Vermont Federation of Sportsman's Clubs
The 2nd Circuit Has Already Ruled that the AR-15 is "In Common Use"

As the Vermont Legislature moves forward in considering the effects of Bruen, it has been correctly stated that decisions from other District or Circuit Courts do not affect the 2nd Circuit. Unless and until the 2nd Circuit or the Supreme Court of the United States (SCOTUS) renders a 2nd Amendment decision on laws like an "Assault Weapons Ban", the 2nd Circuit, and therefore Vermont, will remain unaffected.

For the reasons stated below, the Federation believes that the handwriting is already on the wall regarding the constitutionality of Assault Weapon Bans and other infringements, which the following facts will make clear.

In the 2008 SCOTUS case of D.C. v. Heller, SCOTUS held that the Second Amendment protected an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense in the home (Pp 2-53).

In regard to that individual right, SCOTUS stated: "***None of the Court's precedents forecloses that Court's interpretation. Neither US v. Cruickshank (92 U.S. 542, 553), nor Presser v Illinois (116 U.S. 252, 264-265), refutes the individual-rights interpretation. United State v. Miller (307 U.S. 174) does not limit the right to keep and bear arms to militia purposes, but rather limits the type of weapon to which the right applies to those used by the militia, i.e., those in common use for lawful purposes.***"

Regarding the Bruen decision, Supreme Court Justice Clarence Thomas stated: "…***when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct***", with that "conduct" referring to firearms "***in common use***". Stated another way: If a firearm is in common use, it is presumptively protected by the Second Amendment.

In 2015, in the case of NYSRP v. Cuomo, a challenge was brought to the 2nd Circuit regarding New York and Connecticut laws which prohibited certain semi-automatic "assault weapons" and large-capacity magazines. Both challenges ultimately failed under the 2nd Circuit through their use of a two-step test that utilized intermediate scrutiny; a test that has now been specifically thrown out as being invalid by Bruen when dealing with 2nd Amendment cases.

Of particular note in that case is that the 2nd Circuit stated the following: "***This much is clear: Americans own millions of the firearms that the challenged legislation prohibits.***

The same is true for large-capacity magazines, as defined by New York and Connecticut statutes. Though fewer statistics are available for magazines, those statistics suggest that about 25 million large-capacity magazines were available in 1995, shortly after the federal assault weapons ban was enacted, and nearly 50 million such magazines – or nearly two-large-capacity magazines for each gun capable of accepting one – were approved for import by 2000.

Even accepting the most conservative estimates cited by the parties and by the amici, the assault weapons and large-capacity magazines at issue are "in common use" as that term was used in Heller."

Both the Heller and MacDonald opinions referenced firearms "***in common use***". Bruen also referenced that phrase, with Bruen then supplying the appropriate test to be used when considering Second Amendment cases, with that test being based on text, history and tradition (historical analogues).

The 2nd Circuit has already ruled that semi-automatic firearms such as the AR-15 are "***in common use***", with that determination being central to constitutional analysis under Bruen.

We ask the question: How can it be uncertain or unclear as to how the 2nd Circuit will rule when it is presented with a challenge on an "Assault Weapon Ban", when the 2nd Circuit itself has already stated its opinion that the AR-15 is a firearm "***in common use***", when the answer to that question alone now resolves the law's constitutionality?

That simple fact, coupled with the watershed of "Assault Weapons Bans" that have been overturned as being unconstitutional in other Circuits and District Courts using Bruen with more coming every month, can only lead to one conclusion.

The 2nd Circuit will either strike down Assault Weapons Bans as being unconstitutional, or they will otherwise face an emergency appeal to SCOTUS when we already have a solid understanding of how SCOTUS will rule.