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My testimony is drawn from an extensive analysis of “assault weapon” regulation that I published in 2009, in the Hastings Law Journal entitled, *Supply Restrictions At The Margins Of Heller: Stenberg Principles, Assault Weapons And The Attitudinalist Critique*, 60 *Hastings L. J.* That article is Appendix “A” to this testimony.

My core point is that the classifications established by S. 150 are unsustainable under the lowest standard of constitutional review; that they fail to meet even the rudimentary requirements of rational basis.

To sustain the category of guns the bill claims are *exceptional* (and thus must be banned), we must compare it to the baseline of guns deemed *unexceptional* and thus would remain legal. The characteristics that define the prohibited class all objectively measureable. And by every objective measure, the classification is unsustainable.

The primary characteristic driving the prohibited category is multi-shot capability. Take the example of the AR-15. With the common thirty round magazine it will fire thirty, .22 caliber, typically 55 grain projectiles, one with each pull of the trigger. This characteristic says the bill, justify the ban.

Now compare the common repeating shotgun, either pump or semiautomatic. Countless guns of this type are on the bill’s list of non-prohibited firearms(assuming

for semiautomatics that the bill's definition of pistol grip "any other characteristic that can function as a grip" would not ban classically configured wood stocks with palm swells, etc.). And there are tens of millions of them in the civilian inventory. In 12 gauge configuration, with a three inch, 00 buckshot load, any of these guns will fire fifteen, .33 caliber, 60 grain projectiles with a single pull of the trigger. With a minimum magazine capacity of five rounds and one chambered, that is ninety, .33 caliber projectiles fired with 6 trigger pulls. There are a variety of other loadings that will push this calculation upward or downward, but this example makes the point. See, <http://www.shootingillustrated.com/index.php/20447/buckshot-basics/>

Additionally, this broad category of repeating shotguns can be *continuously reloaded* without disabling the gun. That is an attribute that the prohibited class does not exhibit. So the downtime, while the shooter changes magazines, that has been offered as a justification for the bill's 10 round magazine limit, is circumvented by the shotgun.

Another claim that supposedly distinguishes the prohibited class of guns, is that they are equipped with pistol grips or barrel shrouds and those things it is claimed, contribute to un-aimed, *spray firing, or firing a cloud of projectiles* without aiming. First, this is a dubious characterization of any rifle. But more importantly, it actually better describes shotgun technology. The shotgun actually does fire a cloud of projectiles, that spreads as it moves downrange. Most shotguns do not even have traditional front and rear sights, which are universal on rifles. Instead, the shotgun will have just a front bead, illustrating that the design anticipates pointing in the general direction of often moving targets and covering the targets with a cloud of projectiles. Firing the gun while moving the muzzle enhances this cloud effect.

These basic points are confirmed by the United States Army assessment of whether use of the shotgun in battle is consistent with the laws of war. A version of this analysis appears in a 1997 article published in the *Army Lawyer*. See, W. Hays Parks, *Joint Service Combat Shotgun Program*, *The Army Lawyer*, October 1997, 16-24.

The Army assessment relies centrally on an early analysis by Brig. Gen. Samuel T. Ansell, whose evaluation continues to form the position of the United States as to the legality of the shotgun in combat. Gen. Ansell's critique was prepared

in response to a formal complaint by Germany in World War One, charging that the Model 1897 pump shotgun, in use by U.S. troops, was so destructive that it violated the laws of war. General Ansell responded this way:

The shotgun ... finds its class or analogy as to purpose and effect, in many modern weapons. The dispersion of the shotgun pellets is adapted to the necessary purpose of putting out of action more than one of the charging enemy with each shot of the gun; and in this respect it is exactly analogous to shrapnel shells discharging a multitude of fragments *or a machine gun discharging a spray of bullets.*

Id. at 16.

The 1997 Army assessment goes on to describe a British analysis of the combat shotgun that is also instructive for our purposes. It reports that “To a range of 30 yards, the probability of hitting a man sized target with a shotgun was superior to that of all other weapons.” *Id. at 20.* On this measure it is superior to the “assault rifle” [*Here the reference to assault rifle is the technically defined, fully automatic infantry rifle, firing ammunition in the intermediate ballistics range, see Appendix A at 1290*] and superior to “a submachine gun firing a five round burst.” [*Here the submachine gun reference is to a fully automatic carbine firing a pistol cartridge*]. Shotguns had a hit probability ratio twice as good as rifles.” *Id. at 20.*

The S. 150 is similarly incoherent in its other distinctions. For example, while it bans AR-15 style rifles, it puts the Ruger Mini 14, on the list of good guns, even though in functional effect, these guns are indistinguishable.

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When gauged against objectively measurable characteristics, the rhetoric that defines the prohibited class in S. 150, not only inaccurately describes the class, but more accurately describes guns that S. 150 classifies as less dangerous and places on a companion list of good guns. This renders the bill simply incoherent. It means that the classifications created by the bill do not pass even a rudimentary rational basis review. Also recall that the Supreme Court has emphasized that something well in excess of rudimentary rational basis is demanded here. *District of Columbia v. Heller*, 554 U.S. at 628 n.27

My detailed analysis from 2009 (Appendix A), shows how the “assault weapon” classification fails under the undue burden standard that the Supreme Court has used in the reproductive rights cases and that the 9th Circuit has adopted in Second Amendment cases. *See Nordyke v. King*, 644 F. 3rd. 776 (2011). But it bears repeating that one does not need to go to that sort of enhanced standard. Even under the lowest level of review, a rudimentary rational basis review, the classifications in the bill cannot be sustained.

Ultimately S. 150, like the 1994 assault weapons ban will, *by its own measure, make things worse*. In both cases the result is mainly to accelerate demand for and increase ownership of the very type of gun the bill would claim to ban. As far as any actual or ultimate ban of the guns, that was purely illusory in 1994 and would be only a temporary limit under the proposed bill, which is constitutionally unsustainable. It may help to elaborate the point about the 1994 ban, because some of its structural problems carry over to the current bill.

The 1994 ban was illusory because it defined the prohibited class by functionally insignificant characteristics that some people thought were scary or aggressive looking – e.g., pistol grips, bayonet lugs and folding stocks. New sales of those guns were in fact prohibited. But with very slight changes, functionally identical guns remained available. And the formal ban caused a scare in the market that actually drove up the demand for those functionally identical guns.

This underscores the basic incoherence of the “assault weapon” classification. Because it is not a technically sustainable category, we ended up with far more of basically the same guns in the civilian inventory in 2004 (when the ban expired) than we had when the ban was enacted in 1994. And today, the total may be approaching 10 million, with that number driven to new levels by the current proposal.

S. 150 will have the same unintended consequence as the 1994 ban. Even if passed, the classifications at its core, are rhetorical and political ones that cannot survive even the most minimal standard of constitutional review. So at best, it will be a temporary measure, whose result will be to accelerate demand for the guns it attempts to ban. On that measure, even people whose reflexively think the bill is a good idea, should reject it.

My 2009 analysis also includes several other comparisons of the assault weapon category to other guns. Appendix A at 1289-1309. These are separate aspects of the critique that the prohibited classification fails to meet even the basic requirements of rational basis review.

For example, on the measure of its *prevalence in crime*, one salient comparison is rifle homicides to handgun homicides. See Appendix A at 1289-1309. FBI data from 2010, for example, shows roughly 6,000 handgun homicides and 358 homicides with rifles. This illustrates we have long known; that the firearms characteristic that poses the greatest risk is concealability.

On measures of *ballistics*, the ammunition used in the typical “assault weapon” exhibits intermediate ballistics. On this objective measure the class is less destructive than most rifles used for hunting medium to large game. *Id.* See also, Nicholas J. Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 Santa Clara L. Rev. 1263 (2010).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol50/iss4/6>, and Nicholas J. Johnson, *The Second Amendment in the States and the Limits of the Common Use Standard*, *Harvard Law and Policy Review Online*.
http://hlpronline.com/wp-content/uploads/2010/04/johnson_commonuse.pdf

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Any critique of S. 150 also must be particularly skeptical of its underlying “bad gun” regulatory formula which asserts only the limited aim of banning exceptional categories of firearms – e.g. the ultimately boundless class of “what criminals choose” or otherwise exceptionally dangerous guns. The longer history and broader implications of this approach are illuminating.

Today we are debating whether an elastic category of “assault weapons” should be banned. But on the long view virtually every category of guns has been called an exceptional category of “bad guns” that should be banned.

For most of the modern debate, the aim was to ban handguns. That was the impulse for formation of the Handgun Control Inc., now the Brady Organization. See Nicholas J. Johnson, *The Constitutional Politics of Gun Control*, 71 Brooklyn Law

Review 174 (2005). The goal also was evident in the name of a similar organization, The Coalition to Ban Handguns.

In smaller doses we have had proposals for banning, “civilian sniper rifles” defined by the Violence Policy Center as:

- a bolt action or semi-automatic
- having a two-stage trigger
- having a free-floated barrel
- having a "bull" or "target" barrel
- having a fluted barrel

The technically dubious claim was that “[t]he end product of these and other fine-tuning features, is a precision instrument that is more rugged and more accurate than its hunting cousins, and probably exceeds the capabilities of the person who shoots it.” (VPC, "One Shot, One Kill," 1999, pp. 37-39). One advocate, Rebecca Peters, then Director of the International Action Network On Small Arms, urged that civilians should not have “sniper rifles” that are deadly at “100 meters distance.” Rebecca Peters, CNN Oct. 23

2002 http://transcripts.cnn.com/TRANSCRIPTS/0210/23/i_qaa.01.html

Given the U.S. Army assessment of the shotgun, it is ironic that it seems to be the currently favored version of the “good gun”, recently referenced for example by Vice-President Biden as his personally favored self-defense tool. See, Joe Biden’s Shotgun Advice Would Land His Wife in Jail, Police Sergeant Said. Washington Times, Feb. 21, 2013. , <http://www.washingtontimes.com/news/2013/feb/21/joe-bidens-shotgun-advice-would-land-his-wife-jail/>. The vice president ventures several wild claims about the AR-15 and the shotgun. For a more accurate account, see Appendix A, pages 1289-1309.

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My overall assessment here is grounded on a basic reality that we all recognize. Guns are dangerous. As a class they are exceptionally deadly when compared to other defensive technologies. When deployed against helpless people, virtually every gun poses exceptional dangers. And on that score, S. 150 is mainly a distraction

because the question of how to protect helpless people from a madman with a gun is a quite different conversation from the debate surrounding this bill.