furthermore, stun guns are much cheaper than Tasers. Stun guns can be purchased for twenty to thirty dollars[11] whereas Tasers cost hundreds of dollars. Thus, many people are priced out from purchasing Tasers even assuming those were legal in Rhode Island. Stun guns and Tasers all share the same characteristics that make handguns preferable for self-defense. They also have an important characteristic that handguns do not have. "Countless people may have reservations about

[11] *See* Defs'. Exhibit "G", PageID# 369.

using deadly force, whether for moral, religious, or emotional reasons—or simply out of fear of killing the wrong person." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (Alito, J., concurring). Rhode Island law unconstitutionally burdens self-defense for those that do not wish to use lethal force. This Court should not allow that to continue. Instead, it should find that the State's ban is a severe burden on the right to self-defense and apply strict scrutiny. The State makes no argument as to how its ban survives strict scrutiny. Therefore, the stun gun and Taser ban must fall without further argument if this Court agrees strict scrutiny should apply. However, even if this Court applies intermediate scrutiny the State's ban must fall.

ii. Rhode Island's Taser and Stun Gun Ban is Unconstitutional Under Intermediate Scrutiny

While the State no doubt has an important interest in promoting public safety and preventing crime, that does not mean that the State necessarily has an important interest in banning an arm that is typically used for lawful purposes that is less deadly than the handguns at issue in *Heller* and *McDonald*. *See McDonald v. City of Chi.*, 561 U.S. 742, 783, 130 S. Ct. 3020 (2010) (rejecting the notion that governments may "enact any gun control law that they deem to be reasonable."). After all, "it would be hard to persuasively say that the government has an interest sufficiently weighty to justify a regulation that infringes constitutionally guaranteed Second Amendment rights if the Federal Government and the states have not traditionally imposed—and even now do not commonly impose—such a regulation." *Heller v. District of Columbia* (*Heller II*), 399 U.S. App. D.C. 314, 670 F.3d 1244, 1294 (2011) (Kavanaugh, J., dissenting).

This reasoning has been used in other Second Amendment cases. In *Heller v. District of Columbia*, 801 F.3d 264, 280 (D.C. Cir. 2015) (*Heller III*), the D.C. Circuit struck down the District of Columbia's prohibition on registering more than one pistol per month. The District defended that ban as designed to "promote public safety by limiting the number of guns in

circulation," based on its theory "that more guns lead to more gun theft, more gun accidents, more gun suicides, and more gun crimes." *Id.* But the court rejected that simplistic syllogism, explaining that "taken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home," and so it simply cannot be right. *Id.*; *see also Grace v. District of Columbia,* 187 F. Supp. 3d 124, 148 (D.D.C. 2016) (reasoning that "it is not a permissible strategy to reduce the alleged negative effects of a constitutionally protected right by simply reducing the number of people exercising the right" (quotation marks omitted)).

Here, the State does not have an important government interest in banning possession of electric arms which are nonlethal weapons. This is especially the case when handguns must be allowed pursuant to *Heller.* Unlike the assault weapon ban at issue in *Worman,* the State cannot credibly say that mass shootings or the like have been conducted with electric arms. "[T]he State's general appeal to public safety is particularly hard to square with its suggestion, made repeatedly in its briefs" that Plaintiffs "should just go out and buy a handgun"…" if he wants to better protect himself. *Avitabile v. Beach,* 368 F. Supp. 3d 404, 420 (N.D.N.Y. 2019). *See* State Opp. at 19 ("Section 11-47-42(a), moreover, allows Rhode Island citizens recourse to a vast array of weapons more commonly used for this purpose. *See Kolbe,* 849 F.3d at 130 (applying intermediate scrutiny to a statute that, like Section 11-47-42(a), 'leaves citizens free to protect themselves with handguns and plenty of other firearms and ammunition')."). If we assume that increasing the supply of protected arms could increase crime, "the complete ban on tasers and stun guns actually undermines public safety and crime prevention because it results in more crimes, injuries, and deaths" because it will increase the numbers of handguns purchased. *Avitabile v. Beach,* 368 F. Supp. 3d 404, 420-21 (N.D.N.Y. 2019). Thus, the State does not have an important government

interest in banning stun guns and Tasers. Even if it does, the complete ban is not sufficiently tailored to survive intermediate scrutiny.

"[T]o survive intermediate scrutiny, the defendant[] must show '*reasonable* inferences based on *substantial* evidence' that the statute[] [is] substantially related to the governmental interest. *Maloney*, 351 F. Supp. 3d at 239 (quoting *N.Y. State Rifle I*, 804 F.3d at 264)." *Avitabile v. Beach*, 368 F. Supp. 3d 404, 421 (N.D.N.Y. 2019). Here, the State makes observations that certain stun guns are designed to be disguised as a "tube of lipstick, a keychain, a cell phone, a pen, and even an electronic cigarette" and that banning these stun guns prevent accidents and the potential for people sneaking in disguised stun guns into public areas. State Opp. at 22. Even assuming the government has an interest in restricting disguised stun guns, it does not follow that the State has an interest in banning all stun guns. The fact that the State points to a particular esoteric subset of stun guns as to why all stun guns should be banned demonstrates that a ban on all stun guns is not sufficiently tailored to survive scrutiny.

However, this Court should not accept the State's argument because it has not actually presented any evidence that disguised stun guns are an actual problem. As the Connecticut Supreme Court said in striking Connecticut's ban on the transport of dirks and batons under intermediate scrutiny "[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations . . . ." *State v. Deciccio*, 315 Conn. 79, 144-45, 105 A.3d 165, 206-07 (2014). The State has failed to produce the requisite evidence to justify its ban and thus, this Court should find its ban is not sufficiently tailored to survive intermediate scrutiny.

III. Conclusion

Post-*Heller, McDonald* and *Caetano,* Rhode Island's ban on electric arms is unconstitutional. It simply cannot be that the government cannot ban handguns without violating the Second Amendment, but it may ban an entire class of less-than-lethal arms. Removing Rhode Island's ban on electric arms will promote public safety because it will give Plaintiffs and other similarly situated persons an intermediate level of force that they can look to prior to using a firearm. There is no government interest in maintaining this ban.

For the foregoing reasons, the Court should enjoin Rhode Island's electric arm ban and declare the ban on the ownership and carry of electric arms unconstitutional and grant Plaintiffs' Motion for Summary Judgement.

Dated: June 2, 2021.

Respectfully submitted,
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By and through their legal counsel,

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CERTIFICATE OF SERVICE

I, Stephen D. Stamboulieh, counsel of record for Plaintiffs, hereby certify that the foregoing document or pleading has been filed with the Clerk of the United States District Court, District of Rhode Island, via ECF and that all counsel of record has received electronic notice of this filing.

Dated: June 2, 2021.

/s/ Stephen D. Stamboulieh
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