

14-319-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

JUNE SHEW, STEPHANIE CYPHER, PETER OWENS, BRIAN McCLAIN, HILLER SPORTS, LLC,
MD SHOOTING SPORTS, LLC, CONNECTICUT CITIZENS' DEFENSE LEAGUE, COALITION
OF CONNECTICUT SPORTSMEN, RABBI MITCHELL ROCKLIN, STEPHEN HOLLY,

Plaintiffs-Appellants,

v.

DANNEL P. MALLOY, in his official capacity as Governor of the State of Connecticut,
KEVIN T. KANE, in his official capacity as Chief State's Attorney of the State of
Connecticut, REUBEN F. BRADFORD, in his official capacity as Commissioner of the
Connecticut Department of Emergency Services and Public Protection, DAVID I.
COHEN, in his official capacity as State's Attorney for the Stamford/Norwalk Judicial
District, Geographic Areas Nos. 1 and 20, JOHN C. SMRIGA, in his official capacity as
State's Attorney for the Fairfield Judicial District, Geographical Area No. 2, MAUREEN
PLATT, in her official capacity as State's Attorney for the Waterbury Judicial District,
Geographical Area No. 4, KEVIN D. LAWLOR, in his official capacity as State's Attorney

(Additional Caption On the Reverse)

*On Appeal from the United States District Court
for the District of Connecticut (New Haven)*

**BRIEF FOR *AMICUS CURIAE*
NATIONAL RIFLE ASSOCIATION IN SUPPORT OF
PLAINTIFFS-APPELLANTS AND SUPPORTING REVERSAL**

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Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

The National Rifle Association, Inc. does not have any parent company. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS¹

Amicus Curiae National Rifle Association, Inc. (the “NRA” or “*Amicus*”) was founded in 1871 by Colonel William C. Church and General George Wingate to promote rifle marksmanship skills in the United States. Over the past 150 years, its membership has grown to include over five million members nationwide. The NRA has remained true to its founding principles, still working tirelessly today to advocate for safe firearm shooting, quality marksmanship, thorough training, and sound education. A Motion for Leave to File Brief of *Amicus* National Rifle Association is being filed with this brief.

The NRA is familiar with lawsuits around the country that involve interests protected by the Second Amendment at both the state and federal level. The NRA’s expertise allows it to provide the Court with an up-to-date distillation of the relevant law governing the standard of review and evidence admissible in cases involving the Second Amendment. Moreover, because of the breadth of its knowledge of prior and contemporaneous litigation, the NRA is in a unique position to provide the Court with an analysis of the social science evidence

¹ *Amicus* makes the following disclosure pursuant to Fed. R. App. P. 29(c)(5): No party’s counsel authored this brief in whole or in part. No party, party’s counsel, nor any other person contributed any money to fund preparing or submitting this brief, other than *Amicus*, the NRA.

provided by Defendants-Appellees' experts, including their sworn testimony in other similar cases.

SUMMARY

The NRA's *Amicus* brief will assist the Court in determining the proper level of constitutional scrutiny to apply, the evidence admissible to support the challenged bans and the appropriate weight to give to the expert evidence offered by Defendants-Appellees and relied upon by the lower court.

Connecticut P.A. 13-3, "An Act Concerning Gun Violence Prevention and Children's Safety" (the "Act"), became effective on April 4, 2013, and was amended, effective June 18, 2013. Among other things, the Act banned the purchase, transfer, or receipt within the state of Connecticut of so-called "assault weapons," defined as any of a list of identified firearms as well as any semi-automatic rifles with a detachable box magazine and at least one specified "feature." Conn. Gen. Stat. § 53-202(a)-(c). The Act allowed for the continued possession of any lawfully owned "assault weapons" that were possessed as of the effective date of the Act, provided that the possessor register them before January 1, 2014. Conn. Gen. Stat. § 53-202(d). The June 18 amendment added prohibitions on the purchase, transfer, receipt, or possession of so-called "large-capacity" magazines, defined as "any firearm magazine, belt, drum, fed strip, or similar device that has the capacity of, or can be readily restored or converted to accept,

more than ten rounds.” Conn. Gen. Stat. § 53-202w(1). Like the firearm ban, the magazine ban also permits the continued possession of “large-capacity” magazines that were possessed prior to the effective date of the Act, provided they are registered with the government. Conn. Gen. Stat. § 53-202(x)(1).

ARGUMENT

I. IF THE COURT RESORTS TO INTEREST BALANCING, STRICT SCRUTINY IS THE ONLY BALANCING TEST THAT CAN APPLY.

The provisions of the Act challenged by Plaintiffs-Appellants infringe upon the “core” Second Amendment right of self-defense. Moreover, these provisions of the Act intrude into the home, where they prohibit the possession of commonly owned firearms. This is precisely the type of restriction the Supreme Court struck in *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008), without resort to any interest-balancing test. Legal scholars have observed that courts have adopted the very interest-balancing test rejected by the Supreme Court in *Heller*. As one author (a former staff attorney for the Brady Center to Prevent Gun Violence) phrased it, courts “have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld.”² Allen Rostron, *Justice*

² This phenomenon has precedent in modern jurisprudence. After the United States Supreme Court’s seminal decision in *Roe v. Wade*, 410 U.S. 113 (1973),

Breyer's Triumph in the Third Battle over the Second Amendment, 80 GEO. WASH. L. REV. 703, 705-06 (2012).

This Court has twice before resolved challenges under the Second Amendment that involved laws that prevented individuals from possessing firearms to some degree.³ *Kachalsky, supra*; *United States v. Decastro*, 682 F.3d 160 (2nd Cir. 2012). In *Decastro*, this Court declined to review under heightened scrutiny the federal prohibition on “transferring into one’s state of residence firearms acquired outside the state.” *United States v. Decastro*, 682 F.3d 160, 168 (2nd Cir. 2012). The Court did not find any impediment to acquiring a firearm

state legislatures and lower courts throughout the country made every effort to deny, ignore, limit, misapply and restrict the rights the Court had acknowledged for the first time. This led to years of frustration and litigation, culminating in several later decisions where the Supreme Court overturned restriction after restriction, explaining every time that its holding in *Roe* was not being given the credence it required by the legislatures or lower courts. *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); and *Stenberg v. Carhart*, 530 U.S. 914 (2000).

³ In *Kwong v. Bloomberg*, 723 F.3d 160 (2nd Cir. 2013), this Court resolved a challenge to New York’s handgun licensing fee. As this Court stated, there was “no evidence” that the fee had prevented any plaintiff from actually acquiring a firearm. *Id.* at 167. The Court did not resolve whether intermediate scrutiny or rational-basis review should be employed, because it determined that the challenged law would satisfy intermediate scrutiny. *Id.* at 168. The holding was not based on any analysis of Second Amendment law or on a balancing of interests; rather, this Court held that the fee in question was not impermissible because it was designed to recoup the costs of the licensing program and did not exceed the actual cost of the license. *Id.* at 168-69.

because that law merely required a prospective purchaser to comply with state laws regarding eligibility to own firearms by effecting a transfer through a licensed firearm dealer within one's home state. *Id.* The challenged statute did not prevent anyone from acquiring or possessing a firearm; it only regulated the manner in which one must complete a purchase of an out-of-state firearm. Thus, the Court concluded that there were "ample alternative means" of acquiring the desired firearm – whether by purchasing it in state or having it lawfully transferred – such that the Second Amendment was not offended.

In *Kachalsky*, this Court was confronted with a more intrusive burden on the Second Amendment rights of law-abiding citizens. This Court was called upon to review the requirement that an applicant for a carry permit demonstrate "proper cause" to obtain the permit. *Kachalsky v. County of Westchester*, 701 F.3d 81, 83 (2nd Cir. 2012). This Court held that the law did impose more than an inconsequential burden on Second Amendment rights because it prevented citizens from possessing firearms outside the home and heightened scrutiny was necessary. *Id.* at 94-97. In so doing, this Court recognized that the "critical difference" was that "New York's licensing scheme affects the ability to carry handguns only in public, while the District of Columbia ban [in *Heller*] applied in the home 'where the need for defense of self, family, and property is most acute.'" *Id.* at 94 (quoting *Heller*, 554 U.S. at 628)(emphasis in original).

This Court has drawn two bright lines in Second Amendment jurisprudence. If a law only minimally impacts the exercise of Second Amendment rights and does not actually prohibit the possession of a particular firearm, it will subject the law to rational-basis review. If the law does prohibit the possession of a firearm but in a context other than the home, the law will be subject to heightened review, but only to the level of intermediate scrutiny. It seems only logical, then, that laws such as the Act that prohibit the possession of firearms in the home where “Second Amendment guarantees are at their zenith” must be subject to a more rigorous standard: strict scrutiny. *Id.* at 89.

This is in keeping with the jurisprudence of the Fourth Circuit, which has been even more explicit in its affirmation that strict scrutiny is appropriate to analyze laws that reach into the homes of law-abiding, responsible citizens. In *United States v. Chester*, 628 F.3d 673, 677 (4th Cir. 2010), the defendant, a misdemeanant, unsuccessfully moved to dismiss his indictment on the grounds that the Supreme Court had identified only the mentally ill and felons as classes of persons that could be denied the right to possess firearms. The Fourth Circuit in *Chester* declined to apply strict scrutiny to the prohibition on ownership of firearms by misdemeanants, explaining:

Although Chester asserts his right to possess a firearm in his home for the purpose of self-defense, we believe his claim is not within the core right identified in *Heller* – the right of a *law-abiding*, responsible citizen to possess and carry a weapon for self-defense – by virtue of

Chester's criminal history as a domestic violence misdemeanor. Accordingly, we conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated persons.

Id. at 682-83 (emphasis in original). Plaintiffs-Appellants possess the characteristics found lacking in defendant Chester: they are law-abiding, responsible citizens who seek to acquire commonly possessed firearms and magazines for self-defense. Thus, they do not fall into any less-protected category, and a prohibition on their ability to possess and use firearms in their home is subject to strict scrutiny.

More recently, the Fourth Circuit has opined that a ban on possession of firearms in the home was subject to strict scrutiny: "As we observe that any law regulating the content of speech is subject to strict scrutiny, . . . we assume *that any law that would burden* the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011)(emphasis added); *see also United States v. Carter*, 669 F.3d 411, 416 (4th Cir. 2012)("[W]e have noted that the application of strict scrutiny is important to protect the core right of self-defense identified in *Heller* . . .").

Recently, the Fourth Circuit in *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013), drew precisely the same distinction as this Court in *Kachalsky*. In *Woollard*, the Fourth Circuit considered a challenge under the Second Amendment

to Maryland's requirement that a citizen have a good and substantial reason before he or she could receive a concealed carry weapon permit. The court held that intermediate scrutiny applied to bearing arms outside the home and rejected the argument that strict scrutiny applied because that would "place the right to arm oneself in public on equal footing with the right to arm oneself at home, necessitating that we apply strict scrutiny" *Id.* at 878.

This line of reasoning also has been employed in the Seventh Circuit. *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011). In *Ezell*, the court noted that its earlier Second Amendment opinion, *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010), had utilized intermediate scrutiny only because "the claim was not made by a law-abiding, responsible citizen as in *Heller*; nor did the case involve the central self-defense component of the right." *Ezell*, 651 F.3d at 708. In *Ezell*, "in contrast, the plaintiffs *are* the 'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*" *Id.* The Court then concluded that "a more rigorous showing than that applied in *Skoien* should be required." *Id.* Although the court applied intermediate scrutiny in name, it articulated a heightened standard, much closer to the traditional notion of strict scrutiny. *Id.* at 708-09 ("To be appropriately respectful of the individual rights at issue in this case, the City bears the burden of establishing a strong public-interest justification for its ban on range training: The City must establish a close fit

between the range ban and the actual public interests it serves”). *See also National Rifle Ass’n v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013)(“A law that burdens the Second Amendment guarantee – for example, ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home’ – would trigger strict scrutiny.”); *Heller v. District of Columbia*, 670 F.3d 1244, 1258 (D.C. Cir. 2011)(“*Heller II*”)(using what it called intermediate scrutiny to analyze prohibitions on “assault weapons” and “large capacity magazines” where the prohibition extended to the home, but requiring defendants to establish “a fit that employs . . . a means narrowly tailored to achieve the desired objective”).

Applying strict rather than intermediate scrutiny to the Act would be more in line with the Supreme Court’s holding in *Heller* as well. That case is most often cited for the fact that it held the Second Amendment to be an individual right and that it held a complete ban on the possession of handguns violated the Second Amendment. What is often glossed over is the fact that the Supreme Court also held that a ban on commonly owned long guns, such as those prohibited by the Act, was unconstitutional when it struck down the D.C. requirement that any firearm stored within a home be rendered inoperable. *Heller*, 554 U.S. at 636. To be sure, the Act does not ban the possession of all long guns. Such a law would be manifestly unconstitutional under the rationale employed in *Heller*. But, because the Act does ban the possession of many such commonly owned firearms, its

provisions fall within the ambit of *Heller*'s mandate, and must be subjected to at least strict scrutiny.

II. LOGIC AND PRECEDENT MANDATE THAT DEFENDANTS-APPELLEES ARE LIMITED TO EVIDENCE THAT WAS BEFORE THE LEGISLATURE AT THE TIME OF ENACTMENT.

The proper role of a federal court reviewing the constitutionality of a challenged law under any heightened standard of review is to determine whether the evidence that was before the legislature at the time of enactment was sufficient and substantial. This is not to say that the court is to weigh the competing evidence for and against a particular policy choice. Rather, a court must ensure that the predictive judgments of the legislature are the result of “reasonable inferences based on substantial evidence.” *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2nd Cir. 2012)(quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994)).

Simply from a perspective of pure logic, it is clear that a legislature cannot have drawn “reasonable inferences” from evidence that it never considered (and could not have considered) because that evidence was never put before it. Accordingly, in terms of supplying the trial court with evidence in support of legislation, the Defendants-Appellees must be limited to that evidence which was actually before the legislature at the time of enactment.

In the context of reviewing a law under strict scrutiny, the United States Court of Appeals for the Federal Circuit has excluded all such *post hoc* evidence. Even under the more relaxed analysis of intermediate scrutiny, the United States Supreme Court has indicated that the proper approach is to review only that which was actually presented to the legislature. Regardless of the standard of review employed, the only evidence that should have been considered by the lower court is what was actually presented to the Legislature at the time the Act was enacted.

A. The Court Should Ignore Defendants-Appellees' Evidence that Was Not Considered by the Legislature.

The role of a court conducting a review of a challenged law under a heightened level of scrutiny was established by the United States Supreme Court in *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994). The Supreme Court applied intermediate scrutiny to analyze whether a federal law requiring broadcasters to carry certain enumerated channels violated the First Amendment. The Supreme Court noted that it was not the role of a federal court to replace the considered judgment of the legislature with its own. The Supreme Court was clear that its ruling did not mean, however, that predictive judgments of the legislature are insulated from review; rather, a court must “assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.” *Turner Broadcasting*, 512 U.S. at 666.

The legislature could not possibly have drawn a reasonable inference based on evidence that it never considered. Thus, a court cannot “assure” the reasonableness of any inferences by resorting to evidence marshaled by counsel after the fact in response to, and in creative defense of, litigation. Evidence that was not before the legislature cannot properly be considered because there is no logical way to determine if the legislature’s “predictive judgments” are actually reasonable inferences based upon substantial evidence.

B. Under Strict Scrutiny Review, Defendants-Appellees Cannot Rely upon Evidence Not Considered by the Legislature.

To satisfy the demanding strict scrutiny standard, Defendants-Appellees must establish that the challenged laws are “narrowly tailored to promote a compelling Government interest.” *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 246 (2nd Cir. 2014). When conducting a strict scrutiny analysis, “the court must review the government’s evidentiary support to determine whether the legislative body had a ‘strong basis in evidence’” to justify its intrusion onto constitutionally protected rights. *Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008)(“*Rothe III*”)(applying strict scrutiny to a race-based classification that was intended to remedy prior discrimination)(quoting *Rothe Dev. Corp. v. Department of Defense*, 262 F.3d 1306, 1317 (Fed. Cir. 2001)(“*Rothe I*”).

The *Rothe* opinions set forth the proper scope of a court's review in a strict scrutiny analysis. In these cases, Rothe challenged an Air Force contract award to a competing company. Rothe contended that a federal statute, 10 U.S.C. § 2323, which was designed to make socially and economically disadvantaged businesses more able to compete with other businesses, was a violation of its rights to equal protection under the law as incorporated under the Fifth Amendment. Specifically, Rothe argued that, because the law presumed businesses run by certain racial and ethnic minorities to be part of the protected class of business, the law was facially discriminatory and there was not sufficient evidence to support its discriminatory provisions.

Most relevant is the Federal Circuit's earlier opinion in *Rothe Dev. Corp v. Department of Defense*, 413 F.3d 1327 (Fed. Cir. 2005) ("*Rothe II*"), in which it directly addressed Rothe's contention that evidence that was not presented to Congress should either be stricken from the record or given no weight. Agreeing with Rothe, the Federal Circuit clearly expressed the evidentiary standard in this regard:

Thus, to be relevant in the strict scrutiny analysis, the evidence must be proven to have been before Congress prior to enactment of the racial classification. Although these statistical studies predate the present reauthorization of section 1207 in 2002, their relevance is unclear because it is uncertain whether they were ever before Congress in relation to section 1207. Without a finding that these studies were put before Congress prior to the date of the present

reauthorization in relation to section 1207 and to ground its enactment, it was error for the district court to rely on the studies.

Id. at 1338. Thus, at least one federal court has been explicit in its requirement that the evidence used to support a law that infringes on constitutionally protected rights must have actually been presented to the legislature. This Court should follow the lead of the Federal Circuit and adopt its reasoning in refusing to consider any evidence that was not presented to, or considered by, the Legislature when it passed the Act.

C. Even Under Intermediate Scrutiny, the Court Should Disregard Defendants-Appellees' Evidence Not Considered by the Legislature.

The United States Supreme Court established the standard for the scope of a court's review of a legislative enactment in *Turner Broadcasting*, 512 U.S. at 666 (a court must "assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence"). This language was explicitly adopted by this Court when analyzing Second Amendment challenges. *See Kachalsky*, 701 F.3d at 97 ("Thus, our role is only 'to assure that, in formulating its judgments, [New York] has drawn reasonable inferences based on substantial evidence.'"). This Court in *Kachalsky* considered the legislative record of the law at issue in that case, which required a person seeking a permit to carry a concealed firearm to demonstrate a particularized need to do so. *Id.* at 97-98. It also considered the legislative record of proposed laws that would have amended

the challenged law. *Id.* at 98. This Court did note that both sides had submitted studies supporting their respective positions, *id.* at 99, but explicitly held that the New York legislature had weighed the policy issues and it would not be proper to usurp the role of the legislature by weighing the evidence itself. *Id.* This Court based its determination on whether the legislative record was sufficient to support the predictive judgments of the New York legislature. This was unquestionably the correct method of analysis and it should be followed in this case.⁴

At least one other Circuit Court of Appeals has expressly adopted this particular application and interpretation of *Turner Broadcasting*. In *Hutchins v. District of Columbia*, 188 F.3d 531, 567 (D.C. Cir. 1999), the District of Columbia Circuit Court of Appeals relied upon *Turner Broadcasting* for the principle that “for a legislative judgment to warrant judicial deference, there must be a contemporaneous factual foundation from which the court can conclude that there

⁴ It is worth noting that two district courts in this Circuit, the Western District of New York, *New York State Rifle & Pistol Association v. Cuomo*, No. No. 13-cv-291S, 2013 U.S. Dist. LEXIS 182307 at *15 (W.D.N.Y. Dec. 31, 2013), and the lower court in this case, cited both *Kachalsky* and *Turner Broadcasting* but relied upon evidence that was not before the legislature in finding that substantial evidence exists that would justify the banning of certain firearms and magazines in each respective court’s case. This Court is faced with not one isolated instance of the lower court misapplying *Turner Broadcasting*, but a broader misapprehension of that line of cases to prop up legislative enactments that have no evidentiary basis at the time they were passed. Accordingly, it is all the more critical that this Court correct this inappropriate deference to predictive judgments that are not the result of reasonable inferences drawn from substantial evidence.

is a close nexus between the burden on fundamental rights and the important state interest.” *Id.* As the D.C. Circuit so aptly put it, “[t]he Supreme Court has repeatedly demonstrated that, under intermediate scrutiny, it will not tolerate a severe burden on a fundamental right simply because a legislature has concluded that the law is necessary. Rather, the Court has independently examined *the evidence before the legislature to determine whether an adequate foundation justified the challenged burdens.*” *Id.* (emphasis added).

The D.C. Circuit’s application of *Turner Broadcasting* is unassailable because, implicit in the concept of “draw[ing] reasonable inferences based on substantial evidence,” of course, is the requirement that the evidence from which such inferences are drawn is actually presented to the legislature for its consideration. It would not make sense for the Supreme Court to mandate that a federal court limit its review to whether the judgment of a legislature was “based on substantial evidence” but permit the court to consider evidence upon which the judgment of the legislature could not have been predicated.

Thus, the only evidence that should be considered by this Court is that which was actually before the Legislature at the time the Act was passed; nothing produced subsequent to the Act’s passage could possibly have formed the basis for the government’s interests or how appropriately tailored the laws are, and is thus irrelevant.

Such credulous deference to the “predictive judgments” of the Legislature is inappropriate, as explained by the Ninth Circuit Court of Appeals’ recent holding in *Peruta v. County of San Diego*, No. 10-56971, 2014 U.S. App. LEXIS 2786 (9th Cir. Feb. 13, 2014). In *Peruta*, the Ninth Circuit struck down a municipal ordinance forbidding the concealed carry of firearms without the proper permit, which could be obtained only upon a demonstration of “good cause.” The court provided a principled criticism of the approach recently taken in the Second, Third and Fourth Circuits with respect to deference to legislative findings in the Second Amendment context. The *Peruta* court first took the other Circuits to task for abdicating their responsibility to ensure that the legislative judgments underlying the laws challenged in those cases were based on substantial evidence, but, instead engaging in a balancing test that directly contradicted the Supreme Court’s ruling in *Heller*, as the *Heller* majority expressly rejected the interest-balancing approach advanced by Justice Breyer in his dissent. *Id.* at *91-93. The *Peruta* Court next noted that these other Circuit Courts had failed to ensure that the challenged laws “did not burden the right substantially more than is necessary to further [the government’s legitimate] interests.” *Id.* at *94 (internal quotations omitted). The *Peruta* court concluded that the Fourth, Second, and Third Circuits had erred in striking down the restrictive carry-permit laws because the government had failed to carry its burden of proof. *Id.* at *95-97.

Whenever heightened scrutiny is implicated, therefore, an act cannot be defended “by advancing hypothetical rationales, independent of the legislative record; rather, the government is limited to ‘invoking [the legislature’s] *actual* justification for the law.’” *In re Balas*, 449 B.R. 567, 574 (Bkr. C.D. Cal. 2011)(quoting and incorporating the February 23, 2011 Letter from Attorney General Eric Holder to Speaker of the House of Representatives John Boehner, regarding the constitutional infirmity of the Defense of Marriage Act)(emphasis added). Furthermore, any such “justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.” *United States v. Virginia*, 518 U.S. 515, 533 (1996).

D. The Lower Court Misapplied *Turner Broadcasting* and *Kachalsky*.

As discussed *supra*, a proper application of *Turner Broadcasting* and its progeny, including *Kachalsky*, requires that, under heightened scrutiny, a court must ensure that the legislature makes reasonable inferences from substantial evidence before it at the time of enactment to support its predictive judgments. The lower court paid lip service to these teachings, SPA-24⁵ (“Accordingly, the court must only ‘assure that, in formulating its judgments, [Connecticut] has drawn reasonable inferences based on substantial evidence.’”), but went on to rely on evidence that was never before the Legislature. The lower court’s blind deference

⁵ Citations to “SPA-” are to the Special Appendix attached to Plaintiffs-Appellants’ brief in this Court, ECF No. 126.

to the predictive judgments of the Legislature was both unwarranted and manifest error. Under the analytical framework advanced by the lower court, the Legislature can never lose. The lower court simply confirmed that the counsel for the Defendants-Appellees provided it with some evidence arguably consistent with the supposed inferences of the Legislature, and the Act was given a safe harbor from judicial scrutiny of any kind. This shifts the burden from the government to justify its intrusion into a fundamental right onto the citizen of demonstrating the constitutional limits that would foreclose such legislation. And, since the Legislature need not actually rely on evidence to justify its predictive judgments at the time of enactment, it can simply wait until litigation ensues and rationalize a defense of its pronouncements.

III. EXPERT OPINIONS SUPPORTING THE ACT ARE UNRELIABLE AND SHOULD BE DISREGARDED.

The social science presented by Defendants-Appellees does not support the opinions relied upon by the lower court. Defendants-Appellees and the lower court relied upon the opinions of Dr. Christopher Koper. The lower court in this case did not have the benefit of deposition testimony of Dr. Koper. Because he has been deposed subsequently in other similar litigation, revealing the lack of foundation for his opinions, this Court should disregard his opinions here.

There is currently ongoing litigation in Maryland regarding the constitutionality of that State's ban on so-called "assault weapons" and "large

capacity magazines.” *See Kolbe v. O’Malley*, No. 1:13-cv-02841-CCB (D. Md. 2014). Defendants in that case also relied upon the work of Dr. Koper. In that case, however, he was subjected to cross-examination at deposition.

The lower court here relied upon Dr. Koper’s opinions to support the Court’s finding that “[t]he evidence suggests that there is a substantial government interest in restricting both assault weapons and [large capacity magazines].” SPA-25. In support of this point, the lower court quoted paragraph 77 of Dr. Koper’s Affidavit, setting forth his “considered opinion, based on my nineteen years as a criminologist studying firearms generally and my detailed study of the federal assault weapon ban in particular, that Connecticut’s bans on assault weapons and large-capacity magazines, and particularly its ban on [large capacity magazines], have the potential to prevent and limit shootings in the state over the long run.” SPA-25 n. 50; *see also* Koper Aff., ECF No. 80-1, at ¶ 77. This statement has been directly contradicted by Dr. Koper in both his published work and in sworn deposition testimony.

Dr. Koper admitted at his deposition that he “cannot conclude to a reasonable degree of probability that the federal ban on assault weapons and large capacity magazines reduced crimes related to guns.” Dep. of Christopher Koper, Addendum (“Add.”) at p. 8. Dr. Koper stated in his 2004 published work that “there is not a clear rationale for expecting the [federal] ban to reduce assaults and

robberies with guns.” Defendants’ Ex. 29, ECF No. 80-1 at 81. Dr. Koper confirmed this was an accurate statement of his beliefs at his deposition. Dep. of Christopher Koper, Add. at p. 2. Thus Dr. Koper has admitted that laws such as the Act do not “have the potential to prevent and limit shootings,” as he claimed here. Koper Aff., ECF No. 80-1, at ¶ 77. His contrary statement in his affidavit in this case should be disregarded as unsupported by his own research.

Dr. Koper’s previous work and his sworn statements during his deposition also concede that the federal assault weapons ban did not reduce injuries or deaths related to firearm crime. He confirmed the ban “didn’t reduce the number of deaths or injuries caused by guns either” Dep. of Christopher Koper, Add. at p 8. He also admitted that he is not aware of any expert who has studied the impact of the federal ban and has come to a different conclusion. *Id.* at p. 7. Even Dr. Koper's published work belies his opinion here, admitting that “there has not been a clear decline in the use of [Assault Rifles]” in crime as a result of the federal assault weapon ban. Defendants’ Ex. 29, ECF No. 80-1 at 2. Similarly, he admitted the federal ban did not cause a decline in the criminal use of magazines with more than ten rounds. *Id.* As Dr. Koper admitted at his deposition, “[t]here has been no discernible reduction in the lethality and injuriousness of gun violence” as a result of the federal ban. Dep. of Christopher Koper, Add. at p. 6.

Thus, Dr. Koper's deposition testimony and published work contradict his opinion here, relied upon by the lower court, that the Act has the potential to prevent firearms violence.

The lower court also relied upon Dr. Koper to support its conclusion that the magazine ban is constitutional. SPA-25. The court specifically stated that “evidence suggests that limiting the number of rounds in a magazine promotes and is substantially related to the important governmental interest in crime control and safety.” *Id.* at 37. This conclusion is betrayed by the work of Dr. Koper himself. In his 2004 work, Dr. Koper found that the federal law did not reduce the criminal use of banned magazines. Defendants’ Ex. 29, ECF No. 80-1 at 2 (“[T]he ban has not yet reduced the use of [large capacity magazines] in crime”); *see also* Dep. of Christopher Koper, Add. at p. 5 (stating that when he conducted his 2004 study, there was “not clearly a reduction yet in the use of guns with large capacity magazines”). Dr. Koper’s own evidence demonstrates that banning magazines above a certain capacity does not have a “link” to furthering Connecticut’s interest in public safety, because it will not actually reduce the criminal misuse of these magazines.

The most direct statement provided by Dr. Koper on the potential impact the Act could have was set forth in his 2004 published work, where he noted, “a few

studies suggest that state-level [assault weapons] bans have not reduced crime.” R. at A-530 n.95. Dr. Koper confirmed that this was true at his deposition:

Q: On note 95 on that page [of your 2004 work], you address I believe state bans on assault weapons in which you say, “A few studies suggest that state-level assault weapon bans have not reduced crime.” Am I reading that correct?

A: Yes.

Q: And is that still your view today?

A: I have not seen any further studies of this yet, but yes, I mean, essentially that’s the conclusion.

Dep. of Christopher Koper, Add. at pp. 3-4. Dr. Koper confirmed that state-level restrictions on firearms and magazines have not reduced crime. His opinions to the contrary in his declaration in this case are betrayed by this admission in his deposition in the Maryland case. *See also* Dep. of Christopher Koper, Add. at p. 8 (Dr. Koper confirmed that he could not state that the federal ban on magazines reduced either crime related to guns or the number of deaths of injuries caused by guns).

The lower court also referenced the decision in *New York State Rifle & Pistol Association v. Cuomo*, No. No. 13-cv-291S, 2013 U.S. Dist. LEXIS 182307 at *15 (W.D. N.Y. Dec. 31, 2013), to support its conclusion that the banned firearm are more lethal than other firearms. SPA-25-26 & n.52. The New York district court’s determination in this regard also was based on the opinions of Dr. Koper, and is equally flawed.

Dr. Koper stated in that case that prior to the federal ban, assault weapons or other semiautomatics with large capacity magazines were involved in 6, or 40%, of 15 mass shooting incidents occurring between 1984 and 1993 in which six or more persons were killed or a total of 12 or more were wounded. This statement does not provide the foundation the lower court believed for three reasons. First, it conflates evidence on “assault weapons” and “large capacity magazines.” As Dr. Koper noted in his deposition testimony, however, he was not sure how many of those six incidents involved “assault rifles” versus “assault pistols” or other firearms with large capacity magazines. Dep. of Christopher Koper, Add. at p. 12. Dr. Koper could only state that “at least three of those . . . appeared to have involved an assault rifle.” *Id.* He also could not state with any certainty that the “assault rifles” were actually used in the crimes, except in one incident. *Id.* at pp. 12-13 (stating, in response to the question of whether the firearms were possessed or used, “[t]hey were possessed. I believe they were the weapons used. The way I write about the Patrick Purdy incident in particular used the AK-47. I believe – well, but the other ones you have to look into more depth into the cases”). Thus, Dr. Koper had specific knowledge in only one instance that a firearm banned by the laws challenged by Plaintiffs-Appellants was actually used in a mass shooting.

That Dr. Koper could testify with specificity to only one incident involving a banned firearm is in line with his study, reported in his 2004 published work, in

which he found that in only one of twenty-eight mass murder events he and his team studied was an “assault weapon” used. Defendants’ Ex. 29, ECF No. 80-1 at n.13. Moreover, this single incident was perpetrated with an assault pistol, not a rifle. Dep. of Christopher Koper, Add. at p. 11 (“Q: All right. So the one report of an assault weapon used in the 1992/1994 period for mass murder of four or more persons was in fact an assault pistol; correct? A: It would seem so.”).

Dr. Koper’s opinion with respect to mass shootings is also flawed because it includes assault pistols in its definition of “assault weapons.” Dep. of Christopher Koper, Add. at p. 9 (“Generally speaking I did not always break out assault rifles and assault pistols.”). Thus, the relevance of his opinion is seriously called into question. The third flaw with relying on Dr. Koper’s opinions regarding mass shootings is that they are based on extremely few incidents. As Dr. Koper noted in his declaration in New York, he reported the analysis of only fifteen incidents over a decade, of which only six involved “assault weapons or other semiautomatics with [large capacity magazines].” Thus, Dr. Koper’s declaration that these firearms have a “disproportionate involvement” in mass shootings is based on their being used on average less than once per year, at most. Common sense dictates that such rare use of commonly possessed firearms could not amount to “disproportionate involvement.” As Dr. Koper himself admitted at his deposition, “one has to be cautious” when extrapolating conclusions from such a small set of data. Dep. of

Christopher Koper, Add. at p. 10. Dr. Koper also relied on data reported by an online magazine that has never been peer-reviewed, as Dr. Koper acknowledged at his deposition. Dep. of Christopher Koper, Add. at p. 17 (“Q: And the *Mother Jones* data hasn’t been published in any peer review journal; correct? A: Correct.”).

Finally, Dr. Koper’s work is fatally flawed because he was unable to state his opinions to a reasonable degree of scientific certainty. The term “reasonable degree of scientific certainty” simply means that a conclusion is more likely than not to be true – a low threshold. *See Burke v. Town of Walpole*, 405 F.3d 66, 91 (1st Cir. 2005)(“[T]he term ‘reasonable degree of scientific certainty’ – ‘a standard requiring that the injury was more likely than not caused by a particular stimulus. . . .’” (quoting Black’s Law Dictionary 1294 (8th ed. 2004))). Indeed, this Court has noted that a district court, “in fulfilling its gatekeeping role,” must first determine whether expert evidence “‘has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” *Amorgianos v. Amtrak*, 303 F.3d 256, 265 (2nd Cir. 2002)(quoting *Campbell v. Metropolitan Property & Casualty Insurance, Co.*, 239 F.3d 179, 184 (2nd Cir. 2002)). Expert opinions that cannot be stated to a reasonable degree of scientific certainty cannot aid in the determination of whether a fact is more probable or less probable. Thus, Dr. Koper’s opinions that could not

be stated to a reasonable degree of scientific certainty should not be relied upon by this Court.

Dr. Koper could not testify to a reasonable degree of scientific certainty that the firearm bans challenged in Maryland, which are substantially similar to those at issue in this case, would reduce the number of crimes perpetrated with the banned magazines and firearms. Dep. of Christopher Koper, Add. at pp. 14-15. He also could not state to a reasonable degree of scientific certainty that the bans would reduce the number of shots fired in crimes, would reduce the number of gunshot victims in crimes, would reduce the number of wounds per gunshot victim, would reduce the lethality of gunshot injuries, or would reduce the societal costs of gunshot violence. *Id.*

Thus, the opinions of Dr. Koper relied upon by the lower court should be disregarded by this Court because they are not supported by his published, peer reviewed work as he admitted in his sworn testimony, and because he was not able to state that his conclusions were “more likely than not.”

CONCLUSION

This Court’s precedents, those of other Circuits, and the teachings of *Heller* lead inexorably to the conclusion that, if any level of interest-balancing is employed in the context of a ban of firearms commonly possessed for lawful purposes by responsible, law-abiding citizens, it must be strict scrutiny. In

supporting the Act's constitutionality, the Defendants-Appellees cannot rely upon evidence not before the Legislature at the time of enactment. The sworn testimony of the expert offered by Defendants-Appellees and relied upon by the lower court reveal his opinions are not supported by reliable data and should be disregarded by this Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28(e)(2)(a) because this brief contains less than 6,812 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: May 22, 2014

/s/ John Parker Sweeney
John Parker Sweeney, Esq.
Attorney for Amicus Curiae
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May, 2014, this brief of *amicus curiae* National Rifle Association was served, via electronic delivery to all parties' counsel via CM/ECF system which will forward copies to Counsel of Record.

/s/ John Parker Sweeney
John Parker Sweeney

ADDENDUM

In The Matter Of:

*Shawn J. Tardy, et al. vs.
Martin J. O'Malley, et al.*

Christopher S. Koper, Ph.D.

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1 Q "There is not a clear rationale for
2 expecting the ban to reduce assaults and robberies with
3 guns." Am I reading that correctly?

4 A Yes.

5 Q And that correctly and accurately state
6 your conclusion with respect to the impact on
7 firearm-related crime of the federal ban on assault
8 weapons and large capacity magazines; correct?

9 A That's a partial statement of it.

10 Q All right. But -- but accurate in and of
11 itself?

12 A Yes.

13 Q Okay. And when you say you would not
14 expect the assault weapon or large capacity magazine
15 ban to reduce assaults with guns, that would include
16 assaults leading to homicides; correct?

17 A Not exactly. What I'm saying here is I
18 don't expect the overall level of assaultive violence
19 with guns to change whether or not these guns and
20 magazines are available, but what I am hypothesizing is
21 that changes in the use of these guns and magazines

1 could affect the share of attacks that involve -- that
2 result in injuries or deaths.

3 Q But -- but they -- you would not expect a
4 ban on assault weapons or large capacity magazines to
5 actually reduce the number of firearm-related assaults
6 or robberies; correct?

7 A Correct.

8 Q And you would not expect a ban on assault
9 weapons or large capacity magazines to reduce
10 firearm-related home invasions; correct?

11 A No. Correct, I mean.

12 Q And you wouldn't expect a ban on assault
13 weapons or large capacity magazines to reduce the
14 number of firearms assaults on police officers;
15 correct?

16 A Correct. That's fair enough.

17 Q On note 95 on that page, you address I
18 believe state bans on assault weapons in which you say,
19 "A few studies suggest that state-level assault weapon
20 bans have not reduced crime." Am I reading that
21 correct?

1 A Yes.

2 Q And is that still your view today?

3 A I've not seen any further studies of this
4 yet, but yes, I mean, essentially that's the
5 conclusion.

6 Q All right.

7 A With the qualifiers that are stated in the
8 rest of the footnote.

9 Q Let's mark this as Exhibit 6, please. Let
10 me show you what I've marked as Exhibit 6, which is an
11 article authored by Mark Gius, G-I-U-S, on an
12 examination of the effects of concealed weapon laws and
13 assault weapons bans on state-level murder rates.

14 (Koper Exhibit 6 was marked for
15 identification.)

16 A Okay.

17 Q And I first ask you are you familiar with
18 this article?

19 A No. I've not read this.

20 Q And has anyone mentioned this to you?

21 A Defense counsel did mention the existence

1 matters as much or more than statistical significance.

2 Q All right. And above that -- no,
3 nevermind. Scratch that.

4 Turning back to your 2004 study, did you
5 have anything in here on the impact on homicide rates
6 of the federal assault weapons and large capacity
7 magazine ban?

8 A We did a few things here that were a bit
9 tentative. As I said, the analysis of the key initial
10 intermediate outcome measures showed mixed results. So
11 we saw that there was a reduction in the use of assault
12 weapons, but not clearly a reduction yet in the use of
13 guns with large capacity magazines. So any further
14 analysis of impacts on measures like of injuries and
15 deaths was going to be ambiguous and somewhat
16 problematic, but nonetheless I did put together a few
17 basic trend lines for descriptive purposes looking at
18 some measures that I thought might potentially be
19 affected by ups and downs in the use of assault weapons
20 and large capacity magazines. So I was looking at a
21 few different things like the percentage of violent gun

1 crimes resulting in death. I think the percentage of
2 gunshot victimizations resulting in death. I also
3 summarized in chapter nine of this report some of the
4 other findings that we had had in the '97 report when
5 we had looked at some different similar types of
6 outcome measures.

7 Q On page 96 of your 2004 report marked as
8 Exhibit 5, that's your summary of your conclusions;
9 correct?

10 A Yes.

11 Q And in the third sentence you state, "There
12 has been no discernable reduction in the lethality and
13 injuriousness of gun violence," is that correct?

14 A Yes.

15 Q And is that still your view today based
16 upon your study and analysis of the impact of the
17 federal ban on assault weapons and large capacity
18 magazines?

19 A Yes. Based on the data that I analyzed,
20 it's still my view of it. Again, subject to the
21 qualifications that I noted earlier.

1 Q All right. And are you aware of anyone
2 else's data with respect to studying the impact of the
3 federal ban on assault weapons and large capacity
4 magazines that reached a conclusion different from the
5 conclusion that you state here?

6 A No.

7 Q Would you agree with me that the government
8 interest to be served by the federal assault weapon ban
9 and large capacity magazine ban was the reduction of
10 firearm-related violence; correct?

11 A You could view it that way or you could
12 view it more specifically as trying to get a reduction
13 in shootings in incidents with high numbers of shots
14 fired. And so, you know, again, I tended to view --
15 judge this more specifically in terms of effects on gun
16 injuries and gun deaths. As I noted in the report,
17 given the trends in use of assault weapons and large
18 capacity magazines that had been observed to that
19 point, I felt it was actually premature to make any
20 definitive conclusions about the ban's effects on gun
21 deaths and injuries. I felt that the effects of the

1 ban were still unfolding at that time and might still
2 take a while to fully unfold.

3 Q Isn't it true that as you sit here today,
4 you cannot conclude with a reasonable degree of
5 scientific probability that the federal ban on assault
6 weapons and large capacity magazines reduced crimes
7 related to guns?

8 A Correct.

9 Q And it didn't reduce the number of deaths
10 or injuries caused by guns either; correct?

11 A Correct.

12 Q Returning to your report for a moment,
13 Professor. I lost my copy of.

14 On paragraph five at the top of page two
15 you say, "Based on my research, I found, among other
16 things, that assault pistols" --

17 A I'm sorry. Could you clarify for me?

18 Q I'm sorry. Page two.

19 A Page two. Got you.

20 Q Paragraph five.

21 A Uh-huh.

1 Q Do you have any breakout of assault long
2 guns either as a percentage of guns used in all crime
3 or as a percentage of guns used in the breakdowns of
4 different sorts of crime that you have under your
5 bullet points on page 15?

6 A Generally speaking I did not always break
7 out assault rifles and assault pistols. In I believe
8 it's chapter six of the report, there are some
9 statistics, there are some breakouts that look
10 specifically at assault rifles. It's a limited group
11 of assault rifles that I was examining at that time.
12 Also, as I had noted before in the -- the gun murders
13 of police, we found about half of those assault weapon
14 cases were assault rifles.

15 Q This is the bullet on national guns used in
16 murders of police '92 to '94 that you're referring to?

17 A Yeah.

18 Q Do you know how many instances numerically
19 were involved there?

20 A This is taken -- that statistic is taken
21 from our 1997 report, and I believe -- now this may not

1 Guns that one could look at on that issue.

2 Q What I'm trying to do is understand your
3 data and your study and conclusions to be drawn from
4 that.

5 A Uh-huh.

6 Q Am I correct from footnote 13 here that
7 only one case of mass murders of four or more persons
8 in the period 1992 to 1994 involved an assault weapon?

9 A Yes.

10 Q And as you sit here today, do you know
11 whether that assault weapon was an assault pistol or an
12 assault long gun?

13 A I would have to look for that in the '97
14 report. But I would also note to that that I don't
15 know if this was a very representative sample of mass
16 murders. It was just based on a sample that we found
17 through some newspaper reports at the time.

18 Q And one should always be careful in
19 extrapolating conclusions from such small database of
20 points; correct?

21 A Yeah, one has to be cautious. There is

1 in your 2004 report on page 15?

2 A Oh, got you. Okay. Yeah, you're correct.

3 Q All right. So the one report of an assault
4 weapon used in the 1992/1994 period for mass murders of
5 four or more persons was in fact an assault pistol;
6 correct?

7 A It would seem so.

8 Q Okay.

9 A Now, there's some additional relevant data
10 on page 14. So on page 14, I was making reference to a
11 compilation of mass shooting incidents that Gary Kleck,
12 a professor at Florida State, had put together on
13 incidents where I believe his criteria was where six or
14 more people were killed or a total of 12 or more were
15 shot. And as I said here, assault weapons or other
16 semi-automatics, large capacity magazines were involved
17 in six, at least 15 shooting incidents.

18 Q Can you --

19 A Some of them had assault rifles, I think.

20 Q Now, can you separate out how many of those
21 six incidents involved assault weapons as opposed to

1 other semi-automatics with large capacity magazines?

2 A I don't have the full list in front of me,
3 but I have a few references here. In paragraph one, I
4 make reference to the incident with James Huberty
5 involved an Uzi carbine.

6 Q Now, that would be an assault pistol;
7 correct?

8 A I thought it would be a rifle. I thought
9 it would be the rifle version of the Uzi.

10 Q All right.

11 A The Joseph Wesbecker case, an AK-47 was
12 involved. The Patrick Purdy incident, another AK-47.
13 So there were at least -- at least three of those that
14 appeared to have involved an assault rifle.

15 Q So maybe three of the six we know or half
16 might have been assault weapons that were long guns?

17 A Yes. There could have been others, too. I
18 don't have the full list in front of me.

19 Q All right. Do you know from the
20 information whether those assault rifles were actually
21 used in those mass murders or simply possessed by the

1 murderer?

2 A They were possessed. I believe they were
3 the weapons used. The way I write about the Patrick
4 Purdy incident in particular used the AK-47. I
5 believe -- well, but the other ones you have to look
6 into more depth into the cases.

7 Q Now, if we return to your report, we talked
8 about the last sentence of paragraph five and the
9 assault weapons involved in a higher share of mass
10 public shootings. What information do you have that
11 other firearms with large capacity magazines are used
12 in a higher share of mass public shootings?

13 A So you're saying specifically guns with
14 large capacity?

15 Q I'm obviously trying to control only for
16 the large capacity magazines and eliminate assault
17 weapons.

18 A Uh-huh. I don't think in our report, I
19 don't think we had specific data on -- I don't think we
20 ever produced a figure on what share of the shootings
21 of police involved a large capacity magazine. But for

1 which one might try to infer that, but the case, yeah,
2 it's not as clear. It's fair to say.

3 BY MR. SWEENEY:

4 Q Now, in paragraph eight of your report, you
5 state in the second sentence that Maryland's
6 recently-enacted ban on assault weapons and large
7 capacity magazines has the quote "potential" close
8 quote to accomplish a couple of things; correct?

9 A Yes. Okay.

10 Q Now, when you say potential, I'm trying to
11 understand what you mean here. Would you agree with me
12 that any law would have the potential to produce a
13 benefit?

14 MR. FADER: Objection.

15 THE WITNESS: Might depend on -- on what it
16 is. In this case, you know, I'm saying potential based
17 largely on my studies of the federal assault weapons
18 ban and what -- what we found there.

19 BY MR. SWEENEY:

20 Q Can you state with a reasonable degree of
21 scientific probability that the ban on assault weapons

1 and large capacity magazines in Maryland will reduce
2 the number of crimes committed with assault weapons and
3 other firearms with large capacity magazines?

4 A I can't put a probability on that. You
5 know, all I can say is based on the experience with the
6 federal assault weapons ban, that there are grounds for
7 believing that the Maryland law could achieve that in
8 extrapolating from the results of the federal study.
9 Otherwise, one has to actually study the implementation
10 of the Maryland law to begin putting, you know,
11 probabilities on it and measuring those effects.

12 Q All right. Can you say to a reasonable
13 degree of scientific probability that the ban on
14 assault weapons and large capacity magazines in
15 Maryland will reduce the number of shots fired in gun
16 crimes?

17 A Not sure what you mean by a reasonable
18 probability 'cause I just I can't put a probability on
19 it and tell you how likely it is to occur.

20 Q Can you say to a reasonable degree of
21 scientific probability that the Maryland ban on assault

1 weapons and large capacity magazines will reduce the
2 number of gunshot victims in such crimes?

3 A Again, same answer. I can't state it with
4 an exact probability at this time.

5 Q And if I ask you the same question with
6 respect to number four, reduce the number of wounds per
7 gunshot victim, and five, reduce the lethality of
8 gunshot injuries when they do occur, and six, reduce
9 the substantial societal costs that flow from
10 shootings, would your answer be the same?

11 A Yes.

12 Q Okay. Now, the Maryland law does not
13 prohibit all semi-automatic firearms; correct?

14 A Correct.

15 Q And criminals can substitute semi-automatic
16 firearms that aren't banned; correct?

17 A Those and other guns.

18 Q Right. And isn't that variable something
19 that you can't control and one of the reasons why you
20 can't say to any probability whether or not the ban
21 will accomplish the six items that you state in

1 on how Mother Jones itself compiled the data on which
2 Luke Dillon relies here?

3 A My understanding is that they did this
4 through extensive media searches look for mass public
5 shooting incidents over the last roughly 20-some years
6 going back to '82.

7 Q And the Mother Jones data hasn't been
8 published in any peer review journal; correct?

9 A Correct.

10 Q And --

11 A To my knowledge.

12 Q Right. And have you studied the criteria
13 by which they've selected the data?

14 A Yes. They were looking for all incidents
15 where four or more people were killed and that occurred
16 in a public location. They were -- almost all of them
17 were lone shooter cases.

18 Q Would you agree with me that mass public
19 shootings are not on the uprise? They're not
20 increasing?

21 A No. Actually their data make it seem that